Myth and Reality in Punitive Damages

Stephen Daniels

Joanne Martin

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation

https://scholarship.law.umn.edu/mlr/2360
Myth and Reality in Punitive Damages*

Stephen Daniels**
Joanne Martin***

The idea is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry of the body of the law.¹

This graphic characterization of punitive damages comes from an 1873 opinion by a member of the New Hampshire Supreme Court. Still cited today by those critical of the doctrine of punitive damages, this judicial protest illustrates the age and tone of the debate about punitive damages in the United States.² The debate is old, long on passion and hyperbole, and short on reason and hard evidence.

As early as 1931, Professor Clarence Morris objected to the absence of substantiation in the argument against punitive damages.³ Missing from the debate, he thought, was evidence

---

¹ Fay v. Parker, 53 N.H. 342, 382 (1873).
² This debate includes an often cited article that argued that punitive damages are an unjust absurdity and that "[t]he doctrine is an anachronism and should be abolished." Duffy, Punitive Damages: A Doctrine Which Should Be Abolished, in DEFENSE RESEARCH INSTITUTE, INC., THE CASE AGAINST PUNITIVE DAMAGES 8 (1969). But see Harris, Rereading Punitive Damages: Beyond the Public/Private Distinction, 40 ALA. L. REV. 1079, 1082-83 (1989) (arguing that traditional criticisms of punitive damages are no longer valid).
³ Morris, Punitive Damages in Tort Cases, 44 HARV. L. REV. 1173, 1179 (1931). Morris responded to the claim that it was unjust and unworkable for the goals underlying the doctrine of punitive damages to be dependent on pri-
addressing the key challenges to the doctrine: whether defendants were in fact being subjected to verdicts involving “inadvisably large sums,” whether juries were overly susceptible to plaintiffs’ claims for high awards, and whether judges were unable to control unjust awards.4 Morris argued against abrogating punitive damages on the basis of mere suspicions that are primarily deductive in character.5 Instead, he advocated examining the “law in action” to determine the social consequences of the doctrine.6 The conclusion of his commentary lays out in precise fashion the role empirical evidence should play in the debate about punitive damages:

Once it is agreed that law should be an aggregation of tools for social purposes, we are faced with the necessity of testing this assumption or advocating the abandonment of the practice of basing liability on the misconduct of defendants. The former alternative seems the wiser. . . . Canniness would seem to dictate an examination of law in action to determine the scope of its usefulness to contemporary society, rather than the advocacy of its abrogation on suspicions which must be primarily deductive.

. . . [A]ny valid argument against the allowance of punitive damages must be predicated on inutility — on undesirable results of its application, rather than on taboos deduced from non-utilitarian schemes.7

In one important respect, little has changed in the more than half-century since the publication of Morris’s commentary: criticisms of punitive damages continue, yet little systematic, empirical evidence exists on the “law in action” with regard to punitive damages.8 In another respect, however, an

vate individuals who would benefit personally from heavy judgments and therefore have little interest in what is just or appropriate. Morris said that “at best, this criticism is based on hypothesis, and its value depends on the facts.” Id.

4. Id.
5. Id. at 1206.
6. Id.
7. Id. at 1205-06.
8. There have been only two systematic, empirical studies of jury awards of punitive damages. One is a part of the Rand Corporation Institute for Civil Justice research into jury verdicts in Cook County, Illinois and San Francisco County, California. See M. Peterson, S. Sarma & M. Shanley, Punitive Damages: Empirical Findings iii-xi (1987). The other is a part of a series of projects investigating jury verdicts that are being conducted at the American Bar Foundation. See S. Daniels & J. Martin, Empirical Patterns in Punitive Damage Cases: A Description of Incidence Rates and Awards 1 (American Bar Foundation Working Paper Series No. 8705, 1988); Daniels & Martin, Jury Verdicts and the 'Crisis' in Civil Justice, 11 Just. Sys. J. 321, 321-22 (1986) [hereinafter Daniels & Martin, Jury Verdicts]; Daniels & Martin, The Punitive Damage Dilemma in Products Liability Cases: Fact or Fiction,
important change has occurred that intensifies Morris's concern and makes the absence of systematic empirical information on punitive damages a critical issue. Because of the "insurance crisis" of the mid-1980's and the emergence of the tort reform movement, the nature of the debate about punitive damages has changed. No longer is it a legal debate about the doctrinal merits of punitive damages. It is now a highly politicized public policy debate about the alleged negative effects of punitive damages on American society and the economy. Reformers cast these effects as a major cause of the "insurance crisis" and other ills, and target the doctrine for substantial change, if not outright abolition.  

Contemporary critics of punitive damages confidently


Virtually no aspect of current tort doctrine has been immune to criticism and legislative reform. However, attention has been focused on spectacular punitive damages cases. Despite empirical evidence suggesting that any increase in the size or frequency of punitive damages has been limited to a few geographical areas, large punitive damages awards have come to symbolize the problems perceived in the current system. Many recently enacted tort reform measures severely limit punitive damages.

Id. at 1387-88 (footnotes omitted).

According to Robert Prentice:

The attack on punitive damages is part of a wide-ranging, well-organized attack on the current tort law system. Claims of a "litigation explosion" and an "insurance crisis" have supported a nationwide tort reform movement. No doubt there is some substance to these claims, though the reports of a litigation explosion, like Mark Twain's death, have been greatly exaggerated and the insurance crisis is, at least in part, an invention of the insurance industry. There is also substantial evidence that the claims of runaway punitive damages are greatly exaggerated.

Prentice, Reforming Punitive Damages: The Judicial Bargaining Concept, 7 REV. OF LITIGATION 113, 123 (1988). See also R. HAYDEN, THE CULTURAL LOGIC OF A POLITICAL CRISIS: COMMON SENSE, HEGEMONY AND THE GREAT AMERICAN LIABILITY INSURANCE FAMINE OF 1986 at 2-3 (Institute for Legal Studies Working Paper Series No. 9, 1989) (arguing that the tort reform movement was an attempt to divert political attention from the crisis caused by insurance companies); Daniels, The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric and Agenda-Building, 52 LAW & CONTEMP. PROBS. 269, 269-73 (1989) (arguing that the criticism of juries is part of a comprehensive attack on the civil justice system as a whole); Hayden, Neocontract Polemics and Unconscionable Scholarship, 23 LAW & SOCIETY 663, 863-64 (1990) (reviewing P. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988) (arguing that the book fails to support the position that there is in fact a liability crisis)).
claim that the doctrine has specific and demonstrable negative effects reaching crisis proportions. Four straightforward, empirical propositions underlie these claims: punitive damages are routinely awarded; they are awarded in large amounts; the frequency and size of those awards have been rapidly increasing; and these phenomena are national in scope. The critics' claims about the incidence, size, and effects of punitive damages have reached mythic proportions because the accuracy of these propositions has not been critically evaluated.

The four propositions are based on scanty empirical data and highly questionable interpretations of those data. They nonetheless provide the tort reform movement with the impetus for vigorous legislative challenges to the doctrine of puni-


11. For instance, the amicus brief prepared by a number of major tort reform groups in Pacific Mut. Life Ins. Co. v. Haslip, 553 So. 2d 537 (Ala. 1989), stay granted, 110 S. Ct. 710, cert. granted, 110 S. Ct. 1780 (1990) (No. 89-1279), claims that:

Punitive damages are today awarded with a frequency and in amounts that are startling. . . . And these awards may be enormous: punitive verdicts exceeding $1 million, while certainly not the norm, have become almost commonplace. . . .

This system of punitive damages — where punitive awards are routine and fantastic verdicts receive little attention — is entirely a product of the last 20 years.


12. Some claims about punitive damages may be dismissed as the exaggeration and posturing of political debate. E.g., Mahoney, Consumers, Competitiveness Suffer from Excesses in Punitive Damages, FINANCIER, Jan. 1989, at 20. But the law review literature has at times indulged in similar excesses. Even in this literature are found claims — stated as empirical generalizations — that punitive damages are awarded routinely and in extremely high, if not staggering amounts. For instance, in a widely cited article, Sales and Coles boldly claim that "the amount of punitive damages awarded in recent years, as if feeding upon itself, has escalated to astronomical figures that boggle the mind." Sales & Coles, Punitive Damages: A Relic That Has Outlived Its Origins, 37 VAND. L. REV. 1117, 1154 (1984). See also Brief of the American Institute of Architects, supra note 11, at 4, 17, 21-23.

13. See Brief of the Trial Lawyers for Public Justice as Amicus Curiae in support of Respondents at 7-12, Pacific Mutual (No. 89-1279).
tive damages on both the state and federal levels. In addition, these allegations have generated numerous constitutional challenges, and the Supreme Court has indicated its willingness to address the issue. The Court recently rejected an eighth amendment excessive fines challenge to punitive damages in *Browning-Ferris Industries, Inc. v. Kelco Disposal Co.* In that case, the Court did not address the issue of whether punitive awards would survive a fourteenth amendment due process contest, although some members of the Court expressly invited such a contest. This invitation was noticed and the Court agreed subsequently to hear a due process challenge to punitive damages in *Pacifw Mutual Life Insurance Co. v. Haslip.*


16. Justice O'Connor, in her opinion concurring in part and dissenting in part, states that "awards of punitive damages are skyrocketing." Id. at 2924. In her concurring opinion in *Bankers Life v. Crenshaw*, 486 U.S. 71 (1988), Justice O'Connor states that a situation when state law gives juries the discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain state of mind may violate the due process clause: "This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." Id. at 88 (O'Connor, J., concurring). Similar sentiments are found in Justice Brennan's concurring opinion in *Browning-Ferris*, an opinion with which Justice Marshall joined. 109 S. Ct. at 2923 (Brennan, J., concurring).

17. See Brostoff, Supreme Court Okays Punitive Damage Awards, NAT'L UNDERWRITER, July 3, 1989 at 1, 6. In its July 17, 1989 issue, National Underwriter ran an editorial expressing regret over the Court's decision in *Browning-Ferris* with regard to the eighth amendment issue, describing it as "a temporary setback for the business community." The High Court's Open Door, NAT'L UNDERWRITER, July 17, 1989, at 22. The editorial nonetheless praised the Court because the decision "cleared a neat path for a conclusive decision on the Constitutional fairness of unconstrained punitive assessments sometime in the future." Id. It concluded with the following paragraph:

The battle for constraints on punitive damage awards is far from finished, for where *Browning-Ferris* did not succeed, others are waiting in the wings to try again, with a much better idea, this time, of how to approach the Court: by raising a "due process" argument early in the proceedings, and preserving that argument throughout the trial and appeals process.

Id.

18. 553 So.2d 537 (Ala. 1989), stay granted, 110 S. Ct. 710, cert. granted, 110 S. Ct. 1780 (1990); see also Greenhouse, Court to Decide Damage Award Issue, N.Y. Times, Apr. 3, 1990, § A, at 18, col. 4 (discussing decision to grant certiorari).
It is appropriate, then, to return to Professor Morris's half-century old concern about the "law in action" with regard to the frequency and size of punitive damage awards. This Article presents the findings of an empirical study of punitive damage awards in state trial courts of general jurisdiction. We present our findings as an evaluation of the veracity of the four propositions about the frequency, size, and scope of punitive damages underlying the reform effort. Accompanying this evaluation is a more general commentary on the transformation of the punitive damages debate from a legal debate about doctrinal merits to a highly politicized public policy debate and its implications for the efficacy of proposed reforms. The commentary goes beyond the issue of punitive damages and raises concerns about the public policy process with regard to civil justice generally.

Part I of this Article presents a brief overview of the traditional legal debate concerning punitive damages and argues that in recent years the debate has changed in important ways. Part II provides a cross-sectional analysis of punitive damage verdicts in forty-seven counties in eleven states for the period 1981-85. It explores the veracity of three of the propositions underlying the current challenges to the doctrine of punitive damages: that they are awarded routinely, that they are awarded in large amounts, and that these trends are national in scope. The final section, Part III, addresses the fourth proposition concerning increases in the frequency and size of awards by examining patterns and changes in punitive damage jury verdicts in two counties for the period 1970-88.

I. BACKGROUND AND CRITICISMS OF THE DOCTRINE

A. THE DOCTRINAL DEBATE

As Morris's article implies, the punitive damages debate has been waged in the doctrinal literature for a long time. This debate addresses two issues: whether the purposes of the doctrine are appropriate, and whether they are being met. This Article does not evaluate the arguments advanced on either side of the doctrinal debate, but rather addresses them as a background for a discussion of the policy debate that provides the impetus for the massive tort reform efforts of the 1980's.

An examination of the purposes of punitive damages begins with a recognition of the doctrine's substantial history. Its common law origins generally are traced to two 1793 English cases arising from the same underlying cause of action. In Wilkes v.
PUNITIVE DAMAGES

Wood and Huckle v. Money, appellate courts upheld jury awards of damages in excess of actual damages. These cases established a form of monetary civil punishment, not necessarily proportional to the actual injury, to fulfill a sense of outrage resulting from affronts to the honor of an individual.

Punitive damages have a history of almost equal duration in the United States. Coryell v. Colbaugh, an action for breach of promise to marry decided in 1791, is one of the earliest cases that refers to punitive damages. The court instructed the jury "not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for example's sake, to prevent such offences in [the] future." The court stated that "such a sum... would mark [the jury's] disapprobation, and be an example to others."

Today, an award of punitive damages is predicated on behavior by the defendant that can be characterized as malicious, willful, wanton, oppressive, or outrageous. State statutory provisions generally emphasize the punishment or deterrence rationales, or both, for punitive damages. Dorsey Ellis, one of the doctrine's leading academic commentators, identifies seven objectives for punitive damages that he gleans from judicial opinions and related commentary:

1. punishment of the defendant;
2. specific deterrence, to prevent the defendant from repeating the offense;
3. general deterrence, to prevent others from committing similar offenses;
4. preservation of the peace;
5. inducement for private law enforcement;
6. compensation to victims for otherwise uncompensable losses;
7. payment of the plaintiff's attorney's fees.

The propriety of such objectives and their efficacy is often severely criticized. The punishment rationale, for example, is criticized for duplicating criminal punishment without the pro-

22. 1 N.J.L. 90 (Sup. Ct. 1791).
23. Id. at 91 (emphasis in original).
24. Id.
The burden of proof in the civil system, proof by a preponderance of the evidence, is less rigorous than that required by criminal law, proof beyond a reasonable doubt. Other procedural safeguards inherent in criminal procedure, but not in civil procedure, include the right to counsel and the role and size of juries. Those who find the procedures for assessing punitive damages inadequate argue that juries are not equipped to assess appropriate damages after hearing evidence on the defendant's wealth and motives. These critics assert that juries are overly affected by the presence of an injured plaintiff.

Critics also argue that deterrence is an inadequate rationale for the imposition of punitive damages. Some opponents believe that there is insufficient evidence to prove that deterrence is actually accomplished. Others believe that jurisdictions using this rationale fail to clarify the entities sought to be deterred. Another concern is that even if deterrence is a legitimate goal, the individual plaintiff is not the appropriate recipient of what becomes a windfall award. Additionally, the prospect of punitive damages might prompt a "race to the courthouse" in which those plaintiffs arriving first deplete the funds available to compensate all wronged parties. To resolve these and similar problems, the doctrine's critics propose the use of caps on awards and ratios of punitive damages to compensatory damages. The most radical of the critics argue for the abolition of punitive damages altogether.

Proponents of punitive damage awards defend against such criticisms in several ways. They rebut the argument that punishment is an inappropriate purpose for a civil remedy by reasoning that not all outrageous conduct is criminal in nature.
making civil remedies necessary and appropriate. Proponents address the critics' procedural concerns with examples of increasing numbers of jurisdictions that have adopted a "clear and convincing" standard of proof rather than the preponderance standard. Some also argue that a burden of proof lower than the criminal standard is appropriate in cases where the defendant has a comparative advantage in access to evidence, such as those involving medical malpractice and products liability. Additionally, proponents argue that trial court control and appellate review are adequate safeguards against potential jury abuse. They also point to the lack of systematic empirical evidence that juries are excessively plaintiff-oriented.

Proponents of punitive damages also defend the deterrence rationale. Much of this rationale's criticism presumes that punitive awards are made in excessive amounts, suggesting not deterrence but overkill. The proponents counter that no systematic evidence exists to support opponents' claims about excessive awards. Thus, without such evidence, allegations that juries are incapable of fairly considering the character of the defendant's misconduct, the extent of the plaintiff's injury, and the wealth of the defendant to determine an appropriate award are mere speculation. Moreover, proponents of the doctrine argue that placing caps on awards or imposing ratios of punitive-to-compensatory awards would take away the threat of high damages necessary for effective deterrence.

Commentators have debated the appropriateness of the deterrence and punishment rationales for a long time. During the past decade, however, the traditional arguments have been radically transformed as the debate has moved into the political arena. The next section describes this transformation and its implications.

B. The Politicization of Punitive Damages

1. Transformation of the Punitive Damages Debate

To politicize an issue, according to political scientist Murray Edelman, is to define it for both the mass public and

37. Johnston, supra note 9, at 1403-04.
38. Id. at 1406.
policymakers as being an appropriate issue for public decision-making. More to the point, it is a way of defining an issue as requiring immediate public attention in the furtherance of a particular set of political goals. "Politicization is the creation of a state of mind," says Edelman.\textsuperscript{39} The critical element, in his view, "is the creation of meaning: the construction of beliefs about the significance of events, of problems, of crises, of policy changes, and of leaders. The strategic need is to immobilize opposition and mobilize support."\textsuperscript{40}

The idea of policy problems as social constructions implies a conception of the policymaking process different than that found in much academic writing and the statements of public officials. Rather than being a rational process with responsible agencies searching for the best way of coping with a problem, the striking characteristics of the link between political problems and solutions in everyday life is that the solution typically comes first, chronologically and psychologically. Those who favor a particular course of governmental action are likely to cast about for a widely feared problem to which to attach it in order to maximize its support.\textsuperscript{41}

This idea of politicization is the key to understanding how and why the punitive damages debate, like the larger debate about civil justice, has changed in recent years.

The debate changed in the 1980's as a part of an intense, well-organized, and well-financed political campaign by interest groups seeking fundamental reforms in the civil justice system benefiting themselves.\textsuperscript{42} Thus, their discussion of the doctrine is directed toward the creation of a state of mind that says policymakers must address the issue of punitive damages immediately because substantial reform is necessary. Creating this state of mind is required for the mobilization of a broad base of support for the tort reform cause. It is also necessary to help forestall the efforts of anti-reformers, such as consumer and plaintiff-attorney groups, who are fighting the desired reforms.

To create this state of mind, the reformers characterize the civil justice system as a system out of control, with punitive damages a primary cause. The problems for American society occasioned by this distressed system out of control have

\textsuperscript{40} Edelman, Political Language and Political Reality, 18 PS 10 (1985).
\textsuperscript{41} M. Edelman, Constructing the Political Spectacle 21-22 (1988).
\textsuperscript{42} See Daniels, supra note 9, at 273.
PUNITIVE DAMAGES

reached crisis proportions, the reformers claim. The effects of these problems require fundamental change in the doctrine of punitive damages, if not its outright abolition. Their effort to produce a broad base of support conducive to reform includes the establishment of public relations and lobbying organizations to spearhead the campaign.\(^{43}\) The creation of such groups indicates, more than anything else, how the debate has changed. The reformers' political agenda is so strong that it even intrudes into much of the academic debate concerning punitive damages.\(^{44}\)

---

43. In 1982, for example, a public relations and lobbying campaign called "Project Justice" began in Illinois. The product of combined insurance, business, professional, and service provider interests, "Project Justice, Illinois ... was considered a prototype tort reform coalition." Casey, Tort Reform Coalitions Flourish in Midwest, NAT'L UNDERWRITER, July 18, 1986, at 14. It was formed to disseminate information to the public, opinion leaders, and policymakers, and to coordinate lobbying efforts, all in the interest of civil justice reform. Id. As the "insurance crisis" began making its way onto the public agenda in the early 1980's, similar organizations began appearing across the country. Id. at 54-55.

The following organizations were established in the early to mid-1980's: Indiana Project Justice, Kansas Project Justice, the Truth and Fairness in Litigation Committee in Pennsylvania, the Liability Reform Coalition in Washington, Florida Project Civil Justice, the Wisconsin Coalition for Justice, the Minnesota Tort Reform Coalition, the Ohio Basic Fairness in Litigation Coalition, the Michigan Committee for Civil Justice Equity, Iowa Project Civil Justice Reform, Nebraska Project Justice, and the Texas Tort Reform Coalition, which changed its name to the Texas Civil Justice League. See Civil Justice Coalitions: A National Awakening, J. AM. INS., 1st Q., 1986, at 4. Two of these groups, the Minnesota Tort Reform Coalition and the Texas Civil Justice League, appear in a major amicus brief in Pacific Mutual along with the broader based American Tort Reform Association. See Brief of the American Institute of Architects, supra note 11, at 1.

44. Legal academics have shown more interest in punitive damages and tort reform as the "insurance crisis" has gained more visibility as a public policy issue. According to Dean Ellis, an influential scholar of punitive damages, the general sentiment in the law reviews is against punitive damages. Ellis, supra note 26, at 976. It is worth noting, however, that the reform interests have been active in drawing attention to their agenda and hopefully affecting the direction of academic writing through their support of research institutions such as the Rand Corporation's Institute for Civil Justice and the Manhattan Institute for Policy Research in New York City. See RAND CORPORATION, THE INSTITUTE FOR CIVIL JUSTICE: AN OVERVIEW OF THE FIRST SIX PROGRAM YEARS 75-78 (1986); RAND CORPORATION, THE INSTITUTE FOR CIVIL JUSTICE: ANNUAL REPORT, APRIL 1, 1989 - MARCH 31, 1990 108-111 (1989); MANHATTAN INSTITUTE FOR POLICY RESEARCH, MANHATTAN FORUMS: THE FIRST FIVE YEARS 28 (1986). The Manhattan Institute, along with the Academy of Political Science, cosponsored an academic conference in November, 1987, entitled "New Directions in Liability Law." According to a conference brochure, funds for the conference were provided by the Charles A. Dana Foundation, the Starr Foundation, Aetna, Alliance of American Insurers,
This transformation of the debate, especially the efforts of public relations and lobbying organizations, produces a different style of argumentation than was used in the past. This new approach, which has the single-minded goal of winning a major political battle, is the most troubling aspect of the politicization of the punitive damages debate. It makes the debate more emotional and manipulative, and less reasoned. The reformers appeal to emotions, fear, and anxiety in this political effort while avoiding reason and rational discourse.\(^4\) Not even the academic literature is immune to such appeals.\(^4\)

In many respects, the transformed debate is similar to the handling of other recent political campaigns, such as the Bush presidential campaign’s use of the “Willie Horton issue” during the 1988 election. This issue was a blatant appeal to fear and anxiety, suggesting that a Dukakis victory would lead to the wholesale release from prison of convicted murderers.\(^7\) The transformed debate is also similar to a recent trend in marketing known as “slice-of-death” marketing.\(^8\) The message of slice-of-death marketing is sheer anxiety, and it seeks to create a fear that only a particular consumer product or service can alleviate.\(^9\)

Appeals of this kind in the political arena involve the use of a public rhetoric that is described as the “tactical use of pas-

\(^4\) See Daniels, supra note 9, at 276.

\(^4\) See Dean Ellis’s observations on juries in a recent symposium on punitive damages. Ellis, supra note 26, at 988-1003. See also P. Huber, supra note 10, at 4 (listing “good” activities, such as high school sports, that have been closed down by tort crisis).


\(^9\) Id.
It is a style of argument or manner of constructing an issue that "seeks to eliminate the mind and the critical faculties" and instead provokes "feeling rather than thought." The reformers create fear and anxiety by characterizing the civil justice system as one in crisis, presenting dire threats to personal and national well-being. Fundamental change in the punitive damages system, they argue, is the only way to end the crisis and ensure security. In short, the punitive damages debate has become a matter of public relations, propaganda, and the mobilization of prejudice and fear, rather than a matter of rational discourse.

The transformation of this debate is troubling because the efficacy of any reforms enacted depends on the questionable nature of the underlying assumptions about the operation and effects of the punitive damages system. The reformers have a ready-made set of solutions that benefit them. To achieve these goals, they must create a belief in a set of problems demanding those solutions, so they posit the existence of severe problems

---

50. F. Bailey, The Tactical Uses of Passion 23 (1983). See also Daniels, supra note 9, at 276 (describing the strategic use of emotional appeals in civil jury reform efforts).
52. Id.
53. Edelman suggests that:
[Personified threats are politically potent regardless of the seriousness or triviality of their impact upon people's lives. The personified threat, no matter how atypical, marshals public support for controls over a much larger number of ambiguous cases symbolically condensed into the threatening stereotype.]
M. Edelman, supra note 39, at 14.
54. Edelman notes that "[p]olitical and ideological debate consists very largely of efforts to win acceptance of a particular categorization of an issue in the face of competing efforts in behalf of a different one." Id. at 25. Such efforts may involve a substantial investment in public relations and widespread publicity. See Daniels, supra note 9, at 281-92. More troubling, Edelman also says that "[a] large body of empirical and theoretical work demonstrates that the impact of the most widely publicized formal governmental policies is consistently small or symbolic, especially when both proponents and opponents expect the policies in question to mark a substantial change." Id. at 126. See generally M. Feeley, Court Reform on Trial: Why Simple Solutions Fail 191-207 (1983) (describing systemic and institutional impediments to court reforms).
55. Cobb and Elder note that:
Just as problems may be officially ignored for want of a solution, the emergence of a solution may make possible the recognition of a public policy problem. We normally think of policy problems as having their own origins in events and circumstances. These create difficulties, which, in turn, prompt a search for solutions. Often, however, this is not the case. . . . The impetus then for the definition (or redefi-
caused by the frequency and size of punitive damage awards. To the extent that the reformers are successful in creating their desired characterization, the resulting policy changes are likely to be wholly ineffective in meeting the expectations created for those persuaded to support the reform agenda. Accuracy, in fact, may be largely irrelevant to the reformers' purposes of placing reforms on the policy agenda and enacting those reforms. As Edelman emphasizes, "public policies rest on the beliefs and perceptions of those who help make them, whether or not those cognitions are accurate."55 The danger is that the rhetoric used to justify and gain support for the reform agenda can create misleading beliefs about the existence, causes, and nature of problems. This, then, undermines the efficacy of public policies based on those beliefs, which requires a reasonably accurate picture of the punitive damages system.57

2. The Reformers' Evidence in the Debate

Proponents of change generally use two types of evidence to support their characterization of the punitive damages system: horror stories and anecdotes about jury verdicts involving punitive damages, and aggregate data on the frequency and size of these awards. They present such evidence to convince the public and policymakers of the veracity of four propositions:

1. punitive damages are routinely awarded;
2. punitive damages are routinely awarded in large amounts;
3. the frequency and size of these awards are rapidly increasing; and,
4. propositions 1, 2, and 3 are national in scope.

All other claims about the harmful effects of punitive damages presume the accuracy of these propositions. The presumption is that if these propositions accurately describe the punitive damages system, all of the alleged harmful effects automatically and necessarily occur. Accordingly, the major thrust of the reform agenda is the elimination of punitive damages. In

---

57. Edelman states: "Because public policies and rhetoric can create misleading beliefs about the causes and the nature of these problems, they also ensure that the problems will not be dealt with as effectively as they might be." Id. at 28.
the alternative, the reformers recommend a severe limitation on the availability of punitive damage awards, and the imposition of caps when such awards occur. Increasingly, the reformers are attempting to institute these changes on a national level.58

A series of materials assembled by a Washington, D.C., public relations firm,59 and frequently distributed to editors of a variety of publications, provides examples of the use of these two types of evidence. These materials are an excellent illustration of the style of argumentation that now characterizes the punitive damages debate. Titled *Punitive Damages Update*, the materials are assembled as a “service of a number of corporations and organizations supporting tort reform.”60 Among the most interesting of the materials is a “press kit,” dated April

58. See Mahoney & Littlejohn, supra note 10, at 1397-98.
12, 1989, and mailed to targeted journalists the week prior to oral arguments before the Supreme Court in *Browning-Ferris Industries, Inc. v. Kelco Disposal Co.*

The press kit utilizes both horror stories and aggregate data to characterize the punitive damages system as one so seriously flawed and threatening as to require fundamental change. Under the guise of presenting background information for those journalists reporting on *Browning-Ferris*, it communicates the basic claims that underlie the reformers' characterization: punitive damages are awarded routinely and with increasing frequency, in a wider variety of cases, in larger and larger amounts, and without any apparent pattern. The image presented is a disturbing one of a system out of control. As a result of this situation, the press kit states, many goods and services are becoming more expensive or even unavailable. Most seriously, this includes essential services and goods, such

---

61. Cover Letter, *supra* note 60, at 1. The first three paragraphs of the cover letter read:

Dear Editor/Correspondent:

On April 18 the U.S. Supreme Court will hear oral arguments on *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.* The Court will review a Vermont jury's award of $51,000 in compensatory damages and $6 million in punitive damages.

For the first time the Court will directly examine the question of whether disproportionately large punitive damage awards are in violation of the Excessive Fines clause of the 8th Amendment to the Constitution.

Because you might be considering coverage of the oral arguments and/or the decision expected later this year, we have put together a number of background materials for your unrestricted use. These materials include:

- An overview of the case;
- An overview of punitive damages in general;
- A list of qualified experts who have agreed to interviews on the case;
- A press release on the case from the Lawyers for Civil Justice;
- Relevant studies on punitive damages;
- Quotations from Supreme Court Justices on the issue;
- An article on a recent ruling by a New Jersey judge on mass tort cases;
- A list of states enacting punitive damage legislation since 1986;
- A press release on testimony in Minnesota on punitive damages;
- A press release on punitive damages legislation that passed in Utah; and
- Relevant news clippings.

Id.


PUNITIVE DAMAGES

as medical services and vaccines.\textsuperscript{64} Additionally, research and development in American industry are being halted or discouraged, thereby making American businesses less competitive in the international market and threatening jobs. Consequently, the press kit says, the punitive damages problem is a direct threat to economic stability.\textsuperscript{65} This characterization of a system out of control is at the very heart of the "slice-of-death" appeal to fear and anxiety, and fundamental civil justice reform appears to be the only method to alleviate those feelings.

Among the materials the press kit uses to substantiate such claims are two commentaries written by Richard J. Mahoney, chairman and chief executive officer of Monsanto.\textsuperscript{66} Both rely prominently on horror stories, as does a third Mahoney commentary, co-authored with Stephen E. Littlejohn, the Public Affairs Director for Monsanto, that appears in a late 1989 issue of *Science*.\textsuperscript{67} This third piece is touted in a December 15, 1989 press release mailed by *Punitive Damages Update*.\textsuperscript{68} Mahoney's three essays are similar, but each is directed to a different audience.\textsuperscript{69} Mahoney seeks to justify reform and garner support for the cause by generating fear and anxiety about reduced or curtailed innovation, research and development in American industry. Mahoney links reduced or curtailed research and development to the availability of essential health care services and technologies, to economic stability and prosperity, and in the *Science* article, to the professional well-being of scientific and technical professionals.\textsuperscript{70} Punitive damages, according to the *Science* article, "constitute the driving force behind this problem, and both judges and legislators should aim at bringing them under control with legal reforms."\textsuperscript{71} The Mahoney pieces are worth examining in detail because they illustrate the politicization of the punitive damages debate and provide the
most sophisticated and persuasive examples of the reformers' efforts at characterization. This examination emphasizes Mahoney and Littlejohn's article because Science, arguably the most prestigious American scientific journal, gives their arguments substantial credibility and force.

To illustrate the negative effects of punitive damages, Mahoney tells horror stories, including one involving his own company. Monsanto, he says, cancelled a program to develop an asbestos substitute because of the threat of punitive damages. The Monsanto employee directing the ill-fated project is quoted as saying that "seven-figure jury awards on claims without merit are enough to send shivers down anyone's spine."72 Mahoney also complains repeatedly of a civil justice system that "makes it too easy for lawyers to persuade the jury ... to enrich plaintiffs and contingent fee lawyers with multi-million-dollar windfalls."73 He refers to a "statistically proven relationship between the punitive damages award and the relative wealth and unpopularity of the defendant."74 Such damages, he argues, "were ... virtually unknown" in the past but are now "almost commonplace with multi-million dollar awards occurring monthly."75

72. Id.

73. Mahoney, Punitive Damages, supra note 65, at 3. Nearly the same words appear in Mahoney & Littlejohn, supra note 10, at 1396, and in Mahoney, supra note 12, at 21.

74. Mahoney, supra note 12, at 21. One finds Dean Ellis making the same claim in a recent symposium article on punitive damages. Ellis, supra note 26, at 988-1003. In a burst of excess and invective, Ellis says:

Jury bias in favor of an injured plaintiff and against the defendant is a major concern for the defendant against whom punitive damages are sought. This is especially true for institutional defendants. Profit-making entities, such as insurance companies, banking institutions, and manufacturing corporations, do not rank high in the public's esteem, even when a cross-section of the community is systematically surveyed. And, regardless of our aspirations, juries do not reflect a cross-section of the community. Noticeably absent from most panels are those who are most likely to understand the functions of profits in an enterprise economy—managers and professionals. Hence, the antagonism toward large, profit-making institutions is likely to be greater in a cross-section of jurors than in a cross-section of the community. There is good reason to believe, moreover, that this bias will manifest itself in the jury's decision on the defendant's liability for punitive damages . . . .

Id. at 996-97. Such sloppy reasoning and shallow analysis could be simply dismissed out-of-hand if it were not written by a major legal scholar in this area.

75. Mahoney & Littlejohn, supra note 10, at 1396; Mahoney, supra note 12, at 20.
Two of the three Mahoney articles present the following stories about actual punitive damage cases:

After the longest running trial in America's history, a jury in Belle-
vile, Ill., last year awarded one dollar to each of 65 plaintiffs as nomi-
nal damages for alleged personal injuries in a case involving one of
my company's products — orthochlorophenol crude — which is used
to make wood preservatives. Then, in a burst of tortured reasoning,
the jury awarded $16 million in punitive damages to the plaintiffs.

More recently, Monsanto's G.D. Searle subsidiary was assessed $7
million in punitive damages in a St. Paul, Minn., case involving the
Copper 7 intrauterine device that not only has Food and Drug Admin-
istration approval, but also a long history of safe use and substantial
medical acclaim.\textsuperscript{76}

The \textit{Science} article, aimed at an audience more interested
in research and development, presents a third story as repre-
sentative of jury awards of punitive damages:

One case exemplifies the problem with punitive damages. Lederle
Laboratories, a pharmaceutical company, followed Food and Drug Ad-
ministration (FDA) instructions to the letter in producing and mar-
keting a polio vaccine, only to have a Kansas jury hand down an $8
million punitive damage verdict against it. The reason: The lay jury
decided that the firm should have used a less effective vaccine, essen-
tially overruling FDA doctors, scientists, and policy-makers who had
told the firm to do otherwise.\textsuperscript{77}

\textsuperscript{76} Mahoney, \textit{Punitive Damages, supra} note 65, at 3. The same stories ap-
ppeared in Mahoney, \textit{supra} note 12, at 20. There is, however, reason to be quite
skeptical of Mahoney's protestations of innocence — at least in terms of the
Minnesota Copper-7 judgment he rails against. It was a trial in which numer-
ous internal Searle documents were introduced into evidence. These materials
showed that the company had been aware of problems with the Copper-7 for
many years (problems with a higher incidence of pelvic infections that can
lead to sterility in a clearly identifiable group of women) and that manage-
ment ultimately decided not to make changes in the product for the American
market. \textit{See} Mintz, \textit{The Selling of an IUD: Behind the Scenes at G.D. Searle
During the Rise and Fall of the Copper-7}, Wash. Post, Aug. 9, 1988, Health \textit{§,}
at 12, col. 1. In fact, the company's public posture was to deny any link be-
tween the Copper-7 and pelvic infections despite evidence to the contrary. \textit{Id.}
These Searle documents also raised questions about the quality of the com-
pany's own research involving the testing of the device with regard to pelvic
infections. \textit{See} Judge Denies Searle Bid for New IUD Liability Trial, Chi.
Trib., Feb. 17, 1989, \textit{§ C,} at 3; \textit{Claimant in Searle IUD Liability Case Seeks $15
Million in Punitive Damages, Wall St. J., Aug. 28, 1988, at 9, col. 1; Mintz,
\textit{supra,} at 12, col. 1; Contraceptive Trial Opens with Charges Monsanto Knew of
Copper-7 Defects, Wall St. J., May 18, 1988, at 6, col. 2; \textit{Records Raise Question:
Did Monsanto Know of IUD Problem in Buying Searle? Wall St. J., Mar. 15,
1988, at 9, col. 2; see also Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517,
1526 (D. Minn. 1988) (denying G.D. Searle's motion for a new trial because
jury could have concluded reasonably that Searle intentionally misrepresented
the safety of the Cu-7).}

\textsuperscript{77} Mahoney \& Littlejohn, \textit{supra} note 10, at 1396.
This story is immediately preceded in the article by the presentation of “hard data” presumably intended to show that large, even multi-million dollar, punitive damage awards are routine. In Cook County, Illinois, according to Mahoney and Littlejohn, the average punitive damage award in personal injury actions from 1980 to 1984 was $1,934,000.78

Once the punitive damages problem is “proven,” the essays then describe the alleged adverse effects that punitive damages have on health care and economic well-being: there is “a profound negative impact on the development and utilization of potentially life-saving medical technologies.”79 Pharmaceuticals have been severely affected. According to the Science article, the American Medical Association has concluded that basic biomedical research is deteriorating and small companies are delaying or foregoing innovative product releases.80 Similarly, the National Academy of Sciences has allegedly found that because of the high cost of vaccine-related injuries, many manufacturers may not “pursue the derivation or distribution of a vaccine to prevent AIDS.”81 Furthermore, the article cites another medical authority for stating that the United States is now losing its leadership role in the area of contraceptive technology.82 Thus, it would appear that punitive damages are a threat to public health and necessary medical care.83

The alleged adverse impact also extends to the country’s economic well-being. Mahoney says that the cases he recounts are “known only too well by major American companies, cost-

---

78. Id. A “study” conducted by the Association for California Tort Reform “informs” us that the average punitive damage award in California rose from $1.69 million in 1987 to $3.01 million in 1989. California Punitive Damages, supra note 60, at 1.
79. Mahoney & Littlejohn, supra note 10, at 1397.
80. Id.; Mahoney, supra note 12, at 22.
81. Mahoney, supra note 12, at 22; Mahoney & Littlejohn, supra note 10, at 1397.
82. Mahoney & Littlejohn, supra note 10, at 1397.
83. The parade of horrors continues with an anti-nausea morning sickness drug being withdrawn from the market even though it was “widely used by health care professionals and approved by the FDA.” Id. Medical equipment is also at risk. Union Carbide halted development of a suitcase-sized kidney dialysis machine because of the threat of punitive damages. Id. This company also stopped offering intravenous equipment. Id. Moreover, the only U.S. manufacturer of gas anesthesia machines withdrew from the market, leaving the market to two foreign companies. Id. The alleged explosion in punitive damage awards has also affected foreign suppliers. For instance, “the Japanese maker of a vaccine for Japanese encephalitis withdrew the product from the U.S. market . . . because of liability concerns, leaving American travelers to Asia unprotected.” Id.
ing everybody in lost jobs, new and improved products, and international competitiveness.” 84 Indeed, “American manufacturers are falling behind in key industries and major product groups.” 85 In addition, research laboratories, such as the Lawrence Livermore Laboratory in California and the University of Wisconsin at Madison, are allegedly reluctant to transfer discoveries to the marketplace because of liability concerns. 86 This claim, no doubt, is intended to show the readers of Science that the punitive damage problem is one to which they must pay attention.

Finally, there is the question of how to characterize the punitive damages debate itself. For Mahoney, it is a simple matter of balancing the interests of undeserving plaintiffs and greedy trial lawyers against the public good. In two of his essays he portrays the issue in the following way: “Who loses with these reform proposals? Only plaintiff lawyers and their already compensated clients who have hit the punitive damages jackpot. But the whole country wins with important gains in jobs, new and improved products, international competitiveness — and a fairer legal system for all.” 87

Mahoney intends to create a state of mind and a characterization of the situation that leads to one conclusion: “Clearly, reforms in punitive-damages law are vitally needed by the entire nation.” 88 He claims that our collective well-being depends on changes in the punitive damage system and that those who support his reforms will affirm that the nation’s future depends on the continued pursuit of innovative scientific knowledge. For Mahoney, current punitive damage rules “stifle the forward progress of innovation.” 89

Horror stories in the punitive damages debate, exemplified by the Mahoney pieces, have great evocative power. They imply that Americans are overly litigious, that juries are willing to award millions of dollars in compensatory and punitive damages on a whim, especially in areas such as products liability and medical malpractice, and that plaintiffs’ attorneys abuse the contingency fee system for their own enrichment. The ap-

84. Mahoney, supra note 12, at 20-21.
85. Id. at 23.
86. Mahoney & Littlejohn, supra note 10, at 1397.
87. Mahoney, supra note 12, at 24; Mahoney, Punitive Damages, supra note 65, at 3.
88. Mahoney, supra note 12, at 23; Mahoney, Punitive Damages, supra note 65, at 3.
89. Mahoney & Littlejohn, supra note 10, at 1398.
approach's evocative power comes from its appeal to latent prejudices about undeserving plaintiffs and ambulance-chasing attorneys, and from its generation of anxiety concerning the alleged effects of the punitive damage problems, such as the unavailability of vaccines and life-saving drugs or essential medical services. In appealing to such prejudices and anxieties, the horror stories direct attention away from alternative explanations that may justify large punitive damage awards and portray defendants as something other than the innocent victims of greed.

Reformers present aggregate data on punitive damage verdicts, the second major type of evidence used in the political debate, as more precise and scientific proof of the problem's scope. Their data provide the broader context that makes the horror stories so convincing. Such "hard data" are meant to serve as symbolic benchmarks, much like the figures for monetary losses or deaths after a natural disaster, by which people will shape their perceptions of punitive damages and the civil justice system. These benchmarks arouse concern, and evoke a belief that the civil justice system is reaching a crisis stage. Mahoney and Littlejohn's use of "hard data" from Cook

---

90. See R. HAYDEN, supra note 9, at 13-14; Daniels, supra note 9, at 280.
91. See supra note 76 and accompanying text. See also P. BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL (1985) (approving of punitive damage awards for known dangers in asbestos-related litigation). Edelman provides an apt illustration of the general point about masking alternative explanations for events:

Many crises are precipitated by an event that rather suddenly makes clear the serious consequences of activities that have been going on for a long time without occasioning much concern. Limitations on refining capacity and long-standing tax and price arrangements among American oil companies and Middle East oil-producing countries set the stage for an energy crisis long before the sudden declaration in 1973 that oil was in short supply.

Edelman, supra note 39, at 46-47.
92. See Edelman, supra note 39, at 29-32.
93. See Daniels, supra note 9, at 309-10; R. HAYDEN, supra note 9, at 21-23.

In fact, a major amicus brief in *Pacific Mutual* is premised on this logic:

[J]t is only in recent years that punitive damage awards subject to challenge as unconstitutionally excessive and arbitrary have been imposed upon defendants. From 1789 to 1970, the limited availability and small magnitude of punitive damage awards gave no serious basis for anyone to claim protection under the Due Process Clause. In recent years, however, the need for constitutional scrutiny of punitive damage awards has become increasingly clear.

Brief of the American Institute of Architects, supra note 11, at 23. The brief's argument is dominated by the presentation of quantitative data to show the alleged change. Id. at 23-28.
County and California is a good illustration.94

The Punitive Damages Update press kit includes a section summarizing the findings of a study on punitive damage awards in Cook County and San Francisco conducted by the Rand Corporation's Institute for Civil Justice (ICJ).95 According to the press kit, the study found:

The average punitive damage award in Cook County increased in inflation-adjusted dollars from $43,000 in 1965-69 to $729,000 in 1980-84 — a 1,500 percent increase.

In San Francisco, the average punitive damage awards jumped from an average of $35,000 in 1964-69 to $381,000 in 1980-84 — a 300 percent increase.

The average personal injury punitive damage award in Cook County increased from $14,000 in 1965-69 to $1,934,000 in 1980-84 — a 13,700 percent increase.

Business/contract punitive damage awards in Cook County during the same period went from $97,000 to $624,000, a 543 percent increase in inflation-adjusted dollars.96

These findings are presented with little or no context and no satisfactory explanation of the source of the data, the method of data collection, or the proper method of interpreting the data.97 Regardless of the lack of data, such astronomical figures for the rate of increase in awards present to the reader an apparently clear message that a crisis exists. Used in this way, aggregate data, like horror stories, appeal to emotion and anxiety rather than to reason. When used together with horror stories, aggregate data can create a convincing characterization that calls for the abolition or severe limitation of punitive damages.98

Because the "hard data" are a key part of the reformers' argument, the data also demand closer scrutiny. The findings of the ICJ study, presented in the press kit, are the most widely cited data in the punitive damage debate.99 The ICJ collected

94. Mahoney & Littlejohn, supra note 10, at 1396.
95. American Tort Reform Association, Punitive Damages Update, Relevant Studies on Tort Reform/Punitive Damages (Apr. 12, 1989) [hereinafter Relevant Studies].
96. Id.
97. Id.
98. See also Brief of the American Institute of Architects, supra note 11, at 23 ("This impressive body of anecdotal evidence of growth in the size and frequency of punitive awards is supported by the available empirical data. By far, the most comprehensive empirical study was one conducted by the Rand Institute for Civil Justice.").
99. See also Daniels, supra note 9, at 299 (noting that "[e]ven more widely used are data from Jury Verdicts Research, Inc. (JVR) on awards in malpractice and products liability cases").
data on jury verdicts in both Cook County and San Francisco using local jury verdict reporters, although the Cook County data typically receive emphasis. Both sides of the debate cite the ICJ data with equal confidence, thus demonstrating the problematic nature of the findings. The reformers, however, use the data more frequently and more manipulatively than the defenders of punitive damages. The most prominent use of the ICJ data in the political debate is the Reagan administration's Report of the Tort Policy Working Group (Report) and in a subsequent update (Update) of the Report. In both documents, the Reagan administration unequivocally supports the reform movement, and argues for severe limitations on punitive damages, but not their outright abolition.

The Report discusses punitive damages in the context of non-economic damages and their contribution to the alleged explosive growth in the size of awards generally. The Report, like Mahoney's essays, places special emphasis on personal injury cases. According to the Report:

Such non-economic damages are inherently open-ended and subjective, and, therefore, easily susceptible to dramatic inflation. Of interest in this regard is a recent preliminary study by the Institute for Civil Justice which indicates that the average punitive damage award in Cook County, Illinois, increased from $63,000 in 1970-74 to $489,000 in 1980-84. Of particular interest is that the average Cook County punitive damage award in personal injury cases increased from $40,000 in 1970-74 to $1,152,174 in 1980-84. This explosion in damage awards, particularly in the case of non-economic damages, is vastly in excess of the rate of inflation over the comparable period. For whatever reasons, tort damage awards have

101. For instance, the data were used to demonstrate the seriousness of the problem in Tort Policy Working Group, United States Department of Justice, Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability 39-45 (1986) [hereinafter Report] (Charts G-I), and later in Tort Policy Working Group, United States Department of Justice, An Update on the Liability Crisis 33-38 (1987) [hereinafter Update] (Charts C-H, K, L). The data were used to demonstrate the lack of any serious problem in Special Committee on Punitive Damages, Section of Litigation, American Bar Association, Punitive Damages: A Constructive Examination 17-26 (1986) [hereinafter Constructive Examination].
suddenly soared in the United States without any apparent justification.106 Accompanying this passage is a chart using ICJ's Cook County data showing that the average personal injury punitive damage award increased from $40,000 (in constant dollars) in five cases in 1970-74 to $271,000 in six awards in 1975-79 to $1,152,000 in twenty-three awards in 1980-84.107 In a footnote, the Report adds that the ICJ's "analysis of punitive damage awards in San Francisco also showed an increase in such awards, though of lesser magnitude than in Cook County."108

Differences in the presentation of the ICJ data in the press kit and the Report illustrate the problematic nature of these findings and their use. The two sources adopt different time periods in their respective discussions, the press kit using 1965-69 and 1980-84109 and the Report using 1970-74 and 1980-84.110 The press kit examines punitive awards overall as well as separately, divided into personal injury cases and business or contract cases.111 The Report focuses on personal injury cases in which the numbers are much more dramatic,112 as does Mahoney.113 Additionally, discrepancies exist between the figures in the press kit and in the Report. The press kit cites an average punitive damage award in Cook County of $1,934,000 in 1980-84 for personal injury cases,114 while the Report cites a figure of $1,152,174.115 The press kit cites an overall punitive damage award in Cook County of $729,000 in 1980-84,116 and the Report cites an average of only $489,000.117 Because neither the press kit nor the Report provides any background for the data used or for the ICJ study from which the data are taken, the reason for the differences remains unknown.

The Update also presents ICJ punitive damages data, and it provides an additional illustration of discrepancies in the evidence and of the problematic nature of "hard data" in this de-

106. REPORT, supra note 101, at 39-42 (footnotes and chart references omitted).
107. REPORT, supra note 101, at 43 (Chart II).
108. REPORT, supra note 101, at 42 n.39.
109. Relevant Studies, supra note 95.
110. REPORT, supra note 101, at 39.
111. Relevant Studies, supra note 95.
112. REPORT, supra note 101, at 42.
113. Mahoney & Littlejohn, supra note 10, at 1396.
114. Relevant Studies, supra note 95.
115. REPORT, supra note 101, at 42.
116. Relevant Studies, supra note 95.
117. REPORT, supra note 101, at 39.
bate. According to the *Update*, "[t]he available data indicate that in the last decade the size of punitive damages awards has undergone almost explosive growth, particularly in personal injury cases." The *Update* states that the ICJ data for Cook County show "that the average personal injury punitive damage award grew from $28,000 in 1970-74 to $1,934,000 in 1980-84, a 6,900% increase." This information conflicts with figures presented in the *Report*, which indicate that the average award increased from $40,000 in 1970-74 to $1,152,174 in 1980-84. The discrepancy is noted without commentary in a footnote in the *Update*. Explaining such discrepancies, however, is not the important issue in this context. What is important is that the discrepancies exist and that they receive no discussion that would allow the reader to make a judgment as to the veracity of the new figures. If the reformers' goal were to present an accurate picture of the punitive damages system, the discrepancies would be noted and explained so that the reader can understand why the award figure increased. From a symbolic perspective, however, the veracity of the "hard data" used is less important than the general message they are intended to send.

A final problem with the reformers' use of the ICJ data

---

118. *UPDATE*, supra note 101, at 49.
119. *Id.* at 49 n.62.
120. *REPORT*, supra note 101, at 42.
121. See *UPDATE*, supra note 101, at 47 n.54 (referring to M. PETERSON, S. SARMA & M. SHANLEY, supra note 8, at 4).
122. The problematic nature of the "hard data" is further illustrated by the fact that the reformers' opponents use the exact same study to argue an entirely different categorization of the punitive damages system. In 1986, the same year of the *Report*'s publication, the Special Committee on Punitive Damages of the ABA's Section of Litigation published a report. *See CONSTRUCTIVE EXAMINATION*, supra note 101. This report is based upon a study of punitive damages commissioned by the Special Committee and conducted by the ICJ. *Id.* at 1. This is the ICJ study of punitive damages in Cook County and San Francisco. According to the Special Committee's report:

The major findings of the Rand study ... suggest that contrary to the common perception, punitive damages awards are neither routine nor routinely large, especially in personal injury cases including [product] liability and malpractice litigation. While punitive damages awards have grown in frequency and size over the past 25 years, the bulk of this growth has been in cases of intentional torts, unfair business practices or contractual bad faith. The punitive damages picture in personal injury cases has changed very little in 25 years. Moreover, while the size of punitive damages awards has increased, most awards are moderate in amount and the ratio of punitive to compensatory damages is generally not excessive. The multimillion-dollar punitive award 10 to 20 times the plaintiff's actual damages is, in empirical terms, not a pattern but an aberration. In short, the findings of this
PUNITIVE DAMAGES

concerns the logic of generalization. The ICJ data are from two case studies, with the Cook County data typically receiving emphasis. Case studies have one important limitation. They cannot be used to assess the general incidence or frequency of some phenomenon within a population of sites.123 A case study does not represent a legitimate sample and cannot serve as the basis for statistical generalization. Yet the reformers present the ICJ data as a representative sample, and use the data to make what are, in effect, statistical generalizations about the frequency and size of punitive damage awards nationwide.124 One amicus brief in Pacific Mutual Life Insurance Co. v. Haslip125 even claimed that the ICJ data comprise "[a] comprehensive analysis of jury verdicts in the United States."1126 Such generalizations are inappropriate and unfounded no matter how politically expedient they may be.

At first glance, the horror stories and aggregate data seem to provide persuasive evidence for the reformers' argument. In fact, however, they provide little, if any, reliable evidence about the law in action with regard to punitive damages. They have been used to create a state of mind in the furtherance of a political agenda and should be interpreted accordingly. Unfortunately, the reformer's stories and data have been recognized as systematic and reliable evidence of a punitive damages system out of control and in need of immediate and fundamental reform.127 The following section presents an alternative empirical description.

---

study suggest that the notion of a punitive damages "crisis" is exaggerated overall and focused on the wrong types of cases.  

127. See REPORT, supra note 101, at 39.
II. PATTERNS IN PUNITIVE DAMAGE AWARDS: 1981-1985

This section addresses patterns in the incidence and size of punitive damage awards in a variety of jurisdictions. It relies on a data set consisting of 25,627 civil jury verdicts involving money damages from state trial courts of general jurisdiction in forty-seven counties in eleven states for the years 1981-85. This time period is used because the reformers' assertions about punitive damages are based on claims about excesses of the civil jury system in the early 1980's.

A. THE DATA

The 25,627 case data set uses information drawn from local jury verdict reporters, which are subscription services developed for local attorneys, judges, county law libraries, insurance companies, businesses, and local governmental bodies. The purpose of these reporters is to communicate information on the local "going rates" for various types of legal disputes. This information is used in settlement negotiations and in evaluating damages for trial. The assumption is that most civil matters are settled rather than tried, and that jury verdicts in the minority of matters actually adjudicated play an important role in determining the worth, or settlement value, of civil matters filed but not tried. This practical use of jury verdicts to set going rates is consistent with recent theoretical writing in the field of civil litigation that notes the importance of jury verdicts as "transmitters of signals rather than as deciders of cases."

The jury verdict reporters used in constructing the data set were selected because they are comprehensive in their coverage of money damage cases. They are not limited to a particular type of case, such as personal injury, nor do they only report the high end of the damage award spectrum. These reporters present typical as well as unusual cases, from the $3,000 fender-
PUNITIVE DAMAGES

bender to the multi-million dollar products liability case. Court records and attorneys involved in the cases provide the information. The data in each case description include the county in which the jury rendered the verdict, the names of the parties and the attorneys, a short description of the factual situation, the jury’s verdict and award if given, apportionment of liability when appropriate, and a breakdown of the award into specials, compensatory, and punitive or exemplary components. For each of the forty-seven counties in the study, data were collected on all money damage jury verdicts published in the respective jury verdict reporters. No sampling was done within years and the data generally cover the period 1981-85, although the number of years covered in some sites is less because data are unavailable. Verdicts in cases in which money damages were not involved, federal cases, bench trials, settlements, and post-trial motions are not included.

The forty-seven sites included in the study are not a representative sample of all jurisdictions across the country. Rather, they reflect a combination of regional balance and available source materials. This means that one cannot use the findings presented to generalize about jury activity on a nationwide basis. The sites, however, are sufficiently diverse to allow exploration of the complexities and variations in the aggregate patterns in jury verdicts. The sites are in different parts of the country and are of varying population sizes and socio-economic make-ups. Additionally, they reflect legal systems that differ in basic ways, primarily with regard to negligence systems and the treatment of punitive damages. The data set includes sites from one state, Washington, that does not allow punitive damages at common law, but that by statute does allow extra damages in certain well-defined situations.

Table I presents a list of the counties, courts, time periods, and total number of verdicts in the data set. Combining the data for each site through the years 1981-85, as is done in Table I, creates an overall picture of patterns in jury verdicts for the early 1980’s while controlling for year-to-year fluctuations. Moreover, five years is too short a period to use in discussing

---

133. For a more detailed discussion of jury verdict reporters, see S. Daniels, supra note 129, at 5.
134. Id.
136. Id.
137. See Daniels & Martin, Jury Verdicts, supra note 8, at 343-47.
TABLE I
SITES, COURTS, YEARS, AND NUMBERS OF CIVIL JURY VERDICTS

<table>
<thead>
<tr>
<th>County</th>
<th>Court</th>
<th>Years</th>
<th>N of Verdicts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maricopa, AZ</td>
<td>Superior</td>
<td>1981-85</td>
<td>1,765</td>
</tr>
<tr>
<td>Alameda, CA</td>
<td>Superior</td>
<td>1981-85</td>
<td>357</td>
</tr>
<tr>
<td>Fresno, CA</td>
<td>Superior</td>
<td>1981-85</td>
<td>157</td>
</tr>
<tr>
<td>Los Angeles, CA</td>
<td>Superior</td>
<td>1981-85</td>
<td>2,613</td>
</tr>
<tr>
<td>Sacramento, CA</td>
<td>Superior</td>
<td>1981-85</td>
<td>509</td>
</tr>
<tr>
<td>San Diego, CA</td>
<td>Superior</td>
<td>1981-85</td>
<td>410</td>
</tr>
<tr>
<td>San Francisco, CA</td>
<td>Superior</td>
<td>1981-85</td>
<td>688</td>
</tr>
<tr>
<td>Arapahoe, CO</td>
<td>District</td>
<td>1984-85</td>
<td>51</td>
</tr>
<tr>
<td>Boulder, CO</td>
<td>District</td>
<td>1984-85</td>
<td>53</td>
</tr>
<tr>
<td>Denver, CO</td>
<td>District</td>
<td>1984-85</td>
<td>294</td>
</tr>
<tr>
<td>Jefferson, CO</td>
<td>District</td>
<td>1984-85</td>
<td>94</td>
</tr>
<tr>
<td>Cobb, GA</td>
<td>Superior</td>
<td>1982-84</td>
<td>90</td>
</tr>
<tr>
<td>DeKalb, GA</td>
<td>Superior</td>
<td>1982-84</td>
<td>293</td>
</tr>
<tr>
<td>Fulton, GA</td>
<td>Superior</td>
<td>1982-84</td>
<td>493</td>
</tr>
<tr>
<td>Cook, IL</td>
<td>Circuit</td>
<td>1981-85</td>
<td>4,161</td>
</tr>
<tr>
<td>DuPage, IL</td>
<td>Circuit</td>
<td>1981-85</td>
<td>436</td>
</tr>
<tr>
<td>Kane, IL</td>
<td>Circuit</td>
<td>1981-85</td>
<td>171</td>
</tr>
<tr>
<td>Lake, IL</td>
<td>Circuit</td>
<td>1981-85</td>
<td>355</td>
</tr>
<tr>
<td>McHenry, IL</td>
<td>Circuit</td>
<td>1981-85</td>
<td>61</td>
</tr>
<tr>
<td>Will, IL</td>
<td>Circuit</td>
<td>1981-85</td>
<td>290</td>
</tr>
<tr>
<td>Winnebago, IL</td>
<td>Circuit</td>
<td>1981-85</td>
<td>148</td>
</tr>
<tr>
<td>Johnson, KS</td>
<td>District</td>
<td>1981-85</td>
<td>310</td>
</tr>
<tr>
<td>Wyandotte, KS</td>
<td>District</td>
<td>1981-85</td>
<td>286</td>
</tr>
<tr>
<td>Clay, MO</td>
<td>Circuit</td>
<td>1981-85</td>
<td>104</td>
</tr>
<tr>
<td>Jackson, MO</td>
<td>Circuit</td>
<td>1981-85</td>
<td>894</td>
</tr>
<tr>
<td>Platte, MO</td>
<td>Circuit</td>
<td>1981-85</td>
<td>47</td>
</tr>
<tr>
<td>Bronx, NY</td>
<td>Supreme</td>
<td>1981-85</td>
<td>367</td>
</tr>
<tr>
<td>Erie, NY</td>
<td>Supreme</td>
<td>1983-85</td>
<td>181</td>
</tr>
<tr>
<td>Kings, NY</td>
<td>Supreme</td>
<td>1981-85</td>
<td>762</td>
</tr>
<tr>
<td>Monroe, NY</td>
<td>Supreme</td>
<td>1983-85</td>
<td>127</td>
</tr>
<tr>
<td>Nassau, NY</td>
<td>Supreme</td>
<td>1981-85</td>
<td>635</td>
</tr>
<tr>
<td>New York, NY</td>
<td>Supreme</td>
<td>1981-85</td>
<td>1,401</td>
</tr>
<tr>
<td>Onondaga, NY</td>
<td>Supreme</td>
<td>1983-85</td>
<td>86</td>
</tr>
<tr>
<td>Queens, NY</td>
<td>Supreme</td>
<td>1981-85</td>
<td>404</td>
</tr>
<tr>
<td>Richmond, NY</td>
<td>Supreme</td>
<td>1981-85</td>
<td>71</td>
</tr>
<tr>
<td>Suffolk, NY</td>
<td>Supreme</td>
<td>1981-85</td>
<td>231</td>
</tr>
<tr>
<td>Westchester, NY</td>
<td>Supreme</td>
<td>1981-85</td>
<td>265</td>
</tr>
<tr>
<td>Multnomah, OR</td>
<td>Circuit</td>
<td>1984-85</td>
<td>285</td>
</tr>
<tr>
<td>Bexar, TX</td>
<td>District</td>
<td>1981-85</td>
<td>1,002</td>
</tr>
<tr>
<td>Dallas, TX</td>
<td>District</td>
<td>1981-85</td>
<td>2,166</td>
</tr>
<tr>
<td>Harris, TX</td>
<td>District</td>
<td>1981-85</td>
<td>2,102</td>
</tr>
<tr>
<td>King, WA</td>
<td>Superior</td>
<td>1983-85</td>
<td>416</td>
</tr>
<tr>
<td>Pierce, WA</td>
<td>Superior</td>
<td>1983-85</td>
<td>131</td>
</tr>
<tr>
<td>Skagit, WA</td>
<td>Superior</td>
<td>1983-85</td>
<td>15</td>
</tr>
<tr>
<td>Snohomish, WA</td>
<td>Superior</td>
<td>1983-85</td>
<td>114</td>
</tr>
<tr>
<td>Spokane, WA</td>
<td>Superior</td>
<td>1983-85</td>
<td>122</td>
</tr>
<tr>
<td>Yakima, WA</td>
<td>Superior</td>
<td>1983-85</td>
<td>73</td>
</tr>
</tbody>
</table>

TOTAL 25,627
changes and trends considering our limited knowledge of longer term patterns. All of the data discussed in this section appear in this combined form. Changes over time are examined in Part III of this Article, using data from Dallas County, Texas and Jackson County, Missouri for the period 1970 to 1988.

B. INCIDENCE OF PUNITIVE DAMAGE AWARDS GENERALLY

Table II presents data in combined form on the incidence of punitive damage awards in each of the forty-seven sites for 1981-85. It identifies the total number of punitive awards, the percentage of all reported money damage verdicts that include an award of punitive damages, and the percentage of successful cases (those in which the jury awarded the plaintiff at least one dollar) in which an award of punitive damages is made. Table II presents two simple but important conclusions. The first is that, in general, juries do not award punitive damages in a large percentage of money damage cases. Thus, it appears that punitive damage awards are not routine in money damage cases overall. The second conclusion is that a great deal of variation exists among the sites in terms of the number and rates of punitive damage awards. This second finding suggests that sweeping statements about national trends used to instigate reform should be viewed with a great deal of skepticism.

Of the 25,627 civil jury verdicts in the data base for the 1981-85 period, 1,287 or 4.9% of the cases include punitive damage awards. This represents 8.8% of the 14,462 cases in which plaintiffs were successful. The number of punitive damage awards in all but the largest population centers is below fifty for this five year time period. Only seven sites experienced more than fifty punitive damage awards: Los Angeles County, California, the highest with 169; Maricopa County (Phoenix), Arizona; Cook County (Chicago), Illinois; Jackson County (Kansas City), Missouri; Bexar County (San Antonio), Texas; Dallas County, Texas; and Harris County (Houston), Texas.

Regardless of the raw numbers, the percentage of verdicts that include a punitive damage award is generally modest. Eliminating the six Washington sites and concentrating on those sites that allow punitive damages at common law, the punitive damage rate for all money damage cases, successful and unsuccessful, ranges from 0% in Erie and Richmond Coun-

<table>
<thead>
<tr>
<th>County</th>
<th>N of Punitive Damage Verdicts</th>
<th>% of All Verdicts</th>
<th>% of Successful Verdicts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maricopa, AZ</td>
<td>150</td>
<td>8.5%</td>
<td>14.6%</td>
</tr>
<tr>
<td>Alameda, CA</td>
<td>25</td>
<td>1.0</td>
<td>12.5</td>
</tr>
<tr>
<td>Fresno, CA</td>
<td>9</td>
<td>5.7</td>
<td>11.4</td>
</tr>
<tr>
<td>Los Angeles, CA</td>
<td>169</td>
<td>6.2</td>
<td>11.1</td>
</tr>
<tr>
<td>Sacramento, CA</td>
<td>26</td>
<td>7.5</td>
<td>13.8</td>
</tr>
<tr>
<td>San Diego, CA</td>
<td>16</td>
<td>3.9</td>
<td>8.0</td>
</tr>
<tr>
<td>San Francisco, CA</td>
<td>46</td>
<td>6.7</td>
<td>11.5</td>
</tr>
<tr>
<td>Arapahoe, CO</td>
<td>8</td>
<td>15.7</td>
<td>25.8</td>
</tr>
<tr>
<td>Boulder, CO</td>
<td>9</td>
<td>17.0</td>
<td>23.1</td>
</tr>
<tr>
<td>Denver, CO</td>
<td>20</td>
<td>6.8</td>
<td>12.5</td>
</tr>
<tr>
<td>Jefferson, CO</td>
<td>13</td>
<td>13.8</td>
<td>24.5</td>
</tr>
<tr>
<td>Cobb, GA</td>
<td>11</td>
<td>12.2</td>
<td>19.0</td>
</tr>
<tr>
<td>DeKalb, GA</td>
<td>18</td>
<td>7.5</td>
<td>12.9</td>
</tr>
<tr>
<td>Fulton, GA</td>
<td>38</td>
<td>7.1</td>
<td>12.1</td>
</tr>
<tr>
<td>Cook, IL</td>
<td>68</td>
<td>1.6</td>
<td>2.8</td>
</tr>
<tr>
<td>DuPage, IL</td>
<td>9</td>
<td>2.1</td>
<td>3.7</td>
</tr>
<tr>
<td>Kane, IL</td>
<td>5</td>
<td>2.9</td>
<td>4.8</td>
</tr>
<tr>
<td>Lake, IL</td>
<td>6</td>
<td>2.0</td>
<td>3.4</td>
</tr>
<tr>
<td>McHenry, IL</td>
<td>2</td>
<td>3.3</td>
<td>6.1</td>
</tr>
<tr>
<td>Will, IL</td>
<td>7</td>
<td>2.4</td>
<td>3.9</td>
</tr>
<tr>
<td>Winnebago, IL</td>
<td>7</td>
<td>4.7</td>
<td>8.0</td>
</tr>
<tr>
<td>Johnson, KS</td>
<td>11</td>
<td>3.5</td>
<td>6.7</td>
</tr>
<tr>
<td>Wyandotte, KS</td>
<td>9</td>
<td>3.1</td>
<td>5.1</td>
</tr>
<tr>
<td>Clay, MO</td>
<td>15</td>
<td>14.4</td>
<td>24.2</td>
</tr>
<tr>
<td>Jackson, MO</td>
<td>111</td>
<td>12.4</td>
<td>22.4</td>
</tr>
<tr>
<td>Platte, MO</td>
<td>5</td>
<td>10.6</td>
<td>17.9</td>
</tr>
<tr>
<td>Bronx, NY</td>
<td>1</td>
<td>0.3</td>
<td>0.4</td>
</tr>
<tr>
<td>Erie, NY</td>
<td>0</td>
<td></td>
<td>-</td>
</tr>
<tr>
<td>Kings, NY</td>
<td>5</td>
<td>0.7</td>
<td>1.1</td>
</tr>
<tr>
<td>Monroe, NY</td>
<td>5</td>
<td>3.9</td>
<td>6.4</td>
</tr>
<tr>
<td>Nassau, NY</td>
<td>10</td>
<td>1.6</td>
<td>3.6</td>
</tr>
<tr>
<td>New York, NY</td>
<td>19</td>
<td>1.7</td>
<td>2.7</td>
</tr>
<tr>
<td>Onondaga, NY</td>
<td>1</td>
<td>1.2</td>
<td>2.1</td>
</tr>
<tr>
<td>Queens, NY</td>
<td>3</td>
<td>0.7</td>
<td>1.4</td>
</tr>
<tr>
<td>Richmond, NY</td>
<td>0</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Suffolk, NY</td>
<td>5</td>
<td>1.7</td>
<td>3.3</td>
</tr>
<tr>
<td>Westchester, NY</td>
<td>3</td>
<td>1.2</td>
<td>2.9</td>
</tr>
<tr>
<td>Multnomah, OR</td>
<td>12</td>
<td>4.2</td>
<td>7.0</td>
</tr>
<tr>
<td>Bexar, TX</td>
<td>101</td>
<td>10.1</td>
<td>18.4</td>
</tr>
<tr>
<td>Dallas, TX</td>
<td>141</td>
<td>6.7</td>
<td>13.2</td>
</tr>
<tr>
<td>Harris, TX</td>
<td>156</td>
<td>7.8</td>
<td>14.0</td>
</tr>
<tr>
<td>King, WA</td>
<td>0</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Pierce, WA</td>
<td>0</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Skagit, WA</td>
<td>1</td>
<td>5.3</td>
<td>6.7</td>
</tr>
<tr>
<td>Snohomish, WA</td>
<td>1</td>
<td>0.9</td>
<td>1.5</td>
</tr>
<tr>
<td>Spokane, WA</td>
<td>0</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Yakima, WA</td>
<td>1</td>
<td>1.4</td>
<td>2.2</td>
</tr>
</tbody>
</table>

**TOTAL** | 1,287 | 4.9% | 8.8%
ties in New York to 15.7% and 17.0% in Arapahoe and Boulder Counties, Colorado. Both of these high-rate counties, however, have less than ten punitive damage awards. The numbers are low in these counties because data are available for only two years. If one examines only those counties with twenty-five or more punitive damage awards and a full five years of data, Jackson and Bexar become the counties with the highest rates at 12.4% and 10.1% respectively. The lowest rate (1.6%) among this group of counties with twenty-five or more punitive damage cases is in Cook County.

The punitive damage rates are higher when defined as percentages of successful verdicts. After eliminating the Washington sites along with the two sites with no punitive damage awards, Erie and Richmond Counties, the rate ranges from 0.4% in Bronx County to 25.8% in Arapahoe County. Concentrating on just those sites with twenty-five or more punitive damage verdicts, the rate varies from 2.8% in Cook County to 22.4% in Jackson County. Jackson is the only site having more than twenty-five punitive damage verdicts with a punitive damage rate above 15% for successful cases.

Contrary to the rhetoric of the reformers, punitive damages were not routinely awarded during the early 1980’s in the sites we examined. At its highest level, the punitive damage rate never exceeded one-quarter of all successful cases or one-fifth of all cases. Equally important is the substantial variability among the sites, suggesting that there are not consistent national patterns.

C. THE INCIDENCE OF PUNITIVE DAMAGE VERDICTS IN DIFFERENT CATEGORIES OF CASES

A frequent assertion of the reformers is that even if punitive damage awards are not routine in general, they are routine in certain types of cases. For example, as noted earlier, personal injury cases purportedly attract frequent punitive damage awards, particularly those in which the defendant is a so-called “deep pocket” (especially medical malpractice and products liability).139 Two methods exist to examine the distribution of punitive damage awards among different types of cases. The first examines the distribution of the total number of punitive damage awards across various categories of cases, and the second

139. See Mahoney & Littlejohn, supra note 10, at 1396; REPORT, supra note 101, at 35-42.
examines the punitive damage rate for each of these categories. The distinction is crucial because the two alternatives present quite different pictures of the punitive damages system. The picture portrayed by the first approach would suggest that the reformers are correct in some of their key allegations. The picture emerging from the alternative approach indicates that they are not.

Table III presents a breakdown of punitive damage verdicts by category of case for the twenty sites having ten or more punitive damage cases. It groups cases into four broad categories based on the type of harm involved in each case. The first category includes all cases in which the primary harm involved is physical (e.g., auto, assault, slip and fall, medical malpractice). The second category includes all cases in which the primary harm is financial (e.g., breach of contract, fraud, misrepresentation, business interference). The third category involves all cases in which the primary harm is to property and the fourth category groups all cases involving emotional harm or damage to reputation.

The approach presented in Table III, which breaks down all punitive damage verdicts in a given jurisdiction by type of case, is the approach typically used in the punitive damages debate. It shows that most punitive damage awards occur in cases involving either physical or financial harm. Few of the punitive damage awards appear in cases in which the alleged damage is to property or emotional/reputational harm.

The percentage of punitive damage awards in a single jurisdiction resulting from claims of physical harm ranges from 5.6% in DeKalb County, Georgia to 55.9% in Cook County. In fourteen of the twenty counties, at least 20% of the punitive damage awards occur in cases in which the principal harm is physical. The percentage of punitive damage awards arising from claims of financial harm ranges from 8.3% in Multnomah County (Portland), Oregon to 83.3% in DeKalb County. Financial harm accounts for at least 50% of punitive damage awards in slightly more than one-half — eleven — of the counties. The percentage of punitive damage awards resulting from property harm ranges from no awards in three sites, Cobb and DeKalb

140. See S. DANIELS & J. MARTIN, supra note 8, at 17.
141. Id. at 23.
142. Because of the small numbers of cases within categories, it does not make sense to include the sites with 10 or less punitive damage cases. When the numbers are small, the change of even one case can make a substantial percentage difference.
counties in Georgia and New York County, to 33.3% in Clay County, Missouri.

These data appear to support the widespread belief that many punitive damage awards occur in cases involving physical harm. Thus, it would seem that the reformers' focus on physical harm cases as a key ingredient of the punitive damage "problem" is appropriate. Although on its face a sensible method of examining the incidence of punitive damage awards, the approach taken in Table III is not the most appropriate one. Table III distorts perceptions of punitive damage patterns because it depends on the make-up of the jury docket in a given jurisdiction. In Table III, the number of cases on the jury docket relative to other types of cases determines the magnitude of the percentage for a given type of case, not the rate at which punitive damages are awarded. If, for instance, a large number of physical harm cases are on the jury docket, it is

### Table III

**BREAKDOWN OF PUNITIVE DAMAGE JURY VERDICTS BY CASE CATEGORY**

(Sites with 10+ Punitive Verdicts)

<table>
<thead>
<tr>
<th>County (N)</th>
<th>Physical (%)</th>
<th>Type of Harm Alleged</th>
<th>Emotional (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maricopa, AZ (150)</td>
<td>35.3%</td>
<td>51.3%</td>
<td>6.7%</td>
</tr>
<tr>
<td>Alameda, CA (25)</td>
<td>36.0</td>
<td>40.0</td>
<td>12.0</td>
</tr>
<tr>
<td>Los Angeles, CA (169)</td>
<td>18.3</td>
<td>56.8</td>
<td>6.5</td>
</tr>
<tr>
<td>Sacramento, CA (26)</td>
<td>7.7</td>
<td>69.2</td>
<td>11.5</td>
</tr>
<tr>
<td>San Diego, CA (16)</td>
<td>25.0</td>
<td>56.3</td>
<td>6.3</td>
</tr>
<tr>
<td>San Francisco, CA (45)</td>
<td>19.6</td>
<td>53.7</td>
<td>10.7</td>
</tr>
<tr>
<td>Denver, CO (20)</td>
<td>20.0</td>
<td>65.0</td>
<td>5.0</td>
</tr>
<tr>
<td>Jefferson, CO (13)</td>
<td>53.8</td>
<td>30.8</td>
<td>15.4</td>
</tr>
<tr>
<td>Cobb, GA (11)</td>
<td>27.3</td>
<td>45.5</td>
<td>0</td>
</tr>
<tr>
<td>DeKalb, GA (18)</td>
<td>5.6</td>
<td>83.3</td>
<td>0</td>
</tr>
<tr>
<td>Fulton, GA (38)</td>
<td>21.1</td>
<td>47.4</td>
<td>13.2</td>
</tr>
<tr>
<td>Cook, IL (68)</td>
<td>55.9</td>
<td>23.5</td>
<td>2.9</td>
</tr>
<tr>
<td>Johnson, KS (11)</td>
<td>45.5</td>
<td>27.3</td>
<td>18.2</td>
</tr>
<tr>
<td>Clay, MO (15)</td>
<td>20.0</td>
<td>20.0</td>
<td>33.3</td>
</tr>
<tr>
<td>Jackson, MO (111)</td>
<td>11.7</td>
<td>53.2</td>
<td>14.1</td>
</tr>
<tr>
<td>New York, NY (19)</td>
<td>52.6</td>
<td>26.3</td>
<td>0</td>
</tr>
<tr>
<td>Multnomah, OR (12)</td>
<td>33.3</td>
<td>8.3</td>
<td>8.3</td>
</tr>
<tr>
<td>Bexar, TX (101)</td>
<td>23.8</td>
<td>56.4</td>
<td>11.9</td>
</tr>
<tr>
<td>Dallas, TX (141)</td>
<td>14.2</td>
<td>63.1</td>
<td>13.5</td>
</tr>
<tr>
<td>Harris, TX (150)</td>
<td>38.5</td>
<td>50.0</td>
<td>5.1</td>
</tr>
</tbody>
</table>
likely that physical harm punitive damage cases will comprise a relatively large percentage of all punitive damage awards, even if the rate at which a jury awards punitive damages in physical harm cases is low. The rate at which a jury awards punitive damages is the important issue with regard to the frequency of punitive damage awards. Information regarding how often punitive damage awards occur in particular types of cases is necessary to draw any conclusions about frequency.

The data from Cook County, the reformers' usual example,\textsuperscript{143} illustrate the problems of the approach taken in Table III. Cook County has the highest percentage of punitive damages in the physical harm category of all twenty sites — 55.9%. This figure might easily lead to the conclusion that a plaintiff with a successful claim based on a cause of action involving physical harm is very likely to win an award of punitive damages. In fact, this is a rare occurrence in Cook County.

The high figure in Table III simply reflects the fact that a high percentage of all jury cases in Cook County involve physical harm, rather than the existence of a high punitive damage rate for such cases. Eighty-one percent of all reported money damage jury verdicts in Cook County for the years 1981-85 involve claims of physical harm. When the rate of punitive damage awards in physical harm cases in Cook County is examined — the percentage of plaintiff's verdicts which include a punitive damage award — a very different picture emerges. As Table IV shows, the punitive damage rate for physical harm cases in Cook County is only 1.8%! Using this alternative approach, Cook County moves from appearing as a jurisdiction with a high incidence of punitive damage awards predicated upon physical harm to a jurisdiction with a very low punitive damage rate in such cases. Using a more appropriate measure makes an apparent problem disappear.

Table IV presents data on punitive damage rates for the same sites included in Table III. The figures for physical harm cases are significantly lower in Table IV then they are in Table III. The punitive damage rate for physical harm cases ranges from 1.6% in Sacramento and DeKalb Counties to 25% in Jefferson County. All but two of the sites, Jefferson and Clay Counties, have rates below 10%. Contrary to what might be expected based upon the reformers' rhetoric, punitive damage awards are far from routine in cases involving claims of physical harm.

\textsuperscript{143} See, e.g., UPDATE, supra note 101, at 37.
The picture does not change after taking a deeper cut into the physical harm category and examining medical malpractice and products liability cases, the two types of cases that the reformers emphasize as primary sources of the punitive damages “explosion.” Table V draws from the general database of 25,627 verdicts and presents data on punitive damage rates for these two types of cases. Neither type of case accounts for a large proportion of the verdicts. Malpractice represents 7.5% of the 25,627 verdicts and products liability only 3.8%. Contrary to what might be expected, Table V indicates that plaintiffs usually are not successful in these cases, and that they rarely receive punitive damage awards in the minority of cases in which they are successful. The punitive damage rate for suc-

144. See id. at 38.
successful cases involving medical malpractice is 2.9%, and 8.9% for those involving products liability claims.

TABLE V
PUNITIVE DAMAGE RATES:
MEDICAL MALPRACTICE AND PRODUCTS LIABILITY

<table>
<thead>
<tr>
<th></th>
<th>Ns</th>
<th>Success Rate</th>
<th>Ns With Punitive Award</th>
<th>Punitive Award Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Medical Malpractice</td>
<td>1,917</td>
<td>32.4%</td>
<td>18</td>
<td>2.9%</td>
</tr>
<tr>
<td>Products Liability</td>
<td>967</td>
<td>39.2%</td>
<td>34</td>
<td>8.9%</td>
</tr>
</tbody>
</table>

Returning to a comparison of the figures in Tables III and IV, with a focus on the financial harm cases, we see that the figures in Table IV are again lower than those in Table III. The punitive damage rate in Table IV for these cases ranges from 5.6% in New York County to 40.9% in Sacramento County. Although the rates in most sites for cases involving physical harm are below 10%, the punitive damage rates for financial harm cases in all but four sites are above 10%. More than half the sites have rates greater than 20%.

The patterns in the two tables also differ for cases involving property and emotional/reputational harm. The figures in Table IV are higher for both types of cases than those in Table III. For property harm cases, the punitive damage rate ranges from 0% in three counties, Cobb, DeKalb, and New York, to 50% in Sacramento County. All but six of the counties have punitive damage rates above 10% for property harm cases and slightly more than one-half have rates of at least 20%. For emotional/reputational harm cases, the rate ranges from 0% in two sites, San Diego and Jefferson Counties, to 100% and 85.2% in Clay and Jackson Counties in Missouri. While two of the sites have no awards of punitive damages in cases involving emotional/reputational harm, the remainder of the sites have rates of at least 20%. More than one-half of the sites have rates of 40% or higher for emotional/reputational harm cases.

While we are unable to address the issue of the frequency with which punitive damages are pled and denied, the data in Table IV reveals the frequency with which juries award punitive damages in different types of cases. Generally, in the sites examined, a successful plaintiff was least likely to receive a punitive damage award in a case involving physical harm and
most likely to receive such an award in an emotional/reputational harm case.

D. PATTERNS IN THE SIZE OF PUNITIVE DAMAGE AWARDS

A second major controversy in the punitive damages debate concerns the issue of the dollar value of punitive damage awards. According to the reformers, not only are punitive damages routinely awarded, they are awarded in extremely high amounts—amounts that “boggle the mind” and are “skyrocketing.”

A seemingly esoteric, technical debate underlies the issue of punitive damage award size as well as the issue of jury award sizes generally. It involves the appropriate measure of central tendency to use in describing patterns and changes in the typical award: the arithmetic mean (average) or the median. One obtains the mean, or average, punitive damage award by adding the amount of the awards together and dividing by the total number of awards. The mean’s disadvantage is that a few unusually high or low figures in the data set can skew the result upward or downward. The median punitive damage award, on the other hand, is the middle figure in a sequence of awards listed from lowest to highest. A handful of high or low numbers in the data will not influence the median. The chosen measure is both politically and practically significant because the two measures can give significantly different values to the typical award.

The reformers advocate the use and appropriateness of the mean to describe patterns and changes in award sizes. Their position is politically expedient because mean punitive damage awards, as well as mean jury awards generally, are misleadingly high. The reformers present the mean punitive damage award as evidence that the civil justice system is out of control and in need of reform. For example, as noted earlier, the Reagan administration’s Tort Policy Working Group’s 1986 Report presents average award figures to support its claims of sharply increasing award sizes, and the Report’s Update vigorously defends the mean as the appropriate measure of central ten-

146. See UPDATE, supra note 101, at 39-40.
147. See Daniels & Martin, Jury Verdicts, supra note 8, at 327; Localio, Variations on $962,258: The Misuse of Data on Medical Malpractice, 13 LAW, MEDICINE & HEALTH CARE 126, 127 (1985).
148. REPORT, supra note 101, at 42.
The Update’s defense is a direct response to critics of the Report who challenged the appropriateness of the mean and the resulting claim of increasingly higher awards. The critics point out that “[f]or jury awards, the median is much smaller than the average, which can be significantly influenced upward by a few very large claims.”

Regardless of the political considerations, as a technical matter, the median is more appropriate in this instance. According to a widely used textbook on statistics for the social sciences:

The layman’s conception of the term average is likely to be rather vague or ambiguous. In fact, one may not realize that there are several distinct measures of typicality and that under some circumstances these measures may yield very different results. The fact that it is possible to obtain such different measures of central tendency means that it is necessary to understand the advantages and disadvantages of each measure.

Hubert Blalock, the author of this text, notes that the average is generally used in preference to the median, but not always. There is an all-important difference between the two measures. The mean is affected by changes in extreme values whereas the median will be unaffected unless the value of the middle case is also changed.

... We may say, then, that whenever a distribution is highly skewed, i.e., whenever there are considerably more extreme cases in one direction than another, the median will generally be more appropriate than the mean.

The Update takes this difference and turns it on its head to make a fallacious argument in defense of the mean and against the median. In responding to its critics the Update argues:

The use of the median data essentially obscures — to the point of non-recognition — the effects of “high-end” verdicts on the trend in jury awards. But, as noted, these “high-end” verdicts, while only a small percentage of all jury awards, represent a very large percentage of the total dollars awarded by juries. Accordingly, median data substantially understate the growth of jury verdicts by eliminating or at

---

151. Id. at 27.
153. Id. at 69-70.
154. Id. (emphasis in original).
least greatly obscuring the effect of the large awards. 155

As this response makes clear, the mean is useful to the reformers’ attempt to substantiate claims of “skyrocketing” awards. If one uses the median, the response implies, there is little or no evidence of skyrocketing awards. The Update thus accuses critics of playing politics with the issue of the appropriate measure: “It is perhaps for that reason [the median being unaffected by extreme values] that critics of the Working Group’s Report have so enthusiastically embraced the use of median rather than average verdicts.” 156

The award figures from Cook County for the period 1981-85 illustrate the differences between the mean and the median. 157 The mean award for all plaintiff’s verdicts, not just in punitive damage cases, is $172,541 (in 1985 dollars). Table VI shows that the median award is only $10,982. Examining the proportion of successful plaintiffs’ victories with a jury award lower than the mean demonstrates the degree to which the distribution of awards in Cook County is skewed toward the low dollar end of the scale. Eighty-eight percent of all verdicts in which the plaintiff won at least one dollar are lower than the average award in Cook County for the years 1981-85. Thus, the median will present a radically different picture of the punitive damages system than the mean and places the alleged problem of award size in a new and interesting light.

Table VI presents further data on the median award for all of the sites in Tables III and IV — those with more than ten punitive damage awards for the period 1981-85. It shows the median punitive damage award, the median total award (including both compensatory and punitive damages) for those cases that include a punitive award, and the median total award for all successful cases. All dollar figures represent 1985 dollars, the last year included in the data set.

Table VI indicates that in most of the sites, the median punitive damage award is not at a level that is likely to “boggle the mind.” Fifteen of the twenty sites have median punitive damage awards below $40,000, thirteen of the sites have median punitive damage awards below $30,000. All five of the sites with the higher medians are in California. These higher medians for the California sites suggest that there may be a few lo-

155. UPDATE, supra note 101, at 39.
156. Id. (emphasis in original).
157. These data are from our own research; they are not drawn from the Rand studies.
ocations where punitive damages are relatively high. Nonetheless, the general pattern is one of low to modest awards.

TABLE VI
MEDIAN AWARDS IN 1985 DOLLARS
(Sites with 10+ Punitive Verdicts)

<table>
<thead>
<tr>
<th>County</th>
<th>Median Punitive</th>
<th>Median Total in Punitive Cases</th>
<th>Median Total in All Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maricopa, AZ</td>
<td>$26,450</td>
<td>$46,913</td>
<td>$20,702</td>
</tr>
<tr>
<td>Alameda, CA</td>
<td>90,000</td>
<td>206,500</td>
<td>64,900</td>
</tr>
<tr>
<td>Los Angeles, CA</td>
<td>111,000</td>
<td>260,000</td>
<td>84,240</td>
</tr>
<tr>
<td>Sacramento, CA</td>
<td>180,400</td>
<td>412,580</td>
<td>51,000</td>
</tr>
<tr>
<td>San Diego, CA</td>
<td>204,000</td>
<td>352,424</td>
<td>69,444</td>
</tr>
<tr>
<td>San Francisco, CA</td>
<td>87,300</td>
<td>212,225</td>
<td>65,587</td>
</tr>
<tr>
<td>Denver, CO</td>
<td>20,800</td>
<td>139,100</td>
<td>48,500</td>
</tr>
<tr>
<td>Jefferson, CO</td>
<td>20,000</td>
<td>86,400</td>
<td>29,800</td>
</tr>
<tr>
<td>Cobb, GA</td>
<td>10,800</td>
<td>16,452</td>
<td>11,074</td>
</tr>
<tr>
<td>DeKalb, GA</td>
<td>6,820</td>
<td>12,755</td>
<td>8,433</td>
</tr>
<tr>
<td>Fulton, GA</td>
<td>21,252</td>
<td>45,445</td>
<td>20,720</td>
</tr>
<tr>
<td>Cook, IL</td>
<td>19,184</td>
<td>38,222</td>
<td>10,382</td>
</tr>
<tr>
<td>Johnson, KS</td>
<td>5,570</td>
<td>12,980</td>
<td>9,687</td>
</tr>
<tr>
<td>Clay, MO</td>
<td>32,400</td>
<td>54,000</td>
<td>17,933</td>
</tr>
<tr>
<td>Jackson, MO</td>
<td>14,788</td>
<td>24,608</td>
<td>11,855</td>
</tr>
<tr>
<td>New York, NY</td>
<td>39,520</td>
<td>141,042</td>
<td>186,100</td>
</tr>
<tr>
<td>Multnomah, OR</td>
<td>26,000</td>
<td>38,689</td>
<td>25,900</td>
</tr>
<tr>
<td>Bexar, TX</td>
<td>25,500</td>
<td>50,534</td>
<td>16,911</td>
</tr>
<tr>
<td>Dallas, TX</td>
<td>25,960</td>
<td>66,525</td>
<td>19,688</td>
</tr>
<tr>
<td>Harris, TX</td>
<td>25,000</td>
<td>54,870</td>
<td>16,510</td>
</tr>
</tbody>
</table>

The second column in Table VI presents data on the median total award in cases that include a punitive damage award. Although higher than the median for all money damage cases, these figures are still surprisingly modest for most sites considering the reformers’ claims of skyrocketing award sizes. Six-figure medians do appear in the California sites as well as Denver and New York Counties. All seven of these sites with higher total median amounts, however, are sites with higher medians for all money damage cases.

The third column in Table VI shows that the typical jury award overall is also rather modest in most sites. In twelve of the twenty jurisdictions, the median for money damage cases generally is less than $25,000, hardly an amount to support the reformers’ rhetoric concerning rapidly increasing award sizes.
Only the five California sites and New York County have overall medians in excess of $50,000. New York County is the only site with a six-figure median.

E. SUMMARY

The results of this study are surprising considering the reformers' rhetoric concerning punitive damages. In the sites studied, punitive damages were not routinely awarded. Nor were punitive damages typically given in amounts that “boggle the mind.” Juries awarded punitive damages infrequently, and when they were awarded, the amount was generally modest. Even in Cook County, the reformers’ key example in the policy debate, punitive damage awards were rare, and the amounts of those awards were typically low. Furthermore, juries were least likely to award plaintiffs punitive damages in physical harm cases, even if that case involved medical malpractice or products liability. Courts were more likely to award plaintiffs punitive damages in financial harm and property harm cases and most likely to award such damages in emotional/reputational harm cases.

The punitive damages system that emerges from this study is significantly different than the system described by the reformers, and does not provide evidence of a nationwide problem. Thus, one should view with skepticism the claims that juries routinely awarded punitive damages, that they routinely awarded punitive damages in large amounts, and that these developments are nationwide in scope. Furthermore, one should also question the efficacy of proposed reforms that presume the veracity of such claims. The next section of this Article examines the accuracy of the reformers' final proposition, that the frequency and size of these awards are rapidly increasing.


A. THE DATA

Perhaps the most dramatic and evocative of the reformers' allegations is their claim that the frequency and size of punitive damage awards have changed dramatically in recent years. Proponents of reform assert that awards are skyrocketing to unprecedented levels.\footnote{Sales & Coles, supra note 12, at 1154-58; Brief of the American Institute of Architects, supra note 11, at 21-28.} They typically present data from three time periods (1960-64, 1970-74, and 1980-84) in Cook
County and San Francisco to support their allegations of rising punitive damage awards.\textsuperscript{159}

Ideally, a study of changes in awards would involve an examination of patterns and changes in the incidence and size of punitive damage verdicts over a long period of time, perhaps from the time Morris wrote his article in the 1930's\textsuperscript{160} to the present. Unfortunately, available data do not allow such a long-term view. The available data only permit a study of changes in the recent past. Even such a short-term approach, however, is valuable in assessing the reformers' allegations of dramatic change, which are themselves based on short-term surveys.

To explore patterns and changes in punitive damage verdicts in recent years, we examine Dallas County, Texas and Jackson County, Missouri for the period 1970-88. These sites certainly are not representative of the nation as a whole, and one should not view them as such. Rather, these two case studies provide a foundation for understanding patterns and changes in jury verdicts over time.\textsuperscript{161} We chose these sites as case studies for two reasons.\textsuperscript{162} The scarcity of data limits the number of sites available for study, and data are available for these two sites. In addition, both sites show a relatively high rate of punitive damage awards for the period 1981-85.

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|c|}
\hline
Site & N & Success Rate & N of Punitive & Punitive Rate & Median Punitive Award ($\text{58}$) \\
\hline
Dallas & 7,097 & 49.4\% & 454 & 12.9\% & $22,770$ \\
Jackson & 3,056 & 51.9\% & 232 & 14.6\% & $17,212$ \\
\hline
\end{tabular}
\caption{Dallas and Jackson Counties: 1970-1988}
\end{table}

Table VII provides an overview of activity in Dallas and Jackson Counties for the period 1970-88. It presents aggregate data for this time period on the total number of money damage verdicts, the plaintiff success rate, the number of punitive damages, and the median punitive award.

\textsuperscript{159} See UPDATE, supra note 101, at 33-38.
\textsuperscript{160} See supra note 3 and accompanying text.
\textsuperscript{161} See R. Yin, supra note 123, at 21, 38-41.
\textsuperscript{162} The authors also chose these sites to provide sites different from those typically used in discussions of jury verdicts — Cook County and San Francisco. See, e.g., UPDATE, supra note 101, at 33-38.
age verdicts, the punitive damage rate, and the median punitive damage award expressed in 1988 dollars, the last year covered.

The aggregate success rate for each county is very close to 50%. Thus, juries awarded plaintiffs a verdict for at least one dollar in about one-half of the cases. The punitive damage rate, representing the proportion of successful verdicts that include an award for punitive damages, for each county is below 15% — 14.6% in Jackson and 12.9% in Dallas. The median punitive damage award in each county is rather modest.

These aggregate figures, however, might mask patterns and changes throughout the nineteen year interval. The next section breaks down and analyzes the data in shorter time frames to determine if patterns emerge within the longer time period. This breakdown provides a timeline for jury awards leading to the relatively higher rates evident in 1981-85, and a basis for evaluating the reformers' claims of steadily increasing awards up to, and beyond, the early 1980's.

B. OVERALL PUNITIVE DAMAGE RATES

Figure I presents trend data on punitive damage rates for Dallas, Jackson, and Cook Counties for 1970-88. Cook County data are included because Cook County is so important to the reformers' allegations of rapidly increasing frequency of such awards. Figure I shows three very different patterns over time. In Dallas County, the punitive damage rate fluctuates within a relatively narrow range between 1970 and 1984. During these years the rate ranges from 6.6% in 1971 to 15.3% in 1978. After 1984, the rate steadily increases, reaching 25.6% in 1987. It then falls to 21.9% in 1988. In Jackson County, the pattern is different. Between 1970 and 1979, the punitive damage rate fluctuates within a relatively narrow range, from 5.5% in 1971 to 15.5% in 1976. It increases steadily after 1979, reaching a peak of 23.7% in 1983. The rate falls sharply to 7.9% in 1987, only to rise to 15% in 1988.

A comparison of the punitive damage rates in Jackson and Dallas Counties presents an interesting picture, quite different from what one would expect in light of the reformers' rhetoric. For most of the 1970's, the rates for each site remain within well-defined ranges with no directional trend. This rough similarity ends in the late 1970's as each county follows its own course. While Jackson County's punitive damage rate increases steadily after 1979, the Dallas County rate increases very little. When the Dallas County rate begins a more pronounced in-
crease in the mid-1980’s, the Jackson County rate decreases. These divergent patterns illustrate the futility of discussing a generalized national trend and of choosing any single jurisdiction as a basis for identifying and defining such a trend.

The Cook County data in Figure I further demonstrate this point. The pattern for Cook County is very different from the patterns for Dallas and Jackson Counties. The Cook County punitive damage rate remains surprisingly stable during the entire nineteen year period, maintaining a very low level. The rate fluctuates within an extremely narrow range, between 0.6% in 1971 and 4.1% in 1978. It exceeds 2% in only eight years.

Thus, rather than providing support for a consistently and dramatically increasing punitive damage rate as a broad, national phenomenon, Figure I suggests diversity in patterns and changes in punitive damage rates across the country. A national trend may not exist and jurisdictions may not experience the same patterns and changes over time. There may be only local trends in which some areas have increasing rates, some have decreasing rates, and still others, such as Cook County, experience no significant change. At best, some areas may share similar trends for punitive damage rates, but this remains an empirical question for future research.

The explanations for variations in overall punitive damage
rates are complex. To begin exploring the reasons for the variations, the next section breaks down the overall rate and examines patterns over time for the punitive damage rates in broad types of cases in Dallas and Jackson Counties.

C. PUNITIVE DAMAGE RATES FOR DIFFERENT CATEGORIES OF CASES

Figure II presents punitive damage rates for physical harm cases in Dallas and Jackson Counties during the nineteen year period of 1970-88. The most striking aspect of the chart is the very low rates. For example, the punitive damage rate for physical harm cases in Jackson County never rises above 9.4%. The reformers' rhetoric suggests that there should be a steady increase in the rate for these cases over time, or at the very least an increase after 1979 similar to the increase in Figure I for the overall rate. Neither of these patterns, however, appear in Figure II. In Jackson County, plaintiffs obtained a successful verdict in 831 physical harm cases between 1970 and 1988. Juries awarded plaintiffs punitive damages in only thirty-four of those 831 cases for a punitive damage rate of 4.1% in physical harm cases.

In Dallas County, the punitive damage rate for physical harm cases fluctuates within a narrow range between 1970 and 1985. The rate varies from 0% in 1970 to 9.7% in 1985. It increases to 23.5% in 1986 and 20.4% in 1987, but declines substantially to 6.7% in 1988. The punitive damage rate for physical harm cases in Dallas County increases at the same time that the plaintiff success rate for physical harm cases in Dallas County decreases. This finding suggests that the declining likelihood of plaintiff success may produce the increase in the punitive damage rate. Because the punitive damage rate is calculated from successful plaintiffs' verdicts, a decline in the success rate and a roughly constant number of punitive damage verdicts will result in an increase in the punitive damage rate. This is the situation in Dallas County. Overall, plaintiffs obtained a successful verdict in 1,081 physical harm cases in Dallas County during the 1970-88 period. The courts awarded plaintiffs punitive damages in sixty-six of those cases for a punitive damage rate for physical harm cases of 6.1%.

Figure III presents data on punitive damage rates for finan-

163. See supra notes 92-98, 106-08 and accompanying text.
164. See supra Table VII.
cial harm cases in Dallas and Jackson Counties. The patterns contrast with those in Figure II. The rates for financial harm cases are higher than the rates for physical harm cases, and they exhibit different patterns over the nineteen year period. In Jackson County, the punitive damage rate ranges from 0% in 1971 to 37.5% in 1973 and 38.9% in 1985. This range for punitive damage awards is greater than the range for Dallas County and greater than the range for physical harm cases in Figure II. Significantly, however, the Jackson County rates in Figure III exhibit no clear upward or downward trend. The rates fluctuate widely in no apparent pattern. Overall, plaintiffs obtained successful verdicts in 598 financial harm cases in Jackson County. Juries awarded plaintiffs punitive damages in 128 of these cases for a punitive damage rate of 21.4%.

In Dallas County, the punitive damage rate for financial harm cases fluctuates within a narrower range than in Jackson County, from 5% in 1980 to 29.9% in 1988. In addition, an identifiable pattern emerges in Dallas County. From 1970 to 1977, the punitive damage rate is stable, ranging between 8.6% in 1971 and 13.9% in 1975. In 1978, the rate increases to 23.5%, and then declines sharply to 5% in 1980. During the early 1980's, the rate steadily increases to 23% in 1985. It falls to 18.5% in 1986, but then rises to 29.6% in 1988. Thus, starting in 1980, a gradual upward trend emerges. Overall, plaintiffs ob-
obtained 1,905 successful financial harm verdicts in Dallas County for the 1970-88 period. Plaintiffs were awarded punitive damages in 274 of those cases for a punitive damage rate of 14.4%.

The highest rates for punitive damage awards in Dallas and Jackson Counties are in emotional/reputational harm cases. In many years, the rate is 100% in both counties. Unfortunately, the low numbers of successful cases in each year make it impossible to discuss long-term patterns. In Jackson County, plaintiffs obtained a successful verdict in eighty-one emotional/reputational harm cases. Plaintiffs were awarded punitive damages in fifty-three of those eighty-one cases for a punitive damage rate of 65.4%. In Dallas County, the plaintiffs obtained a successful verdict in seventy-eight emotional/reputational harm cases. Plaintiffs received punitive damages in fifty-one cases for an overall punitive damage rate of 65.4%.

The findings regarding punitive damage rates for different categories of cases in Dallas and Jackson Counties parallel those outlined in Part II of this Article. Plaintiffs were least likely to receive a punitive damage award in a physical harm case. In fact, punitive damage awards were rare in either county for such cases. Plaintiffs were somewhat more likely to receive a punitive award in financial harm cases, but punitive damage awards were still far from routine in these cases.
Plaintiffs were most likely to receive a punitive award in emotional/reputational harm cases, with nearly two-thirds of the successful plaintiffs being awarded punitive damages. The number of successful emotional/reputational cases, however, is too small to provide a basis for any conclusion about trends in the rate courts award punitive damages. Neither physical harm nor financial harm cases demonstrate dramatic trends over time. Figure II shows relatively low, stable rates in both counties for physical harm cases, generally below 10%. The only exceptions occur in 1986 and 1987 for Dallas County when the rate exceeded 20%, but these rates do not mark the beginning of an upward trend because the rate drops to below 7% in 1988. The only evidence of a trend is in Dallas County for financial harm cases. As Figure III shows, however, this is a gradual trend, hardly the type of change to be expected in light of the reformers’ claims of crisis.

D. Award Sizes

The reformers’ final claim is that the size of punitive damage awards has risen to unprecedented levels. They imply that most punitive damage awards are in six-figure amounts or even higher. This section examines typical award sizes to evaluate the widespread belief that punitive damage awards have risen to unforeseen levels.

Figure IV presents data on patterns and changes in median punitive damage awards (expressed in 1988 dollars) in Dallas and Jackson Counties for the period 1970 to 1988. For comparative purposes, Figure V shows patterns and changes in median total awards for all successful cases (again in 1988 dollars).

Two very different patterns for median punitive damage awards appear in Figure IV. In Jackson County, the pattern for punitive damage awards fluctuates, but follows no particular trend over time after the initial, sharp decline in the early 1970’s. The median awards in Jackson County were generally modest, not exceeding $25,000 in thirteen of the nineteen years. This pattern of relative stability in the typical award also appears in Figure V for the median total award for all money damage cases in Jackson County. The median total award fluctuated between $9,145 in 1974 and $22,785 in 1987, and only exceeded $20,000 once in 1987.

In Dallas County, the award pattern for punitive damages is quite different. Figure IV shows that the median punitive damage award fluctuates within a narrow range during the
1970's, between $6,654 and $23,060. During this period, the median exceeds $20,000 only once, in 1970. After 1979, the median punitive award varies widely, as evidenced by the steep peaks and valleys in Figure IV. From 1980 to 1988, the median ranges from $17,982 in 1983 to $75,000 in 1988. With the exception of 1983, the median is greater than $20,000 in each year and exceeds $40,000 in three years — 1982, 1984, and 1988.

Figure V shows that in Dallas and Jackson Counties, for median total awards, the patterns again diverged. In Dallas County, a distinct, but not sharp, upward trend appears after 1979. Interestingly, the wide fluctuations that appear in Figure IV do not arise in Figure V. From 1970 to 1979, the median total award for all money damage cases in Dallas County ranges between $4,948 and $16,045. After 1979, the median gradually increases. It reaches its highest level of $36,519 in 1987, but decreases slightly in 1988.

Figures VI and VII illustrate these patterns and changes in more detail. They present the interquartile range for punitive damage awards, which is the distance between the 25th and 75th percentile when one orders the awards from the lowest to the highest. The graphs are intended to identify underlying directional trends over time. A vertical line for each time period shows the distance between the 25th percentile and the 75th percentile. The 25th percentile marks the bottom of the line
for each time period, and it is the point at which 25% of the awards are less than this dollar amount when one orders the awards from lowest to highest. The 75th percentile marks the top of the line for each time period, and it is the point at which 25% of the awards are higher than this dollar figure and 75% are lower. The median, or 50th percentile, is the solid line that cuts through each interquartile range.

The graphs trace patterns over five time periods. They combine data for each time period to smooth out the peaks and valleys in awards, such as those in Figure IV, so that any underlying trends will emerge. If the size of punitive damage awards generally has increased substantially over time, not only should the median increase, but the 25th and 75th percentiles should also move upward at a similar rate.

The most noticeable aspect of Figure VI is the absence of the wide fluctuations in the median punitive damage award that appear in Figure IV. Instead, there is an underlying pattern of gradual increase in the median to 1982-85, and then a leveling off. The median punitive damage award in this smoothed pattern peaks at $28,940 in 1986-88. The 25th percentile in Figure VI increases only slightly over time, ranging from $2,885 in 1970-73 to $7,688 in 1986-88. The most dramatic changes appear in the 75th percentile and in the widening distance between the 25th and 75th percentiles, especially in 1978-81. The 75th percentile increases from $44,340 in 1970-73 to $97,620 in 1978-81. It decreases to $89,337 in 1982-85, and then increases again to $112,513 in 1986-88. Thus, the pattern in Figure VI is not a simple one of a dramatic increase over time in punitive awards generally, but rather one of an increase in the top 25% of the award distribution. If a substantial increase occurred in the size of punitive damage awards generally, the graph would show increases in the 25th percentile and the median to match those of the 75th percentile.

Figure VII presents a very different pattern for Jackson County. The median punitive damage award decreases slightly from 1970-73 to 1974-77. Following 1977, the median stabilizes with only a slight increase. The median peaks at $18,085 in 1986-88. The pattern for the 25th percentile is similar. The 25th percentile is $22,145 in 1970-73, but decreases to $8,081 in 1974-77. It falls again to $4,582 in 1978-81, then gradually increases to $5,725 in 1986-88. Again, the most dramatic changes involve the 75th percentile. It drops sharply after 1970-73 from $72,012 to $27,806 in 1974-77, but then increases to $65,490 in
FIGURE V
MEDIAN AWARD FOR ALL SUCCESSFUL CASES: 1970-88 (88$)

AMOUNT IN THOUSANDS

YEAR

- - Dallas  - - Jackson

FIGURE VI
RANGE FOR PUNITIVE DAMAGE AWARDS: DALLAS, 1970-88 (88$)

AMOUNT IN THOUSANDS

YEAR

Top of bar is 75th Percentile
Bottom of bar is 25th Percentile
Solid line is Median
1978-81. The 25th percentile and the median both decrease during the same time period. These data indicate that the increase in 1978-81 involves only those punitive damage cases at the high end of the award distribution, rather than punitive damage verdicts generally. Although details differ, the general patterns over time in Jackson and Dallas Counties are similar in this aspect. After 1978-81, the 75th percentile increases significantly while the median and 25th percentile remain relatively stable.

The patterns in Figures VI and VII suggest that any changes that have occurred in the punitive damages award structure have been at the high end of the scale. There are, in effect, two punitive damage systems in Jackson and Dallas Counties. One changes relatively little between 1970 and 1988, and it is comprised of the bulk of the cases. The second involves only the small proportion of cases with the highest awards. These few cases with the greatest award sizes explain the changes in Figures VI and VII.

E. THE TOP TWENTY-FIVE PERCENT OF THE AWARD DISTRIBUTION

To further explore this second punitive damage system,
this section examines the types of cases that account for the highest 25% of the award structure for each of the five time periods used above. The purpose is to describe the higher award punitive damage cases in more detail and not to make claims about their incidence or rates. The figures do not indicate a plaintiff's likelihood of receiving a high punitive damage award in a particular type of case. Instead, the data identify the categories of cases that constitute the highest 25% of the award structure for punitive damages in the two counties. The reformers' claims would lead to the expectation that this second system of unusually high awards is increasingly comprised of physical harm cases, particularly products liability and medical malpractice cases. This is not the situation, however, in Dallas and Jackson Counties.

Table VII shows the composition of the top 25% of the punitive damage award distribution for Dallas and Jackson Counties using the same time periods as in Figures VI and VII and the same case categories as in Tables III and IV. The table presents the percentage of punitive damage cases in each category, with the number of punitive damage cases for each time period in parentheses. For both counties, the overwhelming proportion of high award punitive damage cases involve financial harm, not physical harm. In Dallas County, the proportion of punitive damage awards in financial harm cases remains within a 10% range between 61.5% and 71%. The other three categories experience greater fluctuations.

A more detailed examination shows that slightly more than one-half of the financial harm cases in Dallas County involve fraud. Overall, there are 116 cases in the top 25% of the punitive damage award distribution in Dallas County for the period 1970-88. Of these 116 cases, 65.1% (79) involve financial harm. Fraud comprises 51.9% (41 of 79) of those financial harm cases, with the largest number of fraud cases involving real estate fraud (9 of 41). Twenty-four of the seventy-nine financial harm cases concern contractual matters and only one of those twenty-four cases is a bad faith suit against an insurance company. Finally, ten of the seventy-nine financial harm cases involve business practices, such as tortious interference, and three cases involve landlord/tenant matters.

Nineteen, or 16.4%, of the top 25% of punitive damages awards in Dallas County involve physical harm. Surprisingly,

165. See Mahoney & Littlejohn, supra note 10, at 1396; UPDATE, supra note 101, at 35-38.


**TABLE VIII**

**BREAKDOWN OF HIGHEST 25% OF PUNITIVE DAMAGE AWARD DISTRIBUTION BY HARM: DALLAS AND JACKSON, 1970-88**

<table>
<thead>
<tr>
<th>Type of Harm Alleged</th>
<th>Physical</th>
<th>Financial</th>
<th>Property</th>
<th>Emotional</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>DALLAS</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1970-73 (N=13)</td>
<td>7.7%</td>
<td>61.5%</td>
<td>15.4%</td>
<td>15.4%</td>
</tr>
<tr>
<td>1974-77 (N=20)</td>
<td>10.0%</td>
<td>70.0%</td>
<td>15.0%</td>
<td>5.0%</td>
</tr>
<tr>
<td>1978-81 (N=21)</td>
<td>9.5%</td>
<td>66.7%</td>
<td>4.8%</td>
<td>19.0%</td>
</tr>
<tr>
<td>1982-85 (N=31)</td>
<td>19.4%</td>
<td>67.7%</td>
<td>9.7%</td>
<td>3.2%</td>
</tr>
<tr>
<td>1986-88 (N=31)</td>
<td>25.8%</td>
<td>71.0%</td>
<td>3.2%</td>
<td>0%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>116</td>
<td>68.1%</td>
<td>8.6%</td>
<td>6.9%</td>
</tr>
</tbody>
</table>

| **JACKSON**           |          |           |          |           |
| 1970-73 (N=5)         | 20.0%    | 40.0%     | 0%       | 40.0%     |
| 1974-77 (N=9)         | 12.5%    | 62.5%     | 0%       | 25.0%     |
| 1978-81 (N=12)        | 0%       | 46.2%     | 23.1%    | 30.8%     |
| 1982-85 (N=23)        | 21.7%    | 52.2%     | 4.3%     | 21.7%     |
| 1986-88 (N=12)        | 25.0%    | 75.0%     | 0%       | 0%        |
| **TOTAL**             | 61       | 55.7%     | 6.6%     | 21.3%     |

Only three of these nineteen are product liability cases. Moreover, each of the products liability cases occurs in a separate time period. Thus, there is no trend of an increasing number of products liability cases at the high end of the punitive damage award distribution in Dallas County. Even more surprisingly, only one medical malpractice case appears among the highest awards and it occurs in the 1982-85 period. Of the physical harm cases in the top 25% of the award distribution for Dallas County, vehicular accidents appear most frequently, with five overall. The remaining ten physical harm cases represent various subjects, including premises liability (3), assault (2), work injury (1), toxic tort (1), and negligence (1).

Contrary to what might be expected, therefore, medical malpractice and products liability cases do not constitute a large proportion of the cases in the top 25% of the punitive damage award distribution in Dallas County. Rather, cases involving fraud, contractual matters, and business practices dominate the high end of the punitive damage distribution. These cases cause the increase in the 75th percentile over time in Figure VI.

The composition of the highest 25% in the award distribu-
tion for Jackson County is roughly similar to that for Dallas County. Table VIII shows that financial harm cases again dominate, reaching 75% of all cases in this part of the award distribution in 1986-88. Physical harm cases are much less prominent. Only two physical harm cases appear during the first two time periods in Jackson County, an assault case and a medical malpractice case. Five physical harm cases occur in 1982-85: three products liability cases, one work injury case, and one negligence case. Then in 1986-88, there are three physical harm cases: one vehicular accident case, one assault case, and one products liability case. Overall, physical harm cases comprise 16.4% of the cases in the top 25% of the distribution in Jackson County.

Financial harm cases account for thirty-four, or 55.7%, of the cases in the top 25% of the distribution in Jackson County. The financial harm cases fairly evenly represent four categories of cases: fraud (9), employment matters (9), business practices (9), and contractual matters (7). The prevalence of employment matters results from a Missouri statute that allows individuals to sue their former employers in certain situations;\textsuperscript{166} a provision not enacted in Texas.\textsuperscript{167}

In summary, financial harm cases accounted for the largest proportion of cases in the top 25% of the punitive damage award distribution in both Dallas and Jackson Counties. Additionally, the proportion represented by financial harm cases increased over time. Although the proportion of physical harm cases also increased, the numbers remained relatively small. No upward trend, or trend of any kind, emerged for products liability and medical malpractice cases, the categories most discussed by the reformers.\textsuperscript{168} Rather, the driving force behind the changes in the 75th percentile in Figures VI and VII are cases involving fraud, contractual issues, employment matters, and business practices.

F. PUNITIVE DAMAGES IN RELATION TO OTHER DAMAGES

Two remaining issues in the punitive damages debate concern the percentage of a total award represented by punitive

\textsuperscript{166} MO. REV. STAT. § 290.140 (Vernon Supp. 1990); see also Comment, Missouri's Service Letter Statute: Its Reach, Effect and Constitutionality, 52 UMKC L. Rev. 641 (1984) (describing the scope and effect of recent amendment to this statute).

\textsuperscript{167} See Comment, supra note 167, at 665.

\textsuperscript{168} See REPORT, supra note 101, at 35-40.
damages and the ratio of punitive damages to all other damages. Both of these issues have long been debated. In fact, Morris noted the need for systematic, empirical information on the issue of proportionality in his 1931 article.\textsuperscript{169} The rhetoric of reform suggests that courts typically award punitive damages in amounts that far exceed compensatory damages.\textsuperscript{170} Furthermore, this disparity between compensatory and punitive damages is allegedly increasing over time.\textsuperscript{171} Reformers claim that punitive damages are responsible for a general explosion in awards.

Figure VIII shows the percentage of total awards represented by punitive damages for both Dallas and Jackson Counties. It presents this information as an average percentage and as a median percentage. The graph uses the same time periods as in Figures VI and VII to smooth out the peaks and valleys in the year-to-year patterns and thereby reveal underlying trends.

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure_viii.png}
\caption{PERCENT OF TOTAL CASE AWARD MADE UP BY PUNITIVE DAMAGES: 1970-88}
\end{figure}

Figure VIII shows that in Jackson County, where the typical punitive damage award is lower than in Dallas County, the percentage of the total award that punitive damages represent

\begin{thebibliography}{9}
\bibitem{169} Morris, supra note 3, at 1182.
\bibitem{170} See supra notes 61-65 and accompanying text.
\bibitem{171} Id.
\end{thebibliography}
PUNITIVE DAMAGES

is consistently higher than in Dallas County for both the average percent and the median percent. Contrary to the reform rhetoric, the data show surprising stability over time in Jackson County, rather than an increase. The average percentage fluctuates within a narrow range, from 66% in 1970-73 to 68% in 1982-85. The median percentage also remains within a relatively narrow range, from 63% in 1974-77 to 78% in 1982-85. Following a slight decrease in 1974-77, during the 1980's the median percentage gradually increases to its earlier levels. Thus, neither measure of central tendency provides evidence of a long-term directional trend in Jackson County for the percentage of the total award represented by punitive damages. Instead, the data show stability, especially for the average percentage.

The pattern in Dallas County in Figure VIII for the average percent of the total award that punitive damages represent is roughly similar to that for Jackson County. The average percentage for Dallas County is relatively stable, although it decreases slightly in 1982-85. The median percentages for the two counties, however, have divergent patterns. In Dallas County, after a slight increase in 1978-81, the median percentage decreases, while in Jackson County, the median percentage increases gradually from 1974-77 to 1982-85 and then levels off. Therefore, although the patterns for the two sites differ, neither county experiences a sharply increasing trend over time that would be expected in light of the rhetoric of reform.

Another method of examining the proportionality issue is to compare the ratio of punitive damages to all other damages (P/T - P, where P = punitive award and T = total award). Again, the reformers' claims suggest that the ratio will be high and that the size of the ratio will increase over time. Figure IX shows the ratio of punitive damages to all other damages for Dallas and Jackson Counties. These data differ from those in Figure VIII in an important aspect. The percentages in Figure VIII have a maximum upper limit (100%), while the ratios in Figure IX have no upper limit. As with punitive damage awards, a small number of unusually high ratios can cause misleading results. Consequently, Figure IX uses the median ratio rather than the average ratio for each time period.

Figure IX shows two different patterns for Dallas and Jackson counties. In Dallas County, the median ratio of punitive damages to other damages remains stable during the first two periods. The ratio for both 1970-73 and 1974-77 is 1.0, re-
representing a 1:1 ratio of punitive damages to other damages. The ratio rises slightly in the third time period to 1.34, or 1.34:1. After 1978-81, the ratio declines to 0.74 in the fourth time period and to 0.67 in the final period. These results do not support the reformers' claims. To the contrary, the ratio of punitive to other damages decreases during the time period when the median punitive damage award rises (1978-81). This suggests that in Dallas County, patterns in the size of punitive damage awards are not necessarily linked to patterns in the ratio of such awards to compensatory awards.\(^{172}\) The reform rhetoric presumes a direct, positive relationship in which both increase dramatically.

In Jackson County, the median ratio of punitive damages to other damages initially decreases, then gradually increases. The ratio declines from 3.08 in 1970-73 to 1.98 in 1974-77. It then increases to 2.5 in 1978-81 and 3.53 in 1982-85, before decreasing to 3.2 in the final time period. As in Dallas County, the pattern for the median punitive damage award, shown in Figure VII, does not correspond to the pattern in Figure IX. The increase in the ratio does not translate into an increase in the size of the typical punitive damage award.

Independent of the patterns in the ratios for Jackson and
\(^{172}\) See Figure VI.
Dallas Counties is the question of whether these ratios are too high. The answer is not obvious because of a lack of comparative standards. If the reformers' claims are used as a standard, both sets of ratios appear quite low because the reformers refer to ratios in the hundreds if not the thousands.173 A more appropriate source for a comparative standard might be the various statutory provisions for multiple damages and recent tort reforms. For instance, federal law allows treble damages in antitrust suits,174 and many states permit multiple damages in a variety of situations. The Texas Deceptive Trade Practices Act, for example, allows multiple damages up to three times compensatory damages.175 Of more relevance, a series of tort reform measures recently enacted in Texas provide new standards for punitive damage awards.176

The Texas Omnibus Tort Reform Act of 1987 limits the amount of exemplary damages recoverable in certain actions to the greater of $200,000 or four times actual damages.177 Using the 4:1 standard for comparison, the median ratios for Dallas County are quite low. Only 3.5% (16 of 454) of the punitive damage verdicts in Dallas County between 1970 and 1988 exceed the limits of the Texas law. Although the ratios for Jackson County are higher than those in Dallas County, most are still below the 4:1 limit. Only 9.1% (21 of 223) of the punitive damage verdicts in Jackson County exceed the limits of the Texas law. Thus, for these two sites, any problems that might exist with regard to the ratio of punitive damages to all other damages are minor.

G. SUMMARY

In summary, the results of the study do not support the reformers' claims regarding patterns and changes in punitive damage awards over time. Juries did not routinely award punitive damages in Dallas and Jackson Counties, and no consistent patterns of increasing incidence over time appeared. The punitive damage rates for physical harm cases, including the high visibility areas of medical malpractice and product liability, were extremely low throughout the nineteen years examined.

173. See Mahoney & Littlejohn, supra note 10, at 1397.
175. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1987).
Furthermore, the typical punitive damage award remained modest. The upward trends existed only in the highest 25% of the punitive damage award distribution, suggesting that there were effectively two punitive damage systems in these sites: one for the bulk of punitive damage cases, in which the size of awards only slightly increases, and another for a small proportion of the cases in which the size of awards does significantly increase. Contrary to what might be expected, most of the cases in this higher award system involved financial harm rather than physical harm. What factors determine whether a given case falls into one system or the other is unclear at this time. Finally, the data did not show an increase in the percentage of the total award represented by punitive damages over time or an increase in the ratios of punitive damages to other damages.

Again, these two sites are only case studies, and cannot be used to make generalizations about national trends. The findings do provide a context, however, for interpreting the reformers’ claims about patterns and changes in the incidence and size of punitive damage awards. The results of our study suggest a skeptical approach to empirical claims made about patterns and changes in punitive damage verdicts in recent years, as well as the reform effort itself.

CONCLUSION

Tort reform is about fundamental change in the rules of the game, changes that will clearly benefit certain interests. As the editor of one legal newspaper pointed out to his readers at the end of a series of stories on tort reform and the insurance crisis, “the current tort reform movement seeks not neutral efficiency-enhancing procedural changes, but substantive legal revisions to rewrite the rules more in their [the reformers’] favor.” This movement is predicated on a particular characterization of the civil justice system and how the system has changed in recent years. It draws its impetus from the characterization of a system in crisis that is threatening the nation’s well-being and economic stability.

Such a characterization, however, should be viewed skepti-
Public policy problems, political scientists Cobb and Elder note, are socially constructed: "They arise not so much from events and circumstances as from the meanings that people attribute to those events and circumstances." Each characterization brings its own unique solutions and causal logic to explain the problem. According to Cobb and Elder, the way people define a problem has the effect of allocating responsibility or blame, judging the comparative social worth of different groups and people, and affirming or disapproving certain values, beliefs, and lifestyles. To gain support for their characterization of a civil justice system in crisis, the reformers appeal to fear and anxiety that can be alleviated only by their ready-made solutions.

The reformers' characterization is especially important because it provides the working context for any reforms that legislators might enact. The findings presented in this Article provide good reason to be skeptical of the veracity of the reformers' characterization. The findings challenge widespread beliefs that punitive damages are awarded routinely, and in large amounts, that the frequency and size of these awards are rapidly increasing, and that these phenomena are national in scope. Although accuracy might not be relevant to the reformers' short-term goal of gaining access to the public policy agenda, it is relevant to the efficacy of any reform proposals enacted. Policy changes based upon a characterization that is not reasonably accurate are unlikely to succeed or fulfill the expectations the reformers created.

Malcolm Feeley reached a similar conclusion in his study of failed criminal justice reforms. He concluded that one can find the roots of failure in the mistaken notion of a crisis in the courts, in "the exaggerated assertions about the problems faced by the courts, the historical perspective that informs (or, more properly, fails to inform) so much analysis, and the easy — and often wrong — answers implied in so many crisis-generated discussions." Tort reform illustrates a pathological aspect of the public policy process: that in some situations gaining access to the public policy agenda might undermine the efficacy of the poli-
cies subsequently enacted. Obtaining access to the agenda involves controlling the meaning given to events and circumstances. The efficacy of policy changes depends on a reasonably accurate assessment of reality. The approach used to gain access to the agenda does not always undermine the policy changes subsequently enacted, but this is the probable result with regard to punitive damages and tort reform. Any changes in the punitive damages system are likely to be based on an unfounded, and perhaps manufactured,\textsuperscript{185} notion of crisis and a fundamental misunderstanding of the problem, the dynamics of the system, and the pattern of change.\textsuperscript{186}

\textsuperscript{185} See R. Hayden, supra note 9, at 7; Daniels, supra note 9, at 309.

\textsuperscript{186} M. Feeley, supra note 54, at 205.