Notes

PUNISHMENT BY THE PEOPLE: RETHINKING THE JURY'S POLITICAL ROLE IN ASSIGNING PUNITIVE DAMAGES

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INTRODUCTION

In the past decade the Supreme Court did something—twice—it has never done before: it struck down a punitive damages award for violating the United States Constitution.[1] In each case, the awards had been determined by an elaborate choreography, including the parties and their respective counsel, a jury of disinterested laypeople, and a trial judge. Moreover, the jury in each case made a moral judgment consistent with state constitutional requirements about how much money the defendant should be required to pay as punishment for wrongdoing.[2] But the United States Supreme Court found both punishments "grossly excessive,"[3] violating the Due Process Clause of

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1. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) ("The punitive award of $145 million, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant."); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585–86 (1996) ("[W]e are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit."). *But see* Sw. Tel. & Tel. Co. v. Danaher, 238 U.S. 482, 491 (1915) (invalidating a statutory award for $6,300 against a telephone company for discrimination against a customer because the award "was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law").

2. In *Gore*, the Alabama Supreme Court remitted the $4 million punitive damages award entered on the jury verdict to $2 million after "thoroughly and painstakingly reviewing [the] jury award." BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 629 (Ala. 1994). In *Campbell*, the Supreme Court of Utah reinstated a $145 million jury punitive damages award that the trial judge had remitted to $25 million. Campbell v. State Farm, 65 P.3d 1134, 1141, 1171–72 (Utah 2001).

3. In *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993), the Supreme Court first applied the "grossly excessive" test to a punitive damages award. *Id.* at 458 (borrowing the

the Fourteenth Amendment.[4] The next time the Court reviews the constitutionality of a punitive damages award it should consider that it may do more than upset the jury's *historical* role if it pulls the rug out from under the jury's award. The Court's current approach may be tipping a political balance in favor of the unelected federal judiciary. The jury plays an important *political* role as a counterbalance to the professional judiciary, particularly as a source of morality.

This Note argues that the jury's most historically significant purpose is not given adequate respect in current punitive damages doctrine. Even the Justices who recognize the jury's traditional role in assigning punitive damages[5] neglect the political rationale for this historical role. Particularly by applying community moral standards to its judgments, the American jury has consistently served as a counterbalance to the professional judiciary. Accordingly, this Note asserts that the jury's punitive damages award should be given *some* deference by federal appellate courts, and that courts can do so without compromising Fourteenth Amendment limits on punitive discretion.

Part I narrates the jury's function in assigning civil punishment, from its origins as a monarchical pawn to its role—in the words of the Supreme Court—as "a quintessential government body . . . . [that] exercises the power of the court and of the government that confers the court's jurisdiction."[6] To assess the scope of the jury's political role, Part I explores the jury's history in general, not only its role in the imposition of punitive damages. It releases the reader's

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term of art from *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909), a decision about unconstitutional fines).

4. *See Campbell*, 538 U.S. at 429 ("The punitive award of $145 million, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant."); *Gore*, 517 U.S. at 585–86 (finding a "grossly excessive" punitive damage award violative of the Fourteenth Amendment).

5. *Gore*, 517 U.S. at 600 (Scalia, J., dissenting) ("At the time of adoption of the Fourteenth Amendment, it was well understood that punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved."); *id.* at 613 (Ginsburg, J., dissenting) ("The Court's readiness to superintend state-court punitive damages awards is all the more puzzling in view of the Court's longstanding reluctance to countenance review, even by courts of appeals, of the size of verdicts returned by juries in federal district court proceedings.").

6. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624 (1991). Also, "the jury system performs the critical governmental functions of guarding the rights of litigants and 'ensur[ing] continued acceptance of the laws by all of the people.'" *Id.* (quoting Powers v. Ohio, 499 U.S. 400, 407 (1991)).

imagination from the confines of an empirical approach that might be missing the forest of the jury's political function for the trees of predictability and efficiency.

Part II argues that the jury's political role is constitutional. The Constitution's text,[7] the balance of powers it creates, and various constitutional doctrines[8] all point to the jury's important political role in the republic as a democratic source of morality in the law.[9] Recognizing the jury's political role is a partial, albeit insufficient, solution to the ongoing scholarly debates over how to inject democratic values into the constitutional adjudicative process and how to instill constitutional virtues into the citizenry.

Part III details the current due process standards for punitive damages and the constitutional concerns implicated by unfair punitive damages awards. The Court has limited the jury's power to punish civil wrongdoing in two significant ways: it has suggested that a punitive damages award exceeding nine times the amount of compensatory damages is rarely constitutional,[10] and it has held that neither trial judges nor appellate courts should defer to a jury's assessment of reprehensibility.[11] The Court's overriding concern is

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7. U.S. CONST. amend. VI; U.S. CONST. amend. VII. The Seventh Amendment has not been applied to the states via the Fourteenth Amendment. Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974). Both federal and state criminal trials require a jury because the Sixth Amendment is applied against the states via the Fourteenth Amendment Due Process Clause, *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), unless an accused elects to waive a jury trial, *Patton v. United States*, 281 U.S. 276, 308 (1930).

8. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994) (prohibiting gender-based discrimination in jury selection); Hernandez v. New York, 500 U.S. 352, 363–64 (1991) (allowing trial judges to weigh justifications for peremptory challenges that lead to disproportionate exclusion of members of certain ethnic groups); Batson v. Kentucky, 476 U.S. 79, 84 (1986) (prohibiting the denial of jury participation on account of race).

9. *See* Ring v. Arizona, 536 U.S. 584, 607–09 (2002) (holding that the jury must find the aggravating factors that warrant a death sentence); Miller v. California, 413 U.S. 15, 33–34 (1973) (requiring the jury to determine whether material's dominant theme appeals to a prurient interest and violates community standards of decency, and so amounts to unprotected obscenity under the First Amendment); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280–81 (1964) (allowing instructions to the jury to determine whether a false statement about a public official was made with malice, and thus not protected by the First Amendment).

10. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) ("Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

11. Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 436 (2001) ("[C]ourts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards.").

fairness: Civil defendants who are subjected to a completely unpredictable punishment are not fairly afforded the protection of the rule of law.[12]

Finally, Part IV suggests that, consistent with the jury's political function, the Court should give juries more deference to apply community standards of morality in the imposition of punitive damages. Instead of de novo application of the *Gore* guideposts, the Court should adopt one of three doctrinal options: (1) an "abuse of discretion" review with reference to the *Gore* guideposts, (2) the traditional "clearly arbitrary" or "clearly excessive" standard of review, or (3) a hybrid rule requiring the jury to apply the *Gore* guideposts and judicial review for "abuse of discretion." After analyzing the practical and constitutional strengths and weaknesses of each, this Note ultimately recommends the last option.

I. THE JURY'S STORY REVEALS ITS ESSENTIALLY POLITICAL CHARACTER

The American jury's story is steeped in political drama. This Part recounts the chapters of the jury's story that are necessary to understand what is at stake when the professional judiciary ignores a jury's punitive damages award. The history of the American jury is one facet of the ongoing story of American self-determination; the constant flux in the scope and degree of power exercised by the jury vis-à-vis the professional judge is evidence of America's singular and ongoing attempt to make popular sovereignty work.

A. The Jury's Origin: The Rise of Popular Sovereignty

The clearest starting point of what became the American jury is probably the Frankish *inquisitio*, which evolved into the judgment jury after its introduction to Great Britain.[13] The most important facet

12. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 587 (1996) (Breyer, J., concurring) ("Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.").

13. LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 14 (2d ed. 1988). *But see* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 23 (1986) (recounting early Anglo-Saxon inquisitions as being the first instances of a jury in English legal history). Scholars Maitland and Thayer focus on the legacy of the Normans in the development of the jury, while Dawson focuses on the pre-Norman Anglo-Saxon tradition as the jury's source. *Compare* 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF

of the *inquisitio* for the purposes of this Note is that it operated at the whim of the King.[14] Although members swore to testify to the truth regardless of its impact on the King,[15] because an *inquisitio* was only available if the King permitted, the crown could prevent any damaging judgments by refusing to institute an *inquisitio*.[16] Further, a sort of judicial review guaranteed the *inquisitio*'s loyalty to the Crown: unless they ruled for the King, members of an *inquisitio* suspected of perjury were subject to an ordeal.[17] But by the end of the fourteenth century, partly due to a prohibition of ecclesiastical participation in the ordeal,[18] and perhaps partly due to the economic prudence of employing laymen,[19] the jury largely had evolved from a panel of witnesses into a judgment jury.[20]

Although the early judgment jury bore a resemblance to the modern American jury—for instance, it typically comprised twelve lay persons and was empowered to make decisions of fact—it had several distinctions.[21] First, the purpose of a local jury early on was to serve as a character witness or eyewitness. By the period's end, however, the jury's primary purpose was to empower the community affected by the legal dispute to effectuate its own notions of fairness. Second, the judgment jury frequently was composed of members of the presenting jury.[22] The presenting jury was a holdover from the compurgator jury, which essentially ratified the government's accusations based on first-hand experience with the facts. Thus, it functioned like a modern grand jury. It was assumed this experience would facilitate a just deliberation of the full merits of the case, and thus many presentment members were retained as jurors of the same

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ENGLISH LAW BEFORE THE TIME OF EDWARD I 74 (Lawbook Exchange 1996) (2d ed.1898), *and* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 50 (Boston, Little, Brown & Co. 1898), *with* JOHN P. DAWSON, A HISTORY OF LAY JUDGES 118–20 (1960).

14. MOORE, *supra* note 13, at 14.

15. *Id.* at 16.

16. *Id.* at 14.

17. *Id.*

18. Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 584 (1992).

19. DAWSON, *supra* note 13, at 293.

20. MOORE, *supra* note 13, at 56.

21. *See id.* at 65–68 (detailing the evolution of jury composition from the fifteenth to the eighteenth centuries, including jury size, social status of jurors, exemptions, and challenges available to counsel).

22. HANS & VIDMAR, *supra* note 13, at 28.

trial.[23] Third, and most importantly here, the Crown ensured the partiality of juries to its own agenda through two procedural mechanisms: jurors were selected by a sheriff who "in respect of his allegiance . . . ought to favor the king,"[24] and until the remarkable trial of Quaker William Penn in 1670, jurors were frequently put under overwhelming pressure to comply with a judge's "suggestions."[25]

The story of the Penn trial and the subsequent habeas corpus action brought by Edward Bushell, one of the Penn jurors, is often recounted as the forebear of the truly independent jury. The Penn jurors were deprived of food, water, and a chamber pot until they rendered a proper verdict against the defendant for unlawfully preaching in public as a non-Anglican. Penn, acting as his own counsel, encouraged the jurors to withstand the judge's pressure and vote their consciences, as befitting subjects of the Great Charter.[26] After days of foul conditions and deprivation, during which several of the jurors fell ill, the jury ultimately acquitted Penn of unlawfully preaching in public.[27] The court immediately sent every juror to Newgate prison for contempt of court. Edward Bushell, considered the jury's leading voice, won his habeas corpus action in light of the court's jury abuse, and ultimately the jury's decision was affirmed and enforced.

Little did Bushell know that the legacy of his habeas case,[28] unremarkable except for its context, would greatly surpass that of Penn's case. Chief Justice of Common Pleas Sir John Vaughan memorialized the jury's ability to make an independent decision without fear of judicial reprisal.[29] The decision cemented a barrier between the function of the jury and the function of the professional judiciary. Since then, the common law has respected a jury's decision

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23. *Id.*

24. W. FORSYTHE, HISTORY OF TRIAL BY JURY 191 n.1 (Lawbook Exchange 1994) (1875).

25. *See* HANS & VIDMAR, *supra* note 13, at 28 ("It was not until after juror Bushell won his case that jurors became truly immune to legal sanctions concerning their verdicts."); *see also* MOORE, *supra* note 13, at 72–73 (describing the Star Court's imposition of fines for verdicts of acquittal); *id.* at 76–77 (detailing the potential penalties for *attaint*, or rendering a false verdict).

26. GODFREY D. LEHMAN, WE THE JURY . . . THE IMPACT OF JURORS ON OUR BASIC FREEDOMS 45–46 (1997) (presenting that portion of the Penn trial in narrative form).

27. *Id.* at 61. Juries at this time frequently returned special verdicts, finding the facts of a case but leaving the application of law to the judge. MOORE, *supra* note 13, at 71.

28. Bushell's Case, (1670) 124 Eng. Rep. 1006 (C.P.).

29. Landsman, *supra* note 18, at 590.

regarding how (and sometimes whether) the law governing them applies to a set of facts arising from its community.

Bushell's Case set the stage for the *Seven Bishops Case*[30] in 1688, in which a jury acquitted a group of Anglican bishops of seditious libel.[31] The case launched the Glorious Revolution, established the jury as a "'bulwark of liberty'" against monarchal abuse, and prompted a slew of popular treatises lauding the jury.[32] In both the Penn case and the *Seven Bishops Case*, the jury nullified legislation and rebuffed an abusive professional judiciary.

In 1763, while American juries were playing an important role in the colonies' struggle for self-rule, English juries first awarded modern punitive damages as a remedy for civil wrongdoing in the companion cases of *Wilkes v. Wood*[33] and *Huckle v. Money*.[34] In *Wilkes*, the plaintiff publisher of an allegedly libelous pamphlet, The North Briton,[35] succeeded with an action for trespass against the King's agents who searched and seized his property on a general warrant. A relatively enormous jury award (£1000)[36] was allowed as punishment, deterrence, and an expression of juror disgust.[37] In *Huckle v. Money*, the same pamphlet's printer was illegally seized and imprisoned. Lord Camden upheld a £300 award despite only £20 worth of damages, believing the jury justified in imposing a severe sanction against an exercise of arbitrary power that threatened liberty under the Magna Carta of all Englishmen. He postulated:

> [I]t is very dangerous for the Judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a

30. Seven Bishops Case, (1688) 87 Eng. Rep. 136 (K.B.).

31. Landsman, *supra* note 18, at 590.

32. *Id.* at 590–91 (quoting Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 676 (1918)).

33. Wilkes v. Wood, (1763) 98 Eng. Rep. 489 (K.B.).

34. Huckle v. Money, (1763) 95 Eng. Rep. 768 (K.B.).

35. *Wilkes*, 98 Eng. Rep. at 493.

36. There is disagreement about the value of the award compared to today's awards, depending on the method used to estimate the inflation rate. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 594–95, 597–98 (1996) (Breyer, J., concurring) (finding divergent results using different methods to calculate the present day value of the jury awards in *Wilkes* and *Huckle*).

37. *Wilkes*, 98 Eng. Rep. at 498–99 (Lord Camden wrote, "[A] jury have [sic] it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.").

> tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages.[38]

Even though the jury long before had evolved into a neutral, objective fact finder,[39] Lord Camden's deference to the jury's award in *Wilkes* may have extended the traditional common law reliance on the juror's personal knowledge of the nature of the harm and the relative blameworthiness of the defendant.[40]

Juries and judges had been awarding punitive damages in select categories of cases since before 1700, but after *Wilkes* and *Huckle*, punitive damages were assessed with increasing frequency and in new types of cases.[41] Besides physical injury,[42] multiple damages were awarded for wounded honor and breached promises.[43] The jury furthered the crusade begun in the *North Britain* cases against government abuse,[44] and American juries added corporate malfeasance to the list of targets.[45] In the latter two types of cases, the jury responded to a defendant's behavior that threatened the liberty of the whole community through an abuse of political or economic advantage.[46] This popular sentiment later dovetailed with the jury's rise in America as an instrument of democracy.

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38. *Huckle*, 95 Eng. Rep. at 769.

39. Alan Calnan, *Ending the Punitive Damage Debate*, 45 DEPAUL L. REV. 101, 106–07 (1995).

40. *See* 1 LINDA L. SCHLUETER, PUNITIVE DAMAGES 6 n.31 (5th ed. 2005) ("Juries under early English common law typically consisted of townsmen who were more familiar with the nature of the dispute and the harm committed than the judge himself.").

41. Calnan, *supra* note 39, at 107.

42. *See* Towle v. Blake, 48 N.H. 92, 96 (1868) (punishing violent tort); Grey v. Grant, (1764) 95 Eng. Rep. 794, 795 (K.B.) (justifying punitive damages as an alternative to a duel when one "gentleman" has struck another).

43. *See* Severance v. Hilton, 32 N.H. 289, 291 (1855) (punishing malicious slander); Davidson v. Goodall, 18 N.H. 423, 430–31 (1846) (punishing seduction); Chesley v. Chesley, 10 N.H. 327, 328 (1839) (punishing breach of a promise to marry).

44. *See* Benson v. Frederick, (1776) 97 Eng. Rep. 1130, 1130 (K.B.) (punishing a government agent for wrongly stripping and lashing the plaintiff); Beardmore v. Carrington, (1764) 95 Eng. Rep. 790, 793–94 (K.B.) (punishing an illegal search and seizure).

45. *See* Hopkins v. Atl. & Saint Lawrence R.R., 36 N.H. 9, 10–11 (1857) (punishing a railroad's negligent care of trains); Varillat v. New Orleans & Carrollton R.R., 10 La. Ann. 88, 88–89 (1855) (punishing a negligent railroad employee).

46. The judge's rationale in *Huckle v. Money* resonates this tone:

> [T]he personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20l. damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's

B. American Colonial Developments

In each American colony, almost from inception, the jury emerged as a significant local and popular shield against monarchal abuse of the citizenry. One commentator notes that "[t]he right to trial by jury was probably the only one universally secured by the first American state constitutions."[47] Each colony had a unique system of justice, and each colony presents distinct stories of heroic and rebellious juries.

In Massachusetts, for example, juries enjoyed a broad scope of authority. The jury was an important part of a legal regime dedicated to infusing the law with community morality over issues ranging from creditor-debtor relations to Sabbath breaking.[48] The greatest indication of the jury's power is that "whereas modern juries must follow the law as stated to them by the court, juries in pre-revolutionary Massachusetts could ignore judges' instructions on the law and decide the law by themselves in both civil and criminal cases."[49] William E. Nelson attributes the difference between the jury's power in Massachusetts and in most other common law systems to Massachusetts's "substantial ethical unity and economic and social stability"; as "the unity and stability broke down near the end of the turn of the [nineteenth] century, the jury system began to function less efficiently and with less certainty and predictability."[50]

Experience in the colonies was not homogenous. Although in some colonies, such as Virginia, the jury probably had less power than the justice of the peace, in all cases, "historical evidence makes it clear not only that people throughout America were preoccupied

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> subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavouring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages.

(1763) 95 Eng. Rep. 768, 768–69 (K.B.).

47. LEONARD W. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION 281 (Torchbook 1963) (1960), *quoted in* Stephan Landsman, *The History and Objectives of the Civil Jury System*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 22, 36 (Robert E. Litan ed., 1993).

48. WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 3–6 (1994).

49. *Id.* at 3.

50. *Id.* at 8.

with safeguarding the jury but that they relied on the jury to restrain government."[51]

Perhaps most famously, New York hosted the famous trial of publisher John Peter Zenger in 1735 for seditious libel. He allegedly accused Governor William Cosby "of corruption, misfeasance, and usurpation of the right to jury trial."[52] The judge's instructions gave the jury no discretion to decide whether Zenger's publication was legal or illegal. Rather, the judge effectively required a conviction as long as the jury found that Zenger in fact published the material.[53] Zenger's counsel urged the jury to acquit, however, arguing that the publication was legal if the published accusations were true.[54] The jury ignored the judge's instruction and acquitted Zenger. The case exemplifies the function of the colonial jury as a check on an unelected judiciary.[55]

In addition to the Zenger case, numerous attempts by colonial governors to control the courts, often by limiting jury trials, were consistently rebuffed in the middle of the eighteenth century. By the time of the Revolution, the number of jury trials had actually increased in most jurisdictions and jury trials were available in admiralty and vice admiralty courts. As Stephan Landsman notes, "[i]n the period between the 1760s and the Revolution, the jury represented the most effective means available to secure the independence and integrity of the judicial branch of the colonial government."[56]

Besides the colonial jury experience, the founding generation's words also suggest the jury's political role as originally intended in the Constitution. The Fifth Resolution of the First Continental Congress of 1774 demanded the jury as each colony's *political right* vis-à-vis the Empire: "'[T]he respective colonies are entitled to . . . the great and inestimable privilege of being tried by their peers of the

51. Landsman, *supra* note 47, at 33.

52. Landsman, *supra* note 18, at 593.

53. *Id.*

54. *Id.*

55. *See id.* ("The jury verdict acquitting Zenger established that: the press should be free to criticize the government, truth should be a defense to libel charges, judges do not necessarily have absolute control over questions they designate as 'legal,' and colonial juries, like their English counterparts, were fully capable of defending fundamental rights.").

56. *Id.* at 596.

vicinage . . . .'"[57] The Second Continental Congress's Declaration of the Causes and Necessity of Taking Up Arms,[58] echoed this sentiment, and denial of the "benefits of trial by jury" was one of the grievances against the colonies listed in the Declaration of Independence.[59]

These grievances highlight both a similarity, and an important difference, between the role of the jury in the colonies and its role after the War for Independence. The jury continued to perform a political function, particularly in relation to a professional and often unelected judiciary. But whereas the colonial jury was in many ways the *only* democratic institution available to protect against abuses by what was increasingly considered a foreign occupier, Congress was chosen to bear the weight of the new popular sovereignty conceived by the Framers. The jury was thus no longer necessary to counter-balance an abusive monarch. Or, more cynically, the same jury that was useful for rebels might be threatening to new governors. Even so, Professor Akhil Amar sums up the jury's identity after American Independence: "Juries were, in a sense, the people themselves, tried-and-true embodiments of late-eighteenth-century republican ideology."[60] Even though the jury's political role necessarily evolved in the popular sovereignty, it did not vanish.

C. The Jury's Experience in the United States

Professor Stephan Landsman plots three eras of the jury in the American republic. In the first era (1776–1840), the jury, consistent with its identity as an element of the judiciary, stabilized partisan divisions.[61] Although the Federalists and Republicans bickered about the role of the jury, in most cases a compromise was reached that reasserted the strength of the jury: the Massachusetts legislature

57. *Id.* (quoting DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS (1774), *reprinted in* SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 272, 278 (Richard L. Perry & John C. Cooper eds., 1952)).

58. *Id.*

59. Landsman, *supra* note 47, at 36.

60. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 234 (2005).

61. *See* Landsman, *supra* note 47, at 39–43 ("[The jury] became an instrument of compromise that tempered both the ardent Federalist desire for a strong judiciary and the Republican radicals' thirst for a simplified law without courtrooms or lawyers.").

preserved the jury's right to decide issues of law,[62] Judge Addison of Pennsylvania was impeached for interfering with the jury,[63] and Justice Samuel Chase was prosecuted (but eventually acquitted) for "invad[ing] the province of the jury" by removing certain issues from its consideration.[64] The populace specifically likened Chase to the overreaching judges in the Zenger and *Seven Bishops* cases;[65] such zeal endorsed Alexis de Tocqueville's view that the jury was a repository of power in the governed.[66]

In the second jury era (1840–1900), the jury's political role was limited for the sake of industrial development.[67] The introduction of the doctrine of contributory negligence allowed judges to scrutinize plaintiff behavior and prevent many issues from ever reaching the jury, who, unlike judges, was presumed unable to steel itself against compassion for the "feeble, and apparently oppressed" individual victims of industrial (particularly railroad) enterprises.[68] In short, it was assumed that the jury was "incapable of comprehending the new industrial reality"[69] and would have qualms with the necessity of breaking some proverbial eggs to make the omelet of an advanced society. The use of contributory negligence to shut juries out of the legal decision-making process may not have been universal, but probably accelerated the jury's deterioration beginning in the early 1900s.

The third jury era observed by Landsman encompasses the twentieth century, in which scholars focused on the jury's efficiency, first rhetorically, then with social science studies. Charles E. Clark submitted early realist theories of jury inefficiency to limited empirical study in the 1930s and concluded that the twelve-person, unanimous jury and the procedures attendant wasted judicial time

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62. *See id.* at 41 ("Massachusetts moderates . . . insist[ed] that juries retain the sort of powers they had previously held.").

63. *Id.* at 40.

64. *Id.* at 42–43.

65. *Id.* at 42.

66. *Id.* at 43 ("In *Democracy in America*, Alexis de Tocqueville concludes that the American jury of the 1830s was a fundamentally 'political institution,' whose primary function was to place political power in the hands of the governed.").

67. *See id.* at 43–47 ("Many of the new tort rules [introduced in the nineteenth century] have been said to reflect the perceptions of the judges—who frequently saw the needs of the industrialists as paramount—rather than more liberal and humanistic views.").

68. *Id.* at 45–46 (quoting Haring v. N.Y. & Erie R.R., 13 Barb. 2, 15–16 (N.Y. Gen Term 1852)).

69. *Id.* at 44.

and resources, "'whatever the *political*, *psychological* or *jurisprudential* values of the jury.'"[70] Support for his findings faltered, and they were put to rest definitively by Hans Zeisel and Harry Kalven's University of Chicago Jury Project, which began in the 1950s.[71] The Project asserted that the difference in time between bench and jury trials could be substantially mitigated by "a series of case and trial management techniques."[72] Also, Zeisel and Kalven's conclusion that judges and juries usually agree have been reconfirmed recently in the context of punitive damages: studies suggest that judges and juries do not "differ in the rate at which they award punitive damages, or in the central relation between the size of punitive awards and compensatory awards."[73] Ultimately, unlike Clark, Zeisel and Kalven factored into their inquiry the political and normative role of the jury, and their findings were met with general approval.

The twentieth century has also seen the jury's role in the civil context limited by the advent of a number of trial procedures and institutional developments. For the sake of efficiency, predictability, or institutional control, issues are regularly kept from the jury.[74] For instance, Rule 56 of the Federal Rules of Civil Procedure allows the judge to forgo jury review of the case with a summary judgment ruling,[75] and Rule 50(b) allows the judge to overrule the jury notwithstanding the verdict.[76] These measures may be viewed as the fruit of jury mistrust. More positively, though, they represent an attempt to hone the adversarial system and ensure that "[t]he jury is the most neutral and passive decisionmaker available."[77]

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70. Charles E. Clark & Harry Shulman, *Jury Trial in Civil Cases—A Study in Judicial Administration*, 43 YALE L.J. 867, 884 (1934) (emphasis added).

71. *See* Landsman, *supra* note 47, at 50–51 ("Zeisel and his colleagues found that, while jury trials are approximately 40 percent longer than bench trials, the cost of the jury system is more than justified by the values it introduces into the trial process.").

72. *Id.*

73. Theodore Eisenberg et al., Juries, Judges, and Punitive Damages: An Empirical Study i (Nov. 1, 2000) (unpublished manuscript, on file with the Duke Law Journal), *available at* http://papers.ssrn.com/abstract=248419 (last visited Jan. 28, 2007).

74. *See generally* ELLEN E. SWARD, THE DECLINE OF THE CIVIL JURY 243–349 (2001) (discussing mechanisms that curtail the modern jury's power and involvement in dispute resolution).

75. FED. R. CIV. P. 56.

76. FED. R. CIV. P. 50(b).

77. Stephan Landsman, *The Civil Jury in America*, 62 LAW & CONTEMP. PROBS. 285, 288 (1999).

Numerous categories of legal disputes now evade the jury in favor of an administrative agency[78] or an arbitral tribunal. But the degree to which either of these represents a restriction on the jury is unclear. Administrative adjudications are usually completed by an administrative official without a jury, but they are not entirely out of the judiciary's province because they are usually reviewed for constitutionality by an Article III court. So in administrative adjudications, the jury's political clout is diminished vis-à-vis the power of the federal judiciary. But there is a caveat: many administrative proceedings either would not exist without an administrative mechanism, or would not require a jury trial in the absence of agency oversight. As to arbitrations, private parties who choose to forgo a jury trial by opting for arbitration may not have reached an agreement in the first place without stipulating to an arbitration clause. So, although the rise of alternative dispute resolution and agency adjudication has displaced the jury somewhat, not every case that lands in one of those arenas would have been a controversy but for those arenas' existence.

Even though the American jury's political role was barely discernable in the Frankish *inquisito*, it emerged from English history to its full height in Massachusetts and other colonies, and then necessarily evolved into an integral part of the American republic. Although the jury's influence has been mitigated and threatened over the century, its constitutional role has blossomed in many ways over the last fifty years.

II. THE CONSTITUTION AND THE JURY

The jury's current political role as a democratic and local check on federal judges, although not evident from the text of the Constitution, is exhibited by the structure of the powers created by the Constitution. As current constitutional doctrine across a number of fields suggests, the jury's clearest political responsibility is to inject community morality into the application of the law.

A. History and Text of the Seventh Amendment

The Constitution, as signed by the Continental Congress on September 17, 1787, said little about juries. It never could have been

78. *See* SWARD, *supra* note 74, at 207. Approximately 340,000 cases per year are adjudicated administratively. *Id.*

ratified, however, without amendments safeguarding the common law right to jury trial. These amendments represented a compromise between the Federalists and Antifederalists. Federalist leader Alexander Hamilton noted that all the Framers agreed on "the value they set upon the trial by jury."[79] What distinguished the parties' positions was that the Federalists believed there is no "inseparable connection between the existence of liberty and the trial by jury in civil cases,"[80] but that Congress, as the people's voice, would guarantee the jury's longevity.[81]

The Antifederalists, however, opposed the Constitution if an amendment securing civil juries was not added, often echoing the language of Blackstone:

> The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity; it is not to be expected from human nature that *the few* should be always attentive to the interests and good of *the many*.[82]

On this issue, the nation sided with the Antifederalists. The Bill of Rights guaranteed numerous individual rights designed to maximize not only freedom from state coercion, but public participation in the new republican government. And, "[t]he jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights."[83] Specifically, the Seventh Amendment preserves the right to a jury trial in most cases, and the Judiciary Act of 1789, which Congress considered simultaneous with the Seventh Amendment, narrowly circumscribes the scope of equity at trial, thus necessarily broadening the scope of jury issues.[84]

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79. THE FEDERALIST NO. 83, at 562 (Alexander Hamilton) (Jacob Cooke ed., 1977).

80. *Id.*

81. Landsman, *supra* note 18, at 599.

82. WILLIAM BLACKSTONE, 3 COMMENTARIES *350, *379.

83. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991).

84. Landsman, *supra* note 18, at 600.

The text of the Seventh Amendment addresses those ratifiers concerned that their rights at common law might be abrogated:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[85]

It mentions the common law twice explicitly, and "preserve[s]" the right of trial by jury. Although this adumbration does not clarify whether new kinds of cases require a jury trial,[86] at a minimum, the Seventh Amendment does not abrogate the pre-Independence right to a jury trial in civil cases.

But what does the Seventh Amendment, which preserves the right of civil litigants to trial by a civil jury, have to do with the jury's political role vis-à-vis the political branches? Professors Akhil Amar and Allan Hirsch argue that all voters have an implied Seventh Amendment right to participate in a jury. To them, jury service is inextricably linked to self-determination.[87] This argument is attractive, particularly considered in light of de Tocqueville's assertion that the jury provides an important tool of educating lay people in the laws and administration of justice in order to educate them for self-rule.[88] The assertion of Professors Amar and Hirsch, even if untenable as a constitutional argument, is a welcome caution against the American jury's slow demise. It is not necessary, however, for one to believe in an individual right to serve on a jury to view the jury as having a constitutional role to play as a democratic counterbalance to the professional judiciary.

B. Structure of the Constitution: the Jury as a Local and Democratic Counterbalance

Within the constitutional structure, the jury provides a local and democratic counterbalance to the federal judiciary. This counterbalance is derived both from the Constitution's text, as well as

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85. U.S. CONST. amend. VI.

86. *See* Chauffeurs, Teamsters, & Helpers Local 391 v. Terry, 494 U.S. 558, 564–65 (1990) ("The right to a jury trial includes more than the common-law forms of action recognized in 1791 . . . . The right extends to causes of action created by Congress.").

87. AKHIL AMAR & ALAN HIRSCH, FOR THE PEOPLE 59–60 (1998).

88. *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 285 (Phillips Bradley ed., Alfred A. Knopf 1946) (1830) (calling the jury a "gratuitous public school").

a combination of the text and the architecture of the federal union. In both cases, the jury operates as a subunit of the federal judiciary and counterbalances it as a democratic and local institution.

Read in light of the Bill of Rights, Article III implies that the civil jury, as a subunit of the federal courts, is a democratic counterbalance to judges. Article III vests "[t]he judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[89] This same "Judicial power" does not extend to certain suits in law and equity, pursuant to the Eleventh Amendment.[90] Presumably, then, this judicial power *does* extend to those suits at common law for which the Seventh Amendment preserves the right of trial by jury,[91] and Article III itself provides that the "Trial of all Crimes . . . shall be by Jury."[92] This interpretation of the judicial power provides symmetry to the Constitution's democratic vision: the people themselves, through juries, apply their own laws enacted through Congress and the President.

This symmetry is buttressed by the political structure suggested by the Constitution. Professor Charles Black has noted that, in light of the "high generality and consequent ambiguity which marks so many crucial constitutional texts,"[93] "the logic of national structure"[94] often provides a legitimate and practical constitutional reference.[95] The question is whether the civil jury has a political relationship to the professional judiciary because of the practical structure of the federal government, either between the national branches or between the national government and state government. The Constitution, even if it does not vest part of the judicial power in juries, certainly preserves their function within the federal judiciary. Anything a jury does could be done by a judge—insofar as the Constitution preserves its function, it preserves it at the expense of a judge's power. As

89. U.S. CONST. art. III, § 1.

90. U.S. CONST. amend. XI.

91. U.S. CONST. amend. VII.

92. U.S. CONST. art. III, § 2, cl. 3.

93. CHARLES L. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 30 (1969).

94. *Id.* at 11.

95. *Id.* at 23.

because the product, the jury, is a state actor;[107] and (3) because jury selection is state action, "courts must entertain a challenge to a private litigant's racially discriminatory use of peremptory challenges in a civil trial."[108] The Court had already explained in *Powers v. Ohio*[109] that generally "[a]n individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."[110] The Court thus shifted the emphasis from the right of the parties to an impartial jury to the goals of democracy: "Jury service is an exercise of responsible citizenship by all members of the community."[111]

Jury advocates urge that *Colgrove v. Battin*,[112] which held that the Seventh Amendment does not require a twelve-person jury,[113] reduced the jury's democratic attributes by reducing the odds that a given jury will reflect the diversity of a community. Perhaps this is so, but by the same logic, a twelve-person jury is less democratic than a twenty-person jury or a 300-person jury. Lowering the number of jurors on a jury certainly reduces the breadth of representation on that jury, but it does not change the jury's democratic nature. The finite size of a jury, the random selection of each jury pool, and the challenge and dismissal of potential jurors all work together to define and limit the democratic attributes of the jury. Consistent with the representative model for the other branches of government, a jury is a republican institution, although composed of unelected and to some degree misrepresentative lay people.

All of this is to say that a jury is now, on the whole, more representative of its given community than ever. Judge Calabresi and Professor Philip Bobbit argue that as a representative, one-time player in the legal system, the jury is uniquely situated to make "tragic choices," particularly difficult judgments, without risking either prejudice or political backlash. As they observe, "Juries apply societal standards without ever telling society what these standards

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107. *Id.* at 627 ("The selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race.").

108. *Id.* at 630.

109. Powers v. Ohio, 499 U.S. 400 (1991).

110. *Id.* at 409.

111. *Id.* at 402.

112. Colgrove v. Battin, 413 U.S. 149 (1973). Now, federal juries may be composed of six to twelve people. FED. R. CIV. P. 48.

113. *Colgrove*, 413 U.S. at 160.

are, or even that they exist. This is especially important in those situations in which the statement of standards would be terribly destructive."[114]

As John Hart Ely notes, however, the jury is not a substitute for the legislature as a representative institution.[115] Accordingly, a jury can and should only apply punitive damages consistent with legislation. Even more, each jury judgment should be reviewed for the taint of prejudice. Although a jury's purpose or intent may be even more inscrutable than a legislature's, a reviewing judge should presume that a jury did not act with prejudice when a defendant has access to the political process. Wealthy corporate defendants provide an interesting case that will not be analyzed fully here. Suffice it to say, although corporations may not be represented on a jury by a director or executive, many jurors have a stake in one or more large public corporations, and corporations as a class arguably have more influence on the political process than any other interest group (including racial minorities, Ely's primary concern).[116]

In addition to its role as a democratic voice within the judiciary, the jury also plays an important role in the constitutional structure of federalism as a local actor vis-à-vis a national judiciary. A jury may assign punitive damages, either as a state or federal judicial actor. As a state judicial actor, its democratic role may be less important insofar as the trial judge may be directly elected by a local constituency. Nevertheless, a federal court reviewing a jury's determination of punitive damages for constitutionality is presented with the ad hoc judgment of a group of locals. Because the Tenth Amendment arguably reserves the right to punish civil wrongs to the states, there is no serious objection to the argument that states may constitutionally choose to cap or abolish punitive damages. Pursuant to that constitutional right, most states, even after the tort reform movement, continue to vest local groups of citizens with the power to punish civil wrongdoing. So, although the Constitution is the supreme

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114. GUIDO CALABRESI & PHILIP BOBBIT, TRAGIC CHOICES 17–19, 57–64, 186–89 (1978) (footnote omitted).

115. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 174–77 (1980) (noting the role of statutory restrictions on juror decision-making in capital cases, and concluding that "[i]t is by *reducing*, hardly by increasing, the discretion of juries . . . that we move to protect those who are not so insulated from the sort of 'unusual' enforcement regime it is the point of the Eighth Amendment to preclude").

116. *Id.* at 7–8.

law of the land,[117] and the Fourteenth Amendment limits punitive damages awards,[118] this limit should balance rather than ignore the structure of the federal union. Some deference, at least, should be given by federal judges to local juries in the interest of federalism.

Further, although a state may legislatively limit the jury's punitive damages award discretion, the limits of such legislation—particularly on the heels of the tort reform movement—should give rise to the assumption that the people of the state have democratically chosen to empower the jury to punish wrongdoing up to those limits.[119] This decision should likewise find a place in the federalism equation.

The jury is neither the equal of the legislature as a representative institution nor the equal of the judiciary as a legal decision maker. But both of those other groups collaborate with the jury to govern this nation. Legislatures and judges, over decades, craft laws and rules of procedure and evidence with the intention that a set of local, impartial citizens will, given a carefully drawn set of facts and law, remain impartial and enforce the community's sensibility in a given case. That sensibility may run counter to a state's majority or constitutional principles. The appropriate remedy in the first instance is either remittitur by the trial judge (who may be directly elected) or state legislative action. The appropriate remedy in the second instance is federal judicial review, but because of the jury's political role as a democratic and local check to the federal judiciary, the review should constitute a glance back at the jury's original view, not a carte blanche revision by an unelected national official.

C. The Jury's Constitutional Specialty: Morality

Recent Supreme Court doctrine suggests that the jury best fulfils its role vis-à-vis the professional judge when it provides community moral standards for tough constitutional questions calling for ad hoc judgment. The jury adds such community morality to constitutional law in at least two circumstances: when determining whether a death

117. U.S. CONST. art. VI, § 1, cl. 2.

118. *See infra* Part IV.

119. *See* JAMES A. HENDERSON, JR. & AARON D. TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 634–35 (5th ed. 2004) (providing a catalogue of which states limit punitive damages and how they do so).

sentence is justified, and in determining whether material is obscene, and so not protected by the First Amendment.[120]

First, the Supreme Court in *Ring v. Arizona* held that the jury, not the judge, must determine specific aggravating factors in the case of murder that warrant a death sentence.[121] This extended the Court's holding in *Apprendi v. New Jersey*[122] that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[123] The Sixth Amendment and Due Process Clause demand that the jury, not the judge, determine that all elements of a crime that bear on the appropriate level of punishment are proven beyond a reasonable doubt.[124] Whether a particular factor justifies a sentence of death is a uniquely moral judgment.[125] By requiring the jury to make that judgment, the Court has in part democratized a difficult policy and constitutional issue.[126]

Additionally, since *Miller v. California*,[127] the jury applies community standards to determine whether material is obscene, and therefore not protected by the First Amendment. The Court in *Miller*

120. *See* Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that a jury must find the aggravating factors that warrant a death sentence); Miller v. California, 413 U.S. 15, 33–34 (1973) (deciding that the jury determines whether a material's dominant theme appeals to a prurient interest and violates community standards of decency, and so amounts to unprotected obscenity under the First Amendment).

121. *Ring*, 536 U.S. at 609.

122. Apprendi v. New Jersey, 530 U.S. 466 (2000).

123. *Id.* at 490.

124. *Ring*, 536 U.S. at 609 ("The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death.").

125. Scott Sundby, *The Death Penalty's Future*, 84 TEX. L. REV. 1929, 1959–60 (2006) (citing data that suggest most capital case jurors are trying "to restore the moral imbalance created by the murder" when reaching a sentencing decision); Scott Sundby, *Moral Accuracy and "Wobble" in Capital Sentencing*, 80 IND. L.J. 56, 59 (2005) (suggesting that a jury's sentencing decision in capital cases "is inescapably a moral one").

126. *See* James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM L. REV. 1, 6–7 (2007) ("The Court almost [solved this problem] by blending both Coverian solutions—excused detachment and justified deployment—into an ingenious system for sharing constitutional decisionmaking with capital sentencing juries, state appellate courts, and state legislatures. To achieve its objective, however, the Court needed to exercise residual responsibility for assuring the integrity of hundreds of local proportionality decisions while using the aggregate results of these democratic decisions to inform its own constitutional judgment.").

127. Miller v. California, 413 U.S. 15 (1973).

held that the jury should apply three guidelines to determine whether a law runs afoul of the First Amendment:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[128]

The jury is explicitly told to apply "contemporary community standards" in determining whether material, as a matter of law, is protected by the First Amendment. This is the most overt expression of the Court's reliance on the jury to inject morality into constitutional law.[129]

The Court has not shied away from putting tough questions of morality on the jury's shoulders. The reprehensibility of a civil defendant's behavior is like the factors that warrant the death penalty. In both cases the jury, after assessing liability or guilt, considers the defendant's behavior holistically in light of the defendant's history and the facts of the instant wrongdoing. Although criminal procedure, and particularly the requirement of proof beyond a reasonable doubt, further protects criminal defendants, the analogy is not inapposite because punitive damages are neither as shameful nor destructive as criminal punishment. Civil defendants are not stripped of political rights such as voting, do not carry a civil judgment on their record for life, and are rarely "killed" or completely destroyed by punitive damages. And the determination of punitive damages calls the jury to make a unique community-based judgment of reprehensibility like the determination of prurience, one that might change over time and draw on local community norms. At a minimum, in light of Supreme Court jurisprudence regarding the jury's role in applying community standards of morality, the jury should be given more deference in its assessment of civil punishment.

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128. *Id.* at 24 (internal citations omitted) (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972) (per curiam)).

129. Hamling v. United States, 418 U.S. 87, 106 ("The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts . . . does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity.").

III. THE CONSTITUTIONAL LIMITS OF PUNITIVE DAMAGES

The Constitution's text provides little guidance regarding the propriety of any given punitive damages award. Historically, a jury's decision was not overturned unless it was arbitrary or based on prejudice. Recently, however, the due process requirements for punitive damages awards have stiffened, at the expense of the jury's political power.

An award is constitutionally valid if it is not grossly excessive or arbitrary in light of the behavior it punishes—or conversely, if it is reasonably proportionate to the demerit of that behavior.[130] If a punitive damages award is disproportionate, the defendant is deprived of due process because it was impossible for her have adequate notice of the legal ramifications of her behavior.[131] But this substantive limit provides no real restriction because—at least in theory—any award *could* be justified depending on the reprehensibility of the defendant's behavior. So the substantive rule has no bite until it is joined with the Court's recent procedural limitation: a jury's determination of the reprehensibility of a defendant's behavior garners zero deference on appellate review.[132] Together the rules provide strong medicine against jury overreaching on punitive damages. The Court's concern is the fairness of arbitrarily exorbitant punishments,[133] but its remedy may be too strong when it merely substitutes its own moral judgment for the jury's.

A. The Constitution's Text

The Constitution does not guarantee a right to punitive damages, nor does it prohibit their imposition. The Court has recognized their

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130. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 ("To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.").

131. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 ("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.").

132. *See* Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 436 ("[C]ourts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damage awards.").

133. *See Gore*, 517 U.S. at 587 (Breyer, J., concurring) ("This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion.").

permissibility since 1851, in *Day v. Woodworth*.[134] Moreover, the Court has consistently held, both before and after the advent of the Fourteenth Amendment,[135] that the jury's traditional role at common law in awarding punitive damages is constitutional.[136] Although they are permitted under the Constitution, the Fourteenth Amendment limits punitive damages, and few question a state's power to cap or even abolish them.[137]

A punitive damages award is, of course, punishment. As a punishment imposed for civil misbehavior, it straddles criminal and civil law, because the state typically has a monopoly on punitive power. Although the Constitution does not directly address punitive damages per se, the Eighth Amendment expressly prohibits excessive fines and "cruel and unusual punishments."[138] But the Supreme Court has held—in spite of occasional language to the contrary[139]—that the Eighth Amendment does not limit punitive damages. In *Ingraham v. Wright*,[140] the Court determined that the Eighth Amendment does not limit noncriminal punishments,[141] and, in *Browning-Ferris v. Kelko Disposal, Inc.*,[142] it held that the Excessive Fines Clause of that amendment does not limit awards in cases between private parties.[143]

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134. Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851) (noting that "exemplary, punitive, or vindictive damages" are well-established at common law).

135. Barry v. Edmunds, 116 U.S. 550, 565 (1886) ("For nothing is better settled than that, in such cases as the present, and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict."); *Woodworth*, 54 U.S. at 371 (noting, before the Fourteenth Amendment, that "[t]his has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case"); *see also* Minneapolis & St. Louis Ry. v. Beckwith, 129 U.S. 26, 36 (1889) ("The imposition of punitive or exemplary damages . . . cannot . . . be justly assailed as infringing upon the Fourteenth Amendment . . . .").

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

137. *See* SWARD, *supra* note 74, at 303 n.197 (citing various works that note the lack of constitutional problems with states limiting punitive damages).

138. U.S. CONST. amend. VIII.

139. *See* Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 77 (1988) (stating that an appellant's challenge to the size of a punitive award "raises a cognizable constitutional challenge to the size of the award, one based on the Excessive Fines Clause of the Eighth Amendment," despite declining to rule on the appellant's challenge); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828–29 (1986) (noting that whether a large "punitive damages award is impermissible under the Excessive Fines Clause of the Eight Amendment" is an "important issue[] . . . [that] must be resolved").

140. Ingraham v. Wright, 430 U.S. 651 (1977).

141. *Id.* at 667–68.

142. Browning-Ferris Indus. v. Kelko Disposal, Inc., 492 U.S. 257 (1989).

143. *Id.* at 275.

Instead, the Court's punitive damages jurisprudence is grounded in the Fourteenth Amendment, which prevents a state from "depriv[ing] any person of life, liberty, or property, without due process of law."[144] This clause prohibits courts[145] from depriving any person of "property," including both finances and reputation,[146] by awarding punitive damages without "due process." The question, then, is, "What is due process?"

B. The Due Process Requirement of Notice

Historically, the Court struck down a punitive damages award only if it was "excessive."[147] A jury award was upheld unless it was "the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness."[148] Until 1994, only one award was held to be excessive: the award was "plainly arbitrary and oppressive" because "there was no intentional wrongdoing."[149] Then, in *BMW of North America, Inc. v. Gore*,[150] the Court began adding some muscle and flesh to the skeletal frame of the Due Process Clause.

In *BMW of North America, Inc. v. Gore*, after holding that a state may not punish or deter behavior that is lawful in other states,[151] the Court held that an unusually large punitive damages award does not comport with the requirement that a defendant be given adequate notice of potential punishments for wrongdoing. *Gore* provides three "guideposts" for determining whether a punitive damages award is unreasonable: (1) the degree of the reprehensibility of the defendant's behavior (the most important of the three guideposts), (2) the difference between actual harm and punitive damages, and (3)

144. U.S. CONST. amend. XIV.

145. *See* Shelley v. Kraemer, 334 U.S. 1, 22 (1948) (expressing the notion that judicial decisions are "state action" for the purposes of the Fourteenth Amendment).

146. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

147. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("In most jurisdictions jury discretion over the amounts awarded is limited only by the general rule that they not be excessive.").

148. *Browning-Ferris Indus.*, 492 U.S. at 276.

149. Sw. Tel. & Tel. Co. v. Danaher, 238 U.S. 482, 490–91 (1915).

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

151. *Id.* at 572 ("We think it follows from the[] principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.").

the difference between punitive damages and civil penalties for comparable behavior.[152]

The Court then demonstrated how to apply the guideposts to determine whether the defendant had adequate notice of the punishment imposed by the jury. As to reprehensibility, BMW's behavior was found not to be egregious. The Court considered various indicia of reprehensibility: the nature of the wrong (violence and deceit are particularly serious); the nature of the harm (merely economic harm is not so serious); and whether the wrong is repetitive.[153] All told, BMW's behavior was not too reprehensible. The suppression of a material fact risked, at most, a modest property loss.[154] As to the ratio of punitive to actual damages, although the Court rejected a bright-line rule, it found that a 500 to 1 ratio of punitive to actual damages was "breathtaking" given the low reprehensibility of the defendant's behavior.[155] And finally, as to sanctions for comparable behavior, BMW's conduct would not have been illegal in many states, and—where it was illegal—fines were usually limited to under $10,000.[156] Therefore, every guidepost ultimately pointed toward an excessive punitive damages award.

The Court's standard in *Gore* was predicated partly on a skeptical view of the jury's utility as a source of policy. Justice Breyer, concurring, reasoned that

> one cannot expect to direct jurors like legislators through the ballot box; nor can one expect those jurors to interpret law like judges, who work within a discipline and hierarchical organization that normally promotes roughly uniform interpretation and application of the law. Yet here Alabama expects jurors to act, at least a little, like legislators or judges, for it permits them, to a certain extent, to create public policy and to apply that policy, not to compensate a victim, but to achieve a policy-related objective outside the confines of the particular case.[157]

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152. *Id.* at 574–75.

153. *Id.* at 576–80.

154. *Id.* at 579–80. Justice Scalia, of course, disagreed: "Today's decision . . . is really no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury. . . ." *Id.* at 600 (Scalia, J., dissenting).

155. *Id.* at 583 (majority opinion). Compare Justice Breyer's concurrence, which looks, with a higher level of abstraction, at the proportionality of the award to the state's legitimate punitive goals. *Id.* at 596–97 (Breyer, J., concurring).

156. *Id.* at 584–85 (majority opinion).

157. *Id.* at 596 (Breyer, J., concurring).

Thus, according to Justice Breyer, because juries are unelected on the one hand, and composed of lay people on the other, their discretion regarding "public policy" should be cabined *constitutionally*. This is not just a recommendation to the state of Alabama about the prudence of jury discretion in assigning moral blameworthiness to particular acts. Rather, there is a constitutional requirement to present the jury with "clear legal principles" or "historical or community-based standards," besides the traditional goals of punishment and deterrence.[158] But what is the source of those "historical or community-based standards" if not the jury itself?

Justice Scalia disagreed about the importance and utility of a jury's discretion,[159] writing that, "[t]oday's decision . . . is really no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury, as reduced by the State Supreme Court."[160] He suggested that the majority's decision fails because it takes to task a "judgment about the appropriate degree of indignation or outrage, which is hardly an analytical determination."[161] The majority would likely counter, arguing that legal clarity at least reduces the risk of juror prejudice masquerading as community outrage.[162]

In *State Farm v. Campbell*,[163] the Court embellished the *Gore* "guideposts."[164] Before embarking on the *Gore* analysis, the Court reiterated its concern about "grossly excessive or arbitrary punishments,"[165] particularly because defendants in civil cases had "not been accorded the protections applicable in a criminal proceeding."[166] The Court again asserted that the degree of reprehensibility of the defendant's conduct is the most important

158. *Id.*

159. Justice Ginsburg, joined by Chief Justice Rehnquist, focused her dissent on the danger of federalizing a state subject, particularly where the state court offered adequate review. *Id.* at 610, 613 (Ginsburg, J., dissenting).

160. *Id.* at 600 (Scalia, J., dissenting).

161. *Id.* Justice Scalia later notes that one result of the three "guideposts" offered by the Court, and the "loophole" where "'necessary to deter future misconduct,'" is that reviewing courts will be forced to "concoct rationalizations" to "justify the intuitive punitive reactions of state juries." *Id.* at 605 (quoting *id.* at 584–85 (majority opinion)).

162. Justice Scalia would not be so concerned with jury prejudice so long as the jury's award is reasonable. *Id.*

163. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 416 (2003).

164. *Id.* at 418.

165. *Id.* at 416.

166. *Id.* at 417.

guidepost.[167] Then the Court, relying on principles of federalism, held that a jury may not consider "[l]awful out-of-state conduct" when determining punishment, although evidence of such conduct "may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious."[168] The Court hastened to add that punitive damages should be based solely on the "conduct that harmed the plaintiff," not any other dubious policies or actions.[169] Further, opining on the second *Gore* guidepost, the Court suggested that few punitive damages awards exceeding nine times the amount of compensatory damages would pass constitutional muster, except perhaps when the act was particularly egregious and the actual damages relatively small.[170]

Although *State Farm*'s gloss on *Gore* likely represented an attempt to avoid explicitly raising the level of scrutiny applied to the substance of punitive awards, it effectively did just that. Instead of risk being overturned for constitutional inadequacy, most lower courts would rather decrease a punitive damages award to within nine times the amount of actual damages. It is theoretically possible under *State Farm* for punitive damages less than nine times the amount of actual damages to still violate due process (perhaps if the reprehensibility was very low), or for punitive damages exceeding nine times the amount of actual damages to be valid (if the reprehensibility is extraordinarily high and the actual damages very low). But trial and appeals court judges rarely risk allowing a higher award. And it is unlikely that the Supreme Court would nitpick an award less than nine times the amount of actual damages. So, unless a court is unusually bold, the de facto constitutional rule is that punitive damages which exceed nine times the amount of actual damages violate the Fourteenth Amendment.

C. De Novo Review of Punitive Damages Awards

The biggest blow to the jury's political role in assigning punitive damages came not in *Gore* or *State Farm*, however, but rather between those two decisions, quietly. In *Cooper Industries v. Leatherman Tool*,[171] the Court announced that punitive damages

167. *Gore*, 517 U.S. at 575.
168. *Campbell*, 538 U.S. at 422.
169. *Id.* at 422–23.
170. *Id.* at 425.
171. Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424 (2001).

awards get no deference on appeal, and must be reviewed de novo.[172] The Court justified its decision to erase the judgment of a jury and trial court judge regarding the appropriate level of punitive damages by analogizing to the de novo standard employed in some criminal contexts that require the application of a complex legal doctrine, such as "reasonable suspicion" or "probable cause."[173]

Moreover, the Court held that de novo review of punitive damages awards does not violate the Seventh Amendment's guarantee of a jury for civil trials because, according to the Court's rationale in *Cooper Industries*, punitive damages are not issues of fact.[174] This is a dubious characterization. Whether the award violates the Constitution is, of course, a question of law. But latent in the *Gore* analysis is the reprehensibility guidepost, which is, at most, a mixed question of law and fact, and may be characterized as a pure question of fact. Indeed, that is the very sort of moral blameworthiness that juries determine all the time. Appellate courts are as competent as trial judges and juries to apply the last two, formulaic guideposts.[175] But these courts are likely no more competent than the combination of jury and trial judge in assessing reprehensibility. Moreover, even if they are, it is neither constitutionally necessary nor politically desirable for them to make such decisions.

Justice Ginsburg, dissenting from the *Cooper* decision, noted her concern that the new standard comes at a heavy cost with only speculative benefits. The new review standard may not yield very many different outcomes,[176] but it destroys a firmly-embedded tradition of jury discretion[177] and demands expensive, time-consuming, and clumsy appellate review of trial court decisions.[178]

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172. *Id.* at 436.

173. *Id.*; *see also* United States v. Bajakajian, 524 U.S. 321, 336–37 (1998) (holding that courts of appeal should review proportionality determinations de novo); Ornelas v. United States, 517 U.S. 690, 697 (1996) (holding that trial judges' determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal).

174. *Cooper Indus.*, 532 U.S. at 437.

175. *Id.* at 440; *see* Darryl K. Brown, *Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrines*, 47 HASTINGS L.J. 1255 (1996) (arguing that legal process theory drives the Court's reallocation of jury responsibilities to other institutions more "competent" or efficient at making punishment determinations).

176. *Cooper Indus.*, 532 U.S. at 449–50 (Ginsburg, J., dissenting).

177. *Id.* at 444–45.

178. *See id.* at 450 ("The Court's approach will be challenging to administer.").

Ginsburg responded to the charge that punitive damages are not issues of fact by noting that there is little difference between jury discretion to determine noneconomic damages and punitive damages.[179] Despite institutional competence concerns, she believed the district courts are best situated to determine the "most important" of the *Gore* factors, reprehensibility.[180]

But why is the jury better situated than appeals courts to determine reprehensibility, and why, therefore, should appeals courts hesitate to overturn jury awards? Is it because the jury (and usually an elected state trial judge) has a *better* nose for wrongdoing? Perhaps: the jury and trial judge *do* have the benefit of evaluating testimony and evidence first-hand. More importantly, though, the jury has a *more democratic* nose for wrongdoing than unelected federal appeals judges. Allowing the jury some room to enforce moral standards gives play in the joints to federalism, enhances the democratic legitimacy of judicial judgment, and gives local communities flexibility to respond to novel or particularly pernicious forms of wrongdoing that directly affect them.

IV. RE-EMPOWERING THE JURY WITHOUT SACRIFICING FAIRNESS

The Court's current punitive damages jurisprudence is the product of an evolution away from the Court's historical trust in juries to assign punitive damages, and it dramatically limits the power of local communities to establish the moral norms that will govern both themselves and outside entities that wish to do business with them. The Court's holdings do not need dismantling, merely fine-tuning. This Part identifies the constitutionally necessary parts of the current doctrine and suggests ways to allow the jury greater power to affect community norms without sacrificing due process.

A. The Need for Balance

The Court's punitive damages holdings have a great deal of merit. They successfully excise two unfair considerations from the jury's purview: the defendant's similar behavior in other jurisdictions which do not prohibit such behavior; and the harm caused to others besides the plaintiff, for which the defendant may also be liable. Halting the former consideration prevents the punishment of legal

179. *Id.* at 446–47.
180. *Id.* at 449.

behavior and prevents jurisdiction encroachment, while halting the latter consideration prevents multiple punishments for the same wrong. Also, in many ways, the *Gore* guideposts do nothing but flesh out the long-standing constitutional rule against excessive or grossly arbitrary punitive damages awards. And requiring de novo review of the determinations at trial can even be justified on the grounds that civil law does not provide the same procedural protections as criminal law against unfair punishment.

The Court did not institute these changes, however, until after a rash of large punitive damages awards, and the scholars and special interest groups bemoaning them.[181] The obvious, although unnecessary, conclusion that can be drawn from the Court's decisions is that large awards (perhaps among other factors) undermined the Court's trust in the jury's decision-making ability. In particular, at least some members of the Court were concerned about the political authority and competence of the jury to establish appropriate "public policy."[182]

The Court overcorrected. De novo review does more than cabin jury discretion by preventing certain aspects of the defendant's behavior from factoring into the jury's determination of reprehensibility. It renders juries constitutionally powerless and their input meaningless as to the punishment of civil wrongdoing. Juries may be relevant so long as the punitive damages award—in compliance with *State Farm*'s firm suggestion—is less than nine times the amount of actual damages, but the jury's determination of reprehensibility is effectively expunged any time the defendant appeals. Thus the jury's power vis-à-vis the professional judiciary is

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181. *See generally* Robert E. Litan, *Introduction*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 47, at 1 ("The American system of civil justice, much admired around the world, in recent years has become the subject of great controversy at home."); *see also* George L. Priest, *Introduction: The Problem and Efforts to Understand It*, *in* PUNITIVE DAMAGES: HOW JURIES DECIDE 1, 1–4 (Cass R. Sunstein et al. eds., 2002) (noting the controversy surrounding large punitive damage awards); Jeffrey Robert White, *ATLA Protecting Your Rights: The Civil Jury: 200 Years Under Siege*, ALTA.ORG, http://www.atlanet.org/pressroom/sreports/t006whi.aspx (last visited Jan. 28, 2007) (relating the importance of the right to a jury trial in civil cases and countering critics who claim that civil juries are out of control).

182. *See* BMW of N. Am., Inc. v. Gore 517 U.S. 559, 596 (Breyer, J., concurring) ("[O]ne cannot expect to direct jurors like legislators through the ballot box; nor can one expect those jurors to interpret law like judges, who work within a discipline and hierarchical organization that normally promotes roughly uniform interpretation and application of the law. Yet here Alabama expects jurors to act, at least a little, like legislators or judges, for it permits them, to a certain extent, to create public policy and to apply that policy, not to compensate a victim, but to achieve a policy-related objective outside the confines of the particular case.").

extinguished exactly where the jury is most competent and has played the biggest political role historically: in the enforcement of community moral norms. Perhaps the Court assumed that large jury awards are driven by incompetence or prejudice, rather than assuming that the system of checks and balances was working as it always had.

Assuming contemporary juries are functioning normally, and not prejudicially (for instance, there was no evidence of prejudice in the *Gore* or *State Farm* cases), recent large punitive damages awards may symbolize late twentieth-century community indignation over particular types of wrongdoing more than they indicate a trend of arbitrary judgment. Studies demonstrate that large "blockbuster" awards happen relatively infrequently, and almost exclusively when an individual has been injured by the extremely reckless or intentional wrongdoing of a large corporation—usually a tobacco or oil company.[183] Most important for vindicating jury judgment is the finding that juries and judges tend to "award punitive damages in approximately the same ratio to compensatory damages"[184] and that blockbuster punitive awards strongly relate to compensatory damages.[185] In spite of the current empirical studies battle over the effectiveness of the jury,[186] the strongest that can be said is that "[d]ata reveal a more nuanced and complex picture of judge and jury behavior than does conventional wisdom, which typically rests precariously on unstudied assumptions and axioms."[187] But it is reasonable to conclude that, particularly when balanced against the jury's constitutional and historical role, the empirical arguments that the jury's role in assessing punitive damages should be strictly monitored are unpersuasive. That is, even on the empiricist's terms, the jury is more a barometer of community morality than a gauge of

183. Theodore Eisenberg & Martin T. Wells, *The Significant Association Between Punitive and Compensatory Damages in Blockbuster Cases: A Methodological Primer*, 3 J. EMPIRICAL LEGAL STUD. 175 (2006).

184. Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263, 293 (2006).

185. Eisenberg & Wells, *supra* note 183, at 176.

186. For exemplary artifacts of this war, see generally PUNITIVE DAMAGES: HOW JURIES DECIDE, *supra* note 181, and Neil Vidmar, *Experimental Simulations and Tort Reform: Avoidance, Error, and Overreaching in Sunstein et al.'s* Punitive Damages, 53 EMORY L.J. 1359 (2004). For a list of recent publications dealing with the jury, see Eisenberg et al., *supra* note 184, at 266 n.8.

187. Eisenberg et al., *supra* note 184, at 265.

community irrationality. But with de novo review of jury decisions, that barometer is useless.

B. Alternative Punitive Damages Doctrines

This Section suggests and analyzes the constitutional costs and benefits of three possible resolutions of the present predicament: (1) appellate review of jury awards for abuse of discretion under the *Gore* guideposts, (2) appellate review of jury awards under the prior doctrine of excessiveness or arbitrariness, and (3) a hybrid solution allowing the jury to apply the *Gore* guideposts.

1. *Some Deference to Juries, Plus* Gore *Guidepost Protection of Due Process*. Probably the simplest solution would be to dispense with the de novo standard of review of jury decisions, and to review them instead for abuse of discretion. Appeals courts could still use the *Gore* guideposts as exactly that: guideposts for determining whether the defendant was deprived of due process. But rather than simply substitute their judgment regarding the reprehensibility of the defendant's behavior, courts would give deference to the jury's assessment. The downside to maintaining the guideposts and still giving the jury some deference is that it may allow for an unconstitutional amount of play in the joints of the *Gore* guideposts. *State Farm*, although not providing a bright line rule for the ratio requirement, cleared the haze substantially. But appeals courts may take wildly different approaches in trying to balance deference to the jury and application of the guideposts. Although this may affect the uniformity of awards, it preserves the jury's political role, and so long as courts generally adhere to the ratio requirement of *State Farm*, it provides adequate due process.

2. *Return to the Prior Rule, With Important Modifications*. The Court could return to the prior rule and require review of jury awards only for excessiveness or clear arbitrariness. Almost by definition, the prior rule comports with the understanding of the jury's political and legal role that has predominated in American history. Unlike the Court's current approach to punitive damages, it recognizes that the jury can play an important role in defining public policy in certain areas—particularly when assessing the relative blameworthiness of a defendant's actions. The Court could still allow jury consideration of wrongs committed outside the jurisdiction. And this rule would not be affected by the Court's answer to one of the questions presented

by the current *Philip Morris* case: whether the defendant can be assessed punitive damages for wrongs done against others within the same jurisdiction as the plaintiff.[188] Whether the jury award is clearly arbitrary is essentially a rational basis review. And ever since *Romer v. Evans*,[189] animus is not a constitutionally sufficient reason for state action, so this rule would not only police excessiveness, but prejudice as well.[190]

The greatest strength of this rule, with the appropriate limitations, is that it does not fetter the jury—it allows the community's moral opprobrium to be realized unless it is based on animus, or if it results in excessiveness. This last caveat is the rule's greatest weakness, however: it gives inadequate guidance to courts and juries about the definition of excessiveness, and so it risks unconstitutional deprivations of property and untold amounts of time and money tying up the judicial system with appeals.

3. *Hybrid Solution: Jury Application of the* Gore *Guideposts*. A third option, combining the strengths and eliminating the weaknesses of both of the other approaches, is to allow the jury to apply the *Gore* guideposts directly. This approach would simply put the *Gore* guideposts, including the appropriate indicia of reprehensibility, in the jury punitive damages instructions. This sort of constitutional judgment is not foreign to the modern jury. In fact, the Court employs it most often when it wishes to outsource hazy moral judgments, like whether material is obscene for purposes of the First Amendment,[191] or in determining facts that could justify the death penalty.[192]

Allowing the jury to apply the *Gore* guideposts would be most similar to requiring the jury to apply a three-part test to determine whether material is obscene according to community standards. In

188. Williams v. Philip Morris Inc., 127 P.3d 1165, 1171 (Or. 2006), *cert. granted*, 126 S. Ct. 2329 (U.S. May 30, 2006) (No. 05-1256).

189. Romer v. Evans, 517 U.S. 620, 635 (1996).

190. *Id.* at 635 ("Amendment 2 is [not] directed to any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.").

191. *See* Miller v. California, 413 U.S. 15, 33–34 (1973) (discussing the average person standard).

192. Ring v. Arizona, 536 U.S. 584, 609 (2002) ("The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death.").

this context, the Court has implicitly affirmed the jury's role in making "public policy" determinations, like the appropriate level of protection against prurient media.[193] Whether something is morally offensive is not, after all, a question demanding a choice between two opposite answers. Rather, like the issue of punitive damages, it admits of degrees. A host of policy choices may factor into the jury's analysis because, in application of a three-prong test, the jury is representatively speaking *for the community*, and not just for a combination of the predispositions of individual jurors.

Such would be the case with punitive damages. A jury could impose the community's norms in an attempt to comply with the constitutional due process requirements. Then judicial review would not amount to squeezing the square peg of a jury's moral judgment through the round hole of *Gore*'s guideposts test. Rather, the reviewing court would simply review a jury determination for compliance with the jury's stated objective. Punitive damage awards which exceed nine times the actual damages would be reviewed for constitutionality with the assumption that the jury made a deliberate decision to inflict an extraordinary punishment because it determined that, in light of the reprehensibility factors, the defendant's behavior was extraordinarily reprehensible and deserving of retribution and deterrence. This approach also honestly admits that reprehensibility is a mixed question of law and fact, and one that the jury has historically determined in its role vis-à-vis the professional judiciary.

C. Resituating Fairness

In many ways, this Note enters the current debate about the jury's role in assigning punitive damages through the back door. Scholars evaluate the Court's current doctrine on punitive damages in several ways. By far the dominant approach is an empirical analysis of the jury's function. Some of these scholars interpret the data to indicate the inherent unfairness of the jury[194] and others interpret the

193. *See Miller*, 413 U.S. at 33–34 (stating that the jury should decide what constitutes obscenity).

194. *See* Reid Hastie, *Overview: What We Did and What We Found*, *in* PUNITIVE DAMAGES: HOW JURIES DECIDE, *supra* note 181, at 17, 25–26 (noting the biases and unpredictability of the jury deliberation process). *See generally* Stephen A. Saltzburg, *Improving the Quality of Jury Decision Making*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 47, at 341 (describing the difficulties and inherent unfairness of submitting very complex cases to juries).

data as neutral or favorable for the jury.[195] Another approach is that of the synthesist, who argues for constitutional coherency and consistency.[196] But synthesism, as an argument for coherence, does not always offer adequate support for one potential synthesis over another, and infrequently focuses on a narrow topic like Fourteenth Amendment limits on punitive damages. Yet another scholarly approach recounts the jury's historical and political role.[197]

This Note combines the latter two approaches, arguing that history and the political role of the jury urge the Court to synthesize the current punitive damages doctrine with the doctrines that acknowledge the jury as a source of morality in the area of capital punishment and obscenity. This approach deliberately sidesteps arguments about predictability in order to resituate fairness outside of the normative sway of empiricism. But that is not to deny the legitimacy of concerns about the predictability of punitive damages awards and the valuable role of empirical studies in evaluating the jury. It simply rejects the assumption that large awards are unpredictable and therefore unfair merely because they are large.[198]

Rather, understanding the political purpose of the jury as a counterbalance to the professional judiciary and as a bellwether of

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195. Eisenberg et al., *supra* note 184, at 264–66; Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 779 (2002); Theodore Eisenberg et al., *Reconciling Experimental Incoherence with Real-World Coherence in Punitive Damages*, 54 STAN. L. REV. 1239, 1241–42 (2002); Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 178 (1958); Vidmar, *supra* note 186, at 1399–1403.

196. *See generally* Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1070–80 (2004) (arguing for a uniform constitutional approach to achieving proportional punishments in both the criminal and civil realms); Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 880–83 (2004) (noting a discrepancy between the Supreme Court's handling of proportionality of punishment in the criminal and punitive damage contexts).

197. *See* Landsman, *supra* note 47, at 22 (recounting the history of the American civil jury system). *See generally* Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964) (denying the notion that judges are inherently better at making decisions than juries); Landsman, *supra* note 96 (looking at the historical roots of the civil jury system); Landsman, *supra* note 18 (noting the adaptability of the jury in American history); White, *supra* note 181 (stressing the importance of the Seventh Amendment throughout the history of the United States).

198. *See* Cass R. Sunstein, *What Should Be Done?*, *in* PUNITIVE DAMAGES: HOW JURIES DECIDE, *supra* note 181, at 242, 243 (Cass R. Sunstein et al. eds., 2002) ("If the purpose of [punitive damage] awards is retribution . . . the analysis would be different than if the purpose of such awards is to deter (optimally) future misconduct."). Ultimately Sunstein concludes that "[w]hatever one's views about the purpose of punitive damages awards, juries face extremely serious problems in producing sensible and coherent outcomes." *Id.*

community norms suggests another take on many "unpredictable" jury awards: American communities are outraged by (often unregulated) industrial giants who recklessly or intentionally abuse the goodwill of consumers. In fact, such an interpretation of large punitive damages awards is both intuitively *predictable*, and therefore fair, as well as empirically testable.[199] Not only are some punitive damages necessary to force defendants to internalize the costs of wrongdoing,[200] but, more importantly, the constitutionally-mandated reprehensibility guidepost is inherently an unpredictable determination.[201] Another interpretation may be that jury awards, following the example of jury awards in Massachusetts as that state diversified economically and morally,[202] have become more unpredictable than before because of increasingly diverse moral convictions and economic situations of jurors in the United States. This Note, rather than enter the struggle to interpret empirical data, asserts the jury's role in two areas beyond the purview of empirical studies: the constitutional structure of the United States and morality.

CONCLUSION

If the true source of a growing string of large punitive damages awards is nothing more than the jury doing exactly what the jury should do, then the Court should take the opportunity afforded by a case in which the punitive damages exceed compensatory damages by greater than nine times to reconsider its current punitive damage doctrine. The Fourteenth Amendment promises fairness, but it does not define reprehensibility. The historical and political role of the jury as a counterbalance to the professional judiciary demands—at a

199. Studies suggest, ironically, that jurors are likely to be outraged by pre-hoc cost-benefit analyses by civil defendants. *See* Cass R. Sunstein, *Jurors and Judges as Risk Managers: Introduction*, *in* PUNITIVE DAMAGES: HOW JURIES DECIDE, *supra* note 181, at 109, 110 ("[P]unitive damages awards increase . . . when companies have done [a cost-benefit analysis], even when a high value is placed on the key variables (such as life).").

200. *See* David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1286 (1976) (noting, as regards the deterrence of punitive damages in products liability cases, that "[t]he greater the product's profit potential and the less the likelihood that individual victims will seek recovery, the greater the need for a strong deterrent to reckless marketing decisions").

201. *See* Daniel Kahneman, David A. Schkade & Cass R. Sunstein, *Shared Outrage, Erratic Awards*, *in* PUNITIVE DAMAGES: HOW JURIES DECIDE, *supra* note 181, at 31, 31 ("Even when there is a consensus on punitive intent, there is no consensus about how much in the way of dollars is necessary to produce appropriate suffering in a defendant." (emphasis omitted)).

202. *See supra* notes 50–53 and accompanying text.

minimum—some deference to the jury's moral judgment as to civil punishment. Allowing the jury some room to enforce moral standards gives play in the joints to federalism, and enhances the democratic legitimacy of judicial judgment. Ultimately, the Court begs the question about the constitutional legitimacy of large punitive damages awards when it assumes such awards must be the result of juror bias. Instead of ignoring such awards, perhaps judges should regard them as the result of good old-fashioned moral judgment applied to novel or particularly pernicious forms of wrongdoing. Reasonable people could disagree with any given jury judgment, but a judge should be hesitant to substitute her debatable judgment for the jury's.