THE FARMER'S RETORT TO TORT REFORM: WHY LEGISLATION TO LIMIT OR ELIMINATE PUNITIVE DAMAGES HURTS THE AGRICULTURAL SECTOR

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I. INTRODUCTION

Farming is a hazardous occupation. As a group, farmers and their families are at very high risk for fatal and non-fatal injuries.[1] Across the nation, there

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were over seven hundred work fatalities in agriculture in 2002.[2] That amounted to 21 deaths per 100,000 workers in agriculture, startlingly higher than the 3.6 deaths per 100,000 for all industries that year.[3] In 2001, according to Iowa State University, fifty-one Iowa residents were injured in agriculture-related incidents.[4] That same year, there were twenty-two agricultural fatalities reported.[5] Children are often in harm's way in agricultural activities, too. Minors of any age may perform farm work at any time on a farm owned or operated by a parent or guardian.[6] On average, over two hundred children, nationwide, are killed each year while performing farm work.[7] Tens of thousands of young people are injured from those same activities.[8] When farmers themselves are hurt, the effects of those injuries can be far-reaching. Approximately five hundred agricultural workers are injured daily, to the extent that they suffer a loss of work time, with around five percent of those injuries causing permanent impairment.[9] Given that workers' compensation laws exclude farmers from coverage, specifically self-employed family farmers,[10] these injuries and deaths have an incredible impact of the financial viability of many farming families. In fact, workers' compensation laws go great lengths to bar independent farmers and most agricultural laborers from recovery rights.[11] Injured farmers are often forced to hire additional help to run their operations, resulting in a significant reduction in income at a time when

1. Nat'l Inst. for Occupational Safety & Health, CDC, Traumatic Occupational Injury: Agricultural Safety, *at* http://www.cdc.gov/niosh/injury/traumaagric.html (last visited Oct. 26, 2004) [hereinafter TRAUMATIC OCCUPATIONAL INJURY].

2. NAT'L SAFETY COUNCIL, FACT SHEET & RESOURCES ABOUT CURRENT AGRICULTURAL AND FARMING ISSUES (Sept. 2003), *available at* http://www.nsc.org/farmsafe/factsheets.htm.

3. News Release, National Safety Council, Focus on Farm Security: 60th Annual Farm Safety and Health Week: September 21-27 (Aug. 22, 2003), *available at* http://www.nsc.org/news/nr082203.htm.

4. Agric. and Biosystems Eng'g Dept., Iowa State Univ. Extension, Iowa Injury Report: January 1, 2001-December 31, 2001 4,*available at* http://www.abe.iastate.edu/Safety/PDF/Injuries2001.pdf (last visited Oct. 27, 2004).

5. AGRIC. AND BIOSYSTEMS ENG'G DEPT., IOWA STATE UNIV. EXTENSION, IOWA FATALITY REPORT: JANUARY 1, 2001-DECEMBER 31, 2001*, available at* http://www.abe.iastate.edu/Safety/PDF/Fatalities2001.pdf (last visited Oct. 27, 2004).

6. U.S. DEP'T. OF LABOR, YOUTH AND LABOR: AGRICULTURAL EMPLOYMENT, *at* http://www.dol.gov/dol/topic/youthlabor/Agriculturalemployment.htm (last visited Oct. 27, 2004).

7. NAT'L SAFETY COUNCIL, THE PLAIN FACTS . . . ABOUT THE AGRICULTURAL INDUSTRY (Apr. 17, 2002), *available at* http://www.nsc.org/issues/agri/indus.htm.

8. *See* TRAUMATIC OCCUPATIONAL INJURY, *supra* note 1.

9. *Id.*

10. *See* ARTHUR LARSON & LEX K. LARSON, 2 LARSON'S WORKERS' COMPENSATION § 75.01 (desk ed. Matthew Bender & Co. 2001) (1972); IOWA CODE § 85.1.3 (2003).

11. *See* IOWA CODE § 85.1.3 (providing detailed lists of individuals, who may be connected to agricultural labor, and are excluded from workers' compensation).

dollars are already short due to medical bills. Add to that the steady reduction in rural hospitals and medical care facilities, not to mention the number of farmers working without health insurance, and the problem compounds even further– persons injured often have minimal access to efficient and affordable treatment.

When farmers and their families are injured, the effects can be devastating. While injuries and fatalities to those in the agricultural sector are of serious concern to farmers across the nation, this Note will focus on the problem in Iowa. This is done for two reasons: the developing legal debate in Iowa concerning products liability makes the state a prime case study, and the prominence of agriculture in the state makes the agricultural impact of tort reform clear. Tort reform (the prospect of altering the way that damages are awarded in civil cases) has been a hot topic of debate across the nation.[12] The Iowa Legislature, Iowa Governor, and Iowa Courts have all been involved in an intense battle over the issue of punitive damages.[13] Therefore, the situation in Iowa makes it perfect for analyzing the merits of this debate in relation to the agricultural community.

II. THE BASICS OF TORT REFORM AND PUNITIVE DAMAGES

With popular opinion demanding a solution to massive jury awards and ridiculous lawsuits, it has not taken long for the tort reform movement to gather enough momentum to start having a significant role in state and national politics. To appreciate the seriousness and complexity of this issue, however, requires a thorough top-to-bottom analysis of products liability doctrine before seeking to implement policy solutions.

There are several types of torts, but in the world of tort reform the two primary areas of concern are products liability and medical malpractice. Medical malpractice is the area of law that holds medical professionals accountable for harm caused by their conduct after they fail to comply with reasonable standards.[14] In products liability, the law generally holds companies responsible for putting unreasonably dangerous products on the market.[15] This Note will focus

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12. *See generally* Richard Benedetto, *Bush Renews Liability Debate*, USA TODAY, Jan. 16, 2003 (stating the political and legislative debate over medical liability reform is expected to be lengthy), *available at* http://www.usatoday.com/news/washington/2003-01-16-liability_x.htm.

13. *See* Bob Rush, Editorial, *Legislators Ignored Constitution by 'Logrolling,'* DES MOINES REG., Dec. 12, 2003, at 19A (opining that state legislators added controversial policies to an economic development package).

14. *See* BLACK'S LAW DICTIONARY 959 (6th ed. 1990).

15. *See, e.g.,* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944) (holding that if a company fails to discover defects in their product, it will still be found liable for any injuries resulting therefrom).

on products liability, because it includes the claims for injuries resulting from defective agricultural implements.

There are two main branches that products liability law focuses on: design defects and manufacturing defects.[16] Design defect law encompasses failures to properly design products for safe use, while defective manufacturing law deals with flaws that result from the actual production of the product.[17] Also, the failure to adequately warn of known dangers is included in the field of products liability.[18] A manufacturer is in the best position to reduce the risks of injury, whereas the losses to the injured person can be overwhelming.[19] With manufacturers capable of insuring against these risks and absorbing costs, the law makes the manufacturer accountable for injuries that result from defective products that have entered the marketplace.[20]

Punitive damages are only available for torts that result from the most extreme misconduct, requiring "a willful and wanton disregard for the rights or safety of another" for recovery.[21] Punitive damages are jury awards that go beyond compensatory damages, which simply seek to restore a plaintiff or injured party to pre-injury status.[22] Punitive damages are designed, therefore, to "punish" tortfeasors (i.e., those who cause injuries to others) whose conduct has been particularly egregious.[23] As the Iowa Supreme Court stated in *Ezzone v. Riccardi,* "[p]unitive damages are awarded, not because a plaintiff deserves them, but as punishment, to deter the defendant and others from repeating similar outrageous conduct."[24] By their very nature, punitive damages are designed to have a financial impact that not only gets the attention of the defendant for unreasonable conduct, but also to cause the entire industry to take notice and take corrective action.

III. WHO IS SUPPORTING TORT REFORM?

The punitive damages area of tort law has been a lightning rod for criticism in recent years; it has been the "poster child" for the lawsuit backlash that has enraptured the American public. The message touted is quite clear: no more

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16. LEWIS BASS, PRODUCTS LIABILITY: DESIGN AND MANUFACTURING DEFECTS §§ 4:3, 4:8 (2d ed. West 2001).
17. *See id.*
18. *See id.* at § 10:1; Lovick v. Wil-Rich, 588 N.W.2d 688, 693-94 (Iowa 1999).
19. BASS, *supra* note 16, at §§ 1:18, 1:19.
20. *See Escola*, 150 P.2d at 438-40.
21. IOWA CODE § 668A.1.1(a) (2003).
22. *See* BLACK'S LAW DICTIONARY, *supra* note 14, at 390.
23. *Id.*
24. Ezzone v. Riccardi, 525 N.W.2d 388, 398 (Iowa 1994).

enormous jury awards. President George W. Bush has pressed for reform on a number of occasions, urging that there should be no more "litigation lottery" winners.[25] The rhetoric has galvanized the public perception that trial lawyers and juries are out of control, ruining our society, and tarnishing the American justice system.[26] Tort reform proponents contend that by ridding plaintiffs of the potential for punitive damages, nuisance suits will fade away and people will become more accountable for their own actions.[27] Corporate leaders have stepped up on their soapboxes as well, telling stories of how their fear of lawsuits has been driving up costs and forcing businesses to move into less hostile legal environments.[28] Insurance companies allege that punitive damages have caused their expenses to skyrocket, forcing them to increase the rates they charge customers.[29] Doctors say they feel handcuffed by the fear of malpractice lawsuits and the expenses of paying for malpractice insurance coverage, and they point to tort reform as the solution to their woes.[30] These assertions have brought calls to restore virtues of integrity and accountability in people, rather than allowing people to use the legal system to shift the blame for accidents. The tort reform movement has permeated our society, putting enormous pressure on policymakers to address the issue in a bold and meaningful manner.

Political special interest groups have been lining up on the front lines of this policy battle. Business leaders argue they cannot afford to defend themselves in the U.S. and will move to more legally-friendly areas.[31] Professional medical organizations promulgate the same types of arguments—namely that doctors cannot afford malpractice insurance because current punitive damages laws artificially inflate health care costs and push them out of the medical field for fear of being sued.[32] Insurance groups that contend premiums will come down if punitive damages are reduced or eliminated have very powerful and af-

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25. *See* Benedetto, *supra* note 12.

26. *See* Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1095-96 (1996).

27. *See id.*

28. *See, e.g.,* David A. Lieb, *House Backs Limits on Liability Lawsuits*, JEFFERSON CITY NEWS TRIB., Feb. 27, 2003, at 5, *available at* http://www.newstribune.com/articles/2003/02/27/export184328.txt.

29. *See, e.g.,* Brenda Kimery, *Tort Liability of Nonprofit Corporations and Their Volunteers, Directors, and Officers: Focus on Oklahoma*, 33 TULSA L. J. 683, 687 (1997).

30. *See, e.g.,* Robert Ward Shaw, *Punitive Damages in Medical Malpractice: An Economic Evaluation*, 81 N.C. L. Rev. 2371, 2372-73 (2003).

31. *See* Joachim Zekoll, *Liability for Defective Products and Services*, 50 AM. J. COMP. L., Fall 2002 Supplement, at 121, 158 (2002).

32. *See id.*

fluent political action committees piping their message not only to policy-makers, but also directly to the public.[33]

These messages sound reasonable to the people who pay premiums, definitely a large network upon which to build a political base. It is often insurers who are stuck footing the bill on jury awards, which explains why insurance companies have been taking the lead in pushing tort reform.[34] Business leaders, doctors, and insurance companies have impressive political clout and are looking to do some heavy lifting to get tort reform legislation enacted.[35] But, it is really the simplicity of their message—that through tort reform comes economic growth and a better society—that these groups make strides building a popular national consensus.[36]

IV. TORT REFORM'S CURRENT OPPOSITION

Contrast these points with those of tort reform opponents, whose public presence often seems dwarfed by the proponents of change.[37] At the forefront of the opposition to tort reform are trial lawyers, and for good reason.[38] They see tort reform as a real threat to their careers and have a genuine fear that changes will put significant limits on their ability to seek legal remedies for their clients.[39] In addition, civil liberties groups and consumer advocates also have very clear reasons for opposing tort reform.[40]

Primarily, these groups are very concerned about citizens' legal rights being taken away, in favor of corporations.[41] Put simply, the groups opposing tort reform assert that powerful and wealthy corporate interests want to avoid any kind of accountability that could hurt their bottom lines.[42] Tort reform opponents also fear that eliminating punitive damages will make it easier for manufacturers

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33. *See id.* (citations omitted).

34. *See* Jane C. Arancibia, *Statutory Caps on Damage Awards in Medical Malpractice Cases*, 13 OKLA. CITY U. L. REV. 135, 137-40 (1988).

35. *See, e.g.,* G. Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445, 1457-58 (2003).

36. *See, e.g.*, Galanter, *supra* note 26, at 1095.

37. *See* Joseph Sanders, *Adversarial Legalism and Civil Litigation: Prospects for Change*, 28 LAW & SOC. INQUIRY 719, 720-21 (2003).

38. *See* Ivan E. Bodensteiner, *Consumers Beware–A License to Injure,* 29 VAL. U. L. REV. 1171, 1174-1175 (1995).

39. *See id.*

40. *See generally id.* at 1177 (explaining the financial effect on a typical family if tort reform passed).

41. *See* Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 15-16 (1992).

42. *See* Mary Alexander, *Double Standards on Capitol Hill*, 39 TRIAL, June 2003, at 9.

to place dangerous products on the market.[43] In the end, these groups think tort reform does not make bad doctors better—it just fails to allow injured patients a chance to hold bad doctors accountable.[44]

Interestingly, social scientists also fall into the opposition category.[45] They want to see more proof of reformers' claims before endorsing the tort reform movement in any aspect, because their analysis of issues is very statistic-intensive.[46] An example that frustrates social scientists is the contention that tort reform will keep businesses from relocating outside the U.S. seeking less hostile legal environments, because such economic motivation to relocate in the first place is fictitious. Punitive damages awards in product liability claims deal with issues of where products are purchased and used—not where they are manufactured.[47] Therefore, in terms of punitive damages, foreign companies whose products are purchased and used in the U.S. are just as accountable for their misconduct as any domestic producer.[48] Currently, most of the argument for tort reform is based on broad generalizations rather than solid data compilation.[49]

While opposition groups do have political clout of their own, their message is significantly more complex, which makes it difficult for them to gain ground in the sound-byte style of debate through which the public chooses its side. Arguing that civil liberties and corporate responsibility are in the balance can get traction at the household kitchen table, but the connections just are not as easy to draw on this side of the debate. This, as well as other factors that guide perception, has kept tort reform resistance from enjoying the kind of popular support accessible to the reformers.

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43. *See* Larry S. Stewart, *The Good, the Bad, and the Ugly: Handling Products Liability Cases in the New Millennium*, 2 ATLA ANN. CONV. REFERENCE MATERIALS 2359 (2002) (advocating the rejection of the American Law Institute's recommendations for the new *Restatement (Third) of Torts: Products Liability*).

44. *See* IOWA CITIZEN ACTION NETWORK, MEDICAL MALPRACTICE LAWS MAKE AMERICA SAFER, *at* http://www.yawp.com/ican/cjcp/cjcpmedmal.shtml (last visited Oct. 28, 2004).

45. *See* Michael McCann et al., *Java Jive: Genealogy of a Judicial Icon*, 56 U. MIAMI L. REV. 113, 115 (2001) (identifying the power dimensions and tactics of tort reform advocates).

46. *See id.* (identifying social scientists who utilize sociolegal studies to challenge tort reformers' claims).

47. *See* Rustad, *supra* note 41, at 82-84 (stating punitive damages are assessed based on point of sale and not place of manufacture).

48. *See id*. at 83 (stating foreign companies who sell products in the United States are subject to liability for punitive damages).

49. *See id.* at 82-85 (the arguments for punitive damages reform comes from broad generalizations and from the underlying facts).

V. WHAT TORT REFORM REALLY MEANS FOR FARMERS: THE IOWA TORT REFORM SAGA

A. *How Tort Reform has Progressed in Iowa*

Although Iowa has never been noted for excessive jury awards, tort reformers have become quite active in recent years with efforts to cap recovery amounts, reduce the amount of time to file claims after accidents, send all or part of punitive damage awards to the state rather than the plaintiff, and raise the standard of proof in tort cases.[50] The Association of Business and Industry in Iowa has stated its goals regarding punitive damage reform include sending all damages awarded to the state and preventing attorneys from being able to receive contingency fees from punitive damages—steps that would essentially destroy any incentive for a plaintiff or attorney to go through the expensive and exhausting litigation process.[51] While Iowa is in the middle of tort reform debates, elsewhere, reform efforts have completely eliminated punitive damages in Nebraska and Washington; limited punitive damages to instances specifically authorized by statutes in Louisiana and Massachusetts; and capped punitive damages at certain set dollar amounts in Alabama, Georgia, Indiana, Nevada, New Jersey, Texas, and Virginia.[52]

In addition to reforms enacted in past years, Iowa tort reformers made huge strides during the 2003 special session of the Iowa Legislature. Both the Iowa House and Senate tacked several regulatory reforms onto the Iowa Values Fund Legislation.[53] Iowa Governor Tom Vilsack had under a month to sign or veto this legislation and decided to use his line-item veto power to strike portions of the bill.[54] Though the legislation had the Governor's top priority because it contained the Values Fund as its centerpiece (the topic and impact of which is well beyond the scope of this Note), it also included language that changed workers' compensation laws, the tax code, and also included a sweeping piece of

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50. *See* Interview with Gene Fraise, Iowa State Senator, Agriculture Committee Ranking Member, in Des Moines, Ia. (Feb. 12, 2003) (on file with the DRAKE J. AGRIC. L.); IOWA ASS'N OF BUS. & INDUS., LIABILITY REFORM COMMITTEE, *at* http://www.iowaabi.org/committee_liability_reform.asp (last visited Oct. 28, 2004).

51. IOWA ASS'N OF BUS. & INDUS., *supra* note 50.

52. *See* Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the* BMW/State Farm *Guideposts*, 37 U. MICH. J.L. REFORM, 441, 447 n.29, 448 n.39 (2004) (internal citations omitted).

53. *See* H.F. 692, 80th Gen. Assem., Spec. Sess. (Iowa 2003).

54. *See* Jonathan Roos & Lynn Okamoto, *Judge Upholds Line-Item Vetoes*, DES MOINES REG., Dec. 2, 2003, at B1, *available at* 2003 WL 69394647; *see also* IOWA CONST. art. III, § 16.

tort reform.[55] The political fight that developed over the 285 page bill led to an intense debate over the constitutionality of the governor's line-item veto power that ended in the chambers of the Iowa Supreme Court.[56] It has also left issues of punitive damage reform lingering in the Hawkeye State.[57]

The tort reform portion of the legislation involves a change to Iowa Code Chapter 668A.3, which covers awarding punitive or exemplary damages.[58] In this proposed legislation, the standard of proof required for awarding such damages is altered dramatically.[59] To quote from the bill,

"[p]unitive or exemplary damages shall only be awarded where the plaintiff proves by clear and convincing evidence that the plaintiff's harm was the result of *actual malice. This burden of proof shall not be satisfied by proof of any degree of negligence, including gross negligence.*"[60]

The legislature does not define "actual malice" as used in the new section, which leaves the problem of defining it to the courts.[61] According to the Iowa Supreme Court, "actual malice" in civil law turns on motive, as it requires ill will, hatred, or wrongful motive.[62] There must be intent to inflict harm, as mere contempt is insufficient to show malice.[63] This is an extremely strict standard of proof that would be almost impossible to meet in products liability cases and, as such, effectively eliminates punitive damages in the State of Iowa.[64]

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55. *See* Iowa H.F. 692.

56. *See* Rants v. Vilsack, 684 N.W.2d 193, 210-11 (Iowa 2004) (holding the unconstitutional use of the line-item veto resulted in the entire bill being vetoed); s*ee also* Editorial, *Sign It, Build on It*, DES MOINES REG., June 16, 2003, at 8A (weighing in on the side of signing the bill, even though the paper admitted that "[t]here's a lot to dislike in the 285-page bill"); Lynn Okamoto, *Vilsack Checks Ink in Veto Pen*, DES MOINES REG., June 11, 2003, at 1A, 9A (discussing the merits of challenging the Governor's use of the item veto); Roos & Okamoto, *supra* note 54; Rush, *supra* note 13, at 19A (arguing that the bill itself violated the Iowa Constitution).

57. *See* Thomas Beaumont, *Vilsack: I'll Consider Restrictions on Lawsuits*, DES MOINES REG., July 20, 2004, at 3B (stating that in negotiations concerning the Iowa Values Fund, Governor Vilsack had put punitive damage reform back on the table).

58. *See* Iowa H.F. 692.

59. *Compare* Iowa H.F. 692 at § 117(b) (proposing to require "actual malice") *with* IOWA CODE § 668A.1.1(a) (2003) (requiring "willful and wanton disregard for the rights or safety of another").

60. Iowa H.F. 692 at § 119 (emphasis added).

61. *Id.*

62. *See* Jones v. Lake Park Care Ctr., Inc., 569 N.W.2d 369, 378 (Iowa 1997); Taggart v. Drake Univ., 549 N.W.2d 796, 804 (Iowa 1996); Jones v. Palmer Communications, Inc., 440 N.W.2d 884, 894 (Iowa 1989) (citations omitted).

63. *Palmer Comm.*, 440 N.W.2d at 894.

64. *See* Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 653-54 (Md. 1992) (recognizing the heavy burden placed on plaintiffs by requiring "actual malice" in products liability cases).

The difference between the current standard and that floated by the Iowa Legislature is startling and extreme. Rather than actual malice, the current standard for awarding punitive damages is:

[w]hether, by a preponderance of clear, convincing, and satisfactory evidence, the conduct of a defendant from which the claim arose constitutes a *willful and wanton disregard for the rights or safety of another*.[65]

The courts have defined "willful and wanton conduct" within the meaning of the statute as an intentional act of "unreasonable character in disregard of known or obvious risk that was so great as to make it highly probable that harm would follow."[66] This standard is still difficult to surpass except in those rare instances in which the conduct is particularly egregious and results in significant harm.[67] Plaintiffs seek punitive damages infrequently, and when punitive damages are part of the claim very rarely are the punitive damages awarded.[68] If the proposed "actual malice" standard becomes law, then those already low numbers will likely dwindle to the point of extinction.

B. *The Impact of Reforming Punitive Damages: Analyzing a Hypothetical Scenario*

To illustrate this concept, consider the following hypothetical scenario: Company X makes tractors. The company has an internal memo stating that the new model of one of their tractors produced this year is defectively balanced and extremely prone to rollover. The company is aware some people will be hurt, but, rather than go through the $100 million expense of a recall, Company X chooses to simply settle the claims of those hurt, estimated to cost only $26.5 million. After being maimed in a tragic tractor rollover, an independent farmer decides to bring a claim against Company X.

The first thing to consider is whether the farmer would be able to recover punitive damages under the current Iowa standard of proving "willful and wanton disregard" for the farmer's rights.[69] The hypothetical shows the company made a willful decision that evidences a complete disregard for the safety of those who would use its product. In this case, it seems obvious to the author, that punitive damages would be allowed.

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65. IOWA CODE § 668A.1.1(a) (2003) (emphasis added).

66. Burke v. Deere & Co., 6 F.3d 497, 511 (8th Cir. 1993).

67. *See Palmer Comm.*, 440 N.W.2d at 894 (citing *McCarney*, 239 N.W.2d at 156) (holding that actual malice requires intent to inflict harm).

68. Rustad, *supra* note 41, at 37-38.

69. *See* IOWA CODE § 668A.1.1(a).

The second consideration is whether this case rises to the level of actual malice to allow for punitive damages as required under the proposed law.[70] While this certainly requires heavy speculation as to how the courts will define the meaning of "actual malice," it is highly logical that the definition will be taken from cases in which "actual malice" has been applied to civil law.[71] If the meaning from previous case law is applied, then an actual intent to inflict harm will have to be found.[72]

While the tractor hypothetical seems heartless and nasty, it may not reach the level of actually targeting victims for harm in a court's eyes.[73] If the current standard of requiring proof of "willful and wanton disregard" for the safety of the consumers is applied, however, the case against Company X becomes very compelling. The consequence of changing the standard which dictates when punitive damages are available in these cases is of staggering and dramatic proportions. The notion that it may be unclear whether the hypothetical story would be a case which would merit punitive damages is evidence of that. Iowa State Senator Gene Fraise, the ranking Democrat on the Senate Agriculture Committee, says this application of a new legal standard for plaintiffs to meet is precisely why changes to tort law require very careful scrutiny.[74]

There is a reason why this area of law has developed, and we have to remember that. If a company . . . makes a piece of machinery and knows that there is something wrong with it and it could be dangerous, taking away legal safeguards makes it easier for them to say 'we'll just gamble with it.' Without fair protections under the law, we end up punishing the farmer who gets hurt. [75]

As mentioned earlier, the content of the hypothetical memo clearly shows the company made a willful decision illustrating a disregard for the safety of its customers. Therefore, raising the standard of proof in the proposed legislation has incredible consequences. One can see how easily punitive damages could be eliminated from Iowa's civil justice system if the bill becomes law.

C. *The Infamous McDonald's Case: The Facts that Failed to Make Headlines*

Stepping out of the hypothetical world for a moment, no punitive damages analysis would be complete without addressing the infamous "McDonald's

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70. *See Palmer Comm.*, 440 N.W.2d at 894; *see also* H.F. 692, § 118, 80th Gen. Assem., Spec. Sess. (Iowa 2003).
71. *See Palmer Comm.*, 440 N.W.2d at 894.
72. *See id.*
73. *See id.*; Iowa H.F. 692 at § 118.
74. Interview with Gene Fraise, *supra* note 50.
75. *Id.*

Hot Coffee Case."[76] Almost everyone in the nation can recall the situation in which an elderly woman spilled coffee on herself, sued McDonald's for being burned, and the jury awarded her millions of dollars.[77]

Perhaps the greatest single call for tort reform in America came after this case, as the anti-punitive damages movement exploded with support.[78] But was this case truly an example of legal insanity? Many still say so, yet a careful review of the facts involved paints a far different picture, a picture that is slightly more complicated than the blurb that made its way into newspapers throughout the nation.

According to the UNIVERSITY OF MIAMI LAW REVIEW article "*Java Jive: Genealogy of a Judicial Icon*," Stella Liebeck was anything but a cash-crazed, sue-happy injury exaggerator.[79] She purchased a cup of coffee from a McDonald's restaurant, and while opening the cup to put in her cream and sugar, spilled the coffee on her lap.[80] Instantly, she screamed in pain.[81] After becoming nauseous and changing out of her clothes, she was taken to a hospital.[82] There, it was determined she had severe third-degree burns over six percent of her body, burns of the most serious level that often permeate through the full thickness of the skin to the internal fat, muscle, and bone tissue.[83] Her treating physician testified that it was one of the worst liquid burns he had ever seen.[84]

For all her pain and suffering, this conservative elderly woman simply sent a letter to McDonald's requesting reimbursement for her bills, which was swiftly rejected by the company.[85] Only as a last resort did she approach the legal system for assistance.[86] It was then that two amazing discoveries were made. First, McDonald's had a policy of serving its coffee between 180 and 190 degrees, even though restaurant advisory services recommend serving coffee at 150-157 degrees, and medical experts confirm that the 180 degree mark can cause highly painful and disfiguring burns.[87] Second, McDonald's had sufficient

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76. *See* Liebeck v. McDonald's Rest., P.T.S., Inc., No. CV-93-02419, 1995 WL 360309 (D. N.M. Aug. 18, 1994); *see generally* Shari Seidman Diamond, *Truth, Justice, and the Jury,* 26 HARV. J.L. & PUB. POL'Y 143, 145-46 (2003) (discussing the true facts behind the McDonald's case).

77. *See Diamond*, *supra* note 76, at 145-46.

78. *See* McCann et al., *supra* note 45, at 115.

79. Diamond, *supra* note 76, at 145.

80. *See* McCann et al., *supra* note 45, at 119.

81. *Id.*

82. *Id.* at 120.

83. *Id.*

84. *Id.*

85. *See id.* at 121.

86. *See id.*

87. *Id.* at 123-124.

notice of the dangers its coffee presented, as they had received over *seven hundred* complaints similar to those by Mrs. Liebeck and had already paid out close to *one million dollars* in settlements.[88]

When presented with this information, the jurors, who were originally offended to have been saddled with jury duty over a coffee spill, awarded punitive damages of $2.7 million (the equivalent of two days of coffee sales revenues), as they were now offended by McDonald's callous attitude toward the situation.[89] The judge reduced this amount to $480,000, which amounted to three times the compensatory damages.[90] Rather than appeal, McDonald's settled, meaning Liebeck received an undisclosed amount from the corporation, presumably in the $100,000 range.[91]

Once again, the myths must be separated from the facts before any truly meaningful public debate on punitive damages can take place. If anything, the *McDonald's* case illustrates just how important punitive damages are in convincing companies that safety must come before profits, and that they have a duty to act upon hazards that can easily be corrected.

VI. THE IMPACT ON AGRICULTURE: WHY PUNITIVE DAMAGES ARE IMPORTANT TO FARMERS

While there are various reasons why farm injuries occur, many of the most severe incidents are directly related to the use of farm equipment.[92] Agricultural machinery is becoming more complex and more powerful as new technologies develop, creating an intense need for implements to be as safe as possible. Because farmers are notorious for not seeking to recover their losses in court, farm equipment manufacturers have been effectively immune from the litigation that has brought higher industry safety standards in other business sectors.[93] Generally, "companies think twice about cutting corners on safety when faced with the prospect of indeterminate punitive damages."[94]

If the threat of punitive damages is removed from the equation, the consequences for farm equipment manufacturers who fail to make their products safe

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88. *See id.* at 124-125 (emphasis added).
89. *See id.* at 128-129.
90. *Id.* at 130.
91. *See id.* at 158.
92. *See* FARM SAFETY ASS'N, NAT'L AG SAFETY DATABASE, FACT SHEET NO. F-107 AGRICULTURAL MACHINERY HAZARDS (Jan. 1987), *at* http://www.cdc.gov/nasd/docs/d001501-d001600/d001540/d001540.html (last visited Oct. 28, 2004).
93. *See* Rustad, *supra* note 41, at 79-80 (showing that companies recall products to make the product safer due to threat of litigation).
94. *Id.* at 80.

will also be removed. When hundreds of farmers are being hurt or killed by products and implements they use daily, it is irresponsible to eliminate the one meaningful recourse available to them, given the exceptionally serious nature of injuries caused by agricultural implements.[95]

The case of *Braatz v. Rockwell Standard Corporation*, concerning a tragic auger injury, details the need for punitive damages—namely to ensure that farm implements are made as safe as possible.[96] The very reason there are now protective shields and guards on augers stems from this litigation.[97] It is the threat of punitive damages that truly drives manufacturers to produce the best designed implements, manufactured without defect. This is truly what keeps farmers safe. As reported by Michael L. Rustad in his article *How the Common Good is Served by the Remedy of Punitive Damages*, the *Braatz* case illustrates that even with the positive strides made through the years, there is still a need for punitive damages to protect farmers:

> In *Braatz v. Rockwell-Standard Corporation,* a fourteen year old farm worker received a $3,880,000 jury verdict for amputation injuries suffered when he fell into the unguarded shaft of a grain auger. The accident was proximately caused by a nonstandard, square-headed screw that protruded from the shaft. Punitive damages was based upon testimony that the full cost of compliance with the accepted industrial standard of shielding the protruding screw was a mere $2.38 per grain auger. The company's failure to implement this low-cost safety feature, combined with management knowledge of many prior injuries from the auger, elicited punitive damages.[98]

The argument for making further improvements to farm equipment has also been raised by the Iowa Fatality Assessment and Control Evaluation ("FACE") program, an occupational fatality investigation and surveillance program of the National Institute for Occupational Safety and Health ("NIOSH").[99] The Iowa FACE program responded to a 1995 incident in which a farmer was

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95. *See* FARM SAFETY ASS'N, *supra* note 92 (outlining the dangers of various equipment and some safety recommendations); *see also* TRAUMATIC OCCUPATIONAL INJURY, *supra* note 1 (detailing the dangerous nature of farming and injuries sustained).

96. Braatz v. Rockwell-Standard Corp., No. 23033 (D. Minn. 1982); s*ee* Michael L. Rustad, *How the Common Good is Served by the Remedy of Punitive Damages,* 64 TENN. L. REV. 793, 828 (1997).

97. *See Rustad*, *supra* note 41, at 81-82.

98. *Rustad*, *supra* note 96, at 828.

99. DIV. OF SAFETY RESEARCH, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, NIOSH FACE PROGRAM, *at* http://www.cdc.gov/niosh/face/brochure.html. (last visited Nov. 5, 2004).

killed when he was caught in a grain auger.[100] Iowa FACE suggests augers need to be reconstructed so protective grates cannot be removed during operation and redesigned to reduce clogging and the need for cleaning the auger.[101] Another of the numerous examples from NIOSH and FACE includes the story of a twelve year old girl who had her pony tail caught in the driveline of a hay baler, resulting in the hair and skin being ripped from her head.[102] Had there been proper guards on the driveshaft, the injury could have been prevented. A particularly tragic case concerned five family members who perished in a manure pit after one member attempted to replace a shear pin on an agitator shaft but was overcome by the gases.[103] In attempting rescues, each of the four family members entered the manure pit, where they all collapsed and died of asphyxiation.[104] According to NIOSH, upon making serviceable parts accessible from the outside, many of these types of deaths can be avoided.[105] These are just a few examples of the countless equipment-related incidents that occur on farms. If punitive damages are removed and no longer act as a meaningful watchdog, the incentives to make continuous improvements may be less powerful.

VII. HAVE PUNITIVE DAMAGES CRIPPLED MANUFACTURERS?

Quantifying this problem in a more general sense, as well as attempting to show meaningful trends, is an incredibly elusive task. Media hype and embellishment fuel the rhetoric more than any research could possibly substantiate.[106] Even tort reformers have a difficult time finding the proper way to measure the extent of the problem, which has drawn significant criticism from social scien-

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100. Memorandum from Iowa FACE Program to National Institute for Occupational Safety and Health, Man Dies After Getting His Leg Caught in a Grain Auger—Iowa, *at* http://www.public-health.uiowa.edu/FACE/Reports/REPORT-016.html (last visited Oct. 28, 2004).

101. *Id.* (detailing injury following removal of protective grates).

102. *See* NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, CDC NO. 94-105, NIOSH ALERT: PREVENTING SCALPING AND OTHER SEVERE INJURIES FROM FARM MACHINERY (June 1994), *available at* http://www.cdc.gov/niosh/pto.html.

103. *See* NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, CDC NO. 90-103, NIOSH ALERT: PREVENTING DEATHS OF FARM WORKERS IN MANURE PITS (May 1990), *available at* http://www.cdc.gov/niosh/90-103.html.

104. *Id.*

105. *Id.*

106. *See* Peter Eisler et al., *Hype Outraces Facts in Malpractice Debate***,** USA TODAY, Mar. 5, 2003, *available at* http://www.usatoday.com/money/industries/health/2003-03-04-malpractice-cover_x.htm (stating medical malpractice insurance premiums are only a fraction of doctor's expenses).

tists.[107] Opponents of tort reform point to cases and filing records, arguing "[p]unitive damage awards are a teaspoon-sized drop in an ocean of civil litigation."[108]

While some areas of punitive awards have been increasing, so have many corporate profit margins.[109] Because the emphasis is on punishing corporations for bad behavior, larger profits necessitate larger punitive awards in order to serve as an effective deterrent and have a true punitive impact. Now that the economy has changed, the size of awards will likely follow.[110]

Even during the punitive lawsuit heydays of the 1980s, punitive damages were never the norm in tort cases and jury awards rarely came close to their inflated reputation.[111] That said, the fact that the actual number of punitive damages claims went up in the 1980s and early 1990s is not disputed, as this area of law became much more widely known.[112] However, excluding asbestos cases, punitive damages are actually declining as of 1992.[113] One plausible explanation is that people were "under-suing" for a number of years, as even corporations admit they have been compelled to make products safer in the aftermath of products liability litigation.[114] As for the claims that insurance rates have spiked upward as a result of the status of punitive damages in civil law, numerous other factors and variables can explain rate increases.[115] Interestingly though, there is no appreciable difference between insurance rates in "tort reformed" states when compared with "non-reformed" states.[116]

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107. *See generally* Galanter, *supra* note 26, at 1098 (discussing failure of tort reformers to apply sound statistical data to arguments).

108. Rustad, *supra* note 41, at 37.

109. *See id.* at 76-77 (stating that even huge punitive damage awards have a minimal impact on large corporations).

110. *See, e.g., id.* at 13 (noting a sharp increase in punitive damage awards over the past decade).

111. STEPHEN DANIELS & JOANNE MARTIN, AM. BAR FOUND., WORKING PAPER NO. 8705, EMPIRICAL PATTERNS IN PUNITIVE DAMAGES CASES: A DESCRIPTION OF INCIDENCE RATES AND AWARDS 14 (Am. Bar Found. 1987).

112. *See, e.g.*, Eisler et al., *supra* note 106 (noting a 400% rise in paid claims over $1 million over the past decade).

113. *See* Rustad, *supra* note 41, at 37.

114. *See id.* at 82 (finding that after an award was handed down many defendants made product alterations).

115. *See* Zekoll, *supra* note 31, at 155-56.

116. *See* Gourley *ex rel* Gourley v. Nebraska Methodist Health System, Inc., 663 N.W.2d 43, 94-95 (Neb. 2003) (McCormack, J., dissenting) (noting that statistics from Medical Liability Monitor indicated an upward trend in malpractice rates in not only states that do not cap damages, but a same general upward trend in malpractice rates in states with caps on damages).

VIII. WHY SHOULD WE MAKE MILLIONAIRES OUT OF LAWSUIT-HAPPY INDIVIDUALS?

As for the idea that there is a "litigation lottery" going on in courtrooms, the facts produce a stark contrast to this assumption.[117] The courts themselves have successfully applied existing law and the Constitution to control punitive damages without disturbing the valuable protections they offer. The United States Supreme Court first examined the constitutional implications of larger punitive damage awards in *Haslip,* when the Court concluded that substantive due process issues come into play when excessive awards result even when all the proper judicial procedures are followed.[118] After *Haslip*, the Supreme Court more clearly defined the requirements of substantive due process in *BMW v. Gore* and *State Farm v. Campbell,* where the Court began defining specific factors that must be satisfied when awarding punitive damages.[119] The factors set out in *Gore* express that the reprehensibility of the defendant's misconduct, the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award, and the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases must be considered.[120] *State Farm* expanded on that basis to state that punitive damages that exceed a single-digit ratio between punitive and compensatory damages are constitutional only in cases where the conduct is truly extreme and the com-

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117. *See* Rustad, *supra* note 41, at 58.

118. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991) ("We are aware that the punitive damages award in this case is more than 4 times the amount of compensatory damages, is more than 200 times the out-of-pocket expenses of respondent Haslip….While the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety.")

119. *See generally* State Farm v. Campbell, 538 U.S. 408 (2003); BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

120. *Gore*, 517 U.S. *at* 574-75 (1996). (holding that, "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. Three guideposts… lead us to the conclusion that the $2 million award against BMW is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." However, the Court went on to state that, "Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect 'the enormity of his offense.'") (internal citations omitted).

pensatory damages are minimal.[121] In addition, *State Farm* further clarified that the wealth of a defendant does not justify what would otherwise be viewed as an unconstitutional award of punitive damages.[122] In the pre-*State Farm* case of *Wilson v. IBP*, the Iowa Supreme Court carefully analyzed punitive damages under the Iowa Code.[123] In *IBP*, the court determined that punitive damages should be reduced from $15 million to $2 million in consideration of the *Gore* factors.[124] The court saw that the high level of reprehensibility of the defendant's conduct warranted an award of punitive damages at a high ratio to compensatory damages, especially in light of the defendant's financial status.[125] The Iowa Supreme Court determined that while the wealth of the defendant cannot justify punitive damages that are otherwise unconstitutional, it seems to be an allowable factor in assessing the constitutional level at which the damages may be set.[126]

In Iowa, the law provides that the injured party can only receive twenty-five percent of a punitive damages award.[127] The remainder of the award goes to the state, with the idea being that plaintiffs should not be windfall beneficiaries of corporate wrongdoings.[128] In addition, many claims are dead before they come to life, as Iowa and several other states have statutes of limitations and repose that limit the time period during which claims can be filed.[129] Jury-calculated punitive damage awards can be reduced by judges, which is another important check on the award system.[130] Moreover, attorneys often represent plaintiffs on a contingency basis, taking another percentage of the awards away from injured persons.[131] Considering that huge awards are the exceptions to the rule from the

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121. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) ("Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1. Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'") (internal citations omitted).

122. State Farm, 538 U.S. *at* 427 ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."). *See also* Gore, 517 U.S. at 585.

123. Wilson v. IBP, Inc., 558 N.W.2d 132, 145-47 (Iowa 1996).

124. *Id. at* 136, 148.

125. *Id. at* 147-48.

126. *Id. at* 148.

127. IOWA CODE § 668A.1.2(b) (2003).

128. *See id.*

129. *See id.* at § 614.1.2A(a) (according to Iowa's statute of repose, actions brought by an injured person against the manufacturer of a product based upon the theories of products liability are not valid if filed more than fifteen years after the product was first purchased on the market).

130. *See* Rustad, *supra* note 41, at 53.

131. *See* Zekoll, *supra* note 31, at 147.

start, these reductions to the "jackpots" awarded significantly reduce the size of the awards before they reach the injured parties.

Winning products liability cases is difficult alone, and winning claims for punitive damages is a task of almost unimaginable difficulty. In *Jones v. Hutchinson Manufacturing*, a child who lost part of her leg was denied her claim under products liability law even though she proved that her injury would not have occurred if there had been a shield in place to prevent hands and feet from being caught in the rotating blade of the auger.[132] Even in winning cases, holding onto any part of an initial punitive damages award is extremely difficult. The case of *Burke v. Deere & Company* is an example of the difficulties faced by plaintiffs in the judicial process.[133] In *Burke*, a farmer sustained severe injuries while attempting to clean out a clog in a combine's vertical auger and the evidence showed the company had been notified of twenty-six such injuries over approximately two years.[134] The farmer was awarded $50 million in punitive damages by the jury, reduced by the trial court judge's order of remittitur (where the plaintiff can either accept the judge's reduction of the award or go forward with a new trial) to $28 million.[135] Though upheld on appeal by the Southern District of Iowa Federal District Court, that punitive award was taken away completely by the Eighth Circuit Court of Appeals.[136] Even when plaintiffs do receive significant final awards, contrary to the above scenarios, the reminders of the circumstances surrounding their claim, whether it is the death of a loved one, disfigurement, or being rendered quadriplegic, make it hard to believe these plaintiffs feel anything like lottery winners.

It is easy to see the root cause of the public's perception that punitive damages are ruining our society. The *McDonald's* case is a prime example of the problem: the absurd stories catch the public's attention, and because these stories increase media coverage of tort cases, they leave the public with a skewed perception of civil litigation.[137] Merely reporting the absurd awards, while failing to mention when judges reduce them, leaves the public to conclude the original reports tell the whole story.[138] However, reporting only part of the story seems to have had extensive consequences in steering public policy in this area. The media hype is subsidized by urban legends and e-mail tales, purporting that burglars who get cut on exposed knifes during break-ins are winning huge settlements

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132. *See* Jones v. Hutchinson Mfg., 502 S.W.2d 66, 68-71 (Ky. Ct. App. 1973).
133. *See generally* Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993).
134. *Id*. at 501.
135. *Id.*
136. *Id.* at 513-514.
137. *See* Diamond, *supra* note 76, at 145; Zekoll, *supra* note 31, at 158.
138. *See* Diamond, *supra* note 76, at 144-45.

from their victims.[139] While these stories make interesting water cooler talk, they are not exactly ripped from the pages of legal reporters. Ultimately, the story tellers are doing an incredible disservice to our legal system, and it becomes essentially hopeless for a lawyer to convince a jury to award punitive damages.

IX. THE MYTH OF THE RUNAWAY JURY

An interesting twist in the tort reform movement is not the public's disdain for lawyers, but their distrust of juries.[140] Tort reform opponents point out the public already regulates punitive damages through their involvement in the trial-by-jury process. It seems counterintuitive that juries, the means by which citizens are most directly involved in the judicial process, would get bad marks from the public. The truth of the matter is that juries reflect the public's perception of civil litigation, often holding plaintiffs to incredibly high standards of character, credibility, and behavior.[141] Probably the most surprising empirical finding has been that juries are no more likely to dole out punitive damages than judges.[142] While most people readily assert that they can detect someone faking an injury, they simply do not trust that juries can do the same.[143] Studies have shown, however, that juries are in fact very reliable sources for drawing inferences from evidence.[144]

While there is a legitimate concern that lay people can be confused by complicated law when making decisions, every effort is made to ensure jury instructions are simplified to precisely what jurors are to decide and how they are to go about making their decisions.[145] There has even been a reform movement to improve jury functions.[146] For example, in some jurisdictions juries may become more engaged in the trial process, as they are allowed to take notes and submit

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139. *See id.* at 143-45.

140. *See id.* at 145.

141. Daniel J. Capra, *'An Accident and a Dream': Problems with the Latest Attack on the Civil Justice System,* 20 PACE L. REV. 339, 352 (1999) (citing Valerie Hans & William Loftquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 L. & SOC'Y REV. 85, 94-95 (1992)).

142. *See* Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 751 (2001).

143. *See generally* Neil Vidmar & Leigh Anne Brown, *Tort Reform and the Medical Liability Insurance Crisis in Mississippi: Diagnosing the Disease and Prescribing a Remedy*, 22 MISS. C. L. REV. 9, 24-25 (2002) (stating that tort reformers use illustrations of run-away juries even though studies show juries tend to be conservative).

144. *See* Diamond, *supra* note 76, at 152-53; Galanter, *supra* note 26, at 1110-11.

145. *See* Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497, 1511 (2003).

146. *See id.*

questions to the judge.[147] This engagement, in theory, translates to more attentiveness and better decisions.[148] While the public may not always trust juries as fact-finders, it is clear that our judicial system has good reason to do just that.

X. OTHER TORT REFORM PROPOSALS: WHAT ABOUT LEAVING PUNITIVE DAMAGE LAWS ALONE?

As discussed earlier, the Iowa Legislature attempted to limit punitive damage awards in 2003. In short, Governor Vilsack line-item vetoed this legislation because he saw it as an unnecessary regulation that threatens an important part of our justice system.[149] This line-item veto makes sense because Iowa has already seen sufficient tort reform, including the Iowa statute preventing plaintiffs from becoming windfall beneficiaries of punitive damages.[150]

Maintaining the status quo is not an outrageous alternative, either. According to a study released by the U.S. Chamber of Commerce that analyzed and ranked states according to the effects of tort liability on business climates, Iowa already has the third-best business-friendly tort laws in the nation—without any additional punitive damage reforms.[151] Civil liberties groups, such as the Iowa Citizens Action Network, have pointed to this study to show that Iowa laws already go too far in protecting corporations.[152] While that point is certainly debatable, the study could be a good indicator that the Iowa system may not need "fixing" at all.

The final option available is to try another attempt at reform. There remains the possibility of capping non-economic damages, as President Bush has proposed for federal cases.[153] This proposal has drawn heavy fire on the national scene however, as it fails to allow for flexibility that would truly make compen-

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147. *See id.*

148. *See* Jeffrey C. Grant, *Recent Changes to Washington's Jury Trials: A Great System Made Even Better*, 26 SEATTLE U. L. REV. 431, 437 (2003) (citations omitted).

149. *See* Veto Message on H.F. 692 to Chester Culver, Iowa Secretary of State from Thomas J. Vilsack, Iowa Governor (June 19, 2003), *available at* http://www.legis.state.ia.us/GA/80GA/Session.1/Affected/GovVeto.html.

150. *See* IOWA CODE § 668A.1.2 (2003).

151. *Study Ranks Iowa Third-Best in Nation for Firms in Court*, DES MOINES REG., April 22, 2003, *available at* http://www.dmregister.com/news/stories/c4780934/21066532.html.

152. *Groups Tout Study of Liability System*, WATERLOO-CEDAR FALLS COURIER, Apr. 22, 2003, *available at* http://wcfcourier.com/articles/2003/04/22/business/local/d73c8ea84520460586256d10004d0363.txt

153. *See* Mike Allen & Amy Goldstein, *Bush Urges Malpractice Damage Limits*, WASH. POST, July 26, 2002, at A04, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A64900-2002Jul25.

sation fit particular situations.[154] Former Democratic presidential candidate Dick Gephardt called the Bush plan "heartless" because it "bars the door on compensation" for thousands harmed by egregious conduct.[155] While placement of caps on recovery draws criticism because caps cannot account for the individual cases of extreme harm or misconduct, the real debate may be more appropriately focused on how to set caps that maintain limits high enough to effectively deter misconduct. The benefit of this option is that it addresses concerns over large damage awards without eliminating punitive damages altogether.[156]

Tort reform could also be pursued by setting a structured scale, much like that in workers' compensation cases. The key to this solution, and the grounds for fierce debate, would be devising the mathematical formulas that would establish guidelines for awards.[157] Proponents of this approach often suggest following a set proportional system, in relation to the awards granted by juries in pain and suffering and medical compensation.[158] However, critics say this type of reform still does not do enough to empower juries with the ability to truly punish the most egregious misconduct,[159] which, again, is the objective of having punitive damages in the first place. Perhaps a better way to calculate punitive damages in these situations would be to base them on percentages of the company's net profits in products liability cases, as the jury attempted to do in the *McDonald's* case.[160] Yet, this plan could bring arguments from both sides, raising complaints that smaller infractions could be magnified or, on the other hand, truly horrific events could be minimized in tabulating awards.

A final option that could have a significant impact, perhaps alleviating some of the problems attributed to punitive damages, could be the pursuit of insurance reform.[161] John Edwards, former personal injury lawyer, former presi-

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154. *See id.*

155. Benedetto, *supra* note 12.

156. *See id.* (proposing a $250,000 cap on pain and suffering, but reserving punitive damages in justified cases and limiting them to reasonable amounts).

157. *See* Rachel A. Van Cleave, *"Death is Different," Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217, 258-59 (2003) (describing the division of the U.S. Supreme Court on a two million dollar punitive damages award and the procedure utilized to guide the jury to an appropriate punitive damages amount).

158. *See id.* at 258 (citing U.S. Supreme Court's considerations of the ratio between the compensatory damages and the punitive damages award).

159. *See* Eisenberg et al., *supra* note 133, at 755-56 (citing cases with justified excesses in punitive compensatory ratios).

160. *See* McCann et al., *supra* note 45, at 128 (noting that the $2.7 million punitive damages award was based on an estimate of two days' revenue from coffee sales at McDonald's).

161. *See* ROBERT E. LITAN & CLIFFORD WINSTON, LIABILITY: PERSPECTIVES AND POLICY 223-24 (Robert E. Litan & Clifford Winston, eds., The Brookings Inst., 1988).

dential hopeful, and former Democratic Vice-Presidential candidate in the 2004 election, places the blame on the insurance industry for exaggerating the impact punitive damages have had on their financial activities.[162] According to Edwards, the insurance industry is just trying to pass the buck for poor decisions in the stock market.[163] The possibility of addressing the problem in this manner seems to rest on researching the causes of insurance rate increases. If punitive damages are not the cause of higher insurance rates, it would make no sense to try to address the problem through tort reform. However, an invasive plan to look at the inner workings of insurers likely will draw fierce criticism and opposition from the insurance companies themselves, certainly a group with very influential political players.[164]

XI. CONCLUSION

When the time for a decision arrives, all of these considerations point toward holding off on the current tort reform proposal. Before tort reform can be truly touted as if it were a proven elixir to a variety of problems, the embellishments must be separated from the facts. Effectively eliminating punitive damages appears to do little, if anything at all, to address any of the problems listed by tort reformers. Until more direct correlations can be made between tort reformers' assertions regarding the problems they cite and their proposed solutions, the enactment of such "reforms" must necessarily be delayed. Rather than allowing lobbyists and legislators to make sweeping changes to our judicial system, we should be trusting the citizens that comprise our juries to decide claims for punitive damages on their merits.

In the author's view, the current proposals are irresponsibly strict and will likely lead to some very unfavorable and unintended consequences. When the manufacturers of farm equipment are irresponsible, and farm products cause egregious harm, there is a need for an adequate means of seeking recourse for those injured. There is a need for a system of deterrence that can help to prevent the kind of horrific incidents that are rectified in punitive damages cases.

While the current system may not function perfectly, throwing it out completely is not the solution. The farmer who is injured as a result of a manufacturer's willful and wanton disregard for human life in marketing a defectively

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162. *See* Benedetto, *supra* note 12 (quoting Sen. Edwards, "[t]he insurance industry has done poorly in the [stock] market and is simply passing those costs on to doctors and patients").

163. See id.

164. *See* Zekoll, *supra* note 31, at 158 ("[T]he discussion over whether the [products liability] system is flawed and in need of reform has been highly politicized, on one side by the 'defense' lobby representing the insurance industry, and on the other by plaintiffs' interests represented by the Association of Trial Lawyers of America").

designed or defectively manufactured agricultural implement needs to be able to seek punitive damages. Punitive damages should be available not only to allow the needlessly injured or killed consumer the right to recovery, but the award of punitive damages also ensures that manufacturers are prevented from being placed at a financial advantage after putting dangerous products on the market and paying only compensatory damages when their products cause personal injury. When Company X knowingly puts an unsafe tractor on the market and that tractor hurts people, the company should be given a financial penalty that gets its attention. Punitive damages are vital to ensuring safe products are on the market, and in the hazardous business of agriculture, that is of particular importance. Only after careful study and analysis of all potential alternatives should any reform of this area of law be considered. Unless that kind of intense and all-encompassing research is conducted, no meaningful resolution is possible.

Tort reform in states such as Iowa has gone far enough in providing a suitable litigation environment. Without making a causal connection between punitive damages and concerns over litigation, no further legislation limiting civil recovery rights in the area of punitive damages is appropriate, especially considering that all too many farmers and farming families deal with the mental, physical, and financial pains that accompany injuries and deaths caused by agricultural implements. While other industries have the protections of OSHA standards for safety and workers' compensation laws that both promote safer workplaces and compensate for injuries, farmers only have the protections provided for them in our system of civil justice. We should be doing more, not less, to protect the farming families who have been harmed by defective implements, especially considering the powerful and complex nature of modern farm equipment.