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It is Time for Washington State to Take a Stand Against Holmes's Bad Man: The Value of Punitive Damages in Deterring Big Business and International Tortfeasors

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IT IS TIME FOR WASHINGTON STATE TO TAKE A STAND AGAINST HOLMES'S BAD MAN: THE VALUE OF PUNITIVE DAMAGES IN DETERRING BIG BUSINESS AND INTENTIONAL TORTFEASORS

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Abstract

In Washington State, tortfeasors get a break when they commit intentional torts. Instead of receiving more punishment for their planned bad act, intentional tortfeasors are punished as if they committed a mere accident. The trend does not stop in Washington State—nationwide, punitive damage legislation inadequately deters intentional wrongdoers through caps and outright bans on punitive damages. Despite Washington State's one hundred and twenty-five year ban on punitive damages, it is in a unique and powerful position to change the way courts across the country deal with intentional tortfeasors. Since Washington has never had a compehrensive punitive damages framework, and has largely avoided the sway of the nationwide tort reform movement, it is a blank slate for demonstrating how punitive damages should be used to deter intentional wrongdoing in a fair and appropriate way. While law and economics theorists have debated how to reach complete deterrence, this Note's argument takes reality into consideration in the form of binding Supreme Court precedent on punitive damages to provide a punitive damages framework that results in more deterrence than current punitive damages provide, and still passes constitutional scrutiny. This Note argues for a punitive damages framework based on graduated levels of culpability and correlated compensatory to punitive damage-award ratios to allow for as much deterrence of intentional wrongdoing as possible, while conforming to Supreme Court precedent.

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INTRODUCTION

Intentionally harming someone is wrong and warrants punishment to deter future intentional wrongdoing. Punitive damages serve this role.[1] Judge Richard Posner underlined the utility of punitive damages in the paradigmatic case, *Mathias v. Accor Economy Lodging*, where he upheld a punitive damages award that was over thirty-seven times the compensatory damages award to punish the Defendant, Motel 6, for intentionally subjecting its customers to bed bugs. Motel 6 decided it was more "economical" to lie to their customers than take care of their bed bugs.[2] The lawsuit's punitive damage award straightened out Motel 6's cost-benefit evaluation so it was no longer economically efficient to lie to its guests about bed bugs.

Despite the upsides of punitive damages, they are under siege from an entrenched tort reform movement, which argues that punitive damages are arbitrary and harmful to innovation.[3] As anti-

1. Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83, 90 (2007).

2. Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 677 (7th Cir. 2004).

3. *See* Jill McKee Pohlman, Comment, *Punitive Damages in the American Civil Justice System: Jackpot or Justice?*, 1996 UTAH L. REV. 613, 654 (1996) (advocating for punitive damage reform and noting that "[m]any have . . . referred to these [punitive damage] awards as 'jackpots' because they are awarded in large amounts without any predictability and often without reason.").

punitive damage legislation shows, these arguments have been accepted by a large number of legislators and their voters.[4] The result has been a scaling back of the effectiveness of punitive damages in the states that still have punitive damages, and the outright elimination of punitive damages in others.[5] Critics of tort reform argue that intentional tortfeasors and big business enjoy a subsidy from the American people to commit intentional torts since they are punished as if their purposeful wrongdoing was simple negligence.

Washington State has never had punitive damages, except in specific and limited circumstances.[6] Its ban on punitive damages is not a result of its legislation or Constitution, but the holding of three Washington Supreme Court Justices in 1891.[7] This means Washington is not tied to anti-punitive damages legislation or an entrenched political stance on punitive damages since the ban stems from common law created in the 1800s, which can be overruled by legislation. All of this places Washington in a position to set the standard for how punitive damages should be used in the United States. If Washington can demonstrate the benefits of an effective punitive damages framework, it may persuade other states to put down their tort reform armor and pick up a sword to deter intentional wrongs.

This Note's proposed reform is a punitive damages framework that would be implemented by Washington's legislature. The legislative framework would provide substantially more deterrence than Washington, or any state, currently has while passing the Supreme Court's scrutiny on punitive damages. The framework focuses on graduated culpability levels tied to specific punitive damage-award ratios to obtain as much deterrence as possible while complying with the Supreme Court's precedent on punitive damages.

This reform provides a new perspective on punitive damages that focuses on adapting law and economics efficiency arguments to the Supreme Court's muddled punitive damages doctrine. In doing so, it recommends a clear punitive damages platform that can easily be adopted by other states. Punitive damages scholarship focuses almost exclusively on arguments about why punitive damages are arbitrary,[8] or, taking a different view, how punitive damages can be

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4. *See Punitive Damages Reform*, AM. TORT REFORM ASS'N, http://www.atra.org/issues/punitive-damages-reform (last visited Sept. 23, 2016).

5. *Id.*

6. *Infra* Part I.C.

7. Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1074–75 (Wash. 1891) (holding punitive damages are against state interest).

8. Before *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007) and *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) were decided, Professors Chanenson and Gotanda argued the

most efficient, without regard to Supreme Court precedent and other practical constraints to implementation.[9] This Note's reform takes both sides of the scholarly debate into consideration, as well as existing precedent. Furthermore, there is no legal scholarship advocating for a specific punitive damages framework in Washington State. This is likely due to the fact that only two years after becoming a state, the Washington Supreme Court ruled that punitive damages are prohibited.[10] The chance to implement a punitive damages framework in Washington that could serve as a model for other states is an important opportunity to better protect individuals from intentional wrongdoing that should not be overlooked any longer. This Note provides a comprehensive solution to Washington's lack of punitive damages, and offers a model for other states looking to better deter intentional wrongdoing by focusing on the deterrent effect of punitive damages.

Part I explains the purpose of punitive damages, their history in American political culture, and their current status in the Supreme Court and Washington State. It examines the most persuasive law and economics theories behind punitive damages, binding precedent from the United States Supreme Court, and the few exceptions where punitive damages are available in Washington. This review shows that the Supreme Court's punitive damages precedent is anything but clear.

Part II shows the benefits a punitive damage framework can offer Washington. This part centers on the Washington Supreme Court's focus in 1891 on the public good,[11] and discusses how punitive damages actually serve the public good. This discussion tracks basic law and economics theory.

Part III shows why this Note's proposed reform of implementing a graduated culpability framework for punitive damages is consistent with both the public interest of Washington and Supreme Court precedent. It also offers options for how to split punitive damages awards. This Part concludes with recommendations on

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presumptive constitutional limit on punitive damages should be set by looking to comparable civil or criminal legislative fines in order to give "fair notice" to defendants and to avoid arbitrary awards. Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the* BMW/State Farm *Guideposts*, 37 U. MICH. J.L. REFORM 441, 492 (2004).

9. Steve P. Calandrillo, *Penalizing Punitive Damages: Why the Supreme Court Needs A Lesson in Law and Economics*, 78 GEO. WASH. L. REV. 774, 774 (2010) (claiming that "[from] a law and economics lens . . . there is no justifiable basis for tort law's requirement of morally reprehensible or intentional conduct before punitive damages may be awarded.")

10. *See infra* Part I.C.

11. *Spokane Truck & Dray Co.*, 25 P. at 1074–75.

how to implement the framework; specifically, by using the legislature instead of trying to change Washington Supreme Court precedent through litigation.

This Note ends by emphasizing the importance of overhauling punitive damages in every state, and why this reform is an effective model for other states to use. Washington has a unique opportunity to make intentional tortfeasors take responsibility for their intentional bad acts. By utilizing the outer limits of Supreme Court precedent, Washington State can transform our punitive damages back to their central purpose—deterrence.

I. PUNITIVE DAMAGES: DETER AND PUNISH TO EVEN THE SCALES

Punitive damage awards are one of the biggest areas of contention in the tort reform debate. They are defined as monetary awards in excess of the economic and noneconomic damages that make an injured party whole, and their purpose is typically to deter future conduct by the defendant and similar parties.[12] Other scholars and commentators characterize punitive damages as a punishment.[13] In the wake of the tort reform movement,[14] punitive damages have often received the brunt of political and social criticism.[15] This criticism extends back to the 1970s when tort reform advocates began their public relations campaign to restrict personal injury suits and limit the amount of recovery available based on the type of lawsuit, regardless of the amount of harm, arguing that the civil justice system was broken and served undeserving personal injury victims and attorneys.[16]

Since the 1970s, tort reform advocates have continuously objected to personal injury suits. They have argued that personal

12. *See* Catherine M. Sharkey, *Punitive Damages as Societal Damages,* 113 YALE L.J. 347, 363–64 (2003).

13. *See id.*

14. The tort reform movement seeks to reduce the volume of victims that bring tort lawsuits and to limit the amount of recovery possible. It does not represent any reform to tort law, but only those that constrain and limit remedies in our civil justice system.

15. Michael L. Rustad, *Access to Justice: Can Business Co-exist with the Civil Justice System?: The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1298 (2005) ("True-sounding anecdotes do not make claims about punitive damages true. 'Few arguments are as powerful as a populist-sounding cause backed by the corporate wallet.'") (quoting Marie Cocco, *Bush Tortures: Facts on 'Trial Lawyers,'* NEWSDAY, July 13, 2004, at A39); Denise E. Antolini, *Punitive Damages in Rhetoric and Reality: An Integrated Empirical Analysis of Punitive Damage Judgments in Hawaii, 1985-2001*, 20 J.L. & POL. 143, 145 (2004) (punitive damages have served as the "notorious poster children of the national tort reform movement").

16. Stephen Daniels & Joanne Martin, *"The Impact That It Has Had Is Between People's Ears:" Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453, 454 (2000).

injury suits are more common than ever, frivolous lawsuits are the norm, damages are too high, corporate defendants cannot get a fair trial, and aggressive plaintiffs' personal injury lawyers make us all pay higher costs—through increased insurance costs[17] and chilled innovation—because of their greed in seeking punitive damages.[18] Further, tort reform proponents argue that punitive damages punish the wrong people (shareholders and consumers versus corporate decision makers), encourage more litigation, and create unpredictability.[19]

In response, tort reform opponents argue that there is no "liability crisis" by pointing to empirical studies,[20] and contend that tort law serves an important public service of discouraging harmful behavior. They contend the tort reform movement is funded by big business interests that are damaging to the public good, and that the frivolous lawsuits pandemic is a myth.[21] Proponents of punitive damages see them as crucial to deterring harmful corporate and individual behavior by punishing the specific offender and deterring other possible offenders in the future.[22]

Punitive damages are, in theory, a specific way to control intentional behavior tortfeasors deem economically sound, even though they know it runs a risk of harming others.[23] Punitive damages can be used to make Ken change his behavior in the following example: Ken slaps Stan. The fine for slapping Stan is $19 dollars. Ken is happy to pay this fine, and continue slapping Stan (and anyone else his hands can reach). But, if punitive damages can be awarded, Ken will have to take this into account, and Ken will be influenced to curb his behavior so he avoids situations where he might be

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17. *But see* Jessica Mantel, *Spending Medicare's Dollars Wisely: Taking Aim at Hospitals' Cultures of Overtreatment*, 49 U. MICH. J.L. REFORM 121, 133 (2015) (arguing that prices are raised not only because of the fear of medical malpractice suits, but also because of Medicare's own pricing structure because "physicians [are paid] for each unit of service provided, fee-for-service rewards doing more.").

18. Daniels & Martin, *supra* note 16, at 453–55; *About ATRA*, AM. TORT REFORM ASS'N, http://www.atra.org/about (last visited Sept. 24, 2016).

19. W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 GEO. L.J. 381, 381–85 (1998).

20. *See* Neil Vidmar, *Experimental Simulations and Tort Reform: Avoidance, Error, and Overreaching in Sunstein et al.'s Punitive Damages*, 53 EMORY L.J. 1359, 1369-70 (2004) (providing a list of empirical studies showing that punitive damages are rare, and that the median punitive damage award in 1996 was, contrary to tort reform advocates' belief, a modest $50,000.00)

21. Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 964 (2007).

22. 22 AM. JUR. 2d *Damages* § 559 (2016); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 242 (9th ed. 2014) (arguing that adding a "dollop of punitive damages" will make tort law a real deterrent).

23. POSNER, *supra* note 22, at 241.

tempted to slap Stan, if the punitive damages award is set high enough.

Punitive damages are also used to deter behavior that is especially egregious.[24] Either way, the purpose of punitive damages is to protect the public from serious wrongs by corporations, governments, and individuals. A great example of this is the previously mentioned *Mathias v. Accor Economy Lodging*,[25] where Judge Posner upheld a punitive damages award aimed to take the profit of the defendant's intentional wrongdoing away from it. The case revolved around Motel 6's decision to rent out rooms that they knew were infested with bed bugs to hotel guests, and not tell customers of the bed bug infestation. If asked about bed bugs, its policy was to say they were "ticks" because this would frighten customers less.[26]

Despite widespread media coverage of huge punitive damages awards—*e.g.*, *Liebeck v. McDonald's Restaurants*, also known as the McDonald's hot coffee lawsuit—they are rare.[27] Under common law, in order to face a punitive damages award, a defendant must be sued in a state that allows punitive damages, and their actions must be found to be more egregious than necessary for a normal negligence suit.[28] While punitive damage awards are uncommon, proponents of punitive damages say they are necessary to curb the corporate focus on profit over safety.[29]

Part I.A addresses the most convincing arguments for punitive damages. By covering these arguments, which are mainly based on the law and economics perspective on punitive damages, it is easier to see the problems in Part I.B, which traces the Supreme Court's confusing trail map of punitive damages decisions and tries to make sense of it. Part I.C covers Washington State's presumptive ban on

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24. *Id.* at 244.

25. Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 678 (7th Cir. 2004) (upholding a punitive damages award 37.2 times the compensatory award).

26. *Id.* at 675.

27. Theodore Eisenberg, *Damage Awards in Perspective: Behind the Headline-Grabbing Awards in* Exxon-Valdez *and* Engle, 36 WAKE FOREST L. REV. 1129, 1130 (2001); Michael L. Rustad, *The Incidence, Scope, and Purpose of Punitive Damages: Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 69 (1998) (showing that, empirically, up to 1998, there "is no nationwide punitive damages crisis. The research shows that punitive damages cluster in business tort and intentional tort cases, not personal injury. The increase in punitive damages is largely confined to a few jurisdiction.").

28. The actual standard varies by state, but it is typically a "clear and convincing" standard of the defendant's culpable mental state.

29. Rustad, *supra* note 27, at 47 ("If potential wrongdoers know that their total exposure is limited to a fixed amount, there is only a limited deterrent effect. Removing wealth from the punitive damages equation also eliminates effective punishment."); *see Mathias*, 347 F.3d at 674 (explaining that, in the lower court proceedings, the jurors agreed with the plaintiffs' argument that the defendant should be liable for punitive damages due to their "willful and wanton conduct").

punitive damages, the 1891 lawsuit that took punitive damages out of Washington juries' hands, and the few statutory exceptions where the state allows punitive damages.

A. The Law and Economics Take on Punitive Damages: Optimal Deterrence

Law and economics provides a useful perspective on punitive damages. Several law and economics theorists have explained why punitive damage awards can be a positive asset to public welfare. These reasons include effectively deterring behavior society deems dangerous,[30] allowing tortfeasors to continue to positively contribute to society,[31] forcing parties to the market,[32] and protecting society from predatory behavior.[33] The law and economics perspective on punitive damages hinges on deterrence and punishment, but is balanced by the discipline's concern of "avoid[ing] overcompensation as [well as] undercompensation."[34]

Typically, law and economics theorists say that optimal deterrence is reached by awarding a punitive damage judgment that takes into account the degree of discoverability of the tortfeasor's act.[35] The law and economics professor will take the probability of detection and multiply it by the profit the tortfeasor makes from the act.[36] This understanding gives support to Judge Posner's decision in *Mathias*, because the defendant deliberately tried to conceal its tortious acts. Judge Posner supports this assertion in his comprehensive and definitive book on the doctrine, "Economic Analysis of Law," explaining that "punitive damages punish a tortfeasor who sneaks by detection in the past, and therefore reach[es] the correct level of deterrence."[37] This inquiry relies on deterrence, not punishment, for justification.

The law and economics perspective on criminal punishment underlines the benefits of punitive damages. Economists believe fines

30. Sharkey, *supra* note 12, at 418.

31. POSNER, *supra* note 22, at 262 (explaining the "social costs of imprisonment greatly exceed the costs of collecting fines from solvent defendants").

32. *Id.*

33. *Id.*

34. *Id.* at 223.

35. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 887–88 (1998).

36. POSNER, *supra* note 22, at 242 ("If a tort is concealed (as in a hit-and-run accident), punitive damages or a criminal penalty must be added to the defendant's profit or the victim's loss to provide adequate deterrence.").

37. *Id.*

are a better criminal punishment than incarceration because fines are cheaper to implement, allow for the right amount of punishment and deterrence, and allow the individual to continue working and contributing to society.[38] Insolvency issues explain why fines are not used more in our criminal justice system.[39]

B. The Supreme Court Does Punitive Damages, Timidly

Over the last twenty-five years, the Supreme Court has heard several important punitive damage cases. Through these cases, the Supreme Court has developed a set of murky boundaries within which punitive damage awards are allowed under the Constitution. Understanding these constitutional boundaries sheds light on what is possible for any potential punitive damage scheme in Washington. Through these punitive damages cases, the Supreme Court underscores its focus on ensuring punitive damage awards correspond to the intentionally tortious act that harmed the victim, and are a predictable penalty.

1. The Excessive Fines Clause of the Eighth Amendment Does Not Apply to Civil Cases

In *Browning-Ferris Indus. v. Kelco Disposal*,[40] the Supreme Court held that neither the Excessive Fines Clause of the Eighth Amendment nor federal common law provided a basis for disturbing the jury's punitive damages award in a civil case. *Browning-Ferris* involved an antitrust suit, where the plaintiff, Kelco Disposal, brought forth and won an antitrust and interference with contractual relations lawsuit in Vermont. The trial court awarded, and the Supreme Court eventually upheld, $51,146 in compensatory damages and $6 million in punitive damages for interfering with Kelco's contractual relations.[41] This holding is in full force today.

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38. *Id.* at 261.

39. *See infra* Part I.C.2. (explaining how fines struggle to deter intentional criminal conduct for some criminals).

40. 492 U.S. 257, 280 (1989).

41. *Id.* at 261–62.

2. A Framework for Determining Excessiveness Under the Fourteenth Amendment for Due Process

In 1991, the Supreme Court refused in *Pacific Mutual Life Insurance Company v. Haslip* to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable [punitive damage awards] that would fit every case," and opted for a test of "general concerns of reasonableness."[42] This balancing test consisted of several factors to determine if the punitive award is reasonably related to the "goals of punishment and deterrence."[43] The factors used in considering whether the punitive damage award is excessive or inadequate are:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.[44]

After considering these factors, the Supreme Court decided in this case, where the plaintiffs' insurer misappropriated premiums, causing the plaintiffs' health insurance policies to lapse without them knowing, that a punitive damages award of more than four times the compensatory award was not excessive.[45]

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42. 499 U.S. 1, 18 (1991).
43. *Id.* at 21 (quoting Green Oil Co. v. Hornsby, 530 So. 2d 218, 222 (Ala. 1989)).
44. *Id.* at 21–22.
45. *Id.* at 6–7, 22.

3. Using a General Concern of Reasonableness to Determine if the Punitive Award is So Grossly Excessive as to Violate the Due Process Clause of the Fourteenth Amendment

Two years later, the Supreme Court returned to punitive damages. In *TXO Prod. Corp. v. Alliance Res. Corp.*, the Court focused on the "general concerns of reasonableness" illustrated in *Haslip* to decide whether a punitive damages award for a common-law slander of title suit against a large and wealthy company, TXO, engaged in a knowing baseless quitclaim deed to leverage more royalties from Alliance Resources Corporation—just like it had done to other small businesses across the country—violated the Due Process Clause of the Fourteenth Amendment.[46] Justice Stevens announced the decision of the Court, which did not have a majority opinion, that the judgment against TXO, which included $19,000 in actual damages and $10 million in punitive damages for slander of title, was not excessive under the Fourteenth Amendment's Due Process Clause.[47] The punitive damages were 526 times the compensatory damages, which passed the "general concerns of reasonableness" standard under the Fourteenth Amendment.[48]

4. Judicial Review is an Important Safeguard to Ensure Punitive Damage Awards are Constitutional

The Court next heard an Oregon negligence action where the defendant, Honda, created and sold three-wheel all-terrain vehicles (ATVs), one of which overturned while plaintiff Karl Oberg was driving it. The jury agreed with Oberg's estate that Honda should have known that its ATV had an "inherently and unreasonably dangerous design."[49] Honda appealed on the grounds that the punitive damage award was unconstitutional under the Fourteenth Amendment of the Constitution because Oregon's recent statute, OR. REV. STAT. § 30.9325(3),[50] violated due process.[51] The statute says that judicial review of the amount of punitive damages awarded by a jury is only permitted if a court can affirmatively say there is no evidence to support the verdict. The Oregon Supreme Court upheld the trial

46. 509 U.S. 443, 443 (1993).
47. *Id.* at 462.
48. *Id.* at 473 (O'Connor, J., dissenting).
49. Honda Motor Co. v. Oberg, 512 U.S. 415, 418 (1994).
50. *Id.* at 427, 440.
51. *Id.* at 415.

court's decision, but the Supreme Court of the United States reversed, holding that the functional denial of the review of punitive damages violated the Due Process Clause of the Fourteenth Amendment because "[p]unitive damages pose an acute danger of arbitrary deprivation of property" since juries have wide discretion in awarding damages and because Oregon "removed that safeguard [judicial review of punitive damages] without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time."[52]

5. 500-to-1 Punitive to Compensatory Damage Award is Not Constitutional if Conduct is Not Particularly Reprehensible, and There is Only Minor Economic Damage

In *BMW of N. Am. v. Gore*, the Supreme Court held that a $2 million award of punitive damages was "grossly excessive" under the Fourteenth Amendment when the compensatory damages were only $4,000.[53] In the case, Dr. Gore sued BMW for failing to disclose that his new BMW had been repainted after it was damaged by acid rain during its delivery from Germany. At trial, BMW admitted to having a nationwide policy of not informing its customers of delivery damage when the costs "did not exceed three percent . . . of the car's suggested retail price."[54] Justice Stevens' majority opinion looked at "three guideposts" to determine whether the defendant, BMW, had received adequate notice of the possible sanctions it could face.[55] These guideposts were: (1) the degree of reprehensibility of the nondisclosure; (2) the disparity between the harm or potential harm suffered by the plaintiff and their punitive damages award; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases.[56]

52. *Id.* at 432.
53. BMW of N. Am. v. Gore, 517 U.S. 559, 574–75 (1996).
54. *Id.* at 559.
55. *Id.*
56. *Id.*

6. General Guideline: Few Punitive Damage Awards Exceeding a Single-Digit Ratio with Compensatory Damages Will Satisfy Due Process

The Court in *State Farm Mut. Auto. Ins. Co. v. Campbell* gave more explicit guidance on navigating the punitive to actual damages ratio. In this case, plaintiffs brought a bad faith insurance claim against State Farm, and used evidence of State Farm's national scheme—which involved fraudulently capping claimant payouts to meet its own predetermined corporate financial goal—to obtain a $1 million compensatory damage award and a $145 million punitive damages award. Justice Kennedy, writing for a six-justice majority, declared that a $145 million punitive damage award for only $1 million in compensatory damages was grossly excessive.[57] The Court noted that, in practice, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[58] The Court then reviewed the Utah Supreme Court's application of the three *Gore* factors—(1) reprehensibility, (2) ratio of actual damages to punitive damages, and (3) comparable civil remedies—and found that this was not one of the rare circumstances where a punitive to compensatory damages ratio greater than a single-digit ratio would satisfy due process.[59]

The Court's reasoning shows its focus on predictability and distaste for punishment for its own sake in civil suits. Under the first *Gore* guidepost, the reprehensibility analysis, the Supreme Court noted that the reprehensibility of a defendant should be determined by looking at five factors: whether (1) the harm was physical or economic; (2) the tortious conduct showed an indifference to or reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of an intentional act or an accident.[60] The Utah Supreme Court instead used this case as a "platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country."[61] In contrast, the United States Supreme Court, referring to the plaintiffs' use of State Farm's conduct in other states where it was legal, held "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the

57. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003).
58. *Id.* at 425.
59. *Id.* at 429.
60. *Id.* at 419.
61. *Id.* at 420.

defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff."[62]

The Court then went on to the second *Gore* guidepost, the ratio of actual damages to punitive damages, and held that, while "there are no rigid benchmarks that a punitive damages award may not surpass," "[s]ingle digit multipliers are more likely to comport with due process."[63] The Court held the adverse effect on Utah's population by State Farm's national policies, which included failing to report a $100 million punitive damage award in Texas, was minimal and had little bearing on this case because the plaintiff was unable to direct the Court to evidence demonstrating actual harm to the people of Utah.[64] The Court further held that, while the wealth of a defendant can be an appropriate and lawful factor to consider,[65] "this factor cannot make up for the failure of other factors, such as 'reprehensibility' . . . ." The Court also limited the scope of the third factor, similar civil penalties analysis, by holding it is inappropriate to compare irrelevant and dissimilar out-of-state conduct.[66]

7. Punitive Damage Awards Can Only be Based Off Harm Suffered by Parties to the Case

In *Philip Morris USA* v. *Williams* the Supreme Court decided a complex tobacco case.[67] Jesse Williams' estate, and his widow, sued Phillip Morris for leading Jesse to believe that cigarettes were not bad for him, causing him to become addicted and die from smoking-related lung cancer.[68] Williams' attorney told the jury to "[t]hink about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. . . . [C]igarettes . . . are going to kill ten [of every hundred]."[69] The Court held that punitive damages based on a jury's desire to punish a defendant for harming others not party to the case is a taking of property from the defendant without due process and remanded Williams' suit.[70]

62. *Id.* at 422.
63. *Id.* at 425.
64. *Id.* at 427.
65. *Id.* at 428.
66. *Id.* at 427.
67. 549 U.S. 346 (2007).
68. *Id.* at 349–50.
69. *Id.* at 350.
70. *Id.* at 357.

8. 1-to-1 Compensatory to Punitive Damages Ratio is a Fair Upper Limit for Maritime Cases

In the latest installment of the Supreme Court's take on punitive damages, the Court tackled the maritime case of the Exxon Valdez.[71] While this case does not deal with Fourteenth Amendment due process, and instead focuses on the specifics of federal maritime common law,[72] it sheds light on the Court's more recent attention on predictability in punitive damages. The Exxon Valdez, a supertanker grounded under the watch of intoxicated captain Joseph Hazelwood, spilled millions of gallons of crude oil into the Prince William Sound.[73] The compensatory damages were $507.5 million, and the trial court awarded $5 billion in punitive damages, which was reduced to $2.5 billion by the Ninth Circuit, and to $507.5 million by the Supreme Court.[74] In declining to uphold the original punitive damages award, Justice Souter held that a ratio of 1:1 of compensatory to punitive damages is the maximum amount of damages that can be awarded for an unintentional tort.[75] Justice Souter went to great lengths to emphasize that this case did not deal with an intentional tort, but an unintentional and reckless act.[76] Justice Souter further discussed the importance of predictability for even intentional tortfeasors by noting, "[a] penalty should be reasonably predictable in its severity, so that even Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another."[77]

Drawing from these cases, it is unclear how robust the Supreme Court's presumption against punitive damage awards in excess of a single digit ratio between punitive and compensatory damages is, or how predictable a punitive damage award must be. Yet it appears that the Court is concerned with making sure the punitive damage award is not based off of a jury's dislike of the defendant, but rather on their intentional and reprehensible harm to a specific plaintiff. Further, the Court is preoccupied with making sure punitive damage amounts are predictable by intentional tortfeasors. With the Supreme Court's regular attendance to punitive damages, it is likely

71. Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008).

72. *Id.* at 475.

73. *Id.* at 476.

74. *Id.* at 481, 514.

75. *Id.* at 513.

76. *Id.* at 493.

77. *Id.* at 502.

that the court will hear another case on punitive damages soon.[78] A statute or judicial ruling on punitive damages from Washington State could go a long way in serving as a model of effective use of punitive damages for the entire country in light of the Court's perplexing precedent.

C. The Punitive Scene in Washington: Largely Vacant

Washington is one of a minority of states that generally do not award punitive damages. Washington prevents courts from awarding punitive damages unless the action falls under (1) one of the few statutes specifically allowing for punitive damages,[79] (2) the action is based in federal maritime law,[80] or (3) there is a conflict of law which allows Washington to apply the laws of another state that allows punitive damages.[81] Excepting these narrow situations, Washington has barred punitive damage awards since 1891, two years after it became a state, when the Washington Supreme Court held in *Spokane Truck & Dray Co. v. Hoefer*,

> Surely the public can have no interest in exacting the pound of flesh . . . . [P]unitive damages cannot be allowed on the theory that it is for the benefit of society at large, but must logically be allowed on the theory that they are for the sole benefit of the plaintiff, who has already been fully compensated; a theory which is repugnant to every sense of justice.[82]

Washington's ban on punitive damages is interesting because it took place in a time completely removed from the tort reform focus of the last couple of decades. Yet even with Washington's ability to dodge most of the popular tort reforms in the United States, it is hard to believe that the media and public's focus on tort reform does not affect the continued ban on punitive damages in Washington.[83] Washington is a good candidate for allowing punitive

78. David S. Kemp, *The Constitution and Punitive Damages: A Ten-Year Anniversary Discussion of* State Farm v. Campbell, VERDICT (Apr. 8, 2013), https://verdict.justia.com/2013/04/08/the-constitution-and-punitive-damages.

79. Barr v. Interbay Citizens Bank, 635 P.2d 441, 443 (Wash. 1981) ("Under the law of this state [Washington], punitive damages are not allowed unless expressly authorized by the legislature.").

80. Clausen v. Icicle Seafoods, Inc., 272 P.3d 827, 831 (Wash. 2012).

81. *See* Singh v. Edwards Lifesciences Corp., 210 P.3d 337, 342 (Wash. Ct. App. 2009).

82. 25 P. 1072, 1074 (Wash. 1891).

83. *See* Scott DeVito & Andrew W. Jurs, *"Doubling-Down" for Defendants: The Pernicious Effects of Tort Reform*, 118 PENN ST. L. REV. 543, 545–48 (2014) (positing there are two causes of

damages because it has avoided the brunt of the national tort reform movement, and is unburdened by outdated and ineffective punitive damage statutes that must be repealed since the state has never had a comprehensive punitive damage statute. For these reasons, it is important to understand the current state of punitive damages in Washington.

1. No Punitive Damages Unless a Statute Green Lights Them, If They Are Brought Under General Maritime Law, or Under the Laws of Another State

There are currently a few specific ways to get punitive damages in Washington. The most common way is if punitive damages are specifically codified by legislation. Some codified punitive damage awards include violations of the Insurance Fair Conduct Act,[84] action by governmental entities,[85] and trespass to trees, shrubs, and timber.[86] These exceptions to the punitive damages rule in Washington are narrow, have their issues,[87] and their critics.[88]

General maritime law claims are another exception that allows punitive damage awards in Washington. The reason is that maritime actions brought in Washington state courts are governed by federal maritime law, which recognizes general maritime law. Under general maritime law, "an employer [that acts] callously or willfully in withholding maintenance and cure [is] a basis for recovering attorney fees and punitive damages."[89] Unfortunately, this narrow exception leaves the land bound population of Washington without access to punitive damages.

A third exception are cases that involve a choice of law between Washington and another state, where the other state allows punitive damages and has greater contacts to the case that lead to greater public policy and governmental concerns than Washington. In

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reduction in medical malpractice torts: (1) tort reform laws, and (2) background non-statutory drop in medical malpractice tort filings, and they result in too large of a drop in tort filings).

84. Insurance Fair Conduct Act, WASH. REV. CODE §48.3.015(2) (2007) ("[i]ncrease the total award of damages to an amount not to exceed three times the actual damage").

85. Consumer Protection Act, WASH. REV. CODE §19.86.090 (2009) (allowing treble damages for successful plaintiffs).

86. Injury to Trees Act, WASH. REV. CODE § 64.12.030 (2009).

87. Capping damages, like the Insurance Fair Conduct does (at three times the damage), reduces the punitive damage's effectiveness.

88. Joe Hampton, *Let's Hope Oregon Doesn't Replicate Washington's IFCA Mistake,* INSURANCE COMMANDO BLOG (Apr. 7, 2015, 11:26 PM), http://www.bpmlaw.com/lets-hope-oregon-doesnt-replicate-washingtons-ifca-mistake/.

89. Clausen v. Icicle Seafoods, Inc., 272 P.3d 827, 831 (Wash. 2012).

these circumstances, Washington can elect to award punitive damages under that state's laws.[90] Even with these available avenues for punitive damages in Washington, they are rarely used.[91] Punitive damages are unavailable in Washington, unless you are *lucky* enough to be injured in a peculiar set of circumstances listed in this section. Washington courts do not allow punitive damages if you or a family member gets hit by someone who intentionally drank too much before intentionally getting into his car and driving;[92] if you were hit or almost hit by a safe that was being lifted into a room five stories above you;[93] if you are severely injured by an intentionally poorly made product; and an endless list of other tortious acts that should be deterred.

2. The Common Law on Punitive Damages in Washington: A Pound of Flesh Does Not Help the Public

Since 1891, Washington courts have explicitly held that in civil cases once a plaintiff is compensated for all of their resulting injuries by a tortfeasor—including mental, emotional, and loss of reputation—punitive damages cannot be allowed on the "theory that it is for the benefit of society at large."[94] The seminal case, *Spokane Truck & Dray Co. v. Hoefer*, revolved around the reckless hoisting by the defendant of a heavy safe five stories above a commonly used building entrance, which inevitably fell to the ground and broke the plaintiff's arm as she was leaving the building, completely unaware of the danger looming over her.[95] The court in *Hoefer* noted that criminal jurisdiction, and not civil jurisdiction, is the sole means of punishing defendants in Washington courts, and that a plaintiff in a civil case asking for punitive damages cannot benefit the state, since the state recouped its damages by making the tortfeasor compensate the victim.[96] This precedent is in full force today. A century after *Spokane Truck & Dray Co. v. Hoefer*, the Washington Supreme Court held: "[s]ince 1891, in an unbroken

90. *See* Singh v. Edwards Lifesciences Corp., 210 P.3d 337, 342 (Wash. Ct. App. 2009).

91. *See generally* Rustad, *supra* note 27 (using empirical research to show punitive damage cases are rare).

92. Chris Davis, *Should Washington State Allow Punitive Damages for Outrageous Conduct?*, DAVIS L. GROUP BLOG (Aug. 5, 2011), http://www.injurytriallawyer.com/blog/should-washington-state-allow-punitive-damages-for-misconduct.cfm#comments.

93. *See* Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1074 (Wash. 1891).

94. *Id.*

95. *Id.* at 1072.

96. *Id.* at 1073–74.

line of cases, it has been the law of this state that punitive damages are not allowed unless expressly authorized by the legislature."[97]

3. Washington's Constitution: The Right to a Jury Trial Does Not Include Punitive Damages

The Washington Supreme Court in *Sofie v. Fibreboard Corp.* held that, under Washington Constitution Article 1, § 21, the right of trial by a jury did not include allowing juries to award punitive damages.[98] The Court decided that the right to a jury trial did not include punitive damages because the seminal case, *Spokane Truck & Dray Co. v. Hoefer*, failed to find that Const. Article 1, § 21 allowed punitive damage awards. The Court additionally noted that, since three of the judges for the *Spokane Truck & Dray Co.* case served as drafters for the Washington Constitutional Convention two years prior, they likely knew that the drafters did not envision punitive damage awards in the right to a jury trial.[99] The constitutionality of the right to a jury trial excluding punitive damages has not been litigated in Washington since.

Part I set the foundation for understanding the purpose of punitive damages. It also laid out the current state of punitive damages in the Supreme Court and in Washington State. Part II examines the benefits effective deterrence can offer Washington, and outlines the important contours that any punitive damage framework needs to be successful. This examination of the benefits of deterrence for the public good forms the basis of the reform in Part III.

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97. Barr v. Interbay Citizens Bank, 635 P.2d 441, 445 (Wash. 1981) (citing Maki v. Aluminum Bldg. Products, 436 P.2d 186 (Wash. 1968); *Spokane Truck & Dray Co.*, 25 P. at 1074.

98. 771 P.2d 711, 727 (Wash. 1989). While this seminal case written by Justice Utter overruled a statutory limit on recoverable non-economic damages for wrongful death suits, it did not extend the right of trial by jury to include punitive damages.

99. *Id.*; *see* Shoemaker v. Pang, No. 47242-9-I, 2001 Wash. App. LEXIS 362, at *18 (Wash. Ct. App. Feb. 21, 2001) (stating plaintiff's argument that "the state constitutional right to a jury trial guarantees the right to allow juries to determine punitive damages . . . is unpersuasive.").

II. A DEPICTION OF A SUCCESSFUL PUNITIVE DAMAGES AWARD IN WASHINGTON

The tort reform movement's focus on restraining lawsuits, and in particular punitive damages,[100] has not led to less arbitrary decisions, but more. Similarly, while the Supreme Court's jurisprudence on punitive damages must be given credit for not "draw[ing] a mathematical bright line between constitutionally acceptable and constitutionally unacceptable [punitive damage awards],"[101] their guidelines are unlikely to do much help, and potentially make punitive damage awards less effective and more arbitrary since Court's caps on punitive damages are centered on what the intentional tortfeasor could expect, versus adequate and appropriate deterrence.[102] The Court has it backwards.

Despite these problems, Washington can legislate an effective punitive damages scheme by addressing the myths of punitive damages and utilizing law and economics, which would allow punitive damages to deter potential tortfeasors and punish actual tortfeasors. But before a possible law can be recommended, it is crucial to address the main concerns about punitive damages, why those concerns are mistaken, and what a punitive damages framework should focus on.

A. Punitive Damages Serve the Public Good

The Washington Supreme Court in 1891 held that, in regards to punitive damages, "the public surely has no interest in exacting the pound of flesh."[103] But when confronted with intentionally harmful or reckless conduct, most legal scholars disagree.[104] In fact, the only way to ensure that the public is not taken advantage of by tortfeasors who can escape detection often is through punitive damages.[105]

When looking at the Washington Supreme Court's decision in *Spokane Truck & Dray Co. v. Hoefer*, it is tough to see why punitive damages were banned in the first place: the grossly negligent moving of a safe over unaware people which falls from above and breaks

100. *Punitive Damages Reform*, AM. TORT REFORM ASS'N, http://www.atra.org/issues/punitive-damages-reform (last visited Sept. 25, 2016).

101. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

102. Calandrillo, *supra* note 9, at 774.

103. Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1074 (Wash. 1891).

104. *See* Calandrillo, *supra* note 9, at 774; *see also* POSNER, *supra* note 22, at 242.

105. POSNER, *supra* note 22, at 242. ("If a tort is concealed, punitive damages must be added to the defendant's profit or the victim's loss to provide adequate deterrence.").

someone's arm appears ripe for collecting punishment under deterrence purposes.[106] Perhaps the court was concerned that awarding the plaintiff with a punitive damages award would stifle business and hurt the entire state. But allowing a tortfeasor to intentionally or recklessly cause harm to the public calls for greater concern than punishing a reckless defendant and deterring similar future conduct. Intentional tortfeasors already get away with intentional crime more than they are caught in general—and this is why punitive damages are necessary.[107]

1. Make Intentional Tortfeasors Think Twice Before Committing a Tort

Punitive damages are meant to help the public through deterrence. Despite this, punitive damages are frequently believed to harm the public through chilling innovation and encouraging potential victims to act more recklessly in hopes of a delightful punitive damage award.[108] Tort reform proponents argue that personal injury suits clog our judicial system, pressure medical professionals to conceal innocent mistakes, and line the pockets of plaintiff personal injury attorneys.[109] Research supporting these positions is steeped in rhetoric, but low on evidence.[110] Conversely,

106. 25 P. at 1072.

107. POSNER, *supra* note 22, at 242.

108. *See* STELLA AWARDS, www.stellaawards.com (last visited Sept. 25, 2016) (mocking the parties to the famous "hot coffee case," *Liebeck v. McDonald's*, as "opportunists and self-described victims" versus "any available deep pockets and the U.S. Justice System"); *see also* Lauren Pearle, *"I'm Being Sued for WHAT?"*, ABC NEWS: LAW AND JUSTICE UNIT (May 2, 2007), http://abcnews.go.com/TheLaw/story?id=3121086&page=1 ("Seemingly frivolous lawsuits are costing us billions and changing the way Americans live and function in society, experts tell the ABC News Law & Justice Unit.").

109. *2000 Republican Party Platform*, THE AMERICAN PRESIDENCY PROJECT (July 31, 2000), http://www.presidency.ucsb.edu/ws/?pid=25849 (last visited Feb. 7, 2016).

110. Scott DeVito & Andrew Jurs, *An Overreaction to a Nonexistent Problem: Empirical Analysis of Tort Reform from the 1980s to 2000s*, 3 STAN. J. COMPLEX LITIG. 62, 62 (2015) ("Proponents of tort reform have suggested it is a necessary response to rising personal injury litigation and skyrocketing insurance premiums. Yet the research into the issue has mixed results, and the necessity of tort reform has remained unproven."); *see Punitive Damages Reform*, AM. TORT REFORM ASS'N, http://www.atra.org/issues/punitive-damages-reform (last visited Sept. 25, 2016) ("The difficulty of predicting whether punitive damages will be awarded by a jury in any particular case, and the marked trend toward astronomically large amounts when they are awarded, have seriously distorted settlement and litigation processes and have led to wildly inconsistent outcomes in similar cases."). *see also* Marshall Allen, *Doctor Confesses: I Lied To Protect Colleague in Malpractice Suit*, NATIONAL PUBLIC RADIO (Sept. 23, 2016 5:00 AM), http://www.npr.org/sections/health-shots/2016/09/23/494920109/doctor-confesses-i-lied-to-protect-colleague-in-malpractice-suit?sc=tw (former doctor discusses committing perjury to protect a colleague who committed medical malpractice, and the pressure doctors face to protect each other from medical malpractice suits).

research on punitive damages has shown that punitive damage awards are typically not blockbuster hits,[111] and sought in only ten percent of all tort lawsuits that go to trial.[112]

The real question regarding punitive damages and deterrence is whether punitive damages effectively deter potential tortfeasors from intentional torts. This is a tough question to answer, especially looking at the struggle of our criminal justice system's attempt to justify heavy prison sentences and deterrence with little success.[113] While examples from the criminal justice system are helpful to evaluate what does and does not deter individuals, it operates with far different circumstances and consequences than most civil punitive damages cases. The price to deter someone from committing an intentional crime is generally far higher than that person can pay, and insolvency problems stop punitive damages in their tracks.[114] But this is typically not the case in most civil suits where punitive damages are brought since the intentional tortfeasor is often wealthy;[115] this means punitive damages can be a great source of deterrence for intentional torts.[116] This explains why some punitive damages do not make intentional wrongdoers think twice in the criminal sphere, but work well on the civil side. Allowing punitive damages benefits the public twofold: (1) it helps ensure the plaintiff is fully compensated for the harm done,[117] and (2) encourages that tortfeasor and similarly situated individuals to act in line with the law and cause less harm.

Drawing on a few symbolic punitive damages award decisions, it appears that punitive damages are effective at making potential tortfeasors take their intentionally tortious conduct into account.

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111. *See Punitive Damages in Civil Trials*, BUREAU OF JUST. STATISTICS (June 7, 2011), http://www.bjs.gov/index.cfm?ty=tp&tid=45111 (last visited Sept. 25, 2016).

112. *Id.* ("The median punitive damage award was $64,000, and 13% of cases with punitive awards had damages of $1 million or more.").

113. *See* POSNER, *supra* note 22, at 287 (explaining why economic arguments for the War on Drugs heavy prison sentences are unimpressive).

114. *Id.* at 256.

115. *See supra* Part I (discussing well known punitive damages cases against wealthy companies); *see also* Polinsky & Shavell, *supra* note 35, at 910 (discussing how jury instructions are often realistically tailored to fit the tortfeasors' wealth).

116. *See* POSNER, *supra* note 22, at 260 ("[E]conomists like fines as a mode of punishment because they are much cheaper than prison, since the fine is revenue to the government and once it's been collected the government has no further expense of punishment of the person fined; that is very different from having to pay the living costs of a prison inmate.").

117. *See id.* at 234 (explaining how tort law often fails to restore a party back to its pre-injury utility and is an inefficient method of compensation).

For example, McDonald's, after the often-mocked *Liebeck v. McDonald's Restaurants*,[118] put warnings on their lids and cups alerting customers that the coffee is very hot.[119] In *Liebeck*, the plaintiff was originally awarded $160,000 in compensatory damages and two days' worth of McDonald's profit from its coffee sales for punitive damages, which amounted to $2.7 million.[120] However, this award was reduced to three times the compensatory award, $480,000, for a total of $640,000.[121] The parties entered into a settlement for an undisclosed amount in order to avoid more appeals.[122] Similarly, in *Mathias*,[123] Motel 6 stopped renting out rooms infested with bed bugs to unsuspecting customers after receiving a compensatory judgment of $5,000 and a punitive damage award of $186,000—$1,000 awarded for each room in the infested motel.[124] Opponents of punitive damages maintain that the tortfeasors in these cases would have been deterred and adequately punished by compensatory damages, but this is hard to believe, especially when big business and other intentional tortfeasors continue to commit intentional torts.[125]

2. Punish Intentional Tortfeasors for Being Intentionally Bad

What are we supposed to do when we finally catch an intentional tortfeasor red-handed? Treat them the same as an accidental, nonreckless tortfeasor? Let Ken, from our example in Part I, keep slapping Stan? If the purpose of tort law is only to compensate individuals for harm wrongly done to them, then yes, we should treat these individuals the same. While a main focus of tort law is compensation, it is not the only focus—which is fortunate because

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118. Liebeck v. McDonald's Restaurants, P.T.S., Inc., No. 93-CV-02419, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994), *vacated sub nom.* Liebeck v. Restaurants, (N.M. Dist. Nov. 28, 1994).

119. Kevin G. Cain, *And Now, the Rest of the Story . . . About the Mcdonald's Coffee Lawsuit*, HOUSTON LAWYER 25, 30 (July/Aug. 2007) (questioning whether the reduced verdict had enough deterrent on the corporate defendant).

120. *Id.*

121. *Id.*

122. *Id.*

123. 347 F.3d 672 (7th Cir. 2004).

124. *Id.* at 678 (reasoning that the punitive award was likely given by multiplying $1,000 times the number of rooms in the motel).

125. *See* Rustad, *supra* note 27, at 15 ("If potential wrongdoers know that their total exposure is limited to a fixed amount, there is only a limited deterrent effect. Removing wealth from the punitive damages equation also eliminates effective punishment."); *see also* Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 674 (7th Cir. 2004).

tort law has shortcomings in compensating injured individuals.[126] Unlike Holmes's Bad Man doctrine, where a contracting party has the right to either perform or pay to breach, tort doctrine strives to make people behave reasonably and take care not to injure others.[127] If tort law did not care about deterrence, then Holmes's Bad Man would rule, Ken would continue slapping Stan, and intentional torts would be more profitable than they already are.

Because tort law cannot guarantee full compensation, it uses its other goal of deterrence to make up for its compensation downfalls.[128] Punishing these individuals the same would give a subsidy to intentional tortfeasors for their civil wrongs. This is a bad incentive for public welfare. Punitive damage awards tax away the gained profit that intentional tortfeasors obtain,[129] which are untouched by compensatory damages.

3. Restricting Punitive Damages Means Punitive Damage Worthy Conduct is More Likely to Occur and be More Profitable

It is important to think about the flip side of this debate—what does not allowing or severely limiting punitive damages do for a state? The more restricted punitive damages are, the less likely a tortfeasor will have to account for their intentional conduct, which means more negative externalities are pushed onto a state's citizens. This is because attorneys, and society, are forced to not take into consideration the cost that the intentional tortfeasor imposes on society through past, undetected torts, and the intentional tortfeasor gets an unearned benefit from its intentional and concealed acts. This makes intentional torts more profitable, especially in the context of big business. It is not reassuring to hear punitive damages opponents say the market will punish these intentional

126. POSNER, *supra* note 22, at 234 (stating that the primary function of tort law is deterrence, since it is a costly and incomplete form of compensation).

127. Jill Wieber Lens, *Justice Holmes's Bad Man and the Depleted Purposes of Punitive Damages,* 101 KY. L.J. 789, 789 (2013) ("The bad man is not affected by morality and sees a tort duty only as an obligation to pay damages.").

128. POSNER, *supra* note 22, at 234 ("[Tort law's] primary economic function . . . given the existence of accident and liability insurance, is not compensation; it is the deterrence of inefficient accidents."); *see also id.* n.112. Further, most—if not all—victims would rather have never been injured versus receiving a monetary sum in an attempt to restore them to their pre-injury state.

129. *Id.* at 242.

tortfeasors—especially when considering the massive transaction cost differences between large corporations and their consumers.[130]

Barring punitive damages favors both big businesses that are not phased by compensatory damages,[131] and potentially consumers who do not have to pay higher costs stemming from the result of punitive damages awarded against a business. The first case does not favor the public. Rather, it does quite the opposite: the business's interests are put above those of the consumer. The second case, if true, could provide support for banning punitive damages. But, even if true, it is tough to argue it is acceptable for businesses to assume that citizens agree with paying less in cash for the good or service and paying more with the risk of serious injury. Refusing or restraining punitive damages severely means that behavior warranting punitive damages will be subsidized by that jurisdiction's constituents, whether or not they support the tortfeasor's actions.

B. The Amount of Punitive Damages Must be High to Disincentivize Intentionally Bad Acts

Intentional torts are deserving of more punishment than unintentional torts for another important reason—these tortfeasors are better able to evade detection because they planned out their intentional wrongdoing.[132] A good example of this is *Mathias*, where the tortfeasor intentionally evaded detection, albeit temporarily, by telling customers that the rooms were not filled with bedbugs, but ticks.[133] Banning or restricting punitive damages in this case means that Motel 6, the tortfeasor, would have not been punished for all of the previous times it lied to its customers and subjected them to

130. *Id.* at 491. Often the market is unable to effectively regulate intentional wrongs because the intentional tortfeasor has substantially more bargaining power than the consumer. Examples of this phenomenon include small but widespread harms, detection issues, and other transaction problems.

131. *See* Cain, *supra* note 119, at 25–26 ("Evidence at [Liebeck's] trial was simply damning. It was learned that McDonald's was aware of more than 700 claims brought against it between 1982 and 1992 due to people being burned by its coffee."); REUTERS, *CEO Martin Shkreli Says Securities Fraud Charges Are "Baseless,"* 21 WESTLAW J. HEALTHCARE FRAUD 9 (2016) (highlighting former drug company's indifference towards the consequences of raising the price of lifesaving AIDS medication).

132. POSNER, *supra* note 22, at 256 ("Being for the most part a by-product of lawful, public activities, accidents usually are difficult to conceal and breaches of contract usually impossible to conceal. But someone who is deliberately endeavoring to take something of value from someone else will naturally try to conceal what he is doing, and will often succeed because he has planned the concealment in advance.").

133. Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672, 674 (7th Cir. 2004).

bedbug infiltrated rooms. This, as stated previously above, gives intentional tortfeasors an undeserved subsidy. If the cost of halting the "chilling effect of punitive damages"[134] comes at the price of letting intentional tortfeasors have a competitive advantage—in that individuals and corporations are incentivized to invest in resisting detection rather than consumer safety—this tradeoff preference cannot be attributed to the general public. Additionally, it is inefficient from an economics standpoint.[135] Yet there are scholars and attorneys who state that punitive damages do not have any effect because, while punitive damages do enter into corporate decision-makers' calculations, their effect is diluted because punitive damages are rarely given.[136]

Even if punitive damages are diluted because they are only awarded in a handful of cases, that appears to be more of a reason to award punitive damages than hold them back. This is even more true when looking at the procedural mechanisms already in place today to prevent frivolous lawsuits from proceeding on the merits—not the least of which is the heightened pleading standard resulting from *Twombly* and *Iqbal*[137]—alongside the inherent costs in bringing a worthless personal injury suit to the plaintiff and to the plaintiff's attorney. The more likely an intentional tortfeasor is to escape detection, the higher punitive damages should be in order to obtain optimal deterrence.[138]

Part II showed the most important goals of an effective punitive damage framework for Washington. Part III specifically applies those goals into a coherent statutory scheme to obtain the maximum amount of deterrence while still abiding by the Supreme Court's precedent. Part III's easy to apply framework supports the argument that punitive damages should be revamped in each state, and that this reform is the most effective way to do so.

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134. *The Chilling Effect of Punitive Damages*, CTR. FOR AM., http://www.legalreforminthenews.com/speakers/punitives/punitives_2.html (last visited Sept. 25, 2016).

135. Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 551 (1969) (explaining the inefficiencies of monopolies); *see supra* Part II.A.3. (discussing the problems of letting intentional tortfeasors have an unearned subsidy at the cost of public safety).

136. Steven B. Hantler, *The Seven Myths of Highly Effective Plaintiffs' Lawyers*, 42 CIV. JUST. F. 2, 3 (2004) ("When firms look forward, the prospect of punitive damages is so uncertain that there is no deterrent effect.") (quoting Kip W. Viscusi, *Why There Is No Defense of Punitive Damages*, 87 GEO. L.J. 381, 383 (1998)).

137. Ashcroft v. Iqbal, 556 U.S. 662, 699 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

138. POSNER, *supra* note 22, at 242.

III. A PROPOSED PUNITIVE DAMAGE REGULATORY SCHEME CUSTOM-FIT FOR WASHINGTON, AND A MODEL FOR THE ENTIRE NATION

In Washington, it pays to plan your intentional tort. Intentional tortfeasors get the benefit of an increased chance of evading detection, and if they are caught, they are only held liable—if successfully sued—for the damage they caused to the specific individual. The result is that those who commit intentional torts will not be adequately deterred and have no legal or economic incentive to change their behavior.[139] This is a less than ideal situation for Washington, especially as its population continues to grow.[140] The following punitive damage scheme can reduce intentional torts in Washington, as well as provide a punitive damages template for other states to follow.[141]

A. Sifting Out Arbitrary Decisions

Any potential punitive damage scheme in Washington needs to center on deterring intentional torts and fall in line with the Fourteenth Amendment due process doctrine on punitive damages. The doctrine is best defined by the Supreme Court's decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*: "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[142] While the *State Farm* opinion arguably gets in the way of optimal deterrence with its single-digit ratio suggestion for punitive damages, the decision is porous enough to allow near optimal deterrence with careful guidance.[143]

Washington can create its punitive damages framework to obtain near optimal deterrence and stay within the constitutional lines

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139. *Id.* (arguing punitive damages are necessary to make the tortfeasor "indifferent between stealing and buying my neighbor's car").

140. OFFICE OF FIN. MGMT., STATE OF WASHINGTON: FORECAST OF THE STATE POPULATION, (November 2015), http://www.ofm.wa.gov/pop/stfc/stfc2015/stfc_2015.pdf.

141. The idea of states creating innovative, effective, and influential solutions to problems is one of the most beneficial aspects of our democracy, and is well supported in constitutional precedent. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (J., Brandeis dissent) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

142. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

143. POSNER, *supra* note 22, at 243 (explaining that, while punitive damages should be based on the individual's acts, and not who the individual is, the suggested Supreme Court limit may only apply "when the compensatory damages are very large").

drawn in *State Farm* by delineating the categories of torts that are eligible for punitive damages and specifying the ratio-range of punitive damages available. This certainly does not add up to optimal deterrence, but it is closer than implementing punitive damage actions with an across-the-board ban on punitive damages or a strict cap based solely on the ratio between compensatory and punitive damages.[144] Additionally, giving clear guidance to Washington's punitive damage scheme will allow it to be more transferable to other states looking to decrease harm done by intentional tortfeasors.

1. Mens Rea Inquiry

The first inquiry looks to the tortfeasor's *mens rea*—negligent, reckless, intentional, or malicious—to decide what prima facie ratio-range of damages is appropriate. The purpose of sorting what type of punitive damage awards are available through a gradation of culpability standards is to satisfy the *State Farm* guideline that a single-digit ratio of compensatory to punitive damages should be the general ratio awarded, and to combat the perceived and real danger of getting hit with arbitrary damages.[145]

This framework accounts for Justice Souter's concern that "even Holmes' bad man" can reasonably determine the amount of damages, including potential punitive damages, for which he may be liable.[146] Unfortunately, Justice Souter's concern on predicting one's punitive damage liability, if incorporated into law, would hamper the effectiveness of punitive damages. Such a system would allow a hypothetical tortfeasor to weigh the cost and likelihood of being successfully sued by simply adding a single digit ratio for punitive damages combined with the likelihood of being caught, versus the benefits to them of committing the tort. There is something to be said for predictability, but it is not clear that this factor should take a front seat in determining damages meant solely to deter similar future behavior. Putting limits on the amount of punitive damage that can be awarded prevents them from being optimally effective, since, as the Court noted in *Exxon Valdez*, the bad man can "look ahead" and plan.[147] As Professor Lens explains,

144. *Id.*

145. *Id.* (warning that "[e]xcessive punishment can overdeter; a defendant should have reasonable notice of the sanction for unlawful acts so that he can make a rational determination of how to act; and sanctions should be based on the wrong done rather than on the status of the defendant").

146. Exxon Shipping Co. v. Baker, 554 U.S. 471, 502 (2008).

147. *Id.*

> The reason that the bad man may be affected by punitive damages is not that he suddenly appreciates the immorality of his conduct. Instead, the *unpredictable damages* may reach him because they preclude him from accurately planning out the damages of his tortious conduct, perhaps dissuading him from committing the conduct in the first place. The Supreme Court's insistence on predictability in *Exxon Shipping Co.* precludes the use of this strategy of reaching the bad man.[148]

The focus should not be on whether Holmes' bad man is shocked by a damages award, but if the damages award will deter him.

The Supreme Court's emphasis on predictability undercuts the deterrence and punishment goals of punitive damages. A better punitive damages doctrine is based in law and economics, and revolves around the probability of detection rates; meaning punitive damage awards "should be set by multiplying the inverse of the probability of detection by the amount of actual harm in the instant case."[149] Nevertheless, while we cannot ignore the Supreme Court's decisions on punitive damages, we can incorporate them to achieve as much deterrence as possible given the Supreme Court's suggested boundaries.

In this Note's proposed scheme, torts involving negligent acts are not eligible for punitive damages because they do not involve an individual trying to take advantage of another, and damages to make the plaintiff whole are enough to cause the typical negligent tortfeasor to mind their behavior. Negligent torts often have a high rate of detection, and, as a result, punitive damages are not warranted because they are relatively easy to assign liability and a proper remedy.[150] It would certainly seem unfair to award punitive damages when all a tortfeasor did was fail to live up to the reasonable person standard on a specific occasion.

Reckless tortfeasors will be eligible for punitive damages capped at a 1:1 compensatory to punitive damage ratio, with the top end reserved for extremely dangerous acts.[151] For example, a plaintiff

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148. Lens, *supra* note 127, at 814–15 (emphasis added).

149. Calandrillo, *supra* note 9, at 821; see also Kevin S. Marshall & Patrick Fitzgerald, *Punitive Damages and the Supreme Court's Reasonable Relationship Test: Ignoring the Economics of Deterrence*, 19 ST. JOHN'S J. LEGAL COMMENT. 237, 249 (2005) (arguing the Supreme Court should base its punitive damages doctrine on rational economic principles).

150. Polinsky & Shavell, *supra* note 35, at 874 (explaining that, for high detection torts, "punitive damages would not be appropriate because the firm is unlikely to escape detection and liability for this harm").

151. *See* Mary P. Kehoe, *Lost in Translation: The Circuitous Route to A Standard for Punitive Damages*, 35 VT. B.J. 22, 27 (2009) (arguing Vermont's strict recklessness without "bad motive" is too strict of a standard for deciding whether punitive damages are appropriate); *see*

sues a reckless tortfeasor for drinking ten beers and then driving his SUV, only to come crashing into the plaintiff's sedan, seriously injuring the plaintiff.[152] Reckless tortfeasors also have a high detection rate, because their acts are not planned out.[153] Since reckless tortfeasors have high detection rates, there is less of a need to levy large punitive damage awards against them.

Intentional tortfeasors will be subject to punitive damages in any amount, so long as the amount is directly tied to their related tortious conduct. This is because the intentional tortfeasor planned their acts knowing the harm they would cause others, and they have a lower detection rate than non-intentional torts.[154] A great example of an intentional tortfeasor who would be liable for punitive damages in this scheme is GM in their ignition-switch fiasco. Instead of informing their consumers of a defective ignition switch design that killed dozens, GM chose to cover up their deadly ignition switches.[155] This costs and benefits "business decision," cost 124 people their lives as of December 10, 2015.[156] A court can determine if conduct is directly tied to the defendant's conduct by looking at the detection rate of the tort,[157] the profit expected by the tortfeasor from the act,[158] and seeing if the punitive award is reasonably within those parameters. These safeguards will help prevent any arbitrary punitive damage judgments, and help support a judgment that falls above or below a single digit compensatory to punitive damages ratio.

Malicious tortfeasors are less deterrable than reckless or intentional tortfeasors, so a larger award is warranted. A malicious tortfeasor is someone who intends to get profit *and* satisfaction

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also Exxon Shipping Co., 554 U.S. at 493 (capping punitive damage limit at 1:1 ratio because act was not intentional, but only reckless).

152. *See* Chris Davis, *Should Washington State Allow Punitive Damages for Outrageous Conduct?*, DAVIS L. GROUP BLOG (Aug. 5, 2011), http://www.injurytriallawyer.com/blog/should-washington-state-allow-punitive-damages-for-misconduct.cfm ("If our legislature rejects more jail time for drunk drivers, than why not allow an innocent victim or the victim's family to recover punitive damages instead? A drunk driver who kills should at least be subject to financial punishment . . . . It only seems fair.").

153. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008).

154. POSNER, *supra* note 22, at 242 (stating that to deter a tortfeasor with a low detection rate, more than compensatory damages is necessary).

155. Nathan Bomey & Kevin McCoy, *GM Agrees to $900M Criminal Settlement Over Ignition-Switch Defect*, USA TODAY (Sept. 17, 2015, 6:37 PM), http://www.usatoday.com/story/money/cars/2015/09/17/gm-justice-department-ignition-switch-defect-settlement/32545959/.

156. Chris Isidore, *Death Toll for GM Ignition Switch: 124*, CNN: MONEY (Dec. 10, 2015), http://money.cnn.com/2015/12/10/news/companies/gm-recall-ignition-switch-death-toll/.

157. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 21, 21–22 (1991). Note that, the lower the detection rate, the more support there is for a higher punitive damage award.

158. *Id.*

from harming someone. This tortfeasor will not be deterred by simple compensation plus profit disgorgement. For this reason, malicious tortfeasors will be subject to any amount that is *reasonably* related to the tortfeasor's action, and deemed adequate to deter them from similar future behavior. Reasonably related is different from the "directly tied to" limit proposed for intentional tortfeasors because it is based on pure deterrence. Malicious tortfeasors will not get the benefit of a reviewing court's inquiry into whether the judgment is based on the detection rate and profit expected by the tortfeasor's act, because the jury and any reviewing court will be looking to see if the punitive damage award is in line with the main function of punitive damages—deterrence. The wider leeway for this classification of tortfeasors falls in line with Justice Souter's *State Farm* single digit preference, since these tortfeasors will likely fit in the "rare occasion" category where punitive damage judgments are not tethered to a 1:1 ratio of compensatory to punitive damages.

2. Clear and Convincing Requirement

The second and most important inquiry is whether or not the plaintiff meets their burden of proof for proving if a punitive damages award is warranted. Some states choose to use simple preponderance of the evidence, but Washington would do well to follow the lead of other states that use the standard of "clear and convincing evidence."[159] Clear and convincing evidence is somewhere between preponderance of the evidence and beyond a reasonable doubt.[160] This provides another filter to make sure that on the rare occasion that punitive damages are awarded, they are awarded against people who *deserve* them. Ensuring that tortfeasors are not saddled with a punitive damage award based on an emotional whim should shield the jury's determination from being overturned by upset reckless, intentional, or malicious tortfeasors appealing their case, as well as from the lobbying efforts of tort reform advocates. Table 1 below summarizes this reform, and highlights its simplicity.

159. 58 A.L.R. 4th 878 (Originally published in 1987) (listing the several states with "clear and convincing" as the appropriate standard).

160. *Id.*

TABLE 1. A GRADUATED CULPABILITY PUNITIVE DAMAGES FRAMEWORK

CULPABILITY LEVEL	PUNITIVE DAMAGES BARRED	1:1 RATIO	AMOUNT DIRECTLY TIED TO CONDUCT	AMOUNT REASONABLY TIED TO CONDUCT
NEGLIGENCE	X			
RECKLESS		X		
INTENTIONAL			X	
MALICIOUS				X

B. Where Should the Punitive Damages Go?

Since a plaintiff is theoretically "made whole" without punitive damages, it may seem that the plaintiff should not get any of the punitive damage award. However, plaintiffs and plaintiffs' attorneys will have no incentive to bring punitive damages against appropriate tortfeasors if they are only burdened by the process and do not receive any benefit from attaching a punitive damages claim to their suit—*i.e.*, have to prove more, spend more, and take more time trying the case, only to lose all of that effort regardless of the outcome. It is hard to imagine any attorney spending money that will not help their client or increase the success of their practice.

A potential compromise for those that believe a large punitive damage award is simply too much of a windfall would be to split the punitive damage award between the plaintiff and the state, or charities of the plaintiff's choosing. Some states already have "split-recovery statutes," giving up to seventy-five percent of the punitive damage award directly back to the state.[161] The actual percentage of the split is not so important, as long as it provides enough incentive for plaintiffs and plaintiffs' attorneys to bring legitimate punitive damage claims, instead of letting them go by the wayside and allowing tortfeasors to continue to get a great deal on their intentional tort in Washington. If a compromise on punitive damage award allocation is necessary, a way to ensure enough incentive is maintained for plaintiffs and their attorneys would be to make sure that any extra cost plaintiffs incur to meet their punitive damages burden of proof is covered by the award, as well as adding a

161. Brian H. Bornstein & Sarah Thimsen, *Should Society Get a Share of Punitive Damage Awards?*, 38 MONITOR ON PSYCHOL., AM. PSYCHOL. ASS'N 14 (2007) http://www.apa.org/monitor/nov07/jn.aspx; *but see* Sharkey, *supra* note 12, at 404 (flagging argument that split-recovery awards "in effect 'bribe[s]' [states] to overlook the compromise of procedural protections").

more than nominal amount that serves the purpose of encouraging meritorious punitive damage claims.

C. Punitive Damages through the Legislature

There are two routes for implementing a punitive damages scheme in Washington: the courts or the legislature. Unfortunately, the judicial route is unlikely to be a successful one because the Washington Supreme Court has continued to uphold the *Spokane Truck & Dray Co. v. Hoefer* ban on punitive damages.[162] Therefore, it is doubtful a plaintiff in Washington would spend any time funneling resources toward attempting to overturn this 125 year-old precedent—or that a Washington court would overturn the long-standing precedent. Fortunately, the legislature is not bound by *stare decisis* and can pass a law implementing the above punitive damage scheme if citizens of Washington are supportive of deterring intentional tortfeasors. Washington's favorable use of the minor punitive damages scheme in its Insurance Fair Conduct Act[163] suggests it is plausible the citizens of Washington would not be opposed to enacting a statute allowing punitive damages for civil actions. This Note's proposed statutory framework would pass both Washington and the United States' constitutional requirements and deliver more deterrence than current punitive damages legislation, which is precisely why this proposal for Washington should be the model for the rest of the nation.

Part III put forth a comprehensive and simple reform for ensuring that punitive damages actually deter wrongdoing. This Note concludes by arguing that punitive damage reform is not simply a Washington State concern, but a national concern.

CONCLUSION: PEOPLE NEED PROTECTION—NOT BIG BUSINESS AND INTENTIONAL TORTFEASORS

Washington should prevent intentional tortfeasors from benefitting off its intentional tort friendly climate. Using a two-step method to deter intentional tortfeasors in accordance with the Fourteenth Amendment's Due Process Clause ensures that punitive

162. Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1074 (Wash. 1891).

163. Isaac Ruiz, *All About Washington's Insurance Fair Conduct Act (IFCA), Part 2: IFCA, A New Hope*, ISAAC RUIZ BLOG (June 25, 2013), http://100percentisaac.com/blog/2013/9/1/all-about-the-insurance-fair-conduct-act-ifca-ifca-a-new-hope; Ainsworth v. Progressive Cas. Ins. Co., 322 P.3d 6, 21 (Wash. App. 2014) (affirming treble damages under IFCA).

damage awards against intentional tortfeasors will not be unfair, and will be more effective than Washington's current environment of no punitive damages, as well as other states' punitive damage schemes that are weighed down by tort reform legislation. This reform is not perfect, but it is realistic and better than any other punitive damage framework in use.

Tort reform advocates have successfully shifted the public perspective on tort law from compensating and protecting wronged individuals to making sure corporations are not hit too hard or too often for the harm they cause. The implied assumption is that tortfeasors, especially corporations, cannot live up to this *high* standard—be it reasonableness or otherwise—and the injured party is simply out of luck. The sad reality is that the person injured by the defendant's actions has to pick up the tab for damages that exceed the caps put in place by tort reform. Deterrence through punitive damages can help put the burden back where it belongs: on the intentional tortfeasor.

Punitive damages, properly used, serve the public good. Washington is in an important position to influence the rest of the nation on what punitive damages are meant to do—deter intentional tortfeasors from harming others. It would be a shame to pass on this opportunity to inform big business and intentional tortfeasors that taking advantage of another person for profit is not acceptable in Washington—or the United States.