

# Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-Examination of the American Jury

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LAST TERM, the United States Supreme Court drastically altered the balance of power between judge and jury, and the legal community barely noticed. Although *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*<sup>1</sup> is remarkable for what it does overtly—it changes the standard of review in punitive damages cases from an abuse of discretion review to *de novo* review; it is even more remarkable for what it does covertly—it arguably takes the right to assess punitive damages in the first instance entirely out of the hands of the jury.

According to the Court, “[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a ‘fact’ ‘tried’ by the jury.”<sup>2</sup> If one takes this statement at face value, litigants no longer have a right to have a jury determine the amount of punitive damages. To the extent that modern juries function solely as fact finders,<sup>3</sup> the assessment of a punitive damage award, at least as to the amount, is outside the purview of the jury. Irrespective of whether, from a normative standpoint,<sup>4</sup> this is a desirable state of events, it is now the law of the land in federal courts.<sup>5</sup>

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1. 121 S. Ct. 1678 (2001).

2. *Id.* at 1686 (internal citations omitted).

3. *See, e.g.*, *Wright v. West*, 505 U.S. 277, 296 (1992) (jury is trier of fact); *Harding v. U.S.*, 335 F.2d 515, 517 (9th Cir. 1964) (“[J]ury [is] sole trier of fact.”). This was not always the case, however. At early common law, juries sometimes acted as triers of law as well as fact. *See infra* Part I.

4. *See infra* Part II.

5. Because the Seventh Amendment has not been incorporated and made applicable to the several states by the Fourteenth Amendment, a state could theoretically abolish all jury trials by appropriate legislation. *See Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974)

This Article undertakes to trace the historical events that led both to the rise of the jury and the case law which has, over time, eroded the jury's power, culminating with the Supreme Court's decision in *Cooper*. This Article likewise examines the constitutional tension between the Seventh and Fourteenth Amendments that has been the focus of the Court's punitive damages jurisprudence in recent years, and proposes a framework which best utilizes the populist voice of the jury and the technical expertise of the judge, thereby maximizing the institutional strengths of each.

Accordingly, Part I focuses on the historical development of punitive damages and the jury's function in awarding them. Particular attention is paid to the origins of the jury, the adoption of the Seventh Amendment and the historical pedigree of punitive damages award. Part II examines the division of power between the judge and jury in awarding punitive damages and surveys the Supreme Court's incursions in recent years into the role of the jury. Interestingly, during this period the Court shifted from a traditional, historical analysis in which the jury's power was paramount, to a functional approach which focused on the "fundamental" characteristics of the jury. This, in turn, led to increasing judicial control over jury verdicts in general, and punitive damages awards in particular. Part III examines the constitutionality of punitive damages awards subjected to due process attacks, both from a procedural and a substantive standpoint. Part IV is an analysis of the Court's decision in *Cooper*, including a critical examination of the rationale of the case. Finally, Part V suggests a framework for federal district courts to employ when a plaintiff requests punitive damages in a civil case.

## I. Historical Perspective

### A. The Rise of the Jury

Although the origins of the first use of juries is a topic of considerable scholarly debate,<sup>6</sup> it appears that the first juries to perform fact finding and adjudicatory functions were created in England by Henry II, who came to the throne in 1154.<sup>7</sup> Henry II implemented the jury system through a series of statutory enactments that provided a rem-

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("The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment.")

6. See, e.g., Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 582 (1993) (articulating competing theories regarding the jury's origins).

7. See SIR PATRICK DEVLIN, TRIAL BY JURY 7 (1956).

edy for dispossessed free-holders.<sup>8</sup> These enactments became known collectively as the assize of novel disseisin, and permitted claimants to submit their cause to a jury composed of persons with actual knowledge of the case.<sup>9</sup> That jurors were required to have actual knowledge of the facts of the case suggests that juries functioned as witnesses as much as fact finding bodies.<sup>10</sup>

The jury's dual role as fact finder and witness, however, appears to have died out by the mid-seventeenth century when it became "a punishable offense to contact or inform jurors of any facts or law relating to an impending trial."<sup>11</sup> By this point in history, the civil jury trial had taken on the more familiar format of jurors weighing evidence based solely upon in-court testimony.<sup>12</sup>

Whatever the jury's origins or original functions, it was so firmly ingrained in England's common law that the right to jury trial was given constitutional proportions when King John signed the Magna Carta on June 15, 1215. The Magna Carta provided:

No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.<sup>13</sup>

In ensuing years, English monarchs have "reaffirmed the Magna Charta [sic] thirty-eight times."<sup>14</sup>

In 1285, the *nisi prius* system of adjudication was established in England.<sup>15</sup> Under this system, circuit judges of assize traveled to counties to hear cases, even where the cases were filed in the common law

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8. See 1 SIR FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 74 (2d ed. 1959).

9. See Landsman, *supra* note 6, at 582.

10. See WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 105 (Burt Franklin ed., Lenox Hill Pub. & Dist. Co. 1971) (1878).

11. Landsman, *supra* note 6, at 586 (citing LLOYD E. MOORE, *THE JURY* 70 (1973)).

12. See *id.* at 587.

13. MAGNA CARTA (1215) (ENG.) art. 29. Modern historians no longer accept the theory that the right to jury trials originated with the Magna Carta, although the framers of the Constitution apparently thought this was the case. See e.g., F. Heller, *THE SIXTH AMENDMENT TO THE CONSTITUTION* 15 (1951); POLLOCK & MAITLAND, *supra* note 8, at 173 n.3.

14. Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 13 (1993).

15. See James C. Lopez, Comment, *Appellate Control of Excessive Jury Verdicts Since Gasperini v. Center for Humanities: From Nisi Prius Courts to "Gasperini Hearings,"* 66 U. CINN. L. REV. 1323 (1998).

courts located in London.<sup>16</sup> What remains unclear, however, is the nature of the proceeding in the Westminster Court after a verdict had been rendered by a *nisi prius* judge.<sup>17</sup> Some commentators believe the Westminster Court acted as an appellate body which re-examined facts, while others believe the entire cause was retried by the Westminster Court.<sup>18</sup>

By the mid seventeenth century, as the American colonies were being founded, "trial by jury [had] emerged as the principle defense of English liberties."<sup>19</sup> Professors Dawson and Landsman posit that the role of the jury had a profound impact upon English society. They contend that "relying on the jury and other lay decisionmakers such as justices of the peace had the unanticipated effect of training 'English society, through its local leadership, in the skills and the practice of self-government.'"<sup>20</sup> This experience would give the English citizenry—and the American colonists—the will to fight for what they perceived as their unadulterated right to trial by jury.

The original colonists did, in fact, bring trial by jury with them to the new world. Many of the early Colonial Charters incorporated the right to jury trial. For example, as early as 1606, the Charter to the

16. See William Wirt Blume, *Review of Facts in Jury Cases—The Seventh Amendment*, 20 J. AM. JUDICATURE SOC'Y 130, 131 (1936).

17. See *id.*

18. Commentators arguing that the Westminster Court acted as an appellate court considering the evidence anew include William Wirt Blume, Blume, *supra* note 16; Barbara Lerner, Comment, *Remittitur Review: Constitutionality and Efficiency in Liquidated and Unliquidated Damages Cases*, 43 U. CHI. L. REV. 376, 382–83 (1976); E.W. Hinton, Note, *Power of Federal Appellate Court to Review Ruling on Motion for New Trial*, 1 U. CHI. L. REV. 111, 113 (1933); Comment, *Federal Appellate Review of Excessive or Inadequate Damage Awards*, 28 FORDHAM L. REV. 500, 502–04 (1959); William Renwick Riddell, *New Trial at the Common Law*, 26 YALE L.J. 49, 52–57 (1916); Comment, *Federal Practice—Appeal and Error—Review of Denial of Motion for New Trial*, 32 MICH. L. REV. 387, 388 & n.5 (1933); Note, *Appealability of Rulings on Motion for New Trial in the Federal Courts*, 98 U. PA. L. REV. 575, 579 (1950); Jerry LeMond, Comment, *Federal Review of Excessive Verdicts*, 30 TEX. L. REV. 242, 243–44 (1951). Expressions of the opposite view include *Gasperini v. Center for Humanities*, 518 U.S. 415, 454–56 (1996) (Scalia, J., dissenting); and Frank Warran Hackett, *Has a Trial Judge of a United States Court the Right to Direct a Verdict*, 24 YALE L.J. 127, 142 (1914). The question becomes an important one for Seventh Amendment purposes because it is generally assumed that the "common law" referred to in the amendment is the law of England as it existed in 1791 when the Bill of Rights was adopted. See *U.S. v. Wonson*, 28 F. Cas. 745, 750 (1812) ("Beyond all question, the common law here alluded to is not the common law of any individual State (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence.").

19. Landsman, *supra* note 6, at 590.

20. *Id.* at 588, citing JOHN P. DAWSON, *A HISTORY OF LAW JUDGES* 118–20 (1960).

Virginia Company provided for trial by jury.<sup>21</sup> By 1624, all civil and criminal cases were tried by jury in Virginia.<sup>22</sup> The Massachusetts Bay Colony introduced the right to trial by jury in 1628 and codified that right in 1641.<sup>23</sup> The Colony of West New Jersey provided for jury trial in 1677 as did Pennsylvania in 1682.<sup>24</sup> By 1727, eight of the original thirteen colonies had explicitly incorporated the right to a jury trial.<sup>25</sup> Ultimately, all thirteen colonies provided for the right to jury trial either expressly or through the common law.<sup>26</sup>

Against this backdrop, King George III was attempting to expand the jurisdiction of the admiralty and vice-admiralty courts in the colonies, which sat in equity without a jury.<sup>27</sup> This troubled the early colonists.<sup>28</sup> Ultimately, it became an extremely contentious issue in the years preceding the outbreak of hostilities between England and the colonies.<sup>29</sup> Some have argued that the threat of the abolition of trial by jury was one of the principal causes of the American Revolution.<sup>30</sup> In any event, after the outbreak of hostilities between the colonies and England, each of the thirteen states formally adopted the civil jury trial.<sup>31</sup>

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21. See HAROLD M. HYMAN & CATHERINE M. TARRANT, ASPECTS OF AMERICAN TRIAL JURY HISTORY, IN THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW 23, 24 (Rita James Simon ed., 1975).

22. See Landsman, *supra* note 6, at 592.

23. See *id.*

24. See *id.*

25. See 1 J. KENDALL FEW, IN DEFENSE OF TRIAL BY JURY 36 (1993).

26. See Landsman, *supra* note 6, at 592.

27. See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 654 n.47 (1973).

28. In a letter dated June 6, 1766, George Mason wrote to the Committee of Merchants in London asserting that the vice-admiralty courts' expanding jurisdiction was a threat to the continuing right to a jury trial and explicitly recognizing this as a point of dispute. See 1 THE PAPERS OF GEORGE MASON 65, 67 (R. Rutland ed. 1970).

29. See *id.*

30. There is some documentary support for this proposition. See, e.g., the comments of James M'Dowall of North Carolina reprinted in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 143 (J. Elliot ed. 1891) [hereinafter Elliot's DEBATES] ("What made the people revolt from Great Britain? The trial by jury, that great safeguard of liberty, was taken away, and a stamp duty placed upon them.").

31. See, e.g., Ga. Const. of 1777 art. LXI, in 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 785 (F. Thorpe ed. 1909); Md. Const. of 1776 art. III, in 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 785 (F. Thorpe ed. 1909) at 1686; Mass. Const. of 1780 art. XV, in 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 785 (F. Thorpe ed. 1909) at 1891-92; N.H. Const. of 1784 art XX, in 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 785 (F. Thorpe ed. 1909) at 2456; N.J. Const. of 1776 art. XXII, in 5 THE FEDERAL AND STATE CONSTITUTIONS, COLO-

## B. The Constitutional Convention and the Seventh Amendment

Whatever role the jury trial played in the instigation of the war, surprisingly little attention was paid to the issue by the delegates to the First Constitutional Convention,<sup>32</sup> despite the fact that the fifth resolve<sup>33</sup> stated, "the respective colonies are entitled to the common law of England, and more especially, to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."<sup>34</sup> The federal convention was held in two sessions. The first session began on May 25, 1787, and ended on July 26, 1787. The second session began on August 6 and continued until September 17, 1787.<sup>35</sup> During the adjournment, a Committee on Detail prepared a first draft of the Constitution, which was presented to the delegates when the convention reconvened on August 6.<sup>36</sup> This draft contained a guarantee of a jury trial in criminal cases, but made no mention of a jury hearing civil cases.<sup>37</sup> On August 27 and 28, the Con-

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NIAL CHARTERS, AND OTHER ORGANIC LAWS 785 (F. Thorpe ed. 1909) at 2598; N.Y. Const. of 1777 art. XLI, in 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 785 (F. Thorpe ed. 1909) at 2637; I N.C. Const. of 1776, Declaration of Rights, art XI, in 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 785 (F. Thorpe ed. 1909) at 3083; I S.C. Const. of 1778 art. XLI, in 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 785 (F. Thorpe ed. 1909) at 3257; Va. Const. of 1776, Bill of Rights, § 11, in 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 785 (F. Thorpe ed. 1909) at 3814.

32. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 291 (1966) ("We have almost no direct evidence concerning the intention of the framers of the Seventh Amendment itself."); Wolfram, *supra* note 27, at 657 ("[T]here is no surviving record of any discussion of civil jury trial even though there had been some discussion of the federal judiciary in prior meetings.").

33. During the latter portion of the 1770s, American colonists held several congresses protesting the enforcement of a series of laws collectively known as the Intolerable Acts. During the course of these congresses, the colonists introduced resolutions cataloguing fundamental freedoms that the colonists believed to be essential to ordered liberty, and which they believed were being infringed by authoritarian British Rule. The Fifth Resolve was one in a series of resolutions introduced at the First Continental Congress held in 1784. See, e.g., Landsman, *supra* note 6, at 596.

34. DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS, 1774, Res. 5, reprinted in SOURCES OF OUR LIBERTIES 151 (Richard L. Perry & John C. Cooper eds., 1952).

35. See Henderson, *supra* note 32, at 293.

36. See Wolfram, *supra* note 27, at 657.

37. The proposed language was "That Trials for Criminal Offences be in the State where the Offence was committed by jury." The printed copy that was prepared by the Committee on Detail contained an exception for cases of impeachment. See 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed. 1911) at 137-50 [hereinafter Farrand RECORDS].

vention, in full session, discussed the judiciary articles, but no mention was made of the right to jury trial in civil cases.<sup>38</sup>

Once the Committee on Detail had finalized the structural elements of the document, a Committee on Style and Arrangement was appointed to develop its final, printed format.<sup>39</sup> That committee filed its final report on September 12—five days before the Convention was to adjourn.<sup>40</sup> Only at this late date was the issue of a civil jury guarantee raised by Hugh Williamson, a North Carolina delegate.<sup>41</sup> When Williamson objected to the lack of a civil jury guarantee, the other delegates pointed out that including such a provision would be fraught with insurmountable drafting difficulties because the jury trial procedures varied too greatly among the several states and because it would be too difficult to distinguish between cases sounding in law and those sounding in equity.<sup>42</sup> James Wilson, one of the members of the Committee on Detail stated:

When, therefore, this subject was in discussion, we were involved in difficulties, which pressed on all sides, and no precedent could be discovered to direct our course. The cases open to a jury, differed in different states; it was therefore impracticable, on that ground, to have made a general rule.<sup>43</sup>

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38. See Henderson, *supra* note 32, at 294.

39. See Wolfram, *supra* note 27, at 658.

40. See *id.*

41. See J. Madison, *Debates in the Federal Convention*, in 2 FARRAND RECORDS, *supra* note 37, at 587–88. It should be noted, however, that Professor Wolfram allows for the possibility that the issue was first raised by “the troublesome twenty-nine year old delegate from South Carolina, Charles Pickney.” Wolfram, *supra* note 27, at 658 n.56.

42. See J. Madison, *Debates in the Federal Convention*, in 2 FARRAND RECORDS, *supra* note 37, at 587–88. (The following discussion ensued:

Mr. Gorham. It is not possible to discriminate equity cases from those in which juries are proper. The Representatives of the people may be safely trusted in this matter. Mr. Gerry urged the necessity of Juries to guard [against] corrupt Judges. He proposed that the Committee last appointed should be directed to provide a clause for securing the trial by Juries. Col. Mason perceived the difficulty mentioned by Mr. Gorham. The jury cases cannot be specified. A general principle laid down on this and some other points would be sufficient. He wished the plan had been prefaced with a Bill of Rights, & would second a Motion if made for the purpose—It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours. Mr. Gerry concurred in the idea and moved for a Committee to prepare a Bill of Rights. Col. Mason 2ded the motion. Mr. Sherman was for securing the rights of the people where requisite. The State Declarations of Rights are not repealed by this constitution; and being in force are sufficient—there are many cases where juries are proper which cannot be discriminated. The Legislature may be safely trusted. Col. Mason: The laws of the U.S. are to be paramount to State Bills of Rights.)

43. P. FORD, PAMPHLETS ON THE CONSTITUTION, reprinted in 3 FARRAND RECORDS, *supra* note 37, at 101.

On September 15, Delegates Pickney and Gerry moved to add the following language to article III: "And a trial by jury shall be preserved as usual in civil cases."<sup>44</sup> James Madison recorded the ensuing discussion:

Mr. Gorham. The constitution of Juries is different in different States and the trial itself is usual in different cases in different States, Mr. King urged the same objections.

Genl. Pinckney. He thought such a clause in the Constitution would be pregnant with embarrassments.<sup>45</sup>

In the end, the motion was defeated and the finalized document contained no civil jury guarantee.<sup>46</sup> Professor Wolfram contends that this omission was nearly a "fatal blunder" and observes that:

[the] general history of the background and adoption of the Bill of Rights usually brings to mind images of great constitutional debates over the freedoms of speech and press, the non-establishment of religion, the protections of due process, safeguards for those accused of crime and the like. It is, therefore, somewhat incongruous to a [twenty-first] century reader to learn that the entire issue of the absence of a bill of rights was precipitated at the Philadelphia Convention by an objection that the document under consideration lacked a specific guarantee of jury trial in civil cases.<sup>47</sup>

Although the variance in jury procedures among the colonies may have posed drafting problems—which was the ostensible reason for omission of the right to jury trial in civil cases—other forces may have been at work. Scholars have theorized that the drafters, made up primarily of wealthy nationalists, may have seen civil juries as being

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44. J. Madison DEBATES IN THE FEDERAL CONVENTION, reprinted in 2 FARRAND RECORDS, *supra* note 37, at 628.

45. J. Madison, DEBATES IN THE FEDERAL CONVENTION, in 2 FARRAND RECORDS, *supra* note 37, at 628. See also REMARKS OF JAMES IREDELL IN THE NORTH CAROLINA RATIFYING CONVENTION (July 29, 1788), reprinted in 4 ELLIOT'S DEBATES, *supra* note 30, at 165–66 (diversity of state practice too great to overcome); THE FEDERALIST NO. 83 (Alexander Hamilton) (Isaac Kramnick ed. 1788) at 467–68 (stating:

[I]t appears that there is a material diversity as well in the modification as in the extent of the institution of trial by jury in civil cases, in the several States; and from this fact these obvious reflections flow: first, that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the States; and secondly, that more or at least as much might be hazarded by taking the system of any one State for a standard, as by omitting a provision altogether and leaving the matter, as it has been left, to legislative regulation.);

REMARKS OF JAMES WILSON IN THE PENNSYLVANIA RATIFYING CONVENTION (Dec. 7, 1787), reprinted in 2 ELLIOT'S DEBATES, *supra* note 30, at 488–89 ("no particular mode of trial by jury could be discovered that would suit them all").

46. See U.S. CONST. art. III.

47. Wolfram, *supra* note 27, at 567.



prone to engaging in jury nullification in favor of their debtor peers at the expense of the wealthy, creditor class.<sup>48</sup> Other scholars conclude that the failure to include a Bill of Rights to the original document was simply a function of the exhaustion of the delegates.<sup>49</sup> Whatever the reason for the omission of the right to a civil jury, it “signaled a profound shift in the way an exceedingly powerful segment of society had come to view the institution.”<sup>50</sup>

Commentators identify two possible reasons for the declining importance of the civil jury, at least in the minds of the framers. First, prior to the revolution, colonial juries were thought to counterbalance the power of English judges seeking to enforce laws enacted by Parliament that were thought to be harsh or unfair. Since colonial legislatures were by then enacting the applicable laws, this was no longer seen as a threat.<sup>51</sup> Second, jury decisions were likely to be less predictable than judge-made decisions and were more likely to protect the emerging nation’s fragile financial condition.<sup>52</sup>

The omission of the right to jury trial in civil cases became a lightning rod during the ratification debates that followed. The national discourse was being led by two sharply divided groups. On one side of the debate were the Federalists who were proponents of the Constitution as it had emerged from the Constitutional Convention. On the other were the Anti-Federalists who opposed its adoption, in part, because of the lack of a civil jury guarantee.<sup>53</sup> Many of the Federalists

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48. See Landsman, *supra* note 6, at 597. Professor Landsman, in support of this proposition, points to the series of events that became known as the Shay’s Rebellion. The Shay’s Rebellion occurred when colonies began manipulating currencies to aid debtors and censured judges for deciding cases in creditor’s favor. Professor Wolfram explains that in the aftermath of the war, the paper currency which had been printed by the Colonies became largely worthless. When creditors refused to accept it and brought suit on the debt, sympathetic jurors, many of whom were themselves debtors, were reluctant to apply the law and discharge the debt in contravention of the law. Professor Wolfram concludes that “the refusal of jurors to award damages on [creditor’s] claims was precisely the reason why its guarantee was sought.” Wolfram, *supra* note 27, at 681.

49. See, e.g., Henderson, *supra* note 32, at 293 (observing, [i]t seems likely that the true reason for omitting a . . . provision for civil juries was at least in part that the convention members simply wanted to go home. They had worked hard through a hot, steamy Philadelphia summer on the more difficult and more central problems of representation in Congress and choice of a national executive, and they had had enough.).

50. Landsman, *supra* note 6, at 598.

51. See Forrest Mcdonal, *NOUS ORDO SECLORUM* 41 (1985).

52. See *id.* at 290–91.

53. See Henderson, *supra* note 32. Professor Wolfram suggests that one of the earliest successes of the “[F]ederalists,” the party that eventually won the battle over the adoption of the Constitution was to foist upon their opponents

were concerned that inclusion of the right to a jury in a federal court could lead to jury bias in diversity cases, and opposed it on that basis.<sup>54</sup> Other Federalists argued that the right to a jury in civil cases need not be constitutionally guaranteed because the state constitutions preserved the right to jury trial, and would control in federal courts.<sup>55</sup> This, however, reflected a spurious understanding of the interaction between federal and state courts and the Supremacy Clause. The third argument centered on the relative difficulty of distinguishing which cases were at law, and therefore required a jury, and those that sounded in equity and did not.<sup>56</sup> The fourth argument was simply to leave the matter to Congress, which the Anti-Federalists countered by pointing out that the Constitution was meant to protect citizens from corrupt federal governmental interference. The Federalists' weak reply was, essentially, that only good men would be elected to Congress, and, therefore, there was no need to worry.<sup>57</sup> The final argument was

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the appellation "[A]nti-federalists." The connotations of opposition to a system of state-national governments and of sheer obstructionism were well appreciated by the "[A]nti-federalists' who vigorously argued that the name was better deserved by the supporters of the Constitution, who in fact should not be regarded as "[F]ederalists," but rather as "consolidationists" or "nationalists."

Wolfram, *supra* note 27, at 667 n.77.

54. James Wilson, a delegate at the Pennsylvania ratifying convention, posed the following hypothetical: "The plaintiff comes from another state; he comes a stranger, unknown as to his character or mode of life, while the other party is in the midst of his friends, or perhaps his dependants. Would a trial by jury, in such a case, insure justice to the stranger?" REMARKS OF JAMES WILSON IN THE PENNSYLVANIA RATIFYING CONVENTION (Dec. 11, 1787), reprinted in 2 Elliot's DEBATES, *supra* note 30, at 517. Likewise, another delegate made the following remarks:

A suit is depending between a citizen of Carolina and Georgia, and it becomes necessary to try it in Georgia. What is the consequence? Why, the citizen of this state must rest his cause upon the jury of his opponent's vicinage, where, unknown and unrelated, he stands a very poor chance for justice against one whose neighbors, whose friends and relations compose the greater part of his judges. It is in this case, and only in cases of a similar nature with this, that the right of trial by jury is not established; and judging from myself, it is in this instance only that every man would wish to resign it, not to a jury with whom he is unacquainted, but to an impartial and responsible individual.

REMARKS OF ROBERT BARNWELL IN THE SOUTH CAROLINA CONVENTION (Jan. 17, 1788), reprinted in 4 Elliot's DEBATES, *supra* note 30, at 295.

55. See 3 Elliot's DEBATES, *supra* note 30, at 68.

56. See J. Madison, DEBATES IN THE FEDERAL CONVENTION, in 2 Farrand RECORDS, *supra* note 37, at 587-88. See THE REMARKS OF COLONEL MASON in 2 Farrand RECORDS, *supra* note 42, at 587-88. (stating: "The jury cases cannot be specified.")

57. See J. Madison, DEBATES IN THE FEDERAL CONVENTION, in 2 Farrand RECORDS, *supra* note 37 at 587. See also THE REMARKS OF MR. SHERMAN, in 2 Farrand RECORDS, *supra* note 37, at 587-88 (stating: "The Legislature may be safely trusted.").

that jury trial practices varied among the several states to such a degree that any attempt at uniformity was futile.<sup>58</sup>

In one of the Federalist Papers, Alexander Hamilton took a different tack. First, he observed that “[t]he objection to the plan of the convention, which has met with most success in [New York] and perhaps in several of the other States, is *that relative to the want of a constitutional provision for the trial by jury in civil cases.*”<sup>59</sup> Hamilton characterized the dispute as follows:

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.<sup>60</sup>

His thesis was that the omission of the express right to jury trial did not amount to the abolition of the institution; states were free to order jury trials as they saw fit, and, therefore, the Anti-Federalists were making much ado about nothing. He concluded that there is no “inseparable connexion between the existence of liberty and the trial by jury in civil cases”<sup>61</sup> and “the jury’s role could be safely reduced in democratic post-revolutionary America.”<sup>62</sup>

The Anti-Federalists reacted violently to this rhetoric. So strong was the opposition that the Anti-Federalists “treated the absence of a civil jury guarantee as warranting the rejection of the Constitution in its entirety.”<sup>63</sup> Their first objection was that, Hamilton’s remarks not-

58. See Wolfram, *supra* note 27, at 665–67 and sources cited therein.

59. THE FEDERALIST NO. 83, *supra* note 45, at 461.

60. *Id.* at 464.

61. *Id.*

62. Landsman, *supra* note 6, at 598.

63. *Id.* at 599. See also Wolfram, *supra* note 27, at 662–66. (The lack of a provision for a jury trial became one of the chief sources of attack on the Constitution in the debates over its adoption in 1788 and led to the proposal and ratification of the Seventh Amendment 1789.); HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 64 (1981) (“The most important [of the Anti-Federalists’ demands], and the most widely uttered objections against the Constitution [were] that it did not provide for (and therefore effectively abolished) trial by jury in civil cases.”); Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587 n.23 (2001) (concluding:

The framers were concerned that Article III effectively removed the jury from a civil trial, and were even concerned that since the Supreme Court had appellate review as to both “law and fact,” even if juries were retained nominally, their verdicts could, in effect, be “vetoed” by the Court’s different finding of fact.)

See also REMARKS OF PATRICK HENRY IN THE VIRGINIA RATIFYING CONVENTION (June 20, 1788), reprinted in 3 ELLIOT’S DEBATES, *supra* note 30, at 544 (noting that the provision for appellate jurisdiction “will, in its operation, destroy the trial by jury”); LETTERS OF CENTINEL, NO. 1 (Oct. 5, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 143 (Herbert J. Storing ed., 1981) (stating that the “trial by jury in civil cases is taken away” given the

withstanding, the structure of the Constitution did, in fact, take away the right to jury trial.<sup>64</sup> Their second objection was that the jury right to trial was too important to concepts of individual liberty and was necessary to ensure the freedom of the nascent Republic.<sup>65</sup> Patrick Henry was particularly eloquent:

To hear gentlemen of such penetration make use of such arguments to persuade us to part with that trial by jury, is very astonishing. We are told that we are to part with that trial by jury which our ancestors secured their lives and property with, and we are to build castles in the air, and substitute visionary modes of decision for that noble palladium. I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common-law suits. The unanimous verdict of twelve impartial men cannot be reversed.<sup>66</sup>

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Supreme Court's appellate jurisdiction); *ESSAYS OF CINCINNATUS*, No. 2, (noting that jury trial was taken away both because of Article III's reference to appellate jurisdiction and its silence on original trials); *ESSAY OF A DEMOCRATIC FEDERALIST* (Oct. 17, 1787), reprinted in 3 *THE COMPLETE ANTI-FEDERALIST*, at 59–60 (commenting on “the entire abolition of the trial by jury in civil cases,” given the federal appellate power over law and fact); see also Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 *Wis. L. REV.* 39, 108–10 & nn.193–95 (noting that the primary basis for the Anti-Federalists' claim that Article III destroyed jury trials was grounded in the fear of federal appellate review of jury fact finding).

64. See, e.g., *REMARKS OF MR. BLOODWORTH IN THE NORTH CAROLINA RATIFYING CONVENTION* (July 28, 1788), reprinted in 4 *ELLIOT'S DEBATES*, *supra* note 30 (querying whether “the trial by jury is not cut off”); *LUTHER MARTIN, GENUINE INFORMATION* (Nov. 29, 1787), reprinted in 3 *FARRAND RECORDS*, *supra* note 37, at 221 (the absence of the right to jury, together with Supreme Court review of both law and fact, “absolutely takes away: trial by jury”); *ESSAYS OF CINCINNATUS*, No. 2 (Nov. 8, 1787), reprinted in 6 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 63, at 10–13 (observing that “the trial by jury does seem to be taken away in civil cases”); *WAT TYLER, PROCLAMATION* (Oct. 24, 1787), reprinted in *THE COMPLETE BILL OF RIGHTS* 558 (“trial by jury is abolished in all civil cases”); *ESSAY BY TIMOLEON* (Nov. 1, 1787), reprinted in *THE COMPLETE BILL OF RIGHTS* 559 (express guarantee to jury trial in criminal cases, combined with silence with respect to civil trials, implies no jury in civil trials).

65. See, e.g., *ESSAYS BY A FARMER*, No. 4, *MARYLAND GAZETTE*, Mar. 21, 1788, reprinted in 5 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 63, at 38 (Herbert J. Storing ed., 1981) (“The trial by jury is—the democratic branch of the judiciary power—more necessary than representatives in the legislature . . .”) (emphasis omitted); Letter from Thomas Jefferson to Abbe Arnoux (July 19, 1789), reprinted in *THE COMPLETE BILL OF RIGHTS* 596 (Neil H. Cogan ed., 1997) (stating that citizen participation in the judicial branch was more important than participation in the legislative branch).

66. 3 *ELLIOT'S DEBATES*, *supra* note 30, at 544. Patrick Henry spoke passionately about the right to jury trial:

(a) one of the “rights dear to human nature,” (b) “[t]rial by jury is the best appendage of freedom,” (c) a “sacred right” (d) “that invaluable blessing,” and (e) “that trial by jury which our ancestors secured their lives and property with,” “that noble palladium” “that excellent mode of trial,” “the transcendent excellency of this trial, its essentiality to the preservation of liberty, and the extreme danger of substituting any other mode.”

The Anti-Federalists were largely successful in convincing the citizenry that the newly created Constitution abolished the right to a jury trial in civil cases. As a result, in both Massachusetts and New Hampshire, in order to obtain a majority in the respective conventions necessary to ratify the Constitution, the Federalist constituent had to agree to certain “conciliatory propositions.”<sup>67</sup> The proposed language was as follows: “In civil actions between citizens of different States, every issue of fact arising in actions at common law, shall be tried by a jury, if the parties, or either of them, request it.”<sup>68</sup>

Virginia, New York, and Rhode Island recommended similar amendments. Virginia’s proposed language was particularly sweeping. It read “[t]hat, in controversies respecting property, and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people and [should] remain sacred and inviolable.”<sup>69</sup> In the end, it was Anti-Federalist agitation that resulted in the adoption of the Seventh Amendment, among others, because the Anti-Federalists refused to ratify the constitution without assurances that the amendments would be forthcoming.<sup>70</sup> To the extent, then, that the historical perspective remains relevant in constitutional analysis of the relative powers of the judge and the jury where punitive damages are concerned,<sup>71</sup> the view of the Anti-Federalists that the right to jury trial constituted “the very palladium of free government”<sup>72</sup> suggests that if punitive damages were awarded at common law by the jury, we do violence to the Seventh Amendment to take such awards from them.<sup>73</sup>

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Wolfram, *supra* note 27, at 670 n.85.

67. DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS 80 (1856).

68. *Id.*

69. 3 Elliot’s DEBATES, *supra* note 30, at 658.

70. See Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 594 (2001).

71. See *infra* Part III.

72. THE FEDERALIST NO. 83. (Alexander Hamilton) (Issac Kramnick), paraphrasing Patrick Henry’s remarks reprinted in 3 Elliot’s DEBATES, *supra* note 30, at 544.

73. Interestingly, at the time the Seventh Amendment was adopted, the jury was able to pass on both law and fact. In *Georgia v. Brailsford*, Chief Justice John Jay instructed the jury:

It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy . . . . [B]oth objects are lawfully, within your power of decision.

However, the inquiry cannot end there. Part II demonstrates that the constitutional question no longer turns upon what procedures were historically available at common law. Rather, the court will inquire whether the particular function is "fundamental" to the role of the jury. It is this question to which one must ultimately turn to analyze the validity of the Court's action in *Cooper*. Nonetheless, because the historical test preceded the functional test, it is necessary to examine the historical pedigree of punitive damages.<sup>74</sup>

### C. The Early Punitive Damages Cases

The concept of punitive damages is rooted in ancient times. For example, the Bible,<sup>75</sup> the Babylonian Hammurabi Code,<sup>76</sup> and the Hindu Code of Manu<sup>77</sup> all contain provisions for exemplary damages, or an ancient species of them. Punitive damages were part of the law of the Hittites<sup>78</sup> and the ancient Greeks.<sup>79</sup> Scholars are in general agreement that multiple damages remedies were part of Roman Civil Law.<sup>80</sup> Similar approaches are found at early common law, with multiple damages statutes dating back as far as 1278.<sup>81</sup> However, the earliest

*Georgia v. Brailsford*, 3 U.S. (1 Dall.) 1, 4 (1794). *Brailsford* has never been explicitly overruled.

74. The purpose of punitive damages is "to punish what has occurred and to deter . . . repetition" of the misconduct. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20-21 (1991).

75. See Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1285 (1993) (citing Exodus 22:4 (theft carries a penalty of double restitution); Luke 19:8 (quadruple restitution for fraud or theft)).

76. See Rustad & Koenig, *supra* note 75, at 1285, citing 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, *PUNITIVE DAMAGES* 3 (2d ed. 1989).

77. See Rustad & Koenig, *supra* note 75, at 1285. In an amusing aside, Professors Rustad and Koenig relate the following anecdote:

The laws of the XII Tables declared that whoever should do a personal injury to another should pay twenty-five asses, a considerable sum at the time. At a later time, however, when money abounded, this penalty became so insignificant that one Lucius Veratius used to amuse himself by striking those whom he met in the streets in the face, and then tendering them the legal amends, from a wallet which a slave carried after him for the purpose.

*Id.* (citing *Vindictive Damages*, 4 AM. L.J. 61, 75 (1852)).

78. See generally H. Jolowicz, *The Assessment of Penalties in Primitive Law*, CAMBRIDGE LEGAL ESSAYS (1926).

79. See PLATO, *PROTAGORAS* 324b; PLATO, *LAWS* 9.85b & 9.934a.

80. See e.g., BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 215-25 (1997); LINDA L. SCHLUETER & KENNETH R. REDDEN, 1 *PUNITIVE DAMAGES* 3 (2d ed. 1989); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984).

81. For example, the Statute of Gloucester provided for treble damages for waste. Statute of Gloucester (1278), 6 Edw. I, c. 5.

reported cases of exemplary or punitive damages in the English common law were *Wilkes v. Wood*<sup>82</sup> and its companion case, *Huckle v. Money*.<sup>83</sup> In *Wilkes*, the plaintiff was engaged in the publication of several radical broadsheets in which he accused George III of lying about the status of peace negotiations with France. He was arrested and charged with seditious libel but was acquitted because his statements were protected by the parliamentary privilege. After his acquittal, he promptly sued a number of officials and was awarded £1000.<sup>84</sup> In affirming the award, Lord Chief Justice Pratt stated that juries are entitled

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.<sup>85</sup>

This inclusion of a punitive component within the damages award "is generally agreed to have been the first occasion on which an avowedly punitive award was permitted."<sup>86</sup>

In *Huckle*, a companion case based upon substantially similar facts as the *Wilkes* case, the publisher's employee sued for false imprisonment, trespass, and assault.<sup>87</sup> The Chief Justice stated:

[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 20 [pounds] 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 . . . . I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.<sup>88</sup>

82. 98 Eng. Rep. 489 (K.B. 1763).

83. 95 Eng. Rep. 768 (K.B. 1763).

84. See *Wilkes*, 98 Eng. Rep. at 489.

85. *Id.* at 498-99.

86. Landsman, *supra* note 6, at 591.

87. See *Huckle*, 95 Eng. Rep. at 768.

88. *Id.* at 768-69. A.S. Turberville, a noted British historian, characterized the climate that led to the first award of punitive damages as follows:

It was during the Bute administration in 1762 that John Wilkes, assisted by the satirical poet Charles Churchill, started his scurrilous newspaper *The North Briton*, which first became famous for the violence of its attacks upon the favourite and all his compatriots. In May 1763 a new ministry came into office, its outstanding member being George Grenville. At the prorogation of Parliament the King had made the customary speech from the throne. In No. 45 of his paper,

It was this case that introduced the term “exemplary damages,” the forerunner to the modern concept of punitive damages meant to punish or deter the tortfeasor rather than compensate the victim.<sup>89</sup>

The first case of punitive damages awarded in the United States appears to have been *Coryell v. Colbaugh*.<sup>90</sup> There, the plaintiff sued for breach of a promise to marry and seduction. Her father had already sued the defendant and been awarded approximately £75. The defendant objected to the second trial, asserting that Ms. Coryell’s claim was precluded by the prior suit. The court disagreed, and allowed the jury to be charged, stating, “the injury complained of was of the most atrocious and dishonorable nature, and called for exemplary damages.”<sup>91</sup> The judge told the jury “not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for *example’s* sake, to prevent such offences in future; and also to allow liberal damages for the breach . . . .”<sup>92</sup> The court also stated that the wealth of the defendant was irrelevant despite the defendant’s attempts to mitigate damages by demonstrating that he was poor.

In *Genay v. Norris*,<sup>93</sup> the plaintiff was apparently newly arrived in the United States when the defendant and some of his cronies de-

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published on 23rd April, Wilkes had severely criticized the passages in the speech relating to the Peace of Paris and especially a reference to what the King of Prussia had gained from the treaty. Wilkes bluntly declared that the King had given “the sanction of his sacred name to the most odious measures and to the most unjustifiable public declarations from a throne ever renowned for truth, honour, and unsullied virtue.” Speeches from the throne in Parliament are always regarded as the declarations of the ministers; but it was characteristic of George III to regard this criticism as an accusation of falsehood and as being therefore a gross personal libel. He insisted on the prosecution of the author, and the new ministers were nothing loathe to acquiesce. As the article was anonymous the Government issued a “general warrant, mentioning no specific names for the apprehension of ‘the authors, printers, and publishers’ of the North Briton,” and under this warrant Wilkes was arrested, together with forty-eight other persons, who were suspected, some of them quite wrongly, to have been concerned in the issuing of No. 45. Wilkes stigmatized the general warrant as illegal and “a ridiculous warrant against the whole English people.”

A.S. TURBERVILLE, *ENGLISH MEN AND MANNERS IN THE 18TH CENTURY* 44–46 (2d ed. 1957). The Chief Justice in *Wilkes* opined that the Government’s practices, “which had been produced since the Revolution, are no justification of a practice in itself illegal, and contrary to the fundamental principles of the constitution.” *Wilkes*, 98 Eng. Rep. at 499.

89. See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678, 1683 (2001) (Compensatory damages redress the concrete loss that a plaintiff has suffered by reason of the defendant’s wrongful conduct, but punitive damages are private fines intended to punish the defendant and deter future wrongdoing.).

90. 1 N.J.L. 90 (1791).

91. *Id.* at 91.

92. *Id.*

93. 1 S.C.L. (1 Bay) 6 (1784).



cided to engage him in a prank. Apparently all the parties were quite intoxicated and it was not difficult to contrive a sham "duel," with unloaded pistols. At the conclusion of the "duel" the defendant proposed that they should reconcile their dispute over a drink. Unbeknownst to Mr. Genay, Dr. Norris put cantharides (more commonly known as Spanish Fly) into the plaintiff's drink, which caused the former to become quite ill. In charging the jury, the court stated:

[N]otwithstanding it was called a frolic, yet the proceedings appeared to be the result of a combination, which wrought a very serious injury to the plaintiff, and such a one as entitled him to very exemplary damages, especially from a professional character, who could not plead ignorance of the operation, and powerful effects of this medicine.<sup>94</sup>

The jury awarded £400 in damages.

Commentators have argued that the rise of punitive damages in England and the United States may be attributed to juries assessing damages they felt were warranted, but where there was no significant injury or the injury was not easily quantifiable.<sup>95</sup> Scholars sometimes attribute the rise of exemplary or vindictive damages as the product of juries departing significantly from simple compensation.

In actions of tort, when gross fraud, wantonness, malice, or oppression appears, the jury [is] not bound to adhere to the strict line of compensation, but may, by a severer verdict, at once impose a punishment on the defendant, and hold him [or her] up as an example to the community. It might be said, indeed, that the malicious character of the defendant's intent does, in fact, increase the injury, and the doctrine of exemplary damages might thus be reconciled with the strict notion of compensation . . . . [T]he idea of compensation is abandoned and that of punishment introduced.<sup>96</sup>

The primary proponent of punitive damages in the nineteenth century was Theodore Sedgwick. In Sedgwick's view, where there is fraud, malice, gross negligence, or oppression,

the law . . . adopts a wholly different rule . . . . [I]t permits the jury to give what it terms punitive, or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender.<sup>97</sup>

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94. *Id.*

95. See, e.g., Colleen P. Murphy, *Judicial Assessment of Legal Remedies*, 94 Nw. U. L. REV. 153, 178 (1999); Wolfram, *supra* note 27 at 681.

96. Rustad & Koenig, *supra* note 75, at n.96 (quoting 1 Theodore Sedgwick, A TREATISE ON THE MEASURE OF DAMAGES § 347 at 687).

97. *Id.* at n.153 (quoting Sedgwick, *supra* note 96, at 39).

The concept of punitive damages was not without opposition, however. Those opposing punitive damages awards argued that the concept was foreign to, and logically inconsistent with, the purpose of compensatory tort law, which is to put the victim in as good a position as he or she would have been but for the conduct of the tortfeasor.<sup>98</sup> Nineteenth century commentators went further and questioned the normative fairness of the remedy to society as a whole. For example, in a letter to the editor of an 1878 edition of *The Central Law Journal*, one writer stated: "It is difficult, in principle, to understand why, . . . if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public in whose behalf he is punished."<sup>99</sup> The writer elaborated as follows:

The doctrine of allowing punitive damages rests, at least at the present time, on an unsound foundation. Eminent legal writers have long ago pronounced against it, and have contended that the rule is against the self-evidence and undisputable truth which has become a legal maxim, that a plaintiff ought to recover no more damages than he has actually sustained.<sup>100</sup>

The most influential opponent of punitive damages was Professor Simon Greenleaf. His primary thesis was that there are two types of laws that have developed over time. One body of law, primarily the constitutional and criminal laws, are "public" laws.<sup>101</sup> On the other hand, a second body of law, such as contract and tort, are "private."<sup>102</sup> To permit the public function of punishment and deterrence to enter the private law arena was to improperly mix the two functions. Professor Sedgwick's view that punitive damages were necessary to redress certain types of "private" transgressions ultimately prevailed, but Professor Greenleaf was successful with at least one judge who wrote that punitive damages awards are "monstrous heresy[,] . . . an unsightly and unhealthy excrescence, deforming the symmetry of the body of law."<sup>103</sup>

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98. See 2 SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* 240 n.2 (16th ed. 1899) (contending that punitive damages remedy is inconsistent with the purpose of tort law).

99. Rustad & Koenig, *supra* note 75, at n.137 (quoting Letter from G.K., Correspondent, to the Editor, *CENTRAL LAW JOURNAL*, reprinted in 6 *CENT. L.J.*, 74, 74 (1878) [hereinafter *LETTER TO THE EDITOR*] (citing Chief Justice Ryan's opinion in *Bass v. Chicago & N.W. Ry. Co.*, 42 Wis. 654, 672 (1877))).

100. *Id.*

101. 2 SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* § 253 at 294 n.2 (William Draper Lewis ed. 1897).

102. *Id.*

103. *Fay v. Parker*, 53 N.H. 342, 383 (1872).

In any event, by the time the United States Supreme Court heard the case of *Day v. Woodworth*<sup>104</sup> in 1851, punitive damages awards were so common that the Court placed its official imprimatur on the practice over a due process objection.<sup>105</sup> In *Day*, the plaintiff sued the defendants for trespass after the defendants tore down a part of a dam owned by the plaintiff. At issue was whether the defendants were justified in partially destroying the dam because it interfered with dams upstream owned by the defendants' employer, and, if not, what damages the plaintiff was entitled to. Although the case was not precisely about punitive damages, the Court gave a lengthy discourse on the subject, focusing on common and statutory law pedigree of punitive damages awards.

The Court began by acknowledging that there was a great deal of controversy about punitive damages in the legal community in general and in the legal academy in particular. However, the Court likewise acknowledged that punitive damages had been part of the common law scheme for so long that their validity as a vehicle for punishment and deterrence "will not admit of argument."<sup>106</sup> The Court also highlighted the fact that historically, many torts recognized today were not common law causes of action and that juries often over-compensated plaintiffs in order to redress dignitary harms. The Court stated,

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104. 54 U.S. 363 (1851).

105. Most commentators, including the Court itself, recognize this as the first case in which the Court sanctioned punitive damage awards. *But see* Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 273-74 n.15 (1983). Professor Wheeler writes as follows:

Some confusion exists as to when the Supreme Court first considered the constitutionality of punitive damages awards to private plaintiffs. Justice Harlan, speaking for the plurality in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 159 (1967), and the authors of two law review notes, Note, *In Defense of Punitive Damages* [55 N.Y.U. L. REV. 303 (1980)], at 331 & n.151; Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158, 1177-78 (1966), have suggested that the Court upheld the constitutionality of such awards in *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851). Punitive damages, however, were not at issue in that case. The petitioner, who had been the plaintiff and prevailing party in the trial court, challenged the judgment on the ground that the jury had improperly refused to award him his costs of suit. The Supreme Court affirmed, holding that costs could be awarded only if authorized by the appropriate legislative body and that no such authorization had been shown. In dictum the Court distinguished an award of costs from an award of punitive damages. *Id.* at 371. In several later cases the Court expressed an erroneous belief that *Day* had sanctioned punitive damages. *See* *Scott v. Donald*, 165 U.S. 58, 87-89 (1897); *Milwaukee & St. P. Ry. v. Arms*, 91 U.S. 489, 492-93 (1875); *Philadelphia, W. & B.R.R. v. Quigley*, 62 U.S. (21 How.) 202, 213-14 (1858).

106. *Day*, 54 U.S. at 371.

[i]n many civil actions . . . the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.<sup>107</sup>

The Court went on to note that

courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money'; This 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.<sup>108</sup>

Thus, despite the Court's recognition that punitive damages were controversial, it concluded that the practice of awarding them was so deeply ingrained in the common law, it would violate principles of *stare decisis* to strike them down. *Day* is interesting, moreover, in that it purports to hold that punitive damage awards must always be left to the discretion of the jury. In the next Part, this Article explores the degree to which the Court has moved away from that position.

## II. The Relative Power of the Judge and Jury in Awarding Damages

### A. The Early Common Law

Throughout the history of using juries in civil trials, there have been questions about what is within the province of the jury and what is not. For example, there was much debate about what constituted an action in equity, which did not carry the right to a jury trial, and one at law, which did. This debate was particularly acrimonious prior to the merger that occurred with the adoption of the Federal Rules in 1938. Even after the merger, the debate continues.<sup>109</sup> In colonial America, juries were sometimes given the ability to decide matters of law as well as fact.<sup>110</sup> There are even documented cases of a judge

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107. *Id.*

108. *Id.*

109. *See, e.g., Dairy Queen Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

110. It is odd that the early American juries were given law as well as fact finding tasks. It was likely an effort to thwart what were perceived as unjust laws foisted upon the colonies by England. Certainly, the English common law did not permit juries to find law as well as fact; a doctrine that was strongly reiterated by Lord Hardwicke shortly before hostilities broke out between the Colonies and the Crown. In *The King v. Poole, Cas. T. Hard*, 95 Eng. Rep. 15 (K.B. 1774), the question was whether Mr. Poole had been validly elected as the mayor of Liverpool, and the jury returned a verdict that he had not been, contrary to the

instructing a jury to “redeliberate” and return a different verdict.<sup>111</sup> A particularly knotty problem, however, has been the extent to which a judge has the right to interfere with the amount awarded by juries, particularly where the award is punitive as opposed to compensatory.

Historically, judicial interference with jury awards and determinations has a substantial pedigree. For example, in 1655, the Upper Bench ordered a new trial in *Wood v. Gunston*,<sup>112</sup> a defamation case in which the plaintiff had been branded a “traitor.” The jury awarded him £1500. A motion was made to set aside the verdict and grant a

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Nisi Prius Judge’s instructions on the law of elections. Lord Hardwicke began by stating that “the general rule is, that if the Judge of Nisi Prius directs the jury on the point of law, and they think it fit obstinately to find a verdict contrary to his direction, that is a sufficient ground for granting a new trial.” *Id.* at 17. Lord Hardwicke then qualified the general rule stating that when the judge instructs the jury incorrectly, and the verdict is in line with what the law actually is, rather than the instructions given, a new trial would not be granted. This pronouncement, however, comes dangerously close to the notion that juries, rather than judges, are the arbiters of law, as well as fact. Lest the court be misunderstood, Lord Hardwicke declared,

The thing that governs greatly in this determination is, that the point of law is not to be determined by juries; juries have a power by law to determine matters of fact only: and it is of the greatest consequence to the law of England and to the subject, that these powers of the Judge and jury are kept distinct; that the Judge determines the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England.

*Id.* at 16.

111. One of the earliest recorded instances in the American Colonies of a judge influencing a jury verdict occurred during the Salem Witch Trials. One of the accused, Rebecka Nurse, was originally found not guilty by the jury, yet she was nonetheless hanged as a witch. When questioned about it, one of the members of her jury testified as follows:

I Thomas Fisk, the Subscriber hereof, being one of them that were of the Jury of the last week at Salem-Court, upon the Tryal of Rebecka Nurse, etc., being desired by some of the Relations why the Jury brought her in Guilty, after her Verdict not Guilty; I do hereby give my reasons to be as follows, viz. When the Verdict not Guilty was, the honoured Court was pleased to object against it, saying to them [the jury], that they think they let slip the words, which the Prisoner at the Bar spake against her self which were spoken in reply to Goodwife Hobbs and her Daughter, who had been faulty in setting their hands to the Devils Book, as they have confessed formerly; the words were “what, do these persons give in Evidence against me now, they used to come against us.” After the honoured Court had manifested their dissatisfaction of the Verdict, several of the Jury declared themselves desirous to go out again, and thereupon the honoured Court gave leave; but when we came to consider the Case, I could not tell how to take her words, as evidence against her, till she had a further opportunity to put her Sense upon them, if she would take it; and then going into Court, I mentioned the aforesaid, which by one of the Court were affirmed to have been spoken by her, she being then at the Bar, but [m]ade no reply, nor interpretation of them; whereupon those words were to me principal Evidence against her.

STATEMENT OF THOMAS FISK, JUROR, July 4, 1692, in *THE SALEM WITCHCRAFT PAPERS* (Paul Boyer & Stephen Nissenbaum eds. 1977).

112. Style 466 (Upper Bench 1655).

new trial. The Upper Bench granted the motion, stating "it is frequent in our books for the Court to take notice of miscarriages of juries, and to grant new tryals upon them . . . ." <sup>113</sup> Likewise, in *Ash v. Ash*,<sup>114</sup> a daughter sued her mother for assault, battery, and false imprisonment. The plaintiff was confined for approximately two to three hours, and the jury awarded £2000. Chief Justice Holt overturned the award and granted a new trial, explaining that the jury thought it had "an absolute despotick power," but that he, the judge, "did rectify that mistake, for the jury are to try causes with the assistance of the Judges, and ought to give reasons when required."<sup>115</sup>

Nearly one hundred years later, the King's Bench reaffirmed *Ash* in *Sharpe v. Brice*.<sup>116</sup> In an action for trespass against a customs official, the plaintiff recovered £500 in damages, which the trial judge found to be "very excessive," and a new trial was ordered. The plaintiff argued that a new trial could not be granted in tort, as opposed to contract, actions because of excessive damages. The reasoning was that in tort actions the jury has discretion to award the appropriate amount and that, unlike contract actions, the amount of damages was not fixed. The court disagreed: "It has never been laid down, that the Court will not grant a new trial for excessive damages in any cases of tort. It was held so long ago . . . that the jury have not a despotick power in such actions."<sup>117</sup> Rather, a new trial could be had in tort actions where "the damages [are] excessive and outrageous . . . ." <sup>118</sup>

Courts in the newly formed United States were more cautious about reducing jury awards, particularly where the awards were characterized as compensatory rather than punitive.<sup>119</sup> In *Tillotson v. Cheetham*<sup>120</sup> the plaintiff was the Secretary of State of New York. The defendant published a newspaper called the Republican Watch Tower, in which he accused the plaintiff of accepting bribes and be-

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113. *Id.*

114. 90 Eng. Rep. 526 (K.B. 1697).

115. *Id.*

116. 96 Eng. Rep. 557 (C.P. 1774).

117. *Id.* at 557.

118. *Id.* at 557. Interestingly, the court noted that the plaintiff had offered to set off a £300 award the defendant had against the plaintiff, thereby lowering the amount to be paid to Sharpe by the customs official to £200. When the official refused, the court stated that "this shows a want of candour on [the customs official's] side, and he is therefore entitled to no assistance." *Id.*

119. As the Court noted in *Honda v. Oberg*, 512 U.S. 415, 434 n.12 (1994), "Judicial deference to jury verdicts may have been stronger in 18th-century America than in England, and judges' power to order new trials for excessive damages more contested."

120. 2 Johns. 63 (N.Y. Sup. Ct. 1806).

having in a generally corrupt manner. The jury awarded \$1,400 in damages, at which time the defendant moved for a new trial on the basis of excessive damages. The court refused, stating that it could not

interfere on account of the damages. A case must be very gross, and the recovery enormous to justify our interposition on a mere question of damages, in an action of slander. We have no standard by which we can measure the just amount and ascertain the excess. It is a matter resting in the sound discretion of a jury.<sup>121</sup>

Similarly, *Coleman v. Southwick*<sup>122</sup> is another defamation case in which the jury awarded \$5,000. There, the court said,

[t]he question of damages was within the proper and peculiar province of the jury. It rested in their sound discretion, under all the circumstances of the case, and unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption, we cannot, consistently with the precedents interfere with the verdict.<sup>123</sup>

The court went on to state,

[t]he damages, therefore, must be so excessive as to strike mankind, at first blush, as being beyond all measure unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line, for they have no standard by which to ascertain the excess.<sup>124</sup>

Justice Spencer dissented, stating that he would “not enter upon the question of excessiveness of damages, and desire to be understood, as neither denying or supporting the doctrine advanced by a majority of the court upon that point . . . .”<sup>125</sup>

121. *Id.* at 73.

122. 9 Johns. 45 (N.Y. Sup. Ct. 1812).

123. *Id.* at 50–51.

124. *Id.* at 51.

125. *Id.* Numerous cases from the early nineteenth century repeated this theme. *See, e.g., M’Connell v. Hampton*, 12 Johns. 234, 236 (N.Y. Sup. Ct. 1815), in which an action for assault and false imprisonment arising from a military officer’s court martial of a civilian for treason. In granting a new trial for excessive damages, the court repeated the familiar formula:

[T]o justify the court in setting aside a verdict, the damages ought to appear outrageous, or manifestly to exceed the injury, and such that all mankind would, at once, pronounce unreasonable, and so as to induce the court to believe that the jury must have acted from prejudice or partiality, or were influenced by some improper considerations. It is not necessary that the court should believe that the jury acted corruptly. Their feelings might be so excited, or their passions so inflamed, as to mislead their judgments, and induce them to give a verdict, which their own sober reflection would not approve.

*Id.* at 236.

One commentator theorizes that juridical reluctance to disturb jury awards, particularly awards arising out of slander or defamation, is as much a function of societal concerns as it is of judicial restraint.

Early nineteenth-century reporters reveal a world in which dignitary concerns—honor and a good name—were far more prized than today. The torts that vindicated those concerns—slander, libel, trivial battery, criminal conversation—were much more frequently brought and were treated with great seriousness by the courts. Judges in these cases were very reluctant to interfere with damages. In case after case, courts admitted that damages were very large, larger than the court might like, but were within the jury's discretion both because they were difficult to measure and because some public policy might be served by large damages.<sup>126</sup>

The Supreme Court continued to remain solicitous of the jury's right to assess damages. In *Parsons v. Bedford*,<sup>127</sup> Justice Story observed that

[t]he trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy . . . . One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the [S]eventh [A]mendment of the constitution proposed by congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people.<sup>128</sup>

Nonetheless, incursions began to be made. The earliest instance of an American court granting a new trial on the basis of excessive damages appears to have been *Kuhn v. North*.<sup>129</sup> That case was an action for trespass in which a sheriff was made to levy on the plaintiff's property pursuant to a faulty warrant. When the jury returned a verdict for \$950, the court stated that it could not

account for these heavy damages, except on the ground of some misconception of the jury, perhaps arising from something said in the charge, and because, though I have cautioned them against intemperate damages, the jury might have conceived, from a re-

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126. Renee B. Lettow, *New Trial for Verdict Against the Law: Judge-Jury Relations in Early Nineteenth Century America*, 71 NOTRE DAME L. REV. 505, 548 (1996).

127. 28 U.S. 433 (1830).

128. *Id.* at 446.

129. 10 Serg. & Rawle 399 (Pa. 1823). One case, *Bourke v. Bulow*, 1 S.C.L. 49 (S.C. Com. Pl. 1787) states that "[t]here are many cases in the books, for new trials on account of excessive damages, where they have been granted . . . ." However, it is almost certain that the court there was referring to English jurisprudence.



mark by me often made, that of damages they were the sole and exclusive judges.<sup>130</sup>

The court continued as follows:

And if there were any principle of law, denying the power of the court to grant a new trial on account of excessive damages, in any action of tort, I would not do it in this; but there is no such principle. If there were, it would be time to change it; such an arbitrary power, vested in any body of men, judges or jurors, would be intolerable.<sup>131</sup>

*Blunt v. Little*<sup>132</sup> was the first case to authorize the use of remittitur.<sup>133</sup> The action was for malicious prosecution and the jury returned a verdict for \$2,000. Justice Story began by stating that “the court may grant a new trial for excessive damages,” but only when “it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, [then] it is as much the duty of the court to interfere, to prevent the wrong . . . .”<sup>134</sup> He concluded by stating that “the cause should be submitted to another jury, unless the plaintiff is willing to remit \$500 of his damages.”<sup>135</sup>

More than sixty years later, the Supreme Court finally blessed the use of remittitur in *Northern Pacific Railroad Co. v. Herbert*.<sup>136</sup> There, the defendant argued that remittitur was improper because it invaded the province of the jury. The Court responded that

[t]he exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict was a matter within the discretion of the court. [The trial court] held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could, therefore, be properly allowed to stand.<sup>137</sup>

The practice of remittitur came under constitutional attack in *Arkansas Valley Land & Cattle Co. v. Mann*.<sup>138</sup> In particular, the defendant

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130. *Khun*, 10 Serg. & Rawle at 408.

131. *Id.* at 409.

132. 3 F. Cas. 760 (C.C.D. Mass. 1822).

133. Remittitur is a procedural device which allows the court to order the plaintiff to remit a portion of the award or to face a new trial. *See, e.g.*, FED. R. CIV. P. 59.

134. *Id.* at 761–62.

135. *Id.* at 762.

136. 116 U.S. 642 (1886).

137. *Id.* at 646–47.

138. 130 U.S. 69 (1889).

argued that remittitur deprived him of his Seventh Amendment right to jury trial. In response, the Court held that

to make the decision of the motion for a new trial depend upon a remission of part of the verdict is, in effect, a re-examination by the court, in a mode not known at the common law, of facts tried by the jury and therefore was a violation of the Seventh Amendment of the constitution.<sup>139</sup>

The Court further explained:

The practice which this court approved in *Railroad Co. v. Herbert* is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury, and grants a new trial, where the damages are palpably or outrageously excessive. But, in considering whether a new trial should be granted upon that ground, the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless, by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give him any cause for complaint. Notwithstanding such remission, it is still open to him to show, in the court which tried the case, that the plaintiff was not entitled to a verdict in any sum, and to insist, either in that court or in the appellate court, that such errors of law were committed as entitled him to have a new trial of the whole case.<sup>140</sup>

Judges were not given a totally free reign with respect to remittitur, however. In *Kennon v. Gilmer*,<sup>141</sup> the jury returned a verdict for actual damages in the amount of \$20,000 and medical expenses of \$750. The defendant appealed and the Supreme Court of Montana reduced the award by half. The United States Supreme Court held that this procedure violated the Seventh Amendment. It held that the proper procedure was remittitur or new trial, but that the reviewing court could not simply substitute its own interpretation of the proper amount of the award.<sup>142</sup>

Toward the end of the nineteenth century, the Supreme Court examined the role of the judge and jury in awarding damages, and came down squarely on the side of the jury. In *Barry v. Edmunds*,<sup>143</sup> the

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139. *Id.* at 72-73.

140. *Id.* at 74-75.

141. 131 U.S. 22 (1889).

142. *See id.* at 29-30.

143. 116 U.S. 550 (1886).

plaintiff attempted to satisfy a lien against property arising out of unpaid back taxes. He attempted to pay, in part, with coupons issued by the State of Virginia. The tax collector refused the tender and levied on the plaintiff's property by forcibly removing a horse, which the plaintiff claimed was worth more than twice what he owed. Prior to the levy, the Court had held that payment in the form of the state's tax receivable coupons was sufficient to extinguish the debt, but Virginia's legislature then enacted a statute ordering the tax collector to levy against the property of a tax payer who attempted to use the coupons.

Eventually the defendant, in his role as tax collector, advertised throughout the county that the plaintiff was a delinquent taxpayer, and that his property would be sold at public auction to satisfy the debt, which was viewed by the plaintiff as defamation. He brought suit in federal court, which declined jurisdiction because the damages could not, in the judge's view, exceed the statutory minimum of \$500. In reversing, the Court held that the jury had broad discretion to impose "exemplary, punitive, or vindictive damages."<sup>144</sup> The Court then made the following, rather sweeping, pronouncement:

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 . . . . [A] verdict will not be set aside in a case of tort for excessive damages "unless the court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated," that is, "unless the verdict is so excessive or outrageous," with reference to all the circumstances of the case, "as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them." In no case is it permissible for the court to substitute itself for the jury, and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice, which the jury itself is the appointed constitutional tribunal to award.<sup>145</sup>

## B. Twentieth Century Cases

Notwithstanding the broad language of *Edmunds*, during the course of the twentieth century, the Supreme Court continued to make incursions into the jury's historically powerful role in American

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144. *Id.* at 562.

145. *Id.* at 565 (internal citations omitted).

jurisprudence. This move was precipitated by a fundamental shift in the way the Court viewed the method by which it would determine what questions would be left to a jury. From the adoption of the Seventh Amendment, the Court typically used a historical test. In *United States v. Wonson*,<sup>146</sup> Justice Story, while riding circuit,<sup>147</sup> heard an action for a debt incurred by the defendant pursuant to the Embargo Supplementary Act in which the jury returned a defense verdict, and the United States appealed.

Interpreting the Seventh Amendment, Justice Story stated that the reference to "common law" refers to English common law: "Beyond all question, the common law here alluded to is not the common law of any individual state (for it probably differs in all), but is the common law of England, the grand reservoir of all our jurisprudence."<sup>148</sup> He elaborated, contending that, "according to the rules of the common law the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court, before which the suit is depending, for good cause shown . . . ."<sup>149</sup>

Nonetheless, the Court began to use procedural devices to take verdicts from juries and began to take a functional, as opposed to historical, view of the role of the jury. For example, at issue in *Fidelity & Deposit Co. of Maryland v. United States*<sup>150</sup> was a rule of civil procedure that was a precursor to a summary judgment proceeding. The rule allowed plaintiffs in contract actions to submit affidavits establishing the existence of the contract, and the failure to pay. If the defendant could submit a counter-affidavit showing valid grounds of defense, then the case went to the jury; if not, judgment for the liquidated amount was entered for the plaintiff. Here, the defendant failed to submit a sufficient affidavit and the trial court entered judgment.

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146. 28 F. Cas. 745 (C.C. Mass. 1812).

147. The concept of "circuit riding" traces its origins back to the Judiciary Act of 1789. Under the Act, which was motivated by Federalism principles, each Justice was required to "ride circuit" in addition to acting as a United States Supreme Court Justice. At the time, Circuit courts were composed of one district court judge and two Supreme Court Justices, known as "Circuit Justices." The Circuit Justices were required to preside over matters located within each district in their Circuit twice a year. Although circuit riding was very unpopular amongst the Justices, the technical requirement remained a part of the judiciary system until 1891. See, e.g., Eric J. Gribbin, Note, *California Split: A Plan to Divide the Ninth Circuit*, 47 DUKE L. J. 351 (1997).

148. *Wonson*, 28 F. Cas. at 750.

149. *Id.*

150. 187 U.S. 315 (1902).

On appeal, the plaintiff argued both that the rule exceeded the power of the court to promulgate it and that it violated the Seventh Amendment. The Court disagreed:

If it were true that the rule deprived the plaintiff in error of the right of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as means to delay the recovery of just demands.<sup>151</sup>

Courts were still not permitted, however, to totally substitute their judgment for that of the jury. *Slocum v. New York Life Insurance Co.*<sup>152</sup> was an action to recover benefits under a life insurance policy. The evidence clearly established that the policy had lapsed for non-payment of premiums. At trial, the defendant moved for a directed verdict and, after the jury returned a verdict for the plaintiff, for judgment notwithstanding the verdict. Both motions were denied. The defendant appealed to the circuit court which reversed the plaintiff's verdict and entered judgment for the defendant pursuant to an applicable state statute. The plaintiff then appealed to the United States Supreme Court alleging that the procedure violated the Seventh Amendment, and the Court agreed.

The Court stated,

while on the trial in the circuit court, the jury returned a general verdict for the plaintiff, the Circuit Court of Appeals on an examination of the evidence concluded that it was not sufficient to sustain the verdict, and on that ground directed a judgment for the defendant. In other words, the Circuit Court of Appeals directed a judgment for one party when the verdict was for the other, and did this on the theory, not that the judgment was required by the state of the pleadings, but that it was warranted by the evidence. It will be perceived, therefore, that the court, although practically setting the verdict aside, did not order a new trial, but assumed to pass finally upon the issues of fact presented by the pleadings and to direct a judgment accordingly. If this was an infraction of the Seventh Amendment, it matters not that it was in conformity with the state statute, or with the practice thereunder in the courts of the State, for neither the statute nor the practice could be followed in opposition to the Amendment, which, although not applicable to proceedings in the courts of the several States, is controlling in the Federal courts.<sup>153</sup>

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151. *Id.* at 320.

152. 228 U.S. 364 (1913).

153. *Id.* at 376-77.

The Court here appears to have returned to the historical test that was beginning to be challenged by the more functional approach. This is evidenced by the fact that the Court undertook a lengthy examination of the procedure available at "common law" for non-suit. It stated that its decisions regarding the right to jury trial established that the jurisprudence

afford[s] no justification whatever for overruling or departing from the repeated decisions of this court, reaching back to the beginning of the last century, wherein it uniformly has been held (a) that we must look to the common law for a definition of the nature and extent of the right of trial by jury which the Constitution declares "shall be preserved;" (b) that the right so preserved is the right to have the issues of fact presented by the pleadings tried by a jury of twelve, under the direction and superintendence of the court; (c) that the rendition of a verdict is of the substance of the right, because to dispense with a verdict is to eliminate the jury, which is no less a part of the tribunal charged with the trial than is the court; and (d) that when the issues have been so tried and a verdict rendered they cannot be re-examined otherwise than on a new trial granted by the court in which the first trial was had, or ordered by the appellate court for some error of law affecting the verdict.<sup>154</sup>

However, subsequent cases were beginning to once again move away from the historical approach. In *Gasoline Products Co. v. Champlain Refining Co.*,<sup>155</sup> the Court determined that a remand on the issue of damages alone would not violate the Seventh Amendment. The Court stated that

we are not now concerned with the form of the ancient rule. It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance. All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law. Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure. It does not prohibit the introduction of new methods for ascertaining what facts are in issue, or require that an issue once correctly determined, in accordance with the constitutional command, be tried a second time, even though justice demands that another distinct issue, because erroneously determined, must again be passed on by a jury. . . . Here we hold that where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a

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154. *Id.* at 397.

155. 283 U.S. 494 (1931).

new trial of that issue even though another and separable issue must be tried again.<sup>156</sup>

Then came the oddity that is *Dimick v. Schiedt*.<sup>157</sup> There, the plaintiff sought damages for injuries arising out of an automobile accident. The jury returned a verdict for \$500 and the plaintiff moved for a new trial alleging, among other things, that the damages were inadequate. The trial court ordered a new trial unless the defendant would consent to an increase of the damages to \$1,500. The defendant consented, and plaintiff's motion for new trial was denied. The defendant then appealed, and the circuit court reversed, holding that additur<sup>158</sup> violated the Seventh Amendment. A sharply divided Supreme Court affirmed the court of appeals. The Court began by stating that "[i]n order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791."<sup>159</sup> Once again, the Court appeared to be retreating back to the historical approach.

The plaintiff argued that if remittitur was constitutional, as held in *Blunt v. Little* and its progeny, so too must additur be constitutional. Once again, the Court disagreed.

In the light reflected by the foregoing review of the English decisions and commentators, it, therefore, may be that if the question of remittitur were now before us for the first time, it would be decided otherwise. But, first announced by Mr. Justice Story in 1822, the doctrine has been accepted as the law for more than a hundred years and uniformly applied in the federal courts during that time. And, as it finds some support in the practice of the English courts prior to the adoption of the Constitution, we may assume that in a case involving a remittitur, which this case does not, the doctrine would not be reconsidered or disturbed at this late day.<sup>160</sup>

Noting that "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care[,]"<sup>161</sup> the Court declared

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156. *Id.* at 498–99.

157. 293 U.S. 474 (1935).

158. Additur is the conceptual inverse of remittitur. Theoretically, argued the plaintiff in *Dimick*, if a defendant who is subjected to excessive damages can be granted a new trial unless the plaintiff agrees to submit to a lower award, so too should a plaintiff be accorded a similar power. Thus, if the damages awarded are inadequate, the plaintiff should have the power to force a new trial unless the defendant agrees to enlarge the award. *See id.*

159. *Id.* at 476.

160. *Id.* at 484–85.

161. *Id.* at 486.

that it would not permit a "doubtful precedent [to be] extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land."<sup>162</sup>

In any event, the Court also found a constitutional distinction in the principles of remittitur and additur.

Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the remittitur has the effect of merely lopping off an excrescence. But, where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict.<sup>163</sup>

To hold otherwise, concluded the Court, "is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept 'an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess.'"<sup>164</sup>

Vacillating yet again, the Court returned to the functional approach in *Galloway v. United States*,<sup>165</sup> a case in which the Court authorized the use of the directed verdict, its rhetoric in *Slocum* notwithstanding. The plaintiff sought benefits under a military insurance policy, claiming total and permanent disability. The trial court directed a verdict for the defendant on the grounds that there was

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162. *Id.* at 485.

163. *Id.* at 486.

164. *Id.* at 487. In this 5-4 decision, Justice Stone argued in his dissenting opinion that the Court was better served by its prior use of the functional approach and catalogued the procedural devices upheld by the Court that were not available at common law.

Thus this Court has held that a federal court, without the consent of the parties, may constitutionally appoint auditors to hear testimony, examine books and accounts, and frame and report upon issues of fact, as an aid to the jury in arriving at its verdict; it may require both a general and a special verdict and set aside the general verdict for the plaintiff and direct a verdict for the defendant on the basis of the facts specially found; and it may accept so much of the verdict as declares that the plaintiff is entitled to recover, and set aside so much of it as fixes the amount of the damages, and order a new trial of that issue alone. Yet none of these procedures was known to the common law. In fact, the very practice, so firmly imbedded in federal procedure, of making a motion for a new trial directly to the trial judge, instead of to the court en banc, was never adopted by the common law. But this Court has found in the Seventh Amendment no bar to the adoption by the federal courts of these novel methods of dealing with the verdict of a jury, for they left unimpaired the function of the jury to decide issues of fact, which it had exercised before the adoption of the amendment.

*Id.* at 491-92 (Stone, J., dissenting) (internal citations omitted).

165. 319 U.S. 372 (1943).



insufficient evidence of “total and permanent” disability because, although the plaintiff presented evidence of insanity beginning in 1919 and ending in 1941, there were gaps during which he did not meet his burden of showing “continuous” insanity.<sup>166</sup>

After examining the evidence, the Court concurred with this conclusion, but then embarked on a lengthy exposition of its method of interpreting the Seventh Amendment, which was decidedly functional in its approach:

The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were “the rules of the common law” then prevalent, including those relating to the procedure by which the judge regulated the jury’s role on questions of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries. In 1791 this process already had resulted in widely divergent common-law rules on procedural matters among the states, and between them and England. And none of the contemporaneous rules regarding judicial control of the evidence going to juries or its sufficiency to support a verdict had reached any precise, much less final, form. In addition, the passage of time has obscured much of the procedure which then may have had more or less definite form, even for historical purposes.<sup>167</sup>

Ultimately, the Court summed up its approach by stating that “the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions.”<sup>168</sup> The Court’s approach led Justice Black to lament, in dissent, that “[t]oday’s decision marks a continuation of the gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.”<sup>169</sup>

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166. *Id.* at 387–88.

167. *Id.* at 390–92 (internal citations omitted).

168. *Id.* at 392.

169. *Id.* at 397 (Black, J., dissenting). The use of the functional approach led to the Court’s approval of the reduction of the number of jurors constitutionally required in both criminal, and civil cases. *See, e.g., Colgrave v. Battin*, 413 U.S. 149 (1973); *Williams v. Florida*, 399 U.S. 78 (1970). In another series of cases interpreting the Seventh Amendment tangentially related to the subject matter of this article, but ultimately beyond its scope, is that series of cases which examine in what instance litigants are entitled to a jury in the first instance. In *Ross v. Bernhard*, 396 U.S. 531 (1970), for example, the Court held that plaintiffs in a shareholders derivative suit were entitled to a jury. The Court established a three part test to determine when one is entitled to a jury. First, the Court will use an historical

### C. Judicial Involvement in Assessing Penalties

The preceding section has demonstrated that over the course of time, the Court has been increasingly willing to curtail some of the jury's power through procedural devices and the like. In a separate line of cases, the Court has considered the specific topic at hand—whether judges, rather than juries, are the appropriate persons to assess civil statutory penalties and punitive damages. As a starting point, recall that the Court in *Day v. Woodworth*<sup>170</sup> stated that punitive damage assessments have “always [been] 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.”<sup>171</sup>

However, where statutory civil penalties are concerned, the courts have been less solicitous. *Swofford v. B&W, Inc.*<sup>172</sup> is illustrative. *Swofford* was a patent infringement case in which the plaintiffs contended that they were entitled to have a jury assess the amount of punitive damages. However, the patent statute at issue explicitly authorized the judge to assess damages in the absence of a jury.<sup>173</sup> In interpreting the statute, the Fifth Circuit observed that it had found “no authority for the proposition that the parties enjoyed a constitutional right to jury trial on the award and amount of exemplary damages.”<sup>174</sup> The court then concluded that

[w]e do not agree that a reading of these cases leads to the conclusion that exemplary damages and attorneys' fees are jury questions as of right. The reason is that exemplary damages and attorneys' fees are not money claims triable by jury, although they are awarded in a “legal” action.<sup>175</sup>

Likewise, in *Tull v. United States*,<sup>176</sup> the government brought suit against a developer for dumping fill on wetlands in violation of the

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test, and look to whether the common law would have provided a jury. Second, the Court will look to the nature of the remedy sought, and in particular whether it is primarily equitable or legal in character. Finally, the Court will examine the relative abilities and limitations of the jury. This last point is relevant to the division of labor between judge and jury in assessing punitive damages, and is discussed further later in this Article.

170. 54 U.S. 363 (1851).

171. *Id.* at 371; see also *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.”).

172. 336 F.2d 406 (5th Cir. 1964).

173. See 35 U.S.C. § 284 (1994). The statute states that “the court may increase the damages up to three times the amount found or assessed.”

174. *Swofford*, 336 F.2d at 412.

175. *Id.* at 413.

176. 481 U.S. 412 (1987).

Clean Water Act. A provision of the act authorizes relief in the form of permanent or temporary injunctions and provides that violators of the Act “shall be subject to a civil penalty not to exceed \$10,000 per day.”<sup>177</sup> As a consequence of this provision, the government sought over \$22 million in civil penalties. The defendant requested a jury trial, but the district court denied the request. The court, after a bench trial, concluded that the defendant was guilty of illegal dumping and fashioned a remedy that had both legal and equitable components. The total amount of civil penalties assessed by the district court was \$325,000.

The Fourth Circuit affirmed over a dissent and the Supreme Court granted certiorari to resolve a split among the circuit courts. The Court first characterized the civil penalties as being of a “punitive nature”<sup>178</sup> and held that although the petitioners had the right to jury trial to determine liability, a judge was the appropriate person to fix the amount. The Court started with the legislative history of the Clean Water Act and noted that “[t]he legislative history . . . [shows] that Congress intended that trial judges perform the highly discretionary calculations necessary to award civil penalties after liability is found. We must decide therefore whether Congress can, consistent with the Seventh Amendment, authorize judges to assess civil penalties.”<sup>179</sup>

Resorting once again to the functionality test, the Court observed that “[t]he Seventh Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must determine liability.”<sup>180</sup> The Court concluded that the issue turned on “whether the jury must shoulder this responsibility as necessary to preserve the ‘substance of the common-law right of trial by jury,’”<sup>181</sup> and concluded that a jury is not necessary for that purpose. The Court stated, “[n]othing in the Amendment’s language suggests that the right to a jury trial extends to the remedy phase of a civil trial. Instead, the language defines the kind of cases for which jury trial is preserved, namely suits at common law.”<sup>182</sup> While conceding that there is “almost no direct evidence concerning the intention of the framers of the [S]eventh [A]mendment itself,” the Court asserted that “[w]e have

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177. *Id.* at 414.

178. *Id.* at 423.

179. *Id.* at 425 (internal citations omitted).

180. *Id.* at 425–26.

181. *Id.* at 426.

182. *Id.* at 426 n.9.

been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial.”<sup>183</sup>

The Court also rested its decision on the rationale that Congress has authority to set limits on civil penalties.

Since Congress itself may fix the civil penalties, it may delegate that determination to trial judges. In this case, highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act. These are the kinds of calculations traditionally performed by judges.<sup>184</sup>

Relying on *Tull*, the Fourth Circuit held that judges may substitute their judgment for the jury's on the amount of damages assessed.<sup>185</sup> In *Shamblin's Ready Mix v. Eaton Corp.*, a jury returned a verdict in favor of the plaintiff and awarded \$600,000 in punitive damages. The court of appeals reversed and remanded for a new trial, holding that the damages were excessive. The second jury awarded \$650,000 in punitive damages and the defendant again appealed on the ground that the punitive awards were excessive. On the second appeal, the defendants urged the court of appeals to “determine the amount of punitive damages rather than remand for yet a third trial.”<sup>186</sup> The plaintiffs, however, maintained that the Seventh Amendment required a remand so a third jury could determine the appropriate amount to award in punitive damages. The court stated that the issue was whether the Seventh Amendment “requires that the amount of punitive damages be determined by a jury.”<sup>187</sup>

The court began its analysis by noting that its sister circuits had “reduced the amount of punitive damages without remanding for a new trial.”<sup>188</sup> Although the court acknowledged that in *Kennon v. Gilmore*<sup>189</sup> the Supreme Court had held that the Seventh Amendment

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183. *Id.*

184. *Id.* This statement could have significant implications with respect to punitive damages as well. It is well settled that states have the right to regulate punitive damage awards, as does Congress. If the reasoning in *Tull* is extended, it strengthens the argument that judges, rather than juries, should set punitive damage awards. See discussion *infra* Part V.

185. See *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, 873 F.2d 736 (4th Cir. 1989).

186. *Id.* at 739–40.

187. *Id.* at 740.

188. *Id.* The court cites to the following cases: *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 207 (1st Cir. 1987) (verdict for \$3,000,000 reduced to \$300,000); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1267, 1279 (7th Cir. 1984) (verdict for \$350,000 reduced to \$50,000); *Guzman v. W. State Bank*, 540 F.2d 948, 954 (8th Cir. 1976) (verdict for \$25,000 reduced to \$10,000); *Shimman v. Frank*, 625 F.2d 80, 102, 104 (6th Cir. 1980) (judgment for \$75,000 reduced to \$20,000). The court goes on to recognize that none of these decisions discussed the Seventh Amendment. *Shamblin's Ready Mix*, 873 F.2d at 740–41.

189. 131 U.S. 22 (1889).

precludes a judge from substituting his or her judgment for the jury's with respect to compensatory damages, it held that punitive damages were fundamentally different from compensatory damages, and, therefore, *Kennon* did not apply.<sup>190</sup>

The purpose of compensatory damages is to make the plaintiff whole by vindicating a private wrong. Assessing the extent of harm is appropriately within the province of the jury in its capacity of fact finder. In contrast, punitive damages serve a public purpose. Punitive damages "are not compensation for an injury. Instead they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."<sup>191</sup>

Further, the court held that, consistent with the Supreme Court's halting trend toward the functional test, "[t]he measure of damages in a cause of action for a tort is not a fundamental element of a trial. The proper measure is a function of law not of facts found by a jury."<sup>192</sup> Finally, relying on *Tull*, the court stated that "[t]here is no principled distinction between civil penalties and the modern concept of punitive damages. Both serve the same purposes to deter and punish proscribed conduct."<sup>193</sup> Thus, the court held that "the [S]eventh [A]mendment does not require that the amount of punitive damages be assessed by a jury."<sup>194</sup>

*Shamblin's Ready Mix*, however, turned out to have a short shelf life. Just two years later, the Fourth Circuit reversed itself and overruled *Shamblin's Ready Mix* in *Defender Industries, Inc. v. Northwestern Mutual Life Co.*<sup>195</sup> The court began by distinguishing *Tull*, the case upon which the previous panel had relied. The court noted that the *Shamblin's Ready Mix* court had "reasoned that punitive damages are similar to civil penalties and, therefore, a determination of the appropriate amount is not a fundamental element of a jury trial."<sup>196</sup> The *Shamblin's Ready Mix* court did concede that *Tull* contained "some rather broad language," but distinguished *Tull* on the ground that the Court was there deciding the issue of whether determining the amount of a civil penalty could be delegated to the trial judge without the necessity of a jury determination. Ultimately, the *Shamblin's Ready Mix* panel concluded that "[t]he *Tull* decision cannot stand for the

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190. See *id.* at 28–30.

191. *Shamblin's Ready Mix*, 873 F.2d at 741 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

192. *Id.* at 742.

193. *Id.*

194. *Id.*

195. 938 F.2d 502 (4th Cir. 1991).

196. *Id.* at 506.

proposition that a plaintiff bringing a state common-law cause of action does not have a right to a jury determination of the amount of punitive damages."<sup>197</sup>

Relying on *Kennon v. Gilmore*, which the *Shamblin's Ready Mix* court had been careful to distinguish, the *Defender Industries* court concluded that, as *Kennon* made clear, the Seventh Amendment "guarantees a [right to a] jury determination of the amount of tort damages."<sup>198</sup> The *Defender Industries* court made no attempt to address the distinction made in *Shamblin's Ready Mix* between compensatory and punitive damages, but instead relied on two Supreme Court cases decided after *Shamblin's*: *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*<sup>199</sup> and *Pacific Mutual Life Insurance Co. v. Haslip*.<sup>200</sup> These decisions, according to the *Defender Industries* court, "emphasize the fundamental character of a jury assessment of the amount of punitive damages."<sup>201</sup> In overruling *Shamblin's Ready Mix*, the court stated "[a]n assessment by a jury of the amount of punitive damages is an inherent and fundamental element of the common-law right to trial by jury."<sup>202</sup> Accordingly, the court held that the Seventh Amendment guarantees a litigant the right to a jury determination of the amount to be awarded as punitive damages.<sup>203</sup>

#### D. State Legislative Involvement in Assessing Penalties

There have also been legislative attempts to mandate judicial assessment. For example, in 1987 Ohio lawmakers enacted legislation which provided that "[i]n a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court."<sup>204</sup> A few years later, however, in *Zoppo v. Homestead Insurance Co.*,<sup>205</sup> the Ohio Supreme Court, determined that the legislation violated the Ohio Constitution.<sup>206</sup> The

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197. *Id.*

198. *Id.*

199. 492 U.S. 257 (1989) (concerning an attack on punitive damages based upon the Eighth Amendment's prohibition on excessive fines).

200. 499 U.S. 1 (1991). *Haslip* is discussed at length below.

201. *Defender Ind.*, 938 F.2d at 506.

202. *Id.* at 507.

203. *See id.* at 507.

204. *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 401 (Ohio 1994), citing OHIO REV. CODE ANN. § 2315.21(C)(2) (West 1987), which has since been amended.

205. 644 N.E.2d 397 (Ohio 1994).

206. The Ohio Constitution provides that "[t]he right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the

court stated that the right to jury trial "cannot be invaded or violated by either legislative act or judicial order or decree."<sup>207</sup> The court found that because the right to jury assessment of punitive damages "stems from the common law and is encompassed within the right to trial by jury,"<sup>208</sup> any attempt to remove damage assessment from the jury violated the Constitution.

The Ohio legislature, however, was convinced that tort reform in general, and judicial oversight of punitive damages assessment in particular, was necessary. As a result, in 1999, it enacted a sweeping tort reform bill that affected eighteen different titles, thirty-eight chapters, and over one hundred different sections of the Revised Code.<sup>209</sup> Although the bill, as enacted, was found unconstitutional for a variety of reasons,<sup>210</sup> the court paid particular attention to the amended version of the code section found problematic by the *Zoppo* court. The amended version removed the requirement that punitive damages be judicially assessed, but provided that punitive damages should be capped. In holding that this part of the overall tort reform was unconstitutional, the court stated that "a statute that allows the jury to determine the amount of punitive damages to be awarded but denies the litigant the benefit of that determination stands on no better constitutional footing than one that precludes the jury from making the determination in the first instance."<sup>211</sup>

The Kansas Supreme Court reached the opposite conclusion. At issue was a statute which provided that, to the extent that the case was one in which punitive damages were recoverable, the jury's role was to decide whether to award them in the first instance. If the jury voted to award punitive damages, then the amount was to have been determined by the judge in a separate hearing outside the presence of the jury.<sup>212</sup> After conducting a survey of common law practice, the court

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concurrence of not less than three-fourths of the jury." OHIO CONST. art. I, § 5. Recall that the Seventh Amendment of the United States Constitution has does not apply to individual states. *See supra* note 5.

207. *Zoppo*, 644 N.E.2d at 401.

208. *Id.*

209. H.B. 350 (Ohio 1996) (which contained an amended version of section 2315.21).

210. H.B. 350 was found unconstitutional as whole because it "usurp[ed] judicial power in violation of the Ohio Constitution's separation of powers." *State ex. rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1097 (Ohio 1999).

211. *Sheward*, 715 N.E.2d at 1091. In 2001, the Ohio legislature enacted S.B. 108 which contained yet another version of § 2315.21, which went into effect in July 2001. Section (C)(1) provides, "In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages." OHIO REV. CODE ANN. § 2315.21(C)(1).

212. *See* KAN. STAT. ANN. § 60-3701(a) (West 1995).

concluded that punitive damages, unlike compensatory damages, did not give rise to a factual question and that punitive damages were not considered a remedy at common law, but were rather merely “incident” to a cause of action.<sup>213</sup> While conceding that juries had historically assessed punitive damages,<sup>214</sup> the court further concluded that a claim for punitive damages was not a right at common law.<sup>215</sup>

Having concluded that plaintiffs do not have a common law “right” to punitive damages, the court reasoned that the legislature could constitutionally abolish punitive damages altogether. This conclusion led the court to reason that if the legislature had the power to abolish punitive damages, it also had the power to do something less drastic, including requiring judicial assessment of punitive damages.<sup>216</sup> Accordingly, the court held the Kansas legislation was constitutional under both the United States Constitution and the Kansas Constitution.<sup>217</sup>

### III. The Due Process Attacks

In addition to the litigation surrounding the respective roles of the judge and jury in assessing punitive damages, the concept of awarding punitive damages itself has come under substantial constitutional attack on due process grounds in recent years. In *Pacific Mutual*

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213. See *Smith v. Printup*, 866 P.2d 985 (Kan. 1993).

214. See discussion *supra* Part I.

215. See *id.* at 997–98.

216. See *id.*

217. See *id.* at 998. The plaintiffs were arguing that the statute violated the Fourteenth Amendment of the United States Constitution, rather than the Seventh, which is not incorporated to the states. The plaintiffs were also arguing that the statutory scheme violated the right to jury trial in the Kansas Constitution, which is similar to the Ohio Constitution, and provides “[t]he right of trial by jury shall be inviolate.” KAN. CONST. § 5. One other state, Connecticut, provides for judicial assessment of punitive damages awards in product liability cases only: “If the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such damages not to exceed an amount equal to twice the damages awarded to the plaintiff.” CONN. GEN. STAT. ANN. § 52-240b (West 2001). To date, it appears that the statute has not been challenged on jury trial right grounds. The United States Circuit Courts of Appeals that have addressed the issue have found similar legislation unconstitutional. See, e.g., *Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 502 (4th Cir. 1991), discussed above; *O’Gilvie v. Int’l Playtex, Inc.* 821 F.2d 1438 (10th Cir. 1987); *McKinnon v. Berwyn*, 750 F.2d 1383 (7th Cir. 1984). However, a number of other Circuits have reduced awards without remanding for a new trial. See, e.g., *Rowlet v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987); *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984); and *Guzman v. W. State Bank*, 540 F.2d 948 (8th Cir. 1976), which suggests that those Circuits do not believe judicial assessment is unconstitutional.



*Life Insurance Co. v. Haslip*,<sup>218</sup> the Supreme Court first addressed the constitutional limits on punitive damages awards. In *Haslip*, the plaintiffs, Cleopatra Haslip and several coworkers, brought suit against Pacific Mutual Life Insurance Company and one of its agents. The plaintiffs alleged that the agent had embezzled premiums that were to have been forwarded to the company, causing their insurance policies to lapse. When Haslip was hospitalized, the company refused to honor her policy and she was forced to pay the hospital and physician's bills herself. When she was unable to do so, her account was forwarded to a collection agency, adversely affecting her credit rating.

In charging the jury on punitive damages, the trial court instructed the jury that imposition of punitive damages was discretionary and entirely within the purview of the jury. The trial court further instructed the jury that should they choose to award such damages, they must consider "the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong."<sup>219</sup> The jury returned a general verdict in the plaintiffs' favor in the amount of \$1,040,000 which included punitive damages in the amount of \$840,000. The defendant appealed to the Alabama Supreme Court, which affirmed the award.<sup>220</sup>

In the United States Supreme Court, the defendant argued that the common law procedure used in Alabama, which gave juries unlim-

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218. 499 U.S. 1 (1991). As the *Haslip* court noted, "[t]he constitutional status of punitive damages . . . is not an issue that is new to this Court . . . Challenges had been raised before; . . . [but] they have been rejected or deferred." *Id.* at 12.

219. *Id.* at 6 n.1. (The charge to the jury in full was as follows:

Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find a fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages. This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award punitive damages. Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, it does to the plaintiff, by way of punishment to the defendant and for the added purpose of protecting the public by deterring [sic] the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so. Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.)

220. *See id.* at 7.

ited discretion in determining the amount awarded, as evidenced by the jury instructions, violated its right to due process under the Fourteenth Amendment. By a seven to one margin,<sup>221</sup> the Court upheld the award, but for differing analytical reasons. The majority concluded that the award was valid first because juries had unbounded discretion over punitive damages awards at the time that the Fourteenth Amendment was adopted. Having made that determination, the second prong of the analysis concluded that the award should be upheld because Alabama's procedures were not entirely irrational.<sup>222</sup>

With respect to the first prong, the court recalled its prior precedent that recognized juries as the arbiters of punitive damages awards.

Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.<sup>223</sup>

In light of this long historical practice, the Court declared that it could not conclude that the process was "so inherently unfair as to deny due process and be *per se* unconstitutional."<sup>224</sup> However, the Court expressed its concern over jury verdicts that "ran wild" and allowed that "unlimited [jury] discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."<sup>225</sup> The Court refused to adopt a "mathematical bright line" regarding punitive damages awards, but stated that "general concerns of reasonableness" properly entered into the "constitutional calculus."<sup>226</sup>

With these general guidelines in mind, the Court examined Alabama's procedures and determined that the *Haslip* jury's discretion had been restrained in a reasonable fashion. It found that the jury instructions simultaneously advanced a legitimate state interest while protecting the defendant's right to "rational decision making."<sup>227</sup> The Court found that Alabama's procedures were constitutionally permissible not only because the jury instructions constrained the jury's discretion, but also because jury awards were subject to a further constitutional check in the appellate courts. The Court cited with ap-

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221. Justice Souter did not participate in the decision.

222. See *Haslip*, 499 U.S. at 2.

223. *Id.* at 15.

224. *Id.* at 17.

225. *Id.* at 18.

226. *Id.*

227. *Id.* at 20.

proval the post trial procedures mandated by the Alabama Supreme Court in *Hammond v. City of Gadsden*<sup>228</sup> and noted that the Alabama Supreme Court undertook a comparative analysis to “ensure that the award does ‘not exceed an amount that will accomplish society’s goals of punishment and deterrence.’”<sup>229</sup> Although the Court expressed some concern that the amount awarded exceeded “200 times the out of pocket expenses” of the plaintiff, it nonetheless ultimately concluded that the defendant “had the benefit of the full panoply of Alabama’s procedural protections” and the award was therefore constitutional.<sup>230</sup>

Lastly, the Court announced a series of factors to be taken into consideration in reviewing a punitive damages award:

(a) whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant’s conduct . . . ; (b) the degree of reprehensibility of the defendant’s conduct, the duration of that conduct, the defendant’s awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the “financial position” of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct . . . .<sup>231</sup>

The Court walked a fine line in its due process analysis. Although the majority’s holding was grounded on procedural due process, its reference to “fundamental fairness” and “general reasonableness” left open the possibility that an award could be challenged on substantive, as opposed to procedural, due process grounds. This was not lost on Justice Scalia, who concurred in the judgment, but would have limited the constitutional review to whether certain procedural safeguards were in place.<sup>232</sup>

The sole dissenter was Justice O’Connor, who concluded that the jury instructions did not limit the jury’s discretion, but rather required a jury to make only two decisions: “(1) whether or not to impose puni-

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228. 493 So. 2d 1374 (Ala. 1986). The Hammond factors include the “culpability of the defendant’s conduct,” the “desirability of discouraging others from similar conduct[,]” the “impact upon the parties,” and “other factors, such as the impact on innocent third parties.” *Haslip*, 499 U.S. at 20 (citing *Hammond*, 493 So. 2d at 1379).

229. *Haslip*, 499 U.S. at 21.

230. *Id.* at 23–24.

231. *Id.* at 21–22.

232. *See id.* at 24–25 (Scalia, J., concurring).

tive damages against the defendant, and (2) if so, in what amount.”<sup>233</sup> She stressed that the instructions informed the jury that “[i]mposition of punitive damages is *entirely discretionary* with the jury.”<sup>234</sup> In Justice O’Connor’s view the instructions were impermissibly “vague” in that they “suggest[ ] *no* criteria on which to base the exercise of that discretion” and that the instructions, therefore, “as much permits a determination based upon . . . the color of the defendant’s skin as upon a reasoned analysis of the offensive conduct.”<sup>235</sup> Accordingly, Justice O’Connor would have stricken the Alabama common law punitive damage scheme as void for vagueness.

The next case of constitutional proportions heard by the Court was *TXO Production Corp. v. Alliance Resources Corp.*,<sup>236</sup> a case which made “explicit what was implicit in *Haslip*”<sup>237</sup>—a substantive due process right to be free from “grossly excessive” punitive damages awards.<sup>238</sup> In this case, TXO brought suit to quiet title as to oil and gas development, and Alliance brought a counterclaim for slander of title. The jury awarded Alliance \$19,000 in actual damages and \$10 million in punitive damages. A sharply divided Court upheld the award.<sup>239</sup> Justice Stevens, joined by Chief Justice Rehnquist and Justice Blackmun, wrote the plurality opinion, holding that the proper inquiry is “whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant’s conduct as well as the harm that actually has occurred.”<sup>240</sup>

The Court observed that had TXO been successful in its scheme, it would have enjoyed a massive reduction in its royalty obligations to Alliance, and therefore, the punitive award, though disproportionate to the compensatory award, was warranted.<sup>241</sup> Moreover, because TXO’s behavior constituted a substantial threat to other third parties, the “dramatic disparity” between the amounts did not render the award so “grossly excessive” as to violate due process.<sup>242</sup> And although this analysis clearly speaks to substantive, rather than procedural concerns, Justice Stevens felt compelled to write:

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233. *Id.* at 44.

234. *Id.* at 44 (O’Connor, J., dissenting).

235. *Id.* at 44–45.

236. 509 U.S. 443 (1993).

237. *Id.* at 470 (Scalia, J., dissenting).

238. *TXO Prod. Corp.*, 509 U.S. at 458.

239. *Id.* at 443.

240. *Id.* at 460 (quoting *Haslip*, 499 U.S. at 21).

241. *See id.* at 462.

242. *Id.*

[W]e do not suggest that a defendant has a substantive due process right to a correct determination of the “reasonableness” of a punitive damages award . . . . [S]tate law generally imposes a requirement that punitive damages be “reasonable.” A violation of a state law “reasonableness” requirement would not, however, necessarily establish that the award is so “grossly excessive” as to violate the Federal Constitution.<sup>243</sup>

This analysis, of course, begs the question and may even be disingenuous.<sup>244</sup> After all, the substantive due process analysis had its genesis in *Haslip* in which the Court referred to “general reasonableness” and “fundamental fairness.”<sup>245</sup>

In his concurrence, Justice Scalia reiterated that, in his view, substantive due process should not be employed to scrutinize the size of the award. Rather, his view, first stated in *Haslip*, is that the due process right associated with punitive damages awards refers to a procedural rather than a substantive due process right. Further, he sees little distinction between the “reasonableness” requirement applicable in many states and the “grossly excessive” constitutional standard:

To say (as I do) that “procedural due process” requires judicial review of punitive damages awards for reasonableness is not to say that there is a federal constitutional right to a substantively correct “reasonableness” determination—which is, in my view, what the plurality tries to assure today . . . . *Judicial* assessment of [the] reasonableness [of punitive damages awards] is a federal right, but a *correct* assessment of their reasonableness is not.<sup>246</sup>

Thus, Justice Scalia contends that reviewing courts should never take into account the amount of the award; the only inquiry should be whether the process was fair.

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243. *Id.* at 458 n.24.

244. Writing separately, Justice Kennedy took issue with precisely this portion of the plurality opinion:

To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what? The answer excessive in relation to the conduct of the tortfeasor may be correct, but it is unhelpful, for we are still bereft of any standard by which to compare the punishment to the malefaction that gave rise to it. A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution. This type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend. Furthermore, it might give the illusion of judicial certainty where none in fact exists, and, in so doing, discourage legislative intervention that might prevent unjust punitive awards.

*Id.* at 466–67.

245. *Haslip*, 499 U.S. at 18.

246. *TXO*, 509 U.S. at 471 (Scalia, J., concurring).

In a lengthy dissenting opinion, Justice O'Connor takes the opposite position, contending that "the frequency and size of [punitive] awards have been skyrocketing,"<sup>247</sup> thereby implying that some mechanism must be used to reign them in. Her principle concern, as it was in *Haslip*, is that juries are given insufficient or incomprehensibly vague instructions which establish no articulable standard for juries to follow when awarding damages. She contends that the mechanisms for imposing punitive damages "is rapidly becoming an arbitrary and oppressive system"<sup>248</sup> which resulted in the "monstrous award"<sup>249</sup> imposed upon TXO. In Justice O'Connor's view, where juries receive only "vague and amorphous guidance"<sup>250</sup> with respect to punitive damages, the risk that they will return a verdict based upon "prejudice, bias and caprice remains a real one . . ."<sup>251</sup> She reiterates that "[i]nfluences such as caprice, passion, bias, and prejudice are antithetical to the rule of law. If there is a fixture of due process, it is that a verdict based on such influences cannot stand."<sup>252</sup> Finally, Justice O'Connor was concerned that there was little meaningful appellate review of the jury's award, and took particular issue with the West Virginia Supreme Court's treatment of the case.<sup>253</sup>

The issue of appellate review was again raised in *Honda Motor Co., Ltd. v. Oberg*.<sup>254</sup> In that case, the plaintiff was riding an all-terrain vehicle, manufactured and sold by defendant, when the vehicle overturned and injured the plaintiff. The jury found for the plaintiff, and awarded compensatory damages in the amount of \$919,390.39 and punitive damages in the amount of \$5,000,000.<sup>255</sup> The defendant appealed to the Oregon Court of Appeals, arguing that the punitive award violated its due process rights because the award was grossly excessive, and was the product of standardless jury discretion. The defendant also contended that the Oregon statutory scheme effectively precluded appellate review of punitive awards "unless the court can

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247. *Id.* at 500 (O'Connor, J., dissenting).

248. *Id.* at 473 (O'Connor, J., dissenting).

249. *Id.*

250. *Id.* at 474.

251. *Id.*

252. *Id.* at 475-76.

253. *See id.* at 497. Justice O'Connor was rightly disturbed by the West Virginia court's reference to categorizing the defendant as "really stupid" or "really mean" and allowing greater damages for the latter category: "Reference to categories like 'really stupid' or 'really mean' are a caricature of the difficult task of determining whether an award may be upheld consistent with due process." *Id.* at 498.

254. 512 U.S. 415 (1994).

255. *See id.* at 418.

affirmatively say there is no evidence to support the verdict.”<sup>256</sup> After the defendant failed to prevail in the Oregon courts of appeal, the United States Supreme Court granted certiorari to consider whether Oregon’s limited judicial review of punitive damages awards was consistent with due process.<sup>257</sup>

The Court began by recognizing that its “recent cases have . . . impos[ed] a substantive limit on the size of punitive damages awards,” but concluded that the case before the Court did not concern the standard that should be used to identify unconstitutionally excessive awards.<sup>258</sup> Instead, the Court was focused on the procedural safeguards, which, in the Court’s view, were necessary to ensure that punitive damages were not imposed arbitrarily in violation of the defendant’s procedural due process rights. In particular, the Court undertook review to determine whether it was procedurally infirm to completely abrogate the right to appellate review of a punitive damages award.<sup>259</sup>

In answering that question, the Court looked first to whether the procedure in question deviated from that established at common law,<sup>260</sup> and concluded that “[j]udicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded.”<sup>261</sup> Citing to its decisions in *Haslip* and *TXO*, the Court stated that where an award was subjected to meaningful and adequate review by the trial court and subsequent appellate review, it should be given a “strong presumption of validity.”<sup>262</sup> The negative inference, of course, is that in the absence of such procedural protections, the verdicts will be suspect.

The Court then undertook a comprehensive review of the common law cases, beginning with *Huckle v. Money*,<sup>263</sup> in which the court did not grant a new trial but recognized its ability to do so, and ending with an observation that in “the federal courts and in every State, except Oregon, judges review the size of damages awards.”<sup>264</sup> Accordingly, the Court concluded that Oregon’s procedure did not follow common law procedures because Oregon courts were permitted to

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256. *Id.* (citing OR. CONST. art. VII (amend.), § 3.).

257. *See id.*

258. *Id.* at 420.

259. *See id.*

260. *See id.* at 421.

261. *Id.*

262. *Id.* at 421.

263. 95 Eng. Rep. 768 (K.B. 1763).

264. *Oberg*, 512 U.S. at 426.

review awards in only a few narrow instances,<sup>265</sup> and were expressly forbidden by the Oregon Supreme Court's interpretation of Oregon's constitutional provisions to order a new trial based solely on the ground that the award is excessive.<sup>266</sup>

Having determined that the Oregon procedures deviate from the common law norm, the Court then scrutinized the "constitutional implications of [the State's] deviation from established common law procedures."<sup>267</sup> The Court concluded that the "implications" were fatal to Oregon's constitutional scheme:

While Oregon's judicial review ensures that punitive damages are not awarded against defendants entirely innocent of conduct warranting exemplary damages, Oregon, unlike the common law, provides no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts. What we are concerned with is the possibility that a culpable defendant may be unjustly punished; evidence of culpability warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing.<sup>268</sup>

Harkening back to its *Haslip/TXO* "presumption of validity," the Court went on to elaborate that "Oregon's abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause. As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis."<sup>269</sup> The Court concluded:

Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences. Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger. Oregon has removed that safeguard without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time. For these reasons, we hold that Oregon's de-

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265. For example, prior to *Oberg*, an Oregon court could only order a new trial where the jury was improperly instructed, there was error during trial or there was no evidence to support the punitive award. *See id.*

266. *See id.* at 428.

267. *Id.* at 421.

268. *Id.* at 429.

269. *Id.* at 430.



nial of judicial review of the size of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment.<sup>270</sup>

Against the backdrop of *Haslip*, *TXO*, and *Oberg* came the Court's landmark decision in *BMW of North America v. Gore*.<sup>271</sup> Although some commentators suggest that *BMW* "marks the official recognition of a whole new area of constitutional analysis, the substantive due process right to be free from unreasonably large punitive damages awards,"<sup>272</sup> that ground was already broken by *TXO*.<sup>273</sup> In *TXO*, the Court at least implied that there was a substantive component to the due process analysis in punitive damages awards review, but simply found that the award at issue there did not violate that standard. The Court in *BMW* was not so shy, and although the Court divided by a five to four margin, *BMW* became the first case that "invalidated a state court punitive damage assessment solely because of its excessive amount."<sup>274</sup>

At issue in *BMW* was Ira Gore's assertion that he had been defrauded by BMW's practice of retouching the paint of new cars damaged in transit and sold as new. BMW acknowledged that it had adopted a "nationwide policy" of repairing any damage that did not exceed three percent of the price of the vehicle and then delivering it as new, without informing either the dealer or the customer that the repairs had been made.<sup>275</sup> Bringing suit in an Alabama state court, Gore prayed for \$500,000 in compensatory and punitive damages.<sup>276</sup>

At trial, the parties argued about the scope of the injury upon which damages should be calculated. Gore argued that any punitive damages award should be computed based upon all cars sold nationwide because of BMW's "national policy." BMW, raising Federalism

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270. *Id.* at 432.

271. 517 U.S. 559 (1996).

272. Glen R. Whitehead, *BMW of North America v. Gore: Is the Supreme Court Initiating Judicial Tort Reform?*, 16 QLR 533, 533 (1997).

273. Colleen P. Murphy, *Judgment as a Matter of Law on Punitive Damages*, 75 TUL. L. REV. 459, 479 n.53 (2000) (stating:

At least a few members of the Supreme Court have explicitly recognized a distinction between common law review for reasonableness and review as to whether an award violates the due process clause. As a plurality of the Court noted in a decision a few years before *BMW*: "A violation of a state law reasonableness requirement would not . . . necessarily establish that the award is so grossly excessive as to violate the Federal Constitution." The Supreme Court, however, has confused matters by describing review under due process in terms of "reasonableness." "[A] general concern[ ] of reasonableness . . . properly enter[s] into the constitutional calculus." (citations omitted)).

274. Whitehead, *supra* note 272, at 559.

275. See *BMW*, 517 U.S. at 563-64.

276. See *id.* at 563.

principles, argued that the case must be confined to cars sold in Alabama because Alabama had no interest in deterring conduct in other states. Ultimately, the trial judge admitted evidence of nationwide car sales over BMW's objection. The jury returned a verdict in favor of Gore, awarding him \$4,000 in compensatory and \$4 million in punitive damages.<sup>277</sup>

BMW then filed a post trial motion to set aside the punitive damages award as excessive, which the trial court denied.<sup>278</sup> The Alabama Supreme Court likewise rejected BMW's claim that the award "exceeded the constitutionally permissible amount,"<sup>279</sup> but ordered a remittitur to \$2 million, finding that the trial court improperly relied on sales in other jurisdictions.<sup>280</sup>

In holding the remitted amount to be constitutionally excessive, the United States Supreme Court first endorsed BMW's position that any award in Alabama could not take into account conduct in other jurisdictions: "We think it follows from . . . 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."<sup>281</sup>

The Court then announced a three-prong test to be applied by reviewing courts in determining whether a punitive award is in excess of the constitutionally permissible limit: (1) the "degree of reprehensibility" of the defendant's action; (2) the "disparity between the harm or potential harm" suffered by the plaintiff and the punitive damages award; and (3) the difference between the penalty imposed in the case under review as compared to penalties imposed in other similar cases.<sup>282</sup> Applying these factors to BMW's conduct, the Court concluded that the punitive damage component of the verdict violated BMW's substantive due process right to be free from excessive puni-

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277. *See id.* at 565.

278. *See id.*

279. *Id.* at 566.

280. *See id.* at 567. Rather than using a multiplier of the compensatory award, as the trial court had done, the Alabama Supreme Court relied on "comparative analysis" of awards in Alabama and other jurisdictions. *See id.*

281. *Id.* at 572. Other states' consumer protection laws expressly permitted automobile manufacturers to repair damage not exceeding three percent without disclosing that fact to the dealer or the ultimate end user. Thus, BMW's conduct was lawful in other jurisdictions. *See id.* at 569-71.

282. *See id.* at 575. This is a distillation of the factors first articulated in *Haslip*. *See supra* note 218 and accompanying text.

tive damage awards, and remanded the case to the Alabama Supreme Court for further proceedings.<sup>283</sup>

Justice Breyer, joined by Justice O'Connor and Justice Souter, concurred in the result, finding that the award was procedurally, as opposed to substantively, infirm. After first recognizing that the awards were the product of "fair procedures," and therefore will be "entitled to a strong presumption of validity," Justice Breyer went on to explain that, in his view, although the procedures here were not manifestly unfair, they were the product of an unconstrained jury given virtually unlimited discretion.<sup>284</sup> Although he based his concurrence on procedural grounds, he was willing to concede that substantive due process concerns had been raised. In determining that the award in *BMW* must be reversed, he stated, "the award in this case was both (a) the product of a system of standards that did not significantly constrain a court's, and hence a jury's, discretion in making that

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283. *See id.* at 586. On remand, *BMW of North America, Inc. v. Gore*, 701 So. 2d 507 (Ala. 1997), the Alabama Supreme Court characterized the Supreme Court's decision as follows:

The United States Supreme Court announced, for the first time and by a 5-4 vote, that a punitive damages award, even one that is the product of a fair trial, may be so large as to violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Supreme Court determined that, under the Due Process Clause, a defendant has the right to fair notice not only of the conduct that may subject him to punishment, but also of the severity of the penalty that a state may impose for such conduct. *BMW*, 517 U.S. at [513], 116 S. Ct. at 1598. The Supreme Court recognized that a state may impose punitive damages to further its legitimate interest in punishing misconduct and deterring a repetition of that conduct. 517 U.S. at [568], 116 S. Ct. at 1595. To that end, a state has flexibility in determining the level of punitive damages the state will allow in different classes of cases. *Id.* The Supreme Court held that an award of punitive damages enters "the zone of arbitrariness that violates the Due Process Clause only when that award can be fairly categorized as 'grossly excessive'" in relation to those legitimate interests. *Id.* The Supreme Court then set out the following three "guideposts" by which a reviewing court could determine whether a punitive damages award is constitutionally excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio between the plaintiff's award of compensatory damages and the amount of the punitive damages; and (3) the difference between the punitive damages award and the civil or criminal sanctions that could be imposed for comparable misconduct.

701 So. 2d at 509.

Ultimately, the Alabama Supreme Court held that the plaintiff must accept a remitted award to \$50,000, which *Gore* did. On September 10, 1997, the Supreme Court entered a "certificate of judgment of affirmance" noting that *Gore* did file an acceptance of remittitur of punitive damages to the amount of \$50,000. *Id.* at 509. The certificate ordered "that the judgment of the circuit court for punitive damages is reduced to the sum of \$50,000 and as thus reduced, the judgment of the circuit court is hereby affirmed, with interest and costs." *Id.* at 515.

284. *See id.* at 587 (Breyer, J., concurring).

award; and (b) grossly excessive in light of the State's legitimate punitive damages objectives."<sup>285</sup>

Justice Scalia, who had concurred in the judgments in *Haslip* and *TXO* because the awards were not reduced and concurred in *Oberg* because that case involved procedural, rather than substantive, due process, dissented in *BMW*. Joined by Justice Thomas, Justice Scalia reiterated his position from the concurrences of the prior three cases:

I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against "unfairness"—neither the unfairness of an excessive civil compensatory award, nor the unfairness of an "unreasonable" punitive award. What the Fourteenth Amendment's procedural guarantee assures is an opportunity to contest the reasonableness of a damages judgment in state court; but there is no federal guarantee a damages award actually be reasonable.<sup>286</sup>

In Justice Scalia's view, the *BMW* case was significant in that it revived a "substantive due process right" to be free from the imposition of a "grossly excessive" award, a concept which previously had been "moribund" for a century.<sup>287</sup> He found this revival of the substantive right troubling because, in his view, it vests the lower courts, and ultimately, the Supreme Court, with the authority to decide that which is not of constitutional proportions, but rather a function of the lower court's determination of the "reasonableness" of the award. He pointed out that although the earlier cases of *Haslip*, *TXO*, and *Oberg* had, at least implicitly, recognized the substantive prong of the Court's due process review of punitive awards, none of those cases went as far as "declaring a punitive award unconstitutional simply because it was 'too big.'"<sup>288</sup> Justice Scalia concluded that the *BMW* decision,

though dressed up as a legal opinion, is really no more than a disagreement with the community's sense of indignation or outrage . . . . It reflects not merely, as the concurrence candidly acknowledges, "a judgment about a matter of degree," but a judgment about the appropriate degree of indignation or outrage, which is hardly an analytical determination.<sup>289</sup>

Finally, Justice Ginsberg, joined by the Chief Justice, likewise dissented, primarily on principles of Federalism. "The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally

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285. *Id.* at 595.

286. *Id.* at 598-99. (Scalia, J., dissenting).

287. *Id.*

288. *Id.* at 600.

289. *Id.* at 599-600.

within the States' domain, and does so in the face of reform measures recently adopted or currently under consideration in legislative arenas."<sup>290</sup> Justice Ginsberg also viewed the procedures in place under the Alabama common law scheme as a sufficient restraint on the jury's discretion, and so would have left the award untouched.<sup>291</sup>

Thus, the opinion of the majority, which relied on the "grossly excessive" standard, rested squarely on substantive due process grounds, while the three concurring justices relied more heavily on procedural due process, but acknowledged the substantive element. The four dissenting justices would not incorporate a substantive analysis to reviewing a punitive damages award, but would only reverse for a violation of procedural due process.

#### IV. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*

At issue in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*<sup>292</sup> was the proper standard of review when an appellate court was called upon to determine the constitutionality of a particular punitive award. By the time *Cooper* was argued in February 2001, the general state of the law was that punitive damages awards had a long historical pedigree in both English and American common law and were therefore, generally speaking, constitutional.<sup>293</sup> Moreover, under the Seventh Amendment, punitive damages awards were to be awarded by juries, not judges, though judges had oversight power through traditional common law mechanisms, such as a motion for a new trial, directed verdict, judgment notwithstanding the verdict, and remittitur.<sup>294</sup>

However, punitive damages awards could become unconstitutional to the extent the awards were a product of insufficient process, which, in turn resulted in arbitrary awards that reflected the unconstrained discretion of the jury. These awards were unconstitutional because they were thought to violate the procedural prong of the due process guarantee.<sup>295</sup> Likewise, awards violated the Fifth and Fourteenth Amendments in a substantive sense when the awards were "grossly excessive." Awards were grossly excessive when they were out

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290. *Id.* at 607 (Ginsberg, J., dissenting).

291. *See id.*

292. 121 S. Ct. 1678 (2001).

293. *See supra* Part II.C.

294. *See supra* Part III. Of course, each of these mechanisms were later codified in the Federal Rules of Civil Procedure and judgment notwithstanding the verdict became a judgment as a matter of law. *See* FED. RULE. CIV. P. 50.

295. *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994).

of proportion to the reprehensibility of the defendant's conduct, there was a great disparity between the harm suffered by the plaintiff and the amount of the award was completely out of step with other awards made in comparable cases.<sup>296</sup>

However, there was substantial uncertainty about what standard to use when reviewing such an award. Typically, any fact found by a jury is subject only to an abuse of discretion review. Thus, to the extent that punitive awards are set by juries, the amount of the award was subject only to appellate reversal if the trial court had abused its discretion in entering the judgment.<sup>297</sup> This, however, created tension between the Seventh Amendment on the one hand, and the Fifth and Fourteenth Amendments on the other. Assuming that each of the Amendments are of equal dignity (as one must), reviewing courts were given the daunting task of attempting to balance them. This balancing was done by the Supreme Court, somewhat painfully, in *Gasperini v. Center for Humanities, Inc.*<sup>298</sup> Although the award in *Gasperini* was compensatory, when the Court held that jury awards could be reviewed by a federal appellate body for an abuse of discretion, many believed that the Court would come to the same conclusion with respect to punitive awards.

We were wrong.

Leatherman Tool Group sued a competing tool manufacturer for trade-dress infringement, unfair competition, and false advertising when Cooper Industries, Inc. used Leatherman's advertising materials to promote Cooper's product.<sup>299</sup> The jury returned a verdict in favor of Leatherman, which included a \$50,000 compensatory award and a \$4.5 million punitive award. Cooper made post trial motions to have the awards declared "grossly excessive" and therefore unconstitutional under *BMW*. The trial court denied the motion and Cooper appealed.

In an unpublished opinion, the Ninth Circuit affirmed the punitive damage award and determined that the district court had found that it was "proportional and fair" and that the size of the award "did not violate Cooper's due process rights."<sup>300</sup> The Ninth Circuit then

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296. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 576 (1996).

297. See, e.g., *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996).

298. *Id.* *Gasperini* involved application of the *Erie* Doctrine to a New York statutory scheme which required New York appellate courts apply a more stringent standard of review than that contemplated by the Federal scheme, and which implicated the Seventh Amendment.

299. See *Cooper Indus., Inc.*, 121 S. Ct. at 1680-81.

300. *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, Nos. 98-35147 & 98-35415, 1999 U.S. App. LEXIS 33657, at \*\*3-4 (9th Cir. Dec. 17, 1999).

determined that “the district court did not abuse its discretion in declining to reduce the amount of the punitive damages.”<sup>301</sup> The Supreme Court granted certiorari to determine “whether the Court of Appeals reviewed the constitutionality of the punitive damages award under the correct standard and also whether the award violated the criteria” articulated in *BMW*.<sup>302</sup> The Court concluded that the constitutional issues raised in connection with the awarding of punitive damages merited *de novo* review.<sup>303</sup>

The Court started with the proposition that “[i]f no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court’s ‘determination under an abuse-of-discretion standard.’”<sup>304</sup> Because issues of constitutional proportions are raised when punitive damages are awarded, however, this observation did not end the inquiry. The problem, of course, is that when a fact found by a jury is reviewed for anything other than abuse of discretion, it violates the Seventh Amendment prohibition on re-examination of the facts found by a jury.<sup>305</sup>

In order to avoid this problem, the Court concluded that a punitive damage award was not a “fact” because of the nature of the punitive award itself. First, the Court made distinctions between the nature of compensatory and punitive damages:

Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct. The latter, which have been described as “quasi-criminal,” operate as “private fines” intended to punish the defendant and to deter future wrongdoing. A jury’s assessment of the extent of a plaintiff’s injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.<sup>306</sup>

Thus,

[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a “fact” “tried” by the jury. Because the jury’s

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301. *Id.* at 5.

302. *See Cooper Indus.*, 121 S. Ct. at 1682.

303. *See id.* at 1683.

304. *Id.* at 1684.

305. “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 to a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” U.S. CONST. amend. VII.

306. *Cooper Indus.*, 121 S. Ct. at 1683.

award of punitive damages does not constitute a finding of 'fact,' appellate review of the District Court's determination that an award is consistent with due process does not implicate . . . Seventh Amendment concerns raised . . . .<sup>307</sup>

The Court acknowledged *Barry v. Edmunds*,<sup>308</sup> in which it had held that "it is the peculiar function of the jury to set the amount of punitive damages[.]" and *Day v. Woodworth*,<sup>309</sup> which held that punitive damages should be "left to the discretion of the jury." The Court distinguished these cases in a rather circular manner, by simply stating that the two cases "do not, however, indicate that the amount of punitive damages imposed by the jury is itself a 'fact' within the meaning of the Seventh Amendment's Reexamination Clause."<sup>310</sup>

In a somewhat more satisfying analysis, the Court then distinguished the cases on historical grounds: "In any event, punitive damages have evolved somewhat since the time of respondent's sources. Until well into the century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time."<sup>311</sup> In other words, the Court said that to the extent punitive damages have historically been awarded by juries, the historical context has changed and the reasons for allowing juries to award punitive damages no longer exist.<sup>312</sup>

Justice Ginsberg, the lone dissenter, was persuaded by neither analysis. She began by repeating the Court's holding that a jury's award of punitive damages does not constitute a finding of fact subject to the Seventh Amendment—a proposition with which she largely agrees. However, she was concerned that because "a jury's verdict on punitive damages is fundamentally dependent on determinations we characterize as factfindings," she concluded that punitive damages are more appropriately characterized as other non-economic injuries, such as pain and suffering.<sup>313</sup>

One million dollars' worth of pain and suffering does not exist as a "fact" in the world any more or less than one million dollars' worth

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307. *Id.* at 1686.

308. 116 U.S. 550, 565 (1886).

309. 13 U.S. (1 How.) 363, 371 (1852).

310. 121 S. Ct. at 1686 n.11. The Reexamination Clause is contained within the Seventh Amendment, and provides, "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

311. *Cooper Indus.*, 121 S. Ct. at 1686 n.11.

312. *See id.*

313. *Id.* at 1691. (Ginsberg, J., dissenting).



of moral outrage. Both derive their meaning from a set of underlying facts as determined by a jury. If one exercise in quantification is properly regarded as factfinding, it seems to me the other should be so regarded as well.<sup>314</sup>

However, Justice Ginsberg's observations to the contrary, neither de novo review of the amount of a punitive damages award nor jury involvement as the arbiter of community outrage need be sacrificed on the altar of *Cooper Industries*.

## V. A Modest Proposal

Commentators have long debated whether the jury or the judge should determine the amount of a punitive damage award, and credible arguments have been made on both sides. Proponents of jury assessment argue that historically, the right to jury trial was of tremendous importance to the framers.<sup>315</sup> This was so because the framers believed that individual participation in the democratic process could be accomplished only through the check juries placed on both the legislative branches, through jury nullification,<sup>316</sup> and the judicial branch, whom, it was feared, would become tyrannical, a critique which continues to exist today.<sup>317</sup> Moreover, there were, and are, concerns that federal judges, who have life tenure, could behave erratically in assessing punitive damages.<sup>318</sup>

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314. *Id.*

315. *See supra* Part II.B.

316. Three years after the Seventh Amendment was adopted, the jury was instructed that they had the right "to determine the law as well as the fact in controversy." *Georgia v. Brailsford*, 3 U.S. (1 Dall.) 1, 4 (1794).

317. *See, e.g.*, 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). The author points out that in terms of legal process theory, a critique that can be fairly leveled at judges, is that, they may bring personal bias to the bench and to the extent that most federal judges are highly educated and come from relatively privileged backgrounds, there may be an inclination on the part of the judges to side with wealthy business interests and to refuse to grant appropriate punitive damages awards, i.e., awards that are not sufficiently large enough to deter and punish a wealthy corporate defendant.

318. *See* Margaret M. Koesel, *Invading the Province of the Jury: Section 2315.21(c) and Judicial Determination of the Amount of Punitive Damages*, 15 *OHIO N.U. L. REV.* 55 (1988) (stating:

The inability to easily remove judges from the bench gives rise to the fear that an "eccentric" will remain on the bench once appointed. And because trial judges sit alone, the possibility that any one person's judgment will be idiosyncratic and not countered by others adds to the fear of an individual judge's eccentricity. That is confirmed when citizens and trial lawyers experience "judge-shopping." Trial attorneys certainly realize, as do many citizens who have had some involvement in court processes, that outcomes can vary substantially according to the judge who presides over a case. The considerable power concentrated in a single individual

Another theme in favor of jury assessment is that the jury is an institutional member of the "body politic." When serving on a jury, citizens are engaged in the direct exercise of democracy, as opposed to the representative form found in the legislative body, and serve as the "conscience of the community."<sup>319</sup> This theme is echoed by those who view the jury as a barometer of "moral outrage" when assessing punitive damages.<sup>320</sup> Some commentators have gone so far as to say that judicially imposed punitive damages are both "elitist" and "unconstitutional."<sup>321</sup>

On the other hand, there are persuasive reasons why the judge, not the jury, should assess punitive damages. The most frequently cited reason is that juries have "run wild,"<sup>322</sup> awarding "monstrous"<sup>323</sup> damages that have been "skyrocketing"<sup>324</sup> out of control,<sup>325</sup> thus prompting widespread state tort reform, with varying degrees of success.<sup>326</sup> The theory is that judges are less likely to be swayed by bias, prejudice, or caprice.<sup>327</sup> A related argument is that judges have much more experience in meting out punishment because of their experi-

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gives rise to fear of "arbitrary action." In a legislature, jury, or even multi-member appellate court, the fear of one eccentric participant is substantially diminished.)

319. *Henderson By & Through Hartsfield v. Alabama Power Co.*, 627 So. 2d 878, 893 (Ala. 1993).

320. See, e.g., *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 600 (1997) (Scalia, J., dissenting).

321. See, e.g., Koesel, *supra* note 318, at 58, citing Fisher, "Tort Reform" Is An Attack of Ohio Citizens, *PLAIN DEALER*, Aug. 20, 1987, at 13B (for the "elitist" remark; and S. DARLING, OHIO CIVIL JUSTICE REFORM ACT, at v (1987) for the "unconstitutional" remark).

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

323. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 473 (1993); see also *Fay v. Parker*, 53 N.H. 342, 382 (1872) (punitive damages are, in general, "monstrous heresy").

324. *TXO*, 509 U.S. at 500 (O'Connor, J., dissenting).

325. The empirical data are conflicting, however. See, e.g., Thomas M. Selsheimer and Steven H. Stodgill, *Due Process and Punitive Damages: Providing Meaningful Guidance to the Jury*, 47 S.M.U. L. REV. 329 (1994) ("Anecdotal evidence of skyrocketing awards is plentiful; hard empirical data is not . . . . [P]art of the problem is, of course, a statistical one burdened by the adage that one can prove anything with statistics."); Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15 (1998) (citing nine punitive damages studies that show punitive damage awards are rare, and that increases in punitive damages are limited to only a few jurisdictions).

326. For a comprehensive review of state tort reform, see Richard L. Blatt et al., *PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE* (1999 & Supp. 2001).

327. See, e.g., Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179 (1998) (judges "are more likely to be able to base the severity of the penalty on a rational assessment of the facts, rather than an emotional reaction to the defendant's misconduct").

ence in sentencing criminals and imposing civil fines and penalties.<sup>328</sup> As a result, it is argued, judicially assessed punitive awards would result in greater consistency in the amounts awarded, resulting in desirable economic efficiencies.<sup>329</sup>

It is likewise argued that judges are better able to assess awards that would achieve one of the primary goals of punitive damages—deterrence.

Juries believe that such awards express the community's outrage at certain forms of behavior, and judges' instructions encourage juries to think in precisely these terms. In fact, empirical evidence . . . suggests that juries are not attempting to promote optimal deterrence but instead to punish wrongdoing with, at most, a signal designed to ensure that certain misconduct will not happen again.<sup>330</sup>

Lastly, there are those who argue that juries should never assess penalties because remedies simply do not come within the Seventh Amendment guarantee.<sup>331</sup> Professor Murphy cites three arguments

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328. See Mogin, *supra* note 327 ("Because of their responsibility for sentencing in criminal cases and for imposing civil statutory penalties, judges ordinarily have much more experience than jurors in determining punishments and far more familiarity with the sanctions imposed for various types of misconduct."). Professor Mogin points out that in the criminal justice system, we almost universally allocate to the jury the responsibility of finding guilt, but then charge the court with determining the penalty:

In criminal cases (other than capital cases) sentences are determined by judges in both federal court and the courts of all but eight states. By statute, defendants in six states have a right, in cases triable to a jury, to have a jury fix their punishment, within the limits established by statute. ARK. CODE ANN. § 5-4-103 (Michie 1993) (granting this right only for crimes of rape and statutory rape); 57 OKLA. STAT. ANN. § 353 (West 1991); TEX. CRIM. P. CODE ANN. § 532.055(2) (Baldwin 1990 & Supp. 1997). In Tennessee, defendants have such a right in misdemeanor cases. TENN. CODE ANN. § 40-20-104 (Michie 1990). In Missouri, a trial judge can impose a sentence less than or equal to the sentence chosen by the jury.

*Id.* at n.3.

329. See, e.g., Cass R. Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in the Law)*, 107 YALE L.J. 2071, 2077 (1998) (stating:

From the standpoint of economic efficiency, unpredictable awards need not be troublesome; perhaps individual awards cannot be calculated in advance, but if people can calculate the expected value of the relevant risks, there should be no efficiency loss. If awards are unpredictable, however, resources are likely to be wasted on that calculation, and as a practical matter, a risk of extremely high awards is likely to produce excessive caution in risk-averse managers and companies. Hence unpredictable awards create both unfairness and (on reasonable assumptions) inefficiency, in a way that may overdeter desirable activity.)

See also *Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1802-03 (2000) (recommending that judges, not juries, determine punitive damages awards in order to "promot[e] predictability and rationality").

330. Sunstein et al., *supra* note 329, at 2085.

331. See, e.g., Colleen P. Murphy, *Judicial Assessment of Legal Remedies*, 94 NW. U. L. REV. 153, 172 (1999) ("[T]he assessment of highly discretionary, multifaceted remedies such as

that have been advanced to permit judicially reduced punitive damages without the need for a new trial.<sup>332</sup> First, punitive damage awards are not a "fact." Second, the question of an award's excessiveness is a "matter of law." Finally, reduction to the constitutional maximum is not a remittitur.<sup>333</sup>

The Supreme Court in *Cooper* held that the first argument is conclusive, and the Court's holding bears repeating here: "Unlike the measure of actual damages suffered, which presents a question of fact, the level of punitive damages is not really a 'fact' 'tried' by the jury."<sup>334</sup> If the amount is not a "fact," it is never within the province of the jury because the jury's sole function in a civil trial is to act as a fact finder. Therefore, the question is not whether the jury *should* assess punitive damages, but whether they are constitutionally *permitted* to do so. In the wake of *Cooper*, the answer to the latter question may be in the negative.

Thus, this Article proposes that federal courts can, and should, modify the manner in which punitive damages are assessed. First, the jury must find facts that justify the imposition of the award. The jury should then rank the culpability of the conduct into one of three categories: 1) grossly negligent; 2) recklessly indifferent; or 3) maliciously or fraudulently oppressive. Finally, the jury should determine the wealth of the defendant.<sup>335</sup> Once the jury has performed these functions, the judge should then determine the amount necessary to effectuate the goal of punitive damages, which is to punish the defendant and deter similar misconduct. The use of such a scheme would solve the problem of unbounded jury discretion that has raised procedural due process concerns and would likewise curb or curtail "grossly excessive" awards that raise substantive due process issues.

This proposal has the salutary effect of eradicating the *Gasperini* problem, at least where punitive damages are concerned. Because the jury would not make an initial determination of the punitive damages, the re-examination clause would not be implicated. The facts found

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civil penalties, statutory damages, and punitive damages should not be considered to fall within the scope of the Seventh Amendment.").

332. This is a concept not far removed from allowing judicial assessment at the outset.

333. See Murphy, *supra* note 331, at 202.

334. *Cooper Indus.*, 121 S. Ct. at 1686.

335. There has been controversy over whether the defendant's wealth should be relevant. See, e.g., David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363 (1994). However, this Article takes the position that the wealth of the defendant is highly relevant. A punitive award against a middle-income individual of, say, \$25,000, might have tremendous punitive and deterrent value. The same award levied against a large, wealthy corporation would have a de minimis effect.

by the jury to support the punitive award would continue to be reviewed under an abuse of discretion standard, which, as Justice Ginsberg pointed out in *Gasparini*, involves not so much a review of the facts, but rather of the trial court's use of its discretion, which is a matter of law. The actual amount awarded, on the other hand, would be subject to a *de novo* review to determine whether the judicially awarded amount exceeded constitutional parameters.<sup>336</sup>

This proposal also has the advantage of exploiting the institutional strengths of both the jury and the judge. The jury has the advantage of being the voice of the community expressing the moral outrage of the public. It likewise allows the jury to continue to be the arbiter of the degree of the punishment, if not the actual dollar amount. Finally, it permits the judge to use his or her considerable experience and expertise in assessing penalties and imposing punishment. Further, because the judge has experience superior to the jury's the predictability and consistency of awards will improve. The result would be a form of "technocratic populism,"<sup>337</sup> which allows the jury to be the arbiter of the normative judgments, but employs the expertise of the bench in translating those judgments to actual awards.

## Conclusion

Punitive damages have long been a thorn in our collective judicial side. The problem has generated a great deal of judicial and scholarly ink and has prompted numerous empirical studies to define the problem which, in turn, has resulted in tort reform that has largely failed. This Article proposes a shift in the way in which punitive damages are assessed that needs no tort reform legislation; the law is already on the books. With a single swipe of its judicial pen, the Supreme Court has decreed that punitive damages are not a fact to be found by the jury. Therefore, it should be—perhaps must be—judges, rather than juries, that assess the amount to be awarded with guidance from the jury on the degree of culpability and concomitant moral outrage.

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336. This aspect of the *Cooper* case is discussed more fully in Lisa Litwiller, *Re-Examining Gasparini: Damages Assessments and Standards of Review*, forthcoming in volume 28, OHIO N.U. L. REV.

337. Sunstein et al., *supra* note 329, at 2079.

