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Determining Punitive Damages: Empirical Insights and Implications for Reform

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Determining Punitive Damages: Empirical Insights and Implications for Reform

JENNIFER K. ROBBENNOLT†

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INTRODUCTION

Large punitive damage verdicts typically garner substantial media attention¹ and stir incredible controversy. Indeed, verdicts like the \$2.7 million in punitive damages awarded to a McDonald's customer after she was scalded by a cup of coffee² and the \$5 billion in punitive damages levied against Exxon following the Exxon Valdez oil spill³ have become part of the popular culture and have

1. See Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media As Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419 (1996); Steven Garber, *Product Liability, Punitive Damages, Business Decisions, and Economic Outcomes*, 1998 WIS. L. REV. 237; *infra* note 95 and accompanying text.

2. See *Liebeck v. McDonald's Rests., P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (D.N.M. Aug. 18, 1994); see also Andrea Gerlin, *A Matter of Degree: How a Jury Decided That a Coffee Spill Is Worth \$2.9 [sic] Million*, WALL ST. J., Sept. 1, 1994, at A1; Saundra Torry, *Tort and Retort: The Battle over Reform Heats Up*, WASH. POST, Mar. 6, 1995, at F7 ("In the sound bite wars, the tort reform opponents' worst nightmare is the infamous \$2.7 million punitive damage award won by an elderly Albuquerque woman who spilled scalding McDonald's coffee on herself. Tort reformers have gleefully seized on the case as the epitome of frivolity."). The award was reduced post-trial and the parties eventually settled for less than \$600,000. Gregory Nathan Hoole, *In the Wake of Seemingly Exorbitant Punitive Damage Awards America Demands Caps on Punitive Damages—Are We Barking Up the Wrong Tree?*, 22 J. CONTEMP. L. 459, 472 (1996).

fueled sweeping reforms. However, these reforms have been largely uninformed by the now sizable empirical literature examining the factors that influence punitive damages decision-making. As a result, these reforms have been primarily designed to address an illusory problem, have many counterintuitive effects, and fail to address the specific difficulties that jurors have in determining punitive damages.

In recent decades, criticism of punitive damages has sounded from many quarters⁴—with calls for reform coming from academia⁵ as well as from business leaders,⁶ the judiciary,⁷ the bar,⁸ and legislatures.⁹ Critics of the civil jury contend that juries are arbitrary, capricious, biased in favor of plaintiffs, overgenerous, and unprincipled in the manner in which they award damages, particularly punitive damages. Moreover, they argue that huge damage awards determined by juries have fueled a “litigation crisis” and have contributed to crippling delays in the civil justice

3. *In re Exxon Valdez*, No. A89-0095-CV, 1995 U.S. Dist. LEXIS 12952, at *19 (D. Alaska Jan. 27, 1995). The Ninth Circuit recently held that the \$5 billion award in *Exxon Valdez* was excessive. *Baker v. Hazelwood*, 270 F.3d 1215, 1246 (9th Cir. 2001).

4. For a discussion of the rhetoric of tort reform see STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* (1995); Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 *LAW & CONTEMP. PROBS.* 269 (1989); Stephen Daniels & Joanne Martin, *The Impact That It Has Had Is Between People's Ears: Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 *DEPAUL L. REV.* 453 (2000).

5. See, e.g., W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 *GEO. L.J.* 381 (1998); see also Symposium, 87 *GEO. L.J.* 285 (1998); Special Issue, *The Future of Punitive Damages*, 1998 *WIS. L. REV.* 1.

6. See, e.g., Richard J. Mahoney & Stephen E. Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, 246 *SCIENCE* 1395 (1989).

7. See, e.g., *Fay v. Parker*, 53 N.H. 342, 382 (1873) (“The idea [of punitive damages] is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry of the body of the law.”); see also *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42-64 (1991) (O'Connor, J., dissenting).

8. See, e.g., Victor E. Schwartz, *White House Action on Civil Justice Reform: A Menu for the New Millennium*, 24 *HARV. J.L. & PUB. POL'Y* 393 (2001); Victor E. Schwartz et al., *Reining in Punitive Damages “Run Wild”: Proposals for Reform by Courts and Legislatures*, 65 *BROOK. L. REV.* 1003 (1999); see also *infra* notes 10-11.

9. See *infra* Part III.B. Both the House and Senate versions of the “patients’ bill of rights” legislation that were recently passed contain caps on punitive damages. H.R. 2563, 107th Cong. § 402 (2001); S. 1052, 107th Cong. § 402 (2001).

system.¹⁰ One advocate of punitive damages reform opined that “[p]unitive damages have replaced baseball as our national sport,” and argued that “[t]he system is a perverse combination of lottery and bullfighting, selecting beneficiaries and targets almost at random and inflicting brutal punishment on the latter if they wander into the arena.”¹¹ Critics have argued that the civil justice system results in “freakish punitive damage bonanzas for persons who pour coffee on themselves or ricochet golf balls into their own foreheads.”¹² And Justice O’Connor wrote in *Pacific Mutual Life Insurance Co. v. Haslip* that “[r]ecent years . . . have witnessed an explosion in the frequency and size of punitive damages.”¹³

This popular perception of “out of control” punitive damage awards has led to considerable legal reform designed to constrain them. In recent years, the U.S. Supreme Court has imposed constitutional limits on the size of punitive damage awards¹⁴ and has enlarged the role of appellate judges in reviewing punitive damage awards.¹⁵ At the same time, legislatures have attempted to restrict the imposition of punitive damages through mechanisms such as abolishing punitive damages entirely,¹⁶ placing caps on the amount of punitive damages that may be awarded,¹⁷ adopting higher standards of proof by which plaintiffs must

10. See, e.g., JEROME FRANK, *COURTS ON TRIAL* (1949); PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559 (1992).

11. Theodore B. Olson, *The Dangerous National Sport of Punitive Damages*, WALL ST. J., Oct. 5, 1994, at A17.

12. *Was Justice Served?*, WALL ST. J., Oct. 4, 1995, at A14 (quoting Theodore B. Olson). Responding to evidence that punitive damages are relatively rare, another advocate of tort reform noted:

“The fact is that punitive damages still have a Russian roulette quality to them The chamber may be larger than we thought. Maybe there aren’t six holes in the chamber. Maybe there are 10. But there’s still that one bullet, and who wants to take a chance of being hit?”

Edward Felsenthal, *Punitive Damages Awards Found to Be Generally Modest and Rare*, WALL ST. J., June 17, 1996, at B4 (quoting Victor Schwartz).

13. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 61 (1991) (O’Connor, J., dissenting).

14. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); see also *infra* notes 46-56 and accompanying text.

15. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001); see also *infra* notes 57-59 and accompanying text.

16. See *infra* Part III.B.1.

17. See *infra* Part III.B.2.

prove that punitive damages are justified,¹⁸ bifurcating punitive damages decisions from the rest of the trial,¹⁹ allocating all or a portion of any punitive damage award to a state fund rather than to the plaintiff,²⁰ allocating responsibility for determining punitive damages to judges rather than to jurors,²¹ and reforming jury instructions.²²

While the rhetoric has been persistent and the reform has been considerable, these modifications to the system have been largely uninformed by empirical research. Indeed, the punitive damages debate has been described as "old, long on passion and hyperbole, and short on reason and hard evidence."²³ Until recently there were few systematic attempts to understand how decisions about punitive damages are made. However, there is now a substantial empirical literature addressing punitive damages decision-making. Archival research has provided rich descriptions of the characteristics of punitive damage awards in actual cases and has illustrated important relationships between punitive damage awards and characteristics of the cases and decision makers.²⁴ Experimental research, with its ability to control extraneous influences and to isolate variables of interest, is adding to our understanding of how punitive damages are determined and the factors that influence such determinations.²⁵

18. See *infra* Part III.B.3.

19. See *infra* Part III.B.4.

20. See *infra* Part III.B.5.

21. See *infra* Part III.B.6.

22. See *infra* Part III.B.7.

23. Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 1 (1990).

24. In archival research, statistical analysis of case information is conducted in order to identify relationships between variables of interest. This approach has the benefit of examining data from the "real world" and allows description of patterns and trends in the data. Concerns about these correlational studies center around the limited availability and quality of archival data and a lack of control that allows alternative explanations to confound the results. See generally Robert J. MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 137 (Robert E. Litan ed., 1993).

25. In experimental research (in this context, primarily jury simulation studies), a large number of respondents evaluate the same case. All characteristics of the case (the defendant's conduct, the plaintiff's injuries, etc.) are held constant except for the characteristic of interest. Thus, observed differences in responses can be attributed to the variable of interest, unconfounded by other influences. Simulation methodology allows replication,

This research reveals a much more complex picture of punitive damages decision-making than the image advanced by the tort reformers. On the one hand, juries seem to operate quite successfully as intuitive retributivists and to respond appropriately to a number of factors thought to be important legal underpinnings of punitive damages, such as the extent to which the plaintiff is injured, the reprehensibility of the defendant's conduct, and the defendant's wealth. On the other hand, the research suggests that jurors have difficulty giving effect to optimal deterrence, translating their outrage into a dollar award, and understanding jury instructions. In addition, jurors' decisions are influenced by the large punitive damage awards reported in the media. The empirical research further suggests that the popular notion of unrestrained punitive damage awards is incorrect—a large body of archival evidence indicates that punitive damages are not “out of control.”²⁶ Reform efforts have not been responsive to this research, and many of these efforts have been ill-targeted because they have focused on restraining awards rather than on the aspects of the decision-making process that the research has identified as problematic.

Moreover, a recently emerging body of empirical studies has examined the possible effects of punitive damages

permits observation of deliberation processes, and allows experimental manipulation of legal rules and procedures as well as case and party characteristics. Concerns about simulation methodology typically center around the verisimilitude of the simulations and the degree to which they generalize to the actual trial setting. Field experiments, in which trial features of interest are systematically manipulated, may be feasible in some circumstances (e.g., juror notetaking), but not in others (e.g., plaintiff or defendant characteristics). For general discussion of simulation research, see Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?*, 23 LAW & HUM. BEHAV. 75 (1999); Robert M. Bray & Norbert L. Kerr, *Use of the Simulation Method in the Study of Jury Behavior: Some Methodological Considerations*, 3 LAW & HUM. BEHAV. 107, 117 (1979); Shari Seidman Diamond, *Illuminations and Shadows from Jury Simulations*, 21 LAW & HUM. BEHAV. 561 (1997); MacCoun, *supra* note 24; Wayne Weiten & Shari Seidman Diamond, *A Critical Review of the Jury Simulation Paradigm: The Case of Defendant Characteristics*, 3 LAW & HUM. BEHAV. 71, 75-83 (1979). Michael Saks makes the important point that concerns about methodological features of jury simulations ought to be focused on whether there is an interaction between the feature and the effect being studied. See Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1 (1997).

26. See *infra* Part III.A.

reform. This research suggests that policymakers have proceeded from a set of common assumptions about civil juries and punitive damages decision-making that do not accurately reflect the complex effects that the reforms can have on jurors' punishment decisions. Thus, not only do the most common reforms target a largely illusory problem, but it is also not clear that each of these reforms will operate in practice as intended by supporters. Psychological theory and existing empirical research on legal decision-making and cognitive processing suggest that many of these reforms will have little effect, and that some may even have effects counter to those intended by their proponents. For example, the research suggests that caps on punitive damages may increase punitive damage awards in many cases.²⁷ While these effects are counterintuitive and surprising to most observers, many are consistent with what we now understand about human decision-making.

This paper draws together the empirical literature that has examined punitive damages decision-making and the effects of punitive damages reform. Part I offers some background about punitive damages—the purposes of punitive damages, their availability, and a brief review of the legal landscape. Part II surveys the empirical literature that has investigated how jurors make decisions about punitive damages. The research suggests that lay decision-making is much more orderly in many respects than is suggested by the reform rhetoric. Nonetheless, the research also identifies particular aspects of the process that pose difficulties. Part III considers the implications of this research for punitive damages reform and argues that current reforms are ill-suited to address the real difficulties jurors have in determining punitive damages. First, a review of studies examining punitive damage awards in actual cases demonstrates that claims of out of control punitive damage awards are exaggerated. Thus, the current reforms have largely targeted an illusory problem. Second, a review of the experimental literature examining the potential effects of punitive damages reform reveals that many reforms have effects that contradict intuitive beliefs about how punitive damage reforms will influence the decision-making of civil jurors. Finally, several modifications to the jury decision-making task—

27. See *infra* notes 317-22.

modifications that would address aspects of the process identified by the research as problematic—are briefly explored. The paper concludes, in Part IV, that punitive damages decision-making is a far more complex enterprise than the popular images of runaway juries would suggest. Commonly touted reforms fail to take into account the psychology of punitive damages decision-making and, thus, may not be the best ways to improve the processes by which punitive damages are determined.

I. BACKGROUND

Punitive damages are damages that are awarded in a civil case against a defendant in order to punish the defendant for engaging in intolerable conduct and to deter the defendant and others from engaging in similar conduct in the future. Accordingly, punitive damages may not be awarded unless the defendant's conduct is "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."²⁸ Simple negligence, then, is not sufficient to support a claim for punitive damages. Instead, for punitive damages to be awarded there "must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton."²⁹

28. RESTATEMENT (SECOND) OF TORTS § 908(2) (1977).

29. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 9-10 (5th ed. 1984) (footnotes omitted); *see, e.g.*, ALA. CODE § 6-11-20(a) (1993) (requiring that defendant "consciously or deliberately engaged in oppression, fraud, wantonness, or malice" toward the plaintiff); GA. CODE ANN. § 51-12-5.1(b) (2000) (requiring "that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences"); IDAHO CODE § 6-1604(1) (Michie 1998) (requiring that defendant engaged in "oppressive, fraudulent, wanton, malicious or outrageous conduct"); IOWA CODE ANN. § 668A.1(1)(a) (West 1998) (requiring "willful and wanton disregard for the rights or safety of another"); OR. REV. STAT. § 18.537(1) (1999) (requiring that defendant "has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety, and welfare of others").

A. Purposes of Punitive Damages

Punitive damages are designed to provide “a form of monetary civil punishment, not necessarily proportional to the actual injury, to fulfill a sense of outrage resulting from affronts to the honor of an individual.”³⁰

Amid the rhetoric and emotion of the debate about punitive damages, a basic notion has been lost. The claims of “too many,” “too high,” and “too often” have drowned out the original reasons for punitive damages and the role they play in establishing social norms. The idea behind punitive damages is simple. When actors engage in truly outrageous civil misconduct, they should be required to pay not only the actual damages their conduct engenders, but an additional penalty designed to punish their conduct and to deter them and others from engaging in such conduct in the future.³¹

Two separate justice motivations lie behind a desire to punish—an instrumental desire to control behavior (deterrence) and a desire for retribution.³²

1. *Deterrence.* One of the most commonly accepted reasons to allow punitive damages is that such awards serve to deter the wrongdoer (specific deterrence) and other future wrongdoers (general deterrence) from engaging in harmful conduct.³³ Deterrence occurs when a potential wrongdoer refrains from engaging in prohibited conduct because he or she perceives and fears the threat of legal

30. Daniels & Martin, *supra* note 23, at 7.

31. Sandra N. Hurd & Frances E. Zollers, *State Punitive Damages Statutes: A Proposed Alternative*, 20 J. LEGIS. 191, 192 (1994).

32. See Dale T. Miller & Neil Vidmar, *The Social Psychology of Punishment Reactions*, in THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR: ADAPTING TO TIMES OF SCARCITY AND CHANGE 145, 146 (Melvin J. Lerner & Sally C. Lerner eds., 1981) [hereinafter THE JUSTICE MOTIVE]. Ellis identified seven articulated purposes of punitive damages: punishment, specific deterrence, general deterrence, preserving the peace, encouraging private law enforcement, compensation, and paying plaintiffs' attorney fees. Dorsey D. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982).

33. Deterrence is the focus of many legal analysts. See, e.g. David Crump, *Evidence, Economics, and Ethics: What Information Should Jurors Be Given to Determine the Amount of a Punitive-Damage Award?*, 57 MD. L. REV. 174 (1998); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998). But see Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393 (1993) (focusing on the retributive purposes of punitive damages).

punishment.³⁴ According to economic theory, the deterrent effect of compensatory damages alone is likely to be insufficient if it is difficult to detect or identify the wrongdoer or to bring the wrongdoer to trial, if a social judgment has been made that specific illicit subjective gains should not be allowed to enter into a cost-benefit analysis, or if compensatory damages are systematically too low.³⁵ In these cases, punitive damage awards are intended to provide the deterrence that compensatory damages alone cannot provide.³⁶ Punitive damages are also intended to serve general deterrence purposes by defining and communicating norms of behavior.³⁷

2. *Retribution.* The other most common justification for the use of punitive damages is punishment or retribution.³⁸ The punishment rationale posits that “every wrong deserves punishment” that is proportionate to the wrong.³⁹ In other words, because the wrongdoer has engaged in what society considers to be egregious conduct that has injured another person, he or she must suffer for committing such a wrong. Retribution is concerned not with the behavioral consequences of the punishment, but, rather, with its moral and symbolic effects, particularly when restoration of the status quo ante through compensation is seen as

34. See generally Jack P. Gibbs, *Deterrence Theory and Research*, in NEBRASKA SYMPOSIUM ON MOTIVATION 1985: THE LAW AS A BEHAVIORAL INSTRUMENT 87 (Gary B. Melton ed., 1985).

35. See Polinsky & Shavell, *supra* note 33, at 874-75.

36. The degree to which punitive damages actually deter undesirable behavior is beyond the scope of this article. For a discussion of psychological factors that may influence the deterrent effects of tort law, see Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115 (1993).

37. Thomas Koenig & Michael Rustad, “Crimtorts” As Corporate Just Deserts, 31 U. MICH. J.L. REFORM 289, 315 (1998).

38. See Richard Lempert, *Juries, Hindsight, and Punitive Damage Awards: Failures of a Social Science Case for Change*, 48 DEPAUL L. REV. 867, 872 (1999) (“[D]eterrence is not the sole or even the primary justification for punitive damages.”). For discussion of retribution generally, see Robert Hogan & Nicholas P. Emler, *Retributive Justice*, in THE JUSTICE MOTIVE, *supra* note 32, at 125; Neil Vidmar, *Retribution and Revenge*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 31 (Joseph Sanders & V. Lee Hamilton eds., 2001).

39. Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damage Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1320 (1993).

inadequate.⁴⁰ When a wrongdoer has evidenced disrespect for the value of the injured party or has asserted control over him or her, it is hypothesized that punishment may help to “reestablish the psychological equilibrium.”⁴¹ Punishment attempts to correct the imbalance between the parties, acknowledges the worth of the victim, and sends a public signal that the wrongdoer was blameworthy relative to the victim.⁴²

3. *Additional Purposes.* Some commentators argue that punitive damages are justified because they encourage private law enforcement and compensate plaintiffs for losses and expenses that are not otherwise covered in the law of damages. There is inherently much overlap between punitive damages and compensatory damages:

[E]ven though damages are labeled compensatory, the focus is not entirely on the victim's loss, but also on the conduct of potential wrongdoers. . . .

...

... Ordinary compensatory damages may be pursued for purposes of vengeance, retribution, or vindication. . . .

...

Conversely, punitive damages may be regarded as compensating for lawyers' fees or some otherwise uncompensated distress or . . . as providing adequate incentive for victims or their lawyers to pursue the matter.⁴³

40. See TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 104-105 (1997); Miller & Vidmar, *supra* note 32, at 155; Vidmar, *supra* note 38, at 35; see also *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678, 1683 (2001) (a jury's “imposition of punitive damages is an expression of its moral condemnation”).

41. Miller & Vidmar, *supra* note 32, at 155; see also Jean Hampton, *The Retributive Idea*, in *FORGIVENESS AND MERCY* 111, 124-28 (Jeffrie G. Murphy & Jean Hampton eds., 1988); Galanter & Luban, *supra* note 33, at 1432-33.

42. Galanter & Luban, *supra* note 33, at 1432-33. Galanter and Luban also describe the “norm projection rationale” of punitive damages as a means by which to emphasize the gravity with which society views a particular law. *Id.* at 1430.

43. *Id.* at 1405-07. For discussion of the overlap between compensatory and punitive damages see also Michelle Chernikoff Anderson & Robert J. MacCoun, *Goal Conflict in Juror Assessments of Compensatory and Punitive Damages*, 23 *LAW & HUM. BEHAV.* 313 (1999); Edith Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 *LAW & CONTEMP. PROBS.* 225 (1989); Harry

Not only is litigation expensive, but some losses are not compensable and others are not readily proved. Therefore, some note that punitive damages may serve as additional compensation to plaintiffs.⁴⁴ Many object to such rationales and argue that if the purpose is compensation, then the solution is to reform the law of damages to allow appropriate compensation, rather than allowing for such compensation through the mechanism of punitive damages.⁴⁵ In any case, providing plaintiffs with additional compensation should not be a compelling justification for allowing punitive damages, if it is assumed that jurors have an opportunity to fully compensate plaintiffs through compensatory damages.

B. *Legal Developments*

Concerns about how punitive damages are awarded have led to considerable reform of punitive damages. Judicial decisions have imposed constitutional limitations on the size of punitive damages and have increased the scope of judicial review. Similarly, legislative measures have been directed at limiting the incidence, size, and unpredictability of punitive damage awards.

In a series of cases in the 1990s, the U.S. Supreme Court considered whether punitive damages could be so excessive as to violate due process.⁴⁶ In *Pacific Mutual Life Insurance Co. v. Haslip*, the Court held that the traditional method of awarding punitive damages—the determination of the appropriateness and amount of punitive damages by

Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158 (1958).

44. See David G. Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 VILL. L. REV. 363 (1994); Rustad & Koenig, *supra* note 39, at 1321; see also, e.g., *Berry v. Loiseau*, 614 A.2d 414, 435 (Conn. 1992) (holding that “punitive damages serve primarily to compensate the plaintiff for his injuries and, thus, are properly limited to the plaintiff’s litigation expenses less taxable costs”).

45. See, e.g., Polinsky & Shavell, *supra* note 33, at 939.

46. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (finding punitive damage award constitutionally excessive); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993) (finding punitive damage award not excessive); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (finding punitive damage award not excessive); see also *Browning-Ferris Ind. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276-77 (1989) (expressing willingness to address the due process question, but finding that the issue was not properly raised).

a jury and subsequent review by both trial and appellate courts—is not “so inherently unfair as to deny due process and be *per se* unconstitutional.”⁴⁷ However, the Court expressed willingness to consider whether the imposition of the punitive damages in the specific case before it was violative of due process.

In considering the constitutionality of the approximately \$840,000 punitive damage award in *Haslip*, the Court noted that the award was “more than 4 times the amount of compensatory damages . . . [and] more than 200 times the out-of-pocket expenses of” the plaintiff.⁴⁸ However, the Court refused to adopt a precise test for determining whether a punitive damage award was so excessive as to violate due process. The Court said:

We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case⁴⁹ is tried to a jury properly enter into the constitutional calculus.

In holding that the punitive damages at issue did not violate the Due Process Clause, the Court found that the jury’s discretion was adequately limited by post-trial review of the award and by instructions that confined the jury to the punishment and deterrence purposes of punitive damages, required the jury to take into account the character and degree of the wrong, and reminded the jury that they were not required to award any punitive damages.⁵⁰

Similarly, in *TXO Production Corp. v. Alliance Resources Corp.*, the Court upheld a punitive damage award of \$10 million (526 times the compensatory damage award of \$19,000), again refusing to adopt a bright line test.⁵¹ The

47. 499 U.S. at 17.

48. *Id.* at 23. In *Haslip*, the jury found the defendant, Pacific Mutual, liable for insurance fraud and assessed damages of \$1,040,000. The Court assumed that at least \$840,000 of this award was the punitive component based on the size of the plaintiff’s requests for compensatory and punitive damages. *Id.* at 6 n.2.

49. *Id.* at 18.

50. *Id.* at 19-20.

51. 509 U.S. at 458-59. In *TXO*, the defendant, TXO Production Corporation, was found liable in an action for slander of title. *Id.* at 450.

Court considered the fraudulent nature of the conduct and the harm that could potentially have resulted and concluded that the punitive damage award was not grossly excessive.⁵²

In *BMW of North America v. Gore*, the Court found, for the first time, that an award of punitive damages was constitutionally excessive.⁵³ In *Gore*, the jury awarded the plaintiff \$4000 in compensatory damages and \$4 million in punitive damages (reduced by the Alabama Supreme Court to \$2 million) for an incident arising out of BMW's nationwide policy of not disclosing to dealers or customers when a vehicle had been damaged prior to sale if the damage was less than 3% of the suggested retail price of the vehicle.⁵⁴ In considering this award, the Court articulated three "guideposts" with which to examine punitive damage awards for excessiveness: (1) the reprehensibility of the alleged conduct, (2) the disparity between the harm or the potential harm suffered by the plaintiff and the punitive award, and (3) the difference between the punitive damages remedy and the civil penalties authorized or imposed in comparable cases.⁵⁵ Analyzing the case using these factors, the court found that the \$2 million dollar punitive damage award in the case was excessive.⁵⁶

During this same period, the Court also addressed the contours of the judicial review of punitive damages. In *Honda Motor Co. v. Oberg*, the Court reviewed an Oregon constitutional provision that prohibited appellate review of jury determined punitive damage awards unless there was no evidence to support the verdict.⁵⁷ The Court found that removing the protection offered by judicial review without replacing such protection with sufficient alternative

52. *Id.* at 462.

53. 517 U.S. 559, 585-86 (1996).

54. *Id.* at 564-65.

55. *Id.* at 575. Consistent with its prior opinions, the Court refused to adopt a mathematical formula for comparing actual and potential damages to the punitive award, but found that the ratio at issue, i.e., 500 to 1, must surely "raise a suspicious judicial eyebrow." *Id.* at 583 (quoting *TXO*, 509 U.S. at 481 (O'Connor, J., dissenting)).

56. *Id.* at 585-86.

57. 512 U.S. 415, 426-27 (1994) (stating that state law limited judicial review to cases where a jury was not properly instructed, error occurred during trial, or there was no evidence at trial to support the award of any punitive damages).

safeguards was violative of due process.⁵⁸ Recently, the Court revisited the issue of judicial review of punitive damages. In the Court's most recent ruling on punitive damages, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Court held that appellate courts should review district court determinations of the constitutionality of punitive damage awards de novo.⁵⁹

At the same time that the jurisprudence of punitive damages has been evolving in the courts, legislatures have undertaken a number of reforms designed to address the problem of "out of control" punitive damage awards. These reforms include: abolishing punitive damages altogether,⁶⁰ placing caps on the amount of punitive damages that may be awarded,⁶¹ adopting higher standards of proof by which plaintiffs must prove that punitive damages are justified,⁶² bifurcating the punitive damages portion of the trial,⁶³ allocating a portion of any punitive damage award to a state fund rather than to the plaintiff,⁶⁴ allocating responsibility for determining punitive damages to judges rather than to jurors,⁶⁵ and reforming jury instructions to include descriptions of those factors that ought to be considered when making a punitive damage award.⁶⁶

II. JURY DETERMINATIONS OF PUNITIVE DAMAGES

Concerns about the abilities of jurors to award punitive damages can, and should, be evaluated systematically, rather than merely relying on anecdote and speculation.⁶⁷

58. *Id.* at 432.

59. 121 S. Ct. 1678, 1683 (2001).

60. *See infra* Part III.B.1.

61. *See infra* Part III.B.2.

62. *See infra* Part III.B.3.

63. *See infra* Part III.B.4.

64. *See infra* Part III.B.5.

65. *See infra* Part III.B.6.

66. *See infra* Part III.B.7.

67. No single empirical study can provide definitive answers or explanations. Each study, with its own strengths and limitations, contributes to a growing body of knowledge about how decisions about punitive damages are made. The data reviewed here were collected using experimental, interview, and archival methods. Some of the studies used students as participants, many used jury-eligible adults, some used individuals called for jury service or who served on juries, and others used judges or other legal professionals. Many collected the judgments of individuals, several obtained the collective judgment of groups. A variety of stimulus materials were used. Each study complements

The existing empirical literature examining juries and punitive damages is growing; in recent years a number of studies have been conducted that provide useful examination of this area.⁶⁸ This research has now identified a number of factors that are important influences on punitive damages. Specific case characteristics such as the severity of the harm caused, the reprehensibility of the defendant's actions, and the wealth of the defendant should legally be important influences on the appropriate level of punitive damages. And, in fact, the empirical research demonstrates that these case characteristics do influence punitive damage awards. In addition, differences among decision makers in their attitudes about and perceptions of the civil litigation system generally, or in the goals they seek to accomplish by their award, impact decisions. Additionally, characteristics of the task jurors are asked to perform can impact judgments about punitive damages. The social dynamics of the deliberative process and the translation of outrage and punishment motivations into dollars are both important aspects of the process that also influence final judgments. Finally, research comparing juror and jury decision-making with that of judges demonstrates a high degree of similarity.

Thus, the empirical literature indicates that jurors perform some aspects of their role quite well. They are responsive to legally relevant variations among cases and have consistent punishment intuitions. However, the research demonstrates that jurors have difficulty with specific aspects of their task. Jurors are influenced by media reports about civil litigation, they do not intuitively give effect to optimal deterrence, they have trouble translating their outrage into a monetary equivalent, and they have difficulty understanding legal instructions.

A. *Characteristics of the Case*

Many aspects of civil cases appropriately ought to influence punitive damage awards. Punitive damage

the others as researchers attempt to triangulate in on a clearer picture of how punitive damages are determined. Correspondingly, each study raises questions that ought to be pursued.

68. For a review of research examining civil jury decision-making generally, see Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998).

awards should arguably be higher when the harm caused or risked is greater, when the defendant's conduct is more outrageous, and when the defendant is wealthier. Overall, the empirical research suggests that punitive damages decision-making is properly influenced by these features of cases.

1. *Harm Severity*. Several experimental studies have found that the severity of the injury caused to the plaintiff or the potential harm risked by the defendant influences jurors' punitive damage awards.⁶⁹ Kahneman and his colleagues asked jury-eligible citizens to evaluate ten personal injury claims and to rate the outrageousness of the defendant's conduct, to rate the appropriate level of punishment, or to make a punitive damage award. Kahneman *et al.* found that the severity of the harm to the plaintiff influenced jurors' punitive damage awards such that jurors awarded more in punitive damages when the plaintiff's injury was more severe.⁷⁰ In another experimental study, Robbennolt found that the severity of the plaintiff's injury influenced punitive damage awards, such that jury-eligible citizens and trial court judges awarded more in punitive damages when the actual and potential injuries to the plaintiff were more severe.⁷¹

69. *But see* Corrine Cather et al., *Plaintiff Injury and Defendant Reprehensibility: Implications for Compensatory and Punitive Damage Awards*, 20 LAW & HUM. BEHAV. 189, 201-02 (1996) (finding no significant effect of injury severity on punitive damage awards). These researchers also found that the severity of the injury did not influence compensatory damage awards. *Id.* at 201. Thus, they speculate about whether the injuries used were different enough. *Id.* at 202.

70. Daniel Kahneman et al., *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. RISK & UNCERTAINTY 49, 62-63 (1998). This effect was even more pronounced for larger firms. *Id.* at 63-64. Ratings of the appropriate level of punishment (punitive intent) were also influenced, but reported levels of outrage were not. *Id.* at 62, 63 fig.2; *see also* Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L. J. 2071 (1998).

71. Jennifer K. Robbennolt, *Punitive Damages Decision Making: The Decisions of Citizens and Trial Court Judges*, 26 LAW & HUM. BEHAV. (forthcoming 2002). While both actual and potential injuries to the plaintiff combined to influence punitive damage awards, only the actual harm to the plaintiff influenced compensatory damage awards. *Id.* However, in a study of compensatory damages, Viscusi found that jurors' awards were influenced by the degree of harm risked (and were more likely to be so influenced than were judges). W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the*

Research in social psychology has demonstrated that the degree of harm caused by the wrongdoer is related to punishment reactions more generally.⁷² This is partly because observers attribute more responsibility to an actor when the outcome of the incident is more severe.⁷³ However, Miller and Vidmar noted that this relationship may also “reflect cultural learning” about proportionality.⁷⁴

The experimental studies finding a relationship between the severity of the injury to the plaintiff and punitive damage awards are consistent with evidence from archival studies of damage awards. Using data from forty-five of the seventy-five most populous counties for 1991-1992, Eisenberg and his colleagues found a substantial positive correlation between the size of the compensatory and punitive damages awarded by juries.⁷⁵ Similarly, several studies have found that, in products liability and medical malpractice cases, compensatory damage awards are highly correlated with punitive damage awards.⁷⁶

This aspect of punitive damages decision-making comports with the requirements of the law. The severity of the harm risked or caused by the defendant is commonly

Courts, 30 J. LEGAL STUD. 107, 128-30 (2001); see also Marylie Karlovac & John M. Darley, *Attribution of Responsibility for Accidents: A Negligence Law Analogy*, 6 SOC. COGNITION 287 (1988) (finding that judgments of the degree of punishment perceived as appropriate were determined by the severity of the harm risked).

72. Miller & Vidmar, *supra* note 32, at 158; see also Jennifer K. Robbennolt, *Outcome Severity and Judgments of “Responsibility”: A Meta-Analytic Review*, 30 J. APPLIED SOC. PSYCHOL. 2575 (2000).

73. Miller & Vidmar, *supra* note 32, at 158.

74. *Id.*

75. Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 639 (1997) [hereinafter Eisenberg et al., *Predictability*]; see also Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 772 (2002) [hereinafter Eisenberg et al., *Juries, Judges*]; Jonathan M. Karpoff & John R. Lott, Jr., *On the Determinants and Importance of Punitive Damage Awards*, 42 J.L. & ECON. 527, 543 (1999); Erik K. Moller et al., *Punitive Damages in Financial Injury Jury Verdicts*, 28 J. LEGAL STUD. 283, 300 n.52 (1999).

76. U.S. GEN. ACCOUNTING OFFICE, *PRODUCT LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES* 27-29 (1989) [hereinafter U.S. G.A.O., *PRODUCT LIABILITY*] (products liability); Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 50 (1992) (products liability); Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not “Moral Monsters,”* 47 RUTGERS L. REV. 975, 1009 (1995) (medical malpractice).

thought to be a legally relevant factor in the determination of punitive damages. While the U.S. Supreme Court has repeatedly refused to define a mathematical relationship between the harm done to the plaintiff and the appropriate level of punitive damages,⁷⁷ the Court has held that punitive damage awards ought to have some reasonable relationship with the harm or potential harm suffered.⁷⁸

2. *Defendants' Conduct.* The empirical research also shows a clear connection between the reprehensibility of the defendant's conduct and punitive damage awards. First, archival research shows that punitive damages are more likely to be awarded in cases involving intentional torts, fraudulent conduct, and extreme deviations from the standard of care.⁷⁹ Given that punitive damages are reserved for these types of outrageous cases,⁸⁰ this is hardly surprising.

Second, a number of experimental studies have demonstrated a positive relationship between the reprehensibility of the defendant's actions and the size of punitive damage awards. In several studies, Greene and her colleagues found that both students and jurors who had just completed jury service awarded more in punitive damages against defendants who had acted in a more reprehensible manner.⁸¹ Similarly, Horowitz and Bordens studied the

77. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

78. *BMW*, 517 U.S. at 580-83. In *TXO*, the Court explained why calibrating punitive damages to the actual harm alone is not always sufficient:

"For instance, a man wildly fires a gun into a crowd. By sheer chance, no one is injured and the only damage is to a \$10 pair of glasses. A jury reasonably could find only \$10 in compensatory damages, but thousands of dollars in punitive damages to teach a duty of care. We would allow a jury to impose substantial punitive damages in order to discourage future bad acts."

509 U.S. at 459-60 (quoting *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 902 (W.Va. 1991)). *But see* Polinsky & Shavell, *supra* note 33, at 914-17 (arguing that potential harm should not be considered given the goal of optimal deterrence).

79. *See infra* Part III.A 3.

80. *See supra* notes 28-29.

81. Cather et al., *supra* note 69, at 199 tbl.4 (automobile accident, products liability, and insurance bad faith cases); Edith Greene et al., *Compensation Plaintiffs and Punishing Defendants: Is Bifurcation Necessary?*, 24 LAW & HUM. BEHAV. 187, 196 (2000) [hereinafter Greene et al., *Is Bifurcation Necessary?*]

effect of reprehensible behavior in a products liability case. They found a significant correlation between jury-eligible adults' estimates of the date the defendant should have reasonably been aware of the harmful effects of its product and the size of their punitive damage awards; the earlier the defendant should have known, the higher the award.⁸² Robbennolt found that jury-eligible citizens' and trial court judges' ratings of the offensiveness of the defendant's conduct were related to their punitive damage awards, such that those participants who rated the defendant's conduct as being more offensive awarded more in punitive damages.⁸³ Thus, differences in the reprehensibility of the defendant's conduct and individual differences in how that conduct is perceived may influence the amount awarded in punitive damages.⁸⁴

Again, this aspect of punitive damages decision-making is consistent with the dictates of the law. The reprehensibility of the defendant's conduct is clearly a legally appropriate consideration in the determination of punitive damages. As noted earlier, punitive damages are only available when the defendant's conduct has reached a sufficient threshold of culpability; mere negligence will not suffice.⁸⁵ In *BMW v. Gore* the Supreme Court noted that the reprehensibility of the defendant's conduct was "[p]erhaps the most important indicium of the reasonableness of a punitive damages award."⁸⁶

(finding influence of reprehensibility on punitive damages in automobile accident and products liability cases, but not in a medical malpractice case); Edith Greene et al., *The Effects of Limiting Punitive Damage Awards*, 25 LAW & HUM. BEHAV. 217, 225 (2001) [hereinafter Greene et al., *Limiting Awards*] (personal injury, products liability, and insurance bad faith cases). Conversely, compensatory damages did not tend to be influenced by the reprehensibility of the defendant's conduct. *Id.* at 231-32.

82. Irwin A. Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 LAW & HUM. BEHAV. 269, 281 (1990) (reprehensibility had no effect on compensatory damages).

83. Robbennolt, *supra* note 71.

84. One specific aspect of defendant conduct that has received recent attention is whether the defendant conducted a cost-benefit analysis. See W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547 (2000); see also Robert J. MacCoun, *The Costs and Benefits of Letting Juries Punish Corporations: Comment on Viscusi*, 52 STAN. L. REV. 1821 (2000).

85. See *supra* notes 28-29.

86. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996); see also Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 456 (1998) (arguing from an economic perspective that reprehensibility is a

3. *Defendants' Wealth.* Several experimental studies have also found positive relationships between the wealth of the defendant and the punitive damages awarded.⁸⁷ Robbennolt found that the wealth of the defendant influenced punitive damage awards; jury-eligible citizens and trial court judges awarded more in punitive damages against a wealthier defendant than against a less wealthy defendant.⁸⁸ Similarly, Greene, Woody, and Winter found that higher amounts of punitive damages were assessed against wealthier defendants in three different cases.⁸⁹ In addition, Kahneman *et al.* found that the size of the defendant company (as indicated by annual profits) influenced punitive damage awards.⁹⁰

useful factor in determining punitive damages). *But see* Polinsky & Shavell, *supra* note 33, at 905-10 (arguing that reprehensibility should generally not affect the imposition of punitive damages).

87. Several archival studies have also found that the corporate status of a defendant is related to the size of the punitive damage award such that higher awards are made against corporate defendants than against individual defendants. *See, e.g.,* MARK PETERSON ET AL., RAND INST. FOR CIVIL JUSTICE, PUNITIVE DAMAGES: EMPIRICAL FINDINGS 49-53 (1987); Eisenberg *et al.*, *Predictability*, *supra* note 75, at 639-40. However, these studies use corporate status as a proxy for the defendant's financial condition. With regard to compensatory damages, there is experimental evidence that such effects are due to differential expectations of corporations by jurors, rather than to wealth *per se*. In a series of studies, Hans has demonstrated that many decision makers would hold corporations to a higher standard of conduct because they are seen as having greater knowledge, expertise, and potential impact. VALERIE HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 112-37 (2000) (describing her program of research). Thus, while there may be an effect of the defendant's status on punitive damage awards, the existing research suggests that this effect may be driven by differences in how responsibility is attributed to corporations and individuals and not by wealth *per se*.

88. Robbennolt, *supra* note 71. Interestingly, the effect of wealth information on compensatory damages was marked by a marginally significant interaction effect. Consistent with the prior research on the "deep-pockets hypothesis," *see infra* note 91, citizens' compensatory damage awards were not influenced by wealth information. However, judges awarded more in compensatory damages against a wealthier defendant. Robbennolt, *supra* note 71.

89. Greene *et al.*, *Is Bifurcation Necessary?*, *supra* note 81, at 197 (products liability, automobile negligence, and medical negligence). Consistent with prior research, the wealth of the defendant did not influence compensatory damages. *Id.*

90. Kahneman *et al.*, *supra* note 70, at 64. Underlying ratings of punitive intent and outrage were not so influenced. *Id.* at 62-64. Hastie and his colleagues have investigated the hypothesis that jurors will attempt to re-

While some scholars argue that wealth should not be relevant to the punitive damages calculation, others argue that eliminating wealth as an appropriate consideration would undermine both the deterrence and punishment rationales of punitive damages.⁹¹ The U.S. Supreme Court

distribute wealth by awarding larger damage awards to plaintiffs in geographic proximity to the jurisdiction and against defendants from remote geographical locations. Reid Hastie et al., *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 LAW & HUM. BEHAV. 445 (1999); see also *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (upholding jury award, but noting that "the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident"). Hastie et al. found that jurors awarded more to a plaintiff from the jurors' community than to a plaintiff from a remote location, but did not find a significant effect of the defendant's proximity to the jurisdiction. Hastie et al., *supra*, at 460. The authors speculate that they may have been unable to detect a small effect of the defendant's location with the materials that they used (e.g., their local defendant was from the participants' state, but not from their local community). *Id.* at 464.

91. Compare Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415 (1989), and Crump, *supra* note 33, at 179, and Polinsky & Shavell, *supra* note 33, at 911, with Jennifer H. Arlen, *Should Defendants' Wealth Matter?*, 21 J. LEGAL STUD. 413, 414-15 (1992), and Hylton, *supra* note 86, at 458-59, and Koenig & Rustad, *supra* note 37, at 289. See also John T. Simpson, Jr., *Discovery of Net Worth in Bifurcated Punitive Damages Cases: A Suggested Approach After Transportation Insurance Co. v. Moriel*, 37 S. TEX. L. REV. 193 (1996) (discussing discovery of net worth in bifurcated trials). It is more clear that the defendant's wealth should not influence awards of compensatory damages and, indeed, many empirical studies have found that compensatory damage awards are not affected by the defendant's wealth. MacCoun found that jury eligible adults awarded larger compensatory damage awards against a corporate defendant than against a wealthy individual defendant. However, the compensatory damages awarded against a wealthy individual were no greater than those awarded against a poor individual. Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep-Pockets" Hypothesis*, 30 LAW & SOC'Y REV. 121, 131, 137-38 (1996); see also ROBERT J. MACCOUN, IS THERE A "DEEP-POCKET" BIAS IN THE TORT SYSTEM?: THE CONCERN OVER BIASES AGAINST DEEP-POCKET DEFENDANTS (RAND Inst. for Civil Justice Issue Paper No. 130, 1993). Vidmar has found similar results for jurors deciding medical malpractice cases. NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS 203-20 (1995). Hans also found that while financial information influenced jurors' perceptions of the defendant's ability to pay the award, the information had no effect on liability decisions or on compensatory damage awards. HANS, *supra* note 87, at 184-85. Hans and Ermann found that mock jurors awarded a plaintiff suing a corporation more in compensation than a plaintiff suing an individual. Valerie P. Hans & M. David Ermann, *Responses to Corporate Versus Individual*

has indicated that the “financial position” of the defendant is a factor that can be taken into account in determining the amount of punitive damages and has approved of standards for reviewing jury awards of punitive damages that have included wealth as a factor.⁹² A number of state statutes also specifically enumerate the wealth of the defendant as a factor to be considered in determining the appropriate amount of punitive damages to award.⁹³ Therefore, this aspect of punitive damages decision-making also appears to be in line with the legal requirements.

B. Characteristics of the Decision Maker

In addition to the characteristics of cases that might influence awards of punitive damages, individual differences among jurors influence their assessments of the appropriate level of punitive damages.⁹⁴ First, jurors’

Wrongdoing, 13 LAW & HUM. BEHAV. 151, 157 (1989). However, regression analysis indicated that there was not a consistent effect of the presumed resources of the defendant on awards. Rather, awards were more strongly linked to judgments about the defendants’ recklessness with participants attributing more recklessness to the corporation than to the individual defendant. *Id.* at 160-61. Thus, the experimental evidence suggests that, at least for compensatory damages, there may be an effect of corporate status, but not of wealth.

92. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 n.29 (1993); see also RESTATEMENT (SECOND) OF TORTS § 908 (1979).

93. See, e.g., ALASKA STAT. § 09.17.020(c)(6) (Michie 2000); CAL. CIV. CODE § 3295(d) (West 1997); KAN. STAT. ANN. § 60-3702(b)(6) (1994); MD. CODE ANN., CTS. & JUD. PROC. § 10-913(a) (1998); MINN. STAT. ANN. § 549.20(3) (West 2000); MISS. CODE ANN. § 11-1-65(1)(e) (1999); MO. ANN. STAT. § 510.263(2) (West 2001); MONT. CODE ANN. § 27-1-221(7)(a) (1996); N.J. STAT. ANN. § 2A:15-5.12(c)(4) (West 2000); N.C. GEN. STAT. § 1D-35(2)(i) (1999); OHIO REV. CODE ANN. § 2315.21(D)(c)(i) (Anderson 1998); OKLA. STAT. ANN. tit. 23, § 9.1(A) (West Supp. 2001); 40 PA. CONS. STAT. ANN. § 1301.812-A(a) (West 1999); TEX. CIV. PRAC. & REM. CODE ANN. § 41.011 (Vernon 1997); UTAH CODE ANN. § 78-18-1(2) (1960); see also UNIF. MODEL PUNITIVE DAMAGES ACT § 7(4) (1996) (court shall instruct jury to consider evidence of “the defendant’s present and future financial condition and the effect of an award on each condition” in determining amount of punitive damages). A few states prohibit the use of financial status information. See, e.g., COLO. REV. STAT. ANN. § 13-21-102(6) (West 1997); N.D. CENT. CODE § 32-03.2-11(3) (1996).

94. Demographic factors have not proven to be terribly influential predictors of damage awards. See Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 315 (1998); Hastie et al., *supra* note 90, at 464; Kahneman et al., *supra* note 70, at 61-62; Robbennolt, *supra* note 71; David

attitudes and perceptions about the state of the civil litigation system have been found to influence awards in complex ways. Second, empirical research has demonstrated that jurors tend to award punitive damages in ways that are consistent with retributive purposes, rather than to achieve optimal deterrence.

1. *Perceptions of Civil Litigation.* The information available in the media about civil jury decision-making is not a representative sample of all civil litigation. Content analyses of news reports of tort litigation find that media coverage over-represents cases involving products liability or medical malpractice, cases that go to trial, plaintiff wins, large damage awards, and awards that include a punitive component.⁹⁵ It is likely that these skewed reports of civil litigation shape, in part, perceptions of the civil justice system. In many situations, individuals judge the likelihood of an event by the ease with which they can recall examples of similar events. This judgmental decision tool is termed the availability heuristic.⁹⁶ Events that are memorable or that come to mind more easily are often thought to be more common.⁹⁷

It is hardly surprising, then, that punitive damages are commonly believed to be more customary and more substantial in size than is supported by the research findings. Ostrom and his colleagues reported that only 8% of jury awards were greater than \$1 million and that punitive damages are included in only 6% of civil cases that result in a monetary award.⁹⁸ In contrast to this profile,

Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139, 1156 (2000); Roselle L. Wissler et al., *Decisionmaking about General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 783 (1999).

95. See, e.g., Bailis & MacCoun, *supra* note 1 (analyzing national news magazine articles about tort litigation); Garber, *supra* note 1, at 277-82 (analyzing newspaper coverage of products liability cases brought against automobile manufacturers).

96. See generally Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163 (Daniel Kahneman et al. eds., 1982) [hereinafter HEURISTICS AND BIASES].

97. *Id.* at 163-64.

98. Brian J. Ostrom et al., *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233, 237-38 (1996) (not taking into account post-trial reductions in awards).

Greene, Goodman, and Loftus found that a substantial minority of participants in a jury decision-making study believed that damage awards greater than \$1 million were routine, with 11% of the sample estimating that 50% or more of plaintiffs receive jury awards of more than \$1 million.⁹⁹ Similarly, Robbennolt found that jury-eligible citizens estimated that over 30% of jury awards are greater than \$1 million and that almost one-half of jury verdicts include a punitive damage award.¹⁰⁰

These misperceptions are not limited to lay jurors, but are also common among legal actors. Wissler and her colleagues found that jurors, judges, and defense attorneys all tended to predict that an "average juror" would make a larger general damage award than they themselves would have made. However, the awards made by the jurors in the study tended to be lower than those predicted by the judges and lawyers.¹⁰¹ Similarly, Songer found that attorneys and legislators tended to overestimate the rate at which cases went to jury trials, the rate at which juries found for plaintiffs, and the size of jury awards.¹⁰²

This skewed view of civil litigation can influence determinations of punitive damages in several ways. First, it is likely that cases that result in large punitive damage awards are more available in memory and are called to mind more easily because they are reported more frequently in the media than are other cases.¹⁰³ Media reports of plaintiffs winning large punitive damage awards may inform jurors' judgments of the appropriate range of recovery in subsequent cases. If jurors use the cases that are available in memory as benchmarks, larger damage awards might result. Consistent with this reasoning, several studies have found a positive relationship between

99. Edith Greene et al., *Jurors' Attitudes About Civil Litigation and the Size of Damage Awards*, 40 AM. U. L. REV. 805, 812 (1991).

100. Robbennolt, *supra* note 71.

101. Wissler et al., *supra* note 94, at 801 (finding no differences for plaintiffs attorneys). Jurors, judges, and attorneys all predicted that the "average juror" would order cases in the same way that these actors did, awarding larger (and smaller) amounts in response to the same injuries. *Id.* at 800.

102. Donald R. Songer, *Tort Reform in South Carolina: The Effect of Empirical Research on Elite Perceptions Concerning Jury Verdicts*, 39 S.C. L. REV. 585, 597-98 (1988) (examining perceptions of medical doctors, attorneys, and state legislators about tort litigation in South Carolina).

103. For a description of the availability heuristic see HEURISTICS AND BIASES, *supra* note 96, at 163-64.

perceptions of the frequency of large damage awards and damage award decisions. Greene, Goodman, and Loftus found a significant positive correlation between participants' estimates of the frequency of large damage awards and the amount of damages they awarded, such that those who perceived a high frequency of large damage awards awarded higher amounts in damages.¹⁰⁴ Robbennolt found that differences in participants' estimates of the frequency of punitive damage awards and of the frequency of large awards by juries influenced the participants' compensatory damage awards, although these estimates did not influence punitive damage awards.¹⁰⁵

In a similar vein, Viscusi specifically examined the relationship between media reports of large verdicts and punitive damage awards. Participants who were told that they had read about a "similar case" in which the jury had awarded \$50 million in punitive damages (that the appeals court had reduced to \$25 million) awarded more in punitive damages than did participants who were not told about the case.¹⁰⁶ Consistent with this finding, jurors may use awards of which they are aware as a benchmark for determining an appropriate amount of damages in the case before them.

A second effect operates in a different direction, however. A number of empirical studies have demonstrated a link between jurors' attitudes about the state of the civil litigation system and damage awards.¹⁰⁷ To the extent that

104. Greene et al., *supra* note 99, at 813.

105. Robbennolt, *supra* note 71.

106. W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313, 331 (2001).

107. See generally Valerie P. Hans & W.S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC'Y REV. 85 (1992) [hereinafter Hans & Lofquist, *Jurors' Judgments*]; see also Greene et al., *supra* note 99; Valerie P. Hans & W.S. Lofquist, *Perceptions of Civil Justice: The Litigation Crisis Attitudes of Civil Jurors*, 12 BEHAV. SCI. & L. 181 (1994) [hereinafter Hans & Loftquist, *Perceptions of Civil Justice*]; Elizabeth Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A. J. 68 (1979); Gary Moran et al., *Attitudes Toward Tort Reform, Scientific Jury Selection, and Juror Bias: Verdict Inclination in Criminal and Civil Trials*, 18 LAW & PSYCHOL. REV. 309 (1994). Ellsworth and her colleagues have found evidence that in criminal cases attitudes influence jurors' evaluation of the credibility of witnesses, their construction of a narrative summary of the evidence, and the manner in which they apply the judge's instructions regarding the law to the facts as they have constructed them. Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts*, in

potential jurors hold the view that there is a crisis in civil litigation and that damage awards are too high, they appear to attempt to moderate their awards. Hans and Lofquist interviewed jurors following their jury service in civil cases. They found that jurors had strong negative views of both the frequency and legitimacy of civil lawsuits and believed that civil damage awards are too high. In addition, jury members' average scores on a measure of attitudes toward the civil litigation system were correlated with jury damage awards, such that the more strongly the jurors believed there was a litigation crisis, the lower were the damages awarded.¹⁰⁸ Similarly, Loftus found that mock jurors who were exposed to an insurance industry advertisement asking whether "You *really* think it's the insurance company that's paying for all those large jury awards?" made lower awards for pain and suffering than did those participants who were not exposed to the ad.¹⁰⁹

Other researchers have investigated the relationship between attitudes toward tort reform and legal decisions and have found similar results. In telephone interviews with jury-eligible adults, Moran, Cutler, and DeLisa found that attitudes toward tort reform predicted verdicts in several civil scenarios.¹¹⁰ Similarly, Greene, Goodman, and Loftus found that the scores of jury-eligible adults on a scale measuring attitudes toward tort reform and damages (e.g., whether there is an insurance crisis, the influence of media on attitudes about civil lawsuits, and beliefs about attorney credibility and damage requests) were significantly correlated with damage awards, such that those with more favorable attitudes toward tort reform gave lower damage awards.¹¹¹

2. *Punishment Intuitions.* Punitive damages are intended primarily to punish and deter.¹¹² However, the existing empirical evidence suggests that lay people are

INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 42 (Reid Hastie ed., 1993).

108. Hans & Lofquist, *Jurors' Judgments*, *supra* note 107, at 97; *see also* Hans & Lofquist, *Perceptions of Civil Justice*, *supra* note 107 (examining the attitudes of civil jurors).

109. Loftus, *supra* note 107, at 69-70.

110. Moran et al., *supra* note 107, at 321, 324.

111. Greene et al., *supra* note 99, at 813.

112. *See supra* Part I.A.

“intuitive retributivists” rather than “intuitive deterrence theorists.” In the civil context, then, jurors appear to award punitive damages primarily to punish wrongdoers and to express their outrage at the defendant’s outrageous conduct rather than to effect optimal deterrence.¹¹³

Sunstein, Kahneman, and Schkade investigated whether notions of optimal deterrence drive people’s intuitive approach to punitive damages decision-making.¹¹⁴ According to optimal deterrence theory, punitive damages make up for any deficit in the ability of compensatory damages to deter harmful behavior caused by any ability the defendant has to escape detection or liability.¹¹⁵ In accordance with this theory, the likelihood that the harmful conduct will be detected ought to be related to the appropriate degree of punishment.¹¹⁶ Therefore, Sunstein *et*

113. The notion of “optimal” deterrence “implies deterring offensive conduct only up to the point at which society begins to lose more from deterrence efforts than from the offenses it deters,” in contrast to “complete” deterrence in which the goal is to “stop offenders from committing offensive acts.” Hylton, *supra* note 86, at 421. That lay decision-making is more consistent with retribution than with deterrence has also been demonstrated in the context of criminal punishment. See John M. Darley et al., *Incapacitation and Just Deserts As Motives for Punishment*, 24 *LAW & HUM. BEHAV.* 659 (2000) (demonstrating that lay intuitions mirror a just deserts model rather than an incapacitation model in determining appropriate punishment); Kevin M. Carlsmith et al., *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 *J. PERSONALITY & SOC. PSYCHOL.* (forthcoming 2002) (finding that lay decision makers are more sensitive to just-deserts considerations than to deterrence considerations). Retribution also appears to be the intuitive motive behind support for the death penalty. See Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans’ Views on the Death Penalty*, 50 *J. SOC. ISSUES* 19, 29 (1994); Tom R. Tyler & Renee Weber, *Support for the Death Penalty: Instrumental Response to Crime, or Symbolic Attitude?*, 17 *LAW & SOC’Y REV.* 21, 40-41 (1982).

114. Sunstein et al., *Do People Want Optimal Deterrence?*, 29 *J. LEGAL STUD.* 237 (2000).

115. Polinsky & Shavell, *supra* note 33, at 873-74.

It follows from these observations that a crucial question for consideration is whether injurers sometimes escape liability for harms for which they are responsible. If they do, the level of liability imposed on them when they *are* found liable needs to exceed compensatory damages so that, on average, they will pay for the harm that they cause. This excess liability can be labeled “punitive damages,” and failure to impose it would result in inadequate deterrence. In summary, *punitive damages ordinarily should be awarded if, and only if, an injurer has a chance of escaping liability for the harm he causes.*

Id. (footnotes omitted).

116. *Id.* at 889.

al. considered whether jury-eligible citizens would evaluate cases using information about the probability that the defendant's conduct would have been detected in a way consistent with optimal deterrence theory. They found that variations in the probability that the conduct would be detected did not significantly affect punitive damage awards.¹¹⁷ Thus, the participants did not intuitively make decisions in accordance with a theory of optimal deterrence.¹¹⁸

An experimental study conducted by Baron and Ritov also investigated lay intuitions about deterrence objectives and punishment.¹¹⁹ Using vignettes describing products liability cases involving birth control pills and vaccines, Baron and Ritov asked participants¹²⁰ to assign punishment. They found that most participants would assess the same punishment against the defendant company whether the effect of the punishment would be to cause the company to manufacture an even safer product or to cease making the product altogether (even though the product was safer than the alternatives).¹²¹ Similarly, most respondents indicated that the penalty that they assessed against the company would be the same even if the penalty would not affect the company's future behavior.¹²²

117. Sunstein et al., *supra* note 114, at 243; see also Viscusi, *supra* note 106, at 316 (finding that the probability of detection did not have a significant effect on determinations of the amount of punitive damages needed for optimal deterrence, the amount necessary to punish, or final punitive damage awards); *infra* Part III.C.2.

118. In a second study, Sunstein *et al.* asked eighty-four University of Chicago law students to evaluate a proposal to set aside a jury's award of punitive damages where there was virtually no possibility of escaping detection; the vast majority of participants (84.5%) disagreed with the proposal. Sunstein et al., *supra* note 114, at 244. The participants "apparently rejected that theory with the thought that reckless or invidious behavior deserves to be punished regardless of what deterrence theory may suggest." *Id.* at 246. The participants may also have been guided more by a complete deterrence approach, rather than one of optimal deterrence. See *infra* note 133 and accompanying text.

119. Jonathan Baron & Ilana Ritov, *Intuitions About Penalties and Compensation in the Context of Tort Law*, 7 J. RISK & UNCERTAINTY 17 (1993).

120. The participants were arbitrators, economists, environmental activists, undergraduates, and law students. *Id.* at 21.

121. *Id.* at 23-24.

122. *Id.* at 24. Participants were told that the punishment would have no influence because it was confidential, the company executives who knew about it were retiring, and it would be paid by insurance for which the rates were set industry-wide. *Id.*

In a second study, Baron and Ritov found that explicitly providing participants with an argument about the deterrence rationale had little effect on punishment decisions.¹²³ Finally, in a third study, they asked participants directly whether the effect of the penalty on the future actions of the company (i.e., ceasing to produce the product or making a safer product) should matter and asked why it might matter. They found much diversity of knowledge and acceptance of a deterrence rationale—some participants were familiar with the principles and applied them to their punishment decisions, others were familiar with the principles but did not apply them, while others did not appear to be familiar with deterrence reasoning.¹²⁴ Baron and Ritov concluded that lay intuitions about punishment “are variable from person to person and are not typically consequentialist.”¹²⁵

Greene, Coon, and Bornstein asked participants in an experimental study to rate the extent to which their punitive damage award was intended to serve each of three goals: compensation, punishment, and deterrence. They found that participants’ awards were more intended to punish the defendant than to serve as a deterrent or to compensate the plaintiff.¹²⁶ In an experimental study, Hastie, Schkade, and Payne asked jury-eligible adults to indicate what proportion of their award was intended to punish the defendant rather than to deter the defendant or others. Those who more strongly favored punishment tended to make higher damage awards.¹²⁷ In a second study,

123. *Id.* at 26-28.

124. *Id.* at 30.

125. *Id.* at 31. Individual difference factors that might influence individual deterrence motives include beliefs that the punishment will act as an effective deterrent, that the behavior is a personal threat, and, with regard to general deterrence, that there is a need to deter others and that those others will become aware of the punishment inflicted. Miller & Vidmar, *supra* note 32, at 163-64.

126. Greene et al., *Limiting Awards*, *supra* note 81, at 229.

127. Hastie et al., *supra* note 90, at 457. In a second study, the relationship between punishment and award size was not significant. *Id.* at 462. Participants were also given the opportunity to indicate the specific behaviors they intended to punish or to deter. Participants were more likely to describe behaviors that they intended to punish rather than behaviors that they wished to deter. *Id.* at 456. It is possible that this is a function of the order in which the questions were asked; participants were asked first to list the behaviors they intended to punish, then those they intended to deter. *Id.* at 452.

in response to an open-ended question asking them to describe their thinking as they made their awards, more jurors cited punishment as a goal of their award (31%) than cited deterrence as a goal (19%).¹²⁸

Thus, lay decision makers do not appear to intuitively adopt a perspective that emphasizes optimal deterrence in setting punitive damage awards. Rather, jurors intuitively make punitive damage awards that emphasize retribution.¹²⁹ To the extent that optimal deterrence is the goal of punitive damages, failure to make decisions that are sensitive to deterrence considerations is problematic. However, it is not clear what weight to give this problem. First, not all scholars agree that optimal deterrence is or should be the goal of punitive damages. Hylton argues that in many cases complete deterrence would be a more appropriate goal.¹³⁰ Recently, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Supreme Court stated:

[I]t is not at all obvious that even the *deterrent* function of punitive damages can be served *only* by economically “optimal deterrence.” “[C]itizens and legislators may rightly insist that they are willing to tolerate some loss in economic efficiency in order to deter what they consider morally offensive conduct, albeit cost-beneficial morally offensive conduct; efficiency is just one consideration among many.”¹³¹

It remains to be seen whether jurors’ notions of deterrence are more consistent with the goal of complete

128. *Id.* at 462.

129. Some empirical research suggests that whether or not it is legally appropriate to do so, some jurors may also use punitive damages to further compensate plaintiffs. Hastie *et al.* found that 25% of their mock-jurors described the reasoning behind their punitive damage award in a way that indicated that they intended their punitive damage award to compensate the plaintiff. *Id.* at 462. Because participants in this study were only asked to award punitive damages, conflation between compensatory and punitive damages may have been heightened. Greene *et al.* also found that while student jurors intended their punitive damage award more to punish than to compensate, they nonetheless rated compensation as a moderately important objective of their award. Greene *et al.*, *Limiting Awards*, *supra* note 81, at 229 (rating 5.86 on a 1-10 scale of the extent to which the punitive damage award was intended to meet the objective of compensation).

130. Hylton, *supra* note 86, at 423. Hylton also analyzes the difficulties attendant to requiring a factfinder to estimate the probability that the defendant would be found liable. *Id.* at 460-63.

131. 121 S. Ct. 1678, 1687 (2001) (quoting Galanter & Luban, *supra* note 33, at 1450).

deterrence. Second, lay intuitions about retribution are also an appropriate consideration in determining punitive damages, a consideration that jurors are particularly well-suited to reflect. "After all," the Court noted in *Cooper*, "deterrence is not the only purpose served by punitive damages."¹³² Finally, evidence that lay intuition is not primarily oriented to optimal deterrence does not necessarily mean that jurors could not give effect to optimal deterrence if properly instructed, an issue that is addressed below.¹³³

C. *Characteristics of the Process*

Finally, there are several aspects of the decision task itself that influence determinations of punitive damages. First, the social dynamics involved in the jury deliberation process result in patterns of awards that are different from those that would result from individual decision-making—group punitive damage awards are larger, but potentially less variable. Second, the task of determining punitive damages requires jurors to translate their outrage at the defendant's conduct and their desire to punish the defendant into a dollar equivalent. Recent research suggests that jurors (as well as other decision makers) have difficulty with this task. Finally, empirical research shows that jurors have difficulty understanding jury instructions about punitive damages.

1. *Group Deliberation.* While most empirical research that has examined how damages are awarded has looked at the damage awards of individual jurors, a few studies have examined the effects of group deliberation on group damage awards. Overall, the existing research indicates that the dynamics of deliberation are an important influence on the punitive damage awards made by juries. The research suggests that the deliberation process results in punitive damage awards that are higher, but potentially less variable, than awards made by individual jurors.

132. *Id.*

133. Whether jurors will make decisions consistent with deterrence principles in response to instructions is discussed in more detail *infra* Part III.C.2.

Participation in group decision-making processes such as jury deliberations may influence both the size and the variability of the damages awarded.¹³⁴ Lempert noted:

In civil juries, there is often a wide range of damage estimates, and the range is likely to be wider where the standard for damages has few objective references, as is the case with punitive damages. Normal jury deliberations bring out reasons for these disparities and lead to compromises between the estimates of high and low damage jurors.¹³⁵

Interviews with jurors suggest that final punitive damage awards do represent a compromise between high and low amounts advocated by different factions of the jury.¹³⁶ Understanding whether and how these compromises occur is an important step toward understanding punitive damages decision-making.

Hastie, Schkade, and Payne analyzed the deliberations of 121 six-person mock juries who were asked to deliberate to a unanimous punitive damage liability verdict in one of four personal injury cases.¹³⁷ They found a majority effect such that jury punitive damage liability verdicts tended to mirror the predeliberation preferences of the majority of the individual jurors; the higher the proportion of jurors on the jury who had predeliberation preferences for liability, the more likely it was that the jury would return a verdict imposing punitive liability and vice versa.¹³⁸ However, Hastie *et al.* found a slight advantage for a finding of no liability—juries with an even split between those initially

134. See generally Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687 (1996) (comparing individual and group decision-making generally and identifying factors that can lead to more and less bias in group decisions).

135. Lempert, *supra* note 38, at 870-71.

136. See Greene, *supra* note 43, at 231.

137. Reid Hastie et al., *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 LAW & HUM. BEHAV. 287 (1998) [hereinafter Hastie et al., *Deciding Liability for Punitive Damages*]. For commentary on this study see Neil Vidmar, *Juries Don't Make Legal Decisions! And Other Problems: A Critique of Hastie et al. on Punitive Damages*, 23 LAW & HUM. BEHAV. 705 (1999); Reid Hastie et al., *Reply to Vidmar*, 23 LAW & HUM. BEHAV. 715 (1999); Phoebe C. Ellsworth, *Sticks and Stones*, 23 LAW & HUM. BEHAV. 719 (1999); Robert J. MacCoun, *Epistemological Dilemmas in the Assessment of Legal Decision Making*, 23 LAW & HUM. BEHAV. 723 (1999).

138. Hastie et al., *Deciding Liability for Punitive Damages*, *supra* note 137, at 299.

favoring liability and those initially favoring no liability were more likely to return a verdict finding no liability for punitive damages.¹³⁹

Hastie *et al.* found that the content of the deliberations was related to the decisions ultimately rendered by the groups—juries choosing to impose punitive damages spent more time discussing the deterrent purposes of punitive damages, the blameworthiness of the defendant, and the maliciousness of the defendant and spent less time discussing the burden of proof, the involvement of a third party, the meaning of negligence, the judge's admonition to follow the instructions, and the need for additional information than did juries declining to impose punitive damages.¹⁴⁰ Moreover, juries concluding that punitive damages were appropriate were less likely to discuss each element of the judge's instructions on punitive damages liability than were juries deciding not to award punitive damages.¹⁴¹

In an extensive study of deliberation and punitive damages, Schkade, Sunstein, and Kahneman asked almost 3000 jury-eligible citizens to consider one of fifteen personal injury scenarios and deliberate to a unanimous punitive damages award in six-person groups.¹⁴² The researchers compared the awards of the deliberating juries with the awards that would have been produced by each jury as a "statistical jury" based on the median of its members' pre-deliberation responses.¹⁴³ Schkade *et al.* found no differences

139. *Id.* (finding also that juries with an initial majority favoring no liability were more likely to reach a no verdict than juries with majorities of equal size favoring liability were to reach a yes verdict). *But see* Schkade *et al.*, *supra* note 94, at 1153 (finding that an initially evenly split jury has a 50% chance of returning a no liability verdict). *See generally* Saks, *supra* note 25, at 37 (discussing the majority effect).

140. Hastie *et al.*, *Deciding Liability for Punitive Damages*, *supra* note 137, at 300-01.

141. *See id.*

142. Schkade *et al.*, *supra* note 94, at 1140.

143. Several studies have found that the median of the individual jury members' pre-deliberation damage awards is the best predictor of juries' group damage awards. *See* James H. Davis *et al.*, *Effects of Group Size and Procedural Influence on Consensual Judgments of Quantity: The Example of Damage Awards and Mock Civil Juries*, 73 J. PERSONALITY & SOC. PSYCHOL. 703, 712 (1997) (finding that a model based on the median of the individual group members' initial damage awards fit the observed six- and twelve-person group damage award decisions better than a model based on the mean); Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict*

in the rate at which non-zero punitive damages were awarded by statistical and deliberating juries; deliberating juries tended to reach the liability result favored pre-deliberation by the majority of its members. In contrast to Hastie *et al.*'s findings, juries who began deliberations with an even split between those who favored liability and those who did not were equally likely to find for either party.¹⁴⁴

In addition, Schkade *et al.* found that deliberating juries and statistical juries ranked cases similarly; that is, cases that received high median awards from deliberating juries received high median awards from statistical juries as well.¹⁴⁵ However, they found that deliberating juries made punitive damage awards that were higher than awards constructed for statistical juries.¹⁴⁶ This "severity shift" is consistent with the findings of several studies by Diamond and her colleagues for compensatory damages, that group awards are higher than the median award of the group members.¹⁴⁷

Thus, there appear to be consistent findings that damage awards will exceed the median of the individual group members' predeliberation awards. Several aspects of the social dynamics of jury deliberation may contribute to this result. First, psychological theory concerning group polarization suggests that following group discussion, group members' positions tend to become more extreme in the direction initially favored by the majority.¹⁴⁸ The general

Consequences: Damages, Experts, and the Civil Jury, 26 LAW & SOC'Y REV. 513, 545 (1992) (final compensatory damage awards of seventy six-person juries in an antitrust price fixing case were more highly correlated with the median of the individual jurors' verdicts than with any other predictor examined); Schkade *et al.*, *supra* note 94, at 1163 (finding that the median was a better predictor of punitive damage awards than the mean). Consistent with these findings, a number of studies have analyzed the awards of "statistical juries" created by randomly selecting sets of six or twelve individual respondents and using the median individual judgment of each set as that jury's verdict. See *infra* notes 166-67 and accompanying text.

144. Schkade *et al.*, *supra* note 94, at 1152-53.

145. *Id.* at 1152.

146. *Id.* at 1153, 1159.

147. See Diamond *et al.*, *supra* note 94, at 315-16; Diamond & Casper, *supra* note 143, at 553-57; see also Martin J. Bourgeois *et al.*, *Nominal and Interactive Groups: Effects of Preinstruction and Deliberations on Decisions and Evidence Recall in Complex Trials*, 80 J. APPLIED PSYCHOL. 58, 62 (1995) (finding that the damage awards of juries were higher than their predeliberation awards).

148. See, e.g., Daniel J. Isenberg, *Group Polarization: A Critical Review and Meta-Analysis*, 50 J. PERSONALITY & SOC. PSYCHOL. 1141, 1145 (1986); Martin F.

patterns observed in the studies described here are consistent with this phenomenon. For example, the juries in the Hastie *et al.* study were initially more likely to have large coalitions favoring punitive liability than vice versa; accordingly, more of the jurors who were undecided prior to deliberation became decided in favor of punitive liability.¹⁴⁹

Research into the group polarization effect has found two general mechanisms through which it operates. First, arguments supporting the initially preferred position tend to be more varied, more persuasive, and more frequently mentioned than arguments supporting the non-preferred position.¹⁵⁰ As a result, the group discussion will center around arguments for the initially preferred position. In this context, then, discussion is likely to center around reasons for imposing damage awards when most members of the jury are initially inclined to make an award, to center around reasons for not awarding punitive damages when the jury is initially inclined to deny punitive damages, and to center around high damage awards once there is a decision to award punitive damages. Presumably, some of the arguments generated will be unfamiliar to some of the jurors, and upon considering these "novel and reasonable arguments, mainly in support of the initially favored alternative, the typical group member shifts his or her attitude in that direction, producing an overall shift in this direction."¹⁵¹ Consistent with this notion, Diamond and Casper found that the person selected as the foreperson of the jury tended to have made higher predeliberation damage awards than had other group members and that forepersons had a disproportionate level of influence over

Kaplan, *Discussion Polarization Effects in a Modified Jury Decision Paradigm: Informational Influences*, 40 SOCIOMETRY 262, 269 (1977); David G. Meyers & Martin F. Kaplan, *Group-Induced Polarization in Simulated Juries*, 2 PERSONALITY & SOC. PSYCHOL. BULL. 63, 63 (1976); David G. Meyers & Helmut Lamm, *The Group Polarization Phenomenon*, 83 PSYCHOL. BULL. 602, 603 (1976); Serge Moscovici & Marisa Zavalloni, *The Group As a Polarizer of Attitudes*, 12 J. PERSONALITY & SOC. PSYCHOL. 125, 134 (1969); James A.F. Stoner, *Risky and Cautious Shifts in Group Decisions: The Influence of Widely Held Values*, 4 EXPERIMENTAL SOC. PSYCHOL. 442, 455-56 (1968).

149. Hastie *et al.*, *Deciding Liability for Punitive Damages*, *supra* note 137, at 297-99.

150. See Isenberg, *supra* note 148, at 1145; see also Schkade *et al.*, *supra* note 94, at 1167.

151. ALICE H. EAGLY & SHELLY CHAIKEN, *THE PSYCHOLOGY OF ATTITUDES* 658 (1993).

the group's ultimate decision.¹⁵² In addition, they found that deliberation increased participants' perception of the defendant's blameworthiness and that such perceptions were related to damage awards.¹⁵³

Second, group members are motivated to make comparisons between themselves and others and want to perceive themselves in a socially positive sense and to be perceived by others in the group in a similarly favorable way.¹⁵⁴ Thus, once group members hear about the initial positions of their peers, they are likely to adjust their preferences in the direction of those initial norms.¹⁵⁵ Moreover, the initial positions expressed in discussion may be higher than the positions held by the group as a whole. In their study of deliberation and damage awards, Diamond and Casper found that jurors whose pre-deliberation verdicts were lower were significantly less likely to introduce their predeliberation award as an option for discussion.¹⁵⁶ When jurors hear relatively high damage awards suggested, they may revise their own evaluations of the appropriate award in an upward direction.

Schkade *et al.* argue that there is a rhetorical advantage for arguments in favor of higher damage awards that implicates both processes underlying group polarization.¹⁵⁷ They asked eighty-seven University of Chicago law students to generate the types of arguments that could be made for either a higher or a lower punitive damage award in a case in which punitive damages were warranted. They were then asked to indicate which position they thought would be more difficult to argue. The majority of participants anticipated that it would be more difficult to argue in favor of a lower award.¹⁵⁸ Thus, arguments in favor of higher awards might be easier for participants to

152. Diamond & Casper, *supra* note 143, at 557. *But see* Hastie *et al.*, *Deciding Liability for Punitive Damages*, *supra* note 137, at 296 (finding that the foreperson exerted no greater influence over the final jury verdict).

153. Diamond & Casper, *supra* note 143, at 555.

154. EAGLY & CHAIKEN, *supra* note 151, at 656; Isenberg, *supra* note 148, at 1142.

155. *See, e.g.*, Schkade *et al.*, *supra* note 94, at 1166.

156. Diamond & Casper, *supra* note 143, at 556.

157. Schkade *et al.*, *supra* note 94, at 1161.

158. *Id.* at 1161-62 (55% of participants thought it would be harder to argue in favor of a lower award; compared to 15% who thought it would be harder in favor of a higher award).

generate, might be more persuasive when presented, and might be more consistent with social norms.¹⁵⁹

It is worth noting that the requirement of a unanimous verdict may be relevant to the severity shifts observed.¹⁶⁰ Fewer than one-half of the states require their civil juries to come to unanimous decisions.¹⁶¹ Kaplan and Miller examined how the decision rule affects punitive damage awards by asking students to deliberate to either a unanimous or a majority verdict in response to a personal injury case. Although they found that the punitive damages awarded by six-person juries were greater than those awarded by individual jurors under a rule of unanimity, they found that under a majority decision rule the awards of jurors and juries did not differ significantly.¹⁶² Kaplan and Miller suggested that groups were less able to ignore individual members with preferences for extreme awards under conditions in which unanimity was required, and that extreme individual awards were more likely for the more normative punitive damages judgment than for compensatory damages, resulting in increased punitive damages awards under conditions of unanimity.¹⁶³

159. Thus, Schkade *et al.* suggest that arguing in favor of "appropriate punishment for wrongdoing" is more persuasive than arguing in favor of "ensuring against overdeterrence." *Id.* at 1167. This is consistent with the notion that lay decision makers are intuitive retributionists rather than intuitive deterrence theorists. See *supra* notes 113-29 and accompanying text. However, Hastie *et al.* found that juries with equal divisions between those who favored punitive liability and those who favored no punitive liability were more likely to return a verdict of no liability. Hastie *et al.*, *Deciding Liability for Punitive Damages*, *supra* note 137, at 299. They speculate that the fact that the plaintiff has the burden of proof may give defendants an advantage in that situation. *Id.* at 305.

160. Schkade *et al.*, *supra* note 94, at 1165 n.75.

161. DAVID B. ROTTMAN ET AL., U.S. DEPT OF JUSTICE, STATE COURT ORGANIZATION 1998 (2000) (twenty states require a unanimous civil jury verdict in all cases). At least one state statute specifically requires a unanimous determination as to punitive damages. See MONT. CODE ANN. § 27-1-221(6) (1996).

162. Martin F. Kaplan & Charles E. Miller, *Group Decision Making and Normative Versus Informational Influence: Effects of Type of Issue and Assigned Decision Rule*, 53 J. PERSONALITY & SOC. PSYCHOL. 306, 309 (1987) (nor did the mean amounts of compensatory damages awarded by jurors and juries differ). Kaplan and Miller found no effect of decision rule on compensatory damages. *Id.*; see also Davis *et al.*, *supra* note 143, at 707 (finding no effect of decision rule on compensatory damages).

163. See Kaplan & Miller, *supra* note 162, at 309.

The deliberation process may also affect the variability of the resulting damage awards.¹⁶⁴ Studies of compensatory damages have demonstrated that deliberating groups make less variable awards than do individual jurors. Diamond, Saks, and Landsman compared the predeliberation compensatory damage awards of individual jury-eligible adults with the verdict reached by 120 deliberating six-person juries in response to a videotaped products liability trial. While the juries' higher awards permitted greater variability in absolute terms, the awards of deliberating juries were lower than those of individual jurors as measured both by the standard deviation and as a percentage of the mean award.¹⁶⁵

Studies of "statistical juries" have also found that these groups make damage awards that are less variable than are individual awards and less variable than are judges' awards.¹⁶⁶ This reduced variability is not unexpected given the mathematics of statistical sampling, but it is not clear that juries constructed in this manner accurately reflect

164. The optimal level of variability in awards is beyond the scope of this paper. Wissler and her colleagues have noted:

Perhaps it goes without saying that predictability and consistency might be purchased at the cost of more important values. For example, the rule of thumb some lawyers use to come up with a figure for general damages for purposes of settlement negotiation—multiplying medical specials by three—would, if adopted as a legal rule for assigning damages, produce highly predictable outcomes, but at the expense of injury- and victim-specific considerations. Sometimes the amount awarded would be too great and sometimes it would be too small.

It may be worth noting that some level of variability is beneficial to the legal process. The proper level of uncertainty helps to promote settlements, while not promoting so many that courts do not receive the cases necessary to monitor society's disputes, and thereby to continually refine and announce the law. . . . A rational goal would be to aim to calibrate the level of uncertainty to seek its optimal level, rather than to aim to eliminate uncertainty from the litigation system.

Wissler et al., *supra* note 94, at 812 n.179.

165. Diamond et al., *supra* note 94, at 315-16.

166. See Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883, 898 (1993) (finding statistical juries' pain and suffering awards less variable than arbitrators' awards); Viscusi, *supra* note 106, at 328, 335-37 (finding statistical juries' punitive damage awards less variable than individual jurors' awards); Wissler et al., *supra* note 94, at 803 (finding statistical juries' general damage awards less variable than judges' awards); see also *supra* note 143 (describing statistical juries).

what might occur in actual jury deliberations. MacCoun has noted that "the analogy between empanelled juries and random samples is an imperfect one."¹⁶⁷ Indeed, the Schadke *et al.* study suggests that deliberating groups will make awards that are more variable than those made by "statistical juries."¹⁶⁸ Accordingly, it is likely that group deliberation will result in reduced award variability, albeit a reduction that is unlikely to be of the magnitude demonstrated by studies of "statistical juries."

2. *Translation to Dollars.* In determining punitive damages, jurors must translate their punishment reactions into a dollar award. This aspect of the process of determining punitive damages has been identified as an important factor shaping the pattern of awards.

Kahneman, Sunstein, and Schkade have recently proposed a general model of the processes by which jurors determine punitive damage awards.¹⁶⁹ The outrage model posits that jurors experience outrage in response to a defendant's action; this outrage is influenced by the malice or recklessness the defendant shows in committing the act. Jurors, then, translate their outrage or anger toward a wrongdoer into a judgment about how severely the wrongdoer should be punished, a judgment they term "punitive intent." According to the model, punitive intent is translated into a punitive damage award by mapping it on to a dollar scale.¹⁷⁰

Kahneman and his colleagues asked jury-eligible citizens to evaluate ten personal injury claims and to assess either the outrageousness of the defendant's conduct, the level of appropriate punishment, or the appropriate level of punitive damages. They demonstrated a high degree of consistency among participants about the degree of outrage felt and the severity of the penalty required, but relatively less consistency among participants in making punitive damage judgments.¹⁷¹ Kahneman *et al.* posit that jurors

167. MacCoun, *supra* note 24, at 178 n.126.

168. See Schadke *et al.*, *supra* note 94.

169. Kahneman *et al.*, *supra* note 70, at 50.

170. *Id.* at 52.

171. *Id.* at 63, 66. A similar pattern was detected for "statistical juries" (constructed by creating twelve-person "juries" and using the median individual damage award as a proxy for the final jury judgment); ratings of outrage and

have difficulty with this mapping process because they lack experience in translating their punitive intent into dollar values and they have no benchmark to guide them. Accordingly, jurors who hold similar intentions about punishing a defendant and who would rank different cases similarly may award widely different amounts in punitive damages.¹⁷²

A study examining non-economic compensatory damages has demonstrated a similar difficulty with translating perceptions of a case into judgments about dollars. Wissler, Hart, and Saks compared how jury-eligible citizens, attorneys, and judges assessed different injuries and translated those assessments into general damage awards.¹⁷³ For all groups, assessments of injury severity were highly predictable from ratings of the specific aspects of the injury.¹⁷⁴ General damage awards, however, were less predictable than were assessments of injury severity for all groups, with the largest decline in predictability occurring for jurors.¹⁷⁵ Wissler *et al.* suggest that jurors' relative lack of experience in determining damages may partly account for these differences.¹⁷⁶ These findings are similar to those of Kahneman *et al.* in that decision makers demonstrate

punitive intent made by different statistical juries were much more highly correlated than were dollar awards. *Id.* at 68, 70.

172. *Id.* at 50, 54.

173. Wissler *et al.*, *supra* note 94, at 756. Using a fractional factorial survey to examine sixty-two different injuries, Wissler *et al.* asked each participant to evaluate two injuries and to indicate the amount of general damages they would award for each, rate the degree of physical pain, mental suffering, disability, and disfigurement each injury would have caused the plaintiff, and rate each injury's overall severity. *Id.* at 769-70. Fractional factorial designs allow exploration of the independent main effects and selected interactions of a large number of factors without the unwieldy size and complexity of a full-factorial design. Rather than running a complete factorial design, the researcher runs only a systematically selected portion of the possible factor level combinations. See B. J. WINER, STATISTICAL PRINCIPLES IN EXPERIMENTAL DESIGN 309-11 (2d ed. 1971); see also Dennis P. Stolle *et al.*, *Fractional Factorial Designs for Legal Psychology*, 20 BEHAV. SCI. & L. (forthcoming 2002).

174. Wissler *et al.*, *supra* note 94, at 782 (predicting 72% of the variance in injury severity ratings for jurors and 69% for judges).

175. *Id.* at 794 (the models predicted 23% of the variance in damage awards for jurors and 42% for judges).

176. *Id.* at 808. The order in which participants evaluated injuries influenced the responses of jurors, but not the responses of the other participants. Differences in gender, income, education may also partially account for differences; jurors who were most similar to the judges were more predictable. See *id.* at 808 n.166.

more consistency in making discrete ratings of injury severity or of outrage, but are less consistent when translating those assessments into unbounded dollar amounts.

3. *Jury Instructions.* The empirical research demonstrates that jurors often have difficulty understanding and applying the judge's instructions on the law.¹⁷⁷ In several studies, Hastie and his colleagues have found that jurors' ability to recall the content of the judicial instructions they received was quite low. In a study of decisions about liability for punitive damages, Hastie *et al.* asked jurors to recall the factors they were instructed to consider when determining liability for punitive damages in a series of specific open-ended questions. The mean score was 9% correct.¹⁷⁸ Similarly, in a study that asked jurors to assess damage award amounts, Hastie *et al.* asked jurors to list the factors that they had been instructed to consider. Overall, the average correct recall was 12%.¹⁷⁹ In contrast, Landsman and his colleagues found relatively high levels of comprehension in response to multiple-choice questions regarding punitive liability and damages with overall accuracy of approximately 67%.¹⁸⁰ There are several possibilities for these differences. First, Hastie asked participants to recall central aspects of the instructions in

177. For psychological research on jury instructions in other contexts see AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982) (jury instructions on negligence); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224 (1996) (criminal jury instructions); Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It*, 1 LAW & HUM. BEHAV. 163 (1977) (jury instructions on negligence); Vicky L. Smith, *When Prior Knowledge and Law Collide: Helping Jurors Use the Law*, 17 LAW & HUM. BEHAV. 507 (1993); Vicky L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857 (1991). For reviews see Peter English & Bruce Sales, *A Ceiling or Consistency Effect for the Comprehension of Jury Instructions*, 3 PSYCHOL. PUB. POL'Y & L. 381 (1997); Joel Lieberman & Bruce Sales, *What Social Psychology Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589 (1997).

178. Hastie et al., *Deciding Liability for Punitive Damages*, *supra* note 137, at 295 (the median was 5% correct; 30% of participants received a score of zero; the highest score was 67%).

179. Hastie et al., *supra* note 90, at 456.

180. See Stephen Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297, 330, 333 (finding correct answers given approximately two-thirds of the time).

open-ended questions while Landsman *et al.* asked participants to recognize such information in multiple-choice questions. It is axiomatic that it is more difficult to recall information than it is to recognize it.¹⁸¹ Second, it is possible that the content of the questions themselves varied in difficulty or differed in how strictly they were scored. Finally, the instructions the researchers used may have varied in difficulty.

Hastie and his colleagues have also conducted detailed content analysis of the substance of jury deliberations about punitive damages. They found that jurors were most likely to spend time discussing the evidence in the case and next most likely to spend time discussing the legal issues and instructions.¹⁸² However, Hastie *et al.* found that juries did not engage in a thorough treatment of each element of the legal instructions, on average only discussing and drawing conclusions about approximately three of the five elements in the instructions they were given.¹⁸³ Juries choosing to impose punitive damages spent less time discussing the judge's admonition to follow the instructions and were less likely to discuss each element of the instructions than juries

181. MICHAEL W. EYSENCK, A HANDBOOK OF COGNITIVE PSYCHOLOGY 145 (1984). For example, a question from the Hastie *et al.* study reads:

In his instructions to the jury, the judge listed four specific factors that were of special relevance in determining an appropriate amount of punitive damages to award when the defendant is a corporation. Try to list these four factors; if you cannot remember exact words from the instructions, please use your own words to describe the four factors.

Hastie *et al.*, *supra* note 90, at 452.

182. Hastie *et al.*, *Deciding Liability for Punitive Damages*, *supra* note 137, at 299-300.

183. *Id.* at 300. This finding may be partially explained by the specific instructions that participants were given; participants were told that they could award punitive damages if they found "that the defendant's conduct (1) was malicious; or (2) manifested reckless or callous disregard for the rights of others." The second of these conjunctive conditions required the plaintiff to prove four separate factors. *Id.* at 310-11. Theoretically, a jury that considered the first condition, maliciousness, and decided in the affirmative would not need to consider in detail the second condition with its four factors. In fact, it appears that over 80% of juries did discuss the maliciousness instruction. *Id.* at 302 fig.2. It is entirely possible that the juries did not make this distinction; even so, it may be premature to draw the conclusion that jurors do not consider the instructions. In any case, these findings are consistent with other research suggests that jurors may have difficulty in using legal instructions in making their decisions. *See supra* note 177.

declining to impose punitive damages.¹⁸⁴ Almost half of the individual jurors, asked to write explanations for their verdicts following the jury deliberation, failed to mention the judge's instructions. Those who more clearly used the judge's instructions in accounting for their verdicts were more likely to have been on juries that did not impose punitive damages.¹⁸⁵

D. *Jurors Compared to Judges*

While conventional wisdom about the differences between judges and juries suggests that punitive damage awards by judges will be less frequent, of smaller magnitude, and less variable, it is not clear that this will necessarily be the case.¹⁸⁶ Although a great deal of research has examined juror decision-making in a variety of contexts,¹⁸⁷ comparatively little research has examined judicial decision-making.¹⁸⁸ The existing empirical research investigating decision-making about other legal issues has shown that judges and jurors are influenced by similar factors in criminal cases,¹⁸⁹ that judges and jurors have

184. Hastie et al., *Deciding Liability for Punitive Damages*, *supra* note 137, at 301.

185. *Id.* at 303.

186. To the extent that there are differences, there is not always a clear benchmark for determining which group's answer is normatively better. See MacCoun, *supra* note 137, at 726 ("[T]he observed discrepancy tells us nothing about whether either decision maker (or group) is actually accurate; both could be wrong."); Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 165 (1991) ("[J]ury bias can mean that the jury exercises sound discretion, but that jury determinations nevertheless systematically differ from those that judges would make because of moral or experiential differences between judges and juries. Because there is no unbiased baseline, any claim of juror bias of this . . . type can be restated as an equally true claim of judicial bias.").

187. See Vidmar, *supra* note 68 (reviewing the research on civil juries).

188. Anderson & MacCoun, *supra* note 43, at 328 ("Considering the amount of attention that has been given to jurors' ability to use legal evidence, it is remarkable how little we know about their professional counterparts [i.e., judges].").

189. See Edmund S. Howe & Thomas C. Loftus, *Integration of Intention and Outcome Information by Students and Circuit Court Judges: Design Economy and Individual Differences*, 22 J. APPLIED SOC. PSYCHOL. 102 (1992) (finding that while students found higher levels of blameworthiness overall, judges and students were similarly influenced by the outcome of an offense and by the level of intention of the perpetrator).

similar responses to statistical information,¹⁹⁰ and that judges, not unlike ordinary citizens, are unable to ignore inadmissible evidence¹⁹¹ and are vulnerable to cognitive illusions such as hindsight bias,¹⁹² anchoring,¹⁹³ egocentric bias,¹⁹⁴ framing,¹⁹⁵ and the representativeness heuristic.¹⁹⁶ A

190. See Gary L. Wells, *Naked Statistical Evidence of Liability: Is Subjective Probability Enough?*, 62 J. PERSONALITY & SOC. PSYCHOL. 739 (1992).

191. See Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effects of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113 (1994) (finding that judges' and jurors' liability decisions and perceptions of the trial were similarly affected by exposure to potentially biasing, but inadmissible, evidence). Interestingly, Landsman and Rakos found that while the effect of the biasing information was the same for judges and jurors, the jurors appeared to be more sensitive to their cognitive limitations in disregarding the evidence than did the judges. *Id.*

192. See John C. Anderson et al., *Evaluation of Auditor Decisions: Hindsight Bias Effects and the Expectation Gap*, 14 J. ECON. PSYCHOL. 711 (1993) (judges and outcome bias); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 802-03 (2001). But see Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance As a Risk Manager*, 40 ARIZ. L. REV. 901, 906 (1998); Lempert, *supra* note 38 (critiquing Hastie & Viscusi, *supra*). Hindsight bias is unconsciously overestimating the likelihood one would have assigned to an event once the outcome is known. See generally Barauch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 288 (1975).

193. See Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCHOL. 1535 (2001); Guthrie et al., *supra* note 192, at 791-92; see also discussion *infra* note 319. See generally Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in HEURISTICS AND BIASES, *supra* note 96, at 3, 14-18.

194. See Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979, 982, 994 (1994) (bankruptcy judges); Guthrie et al., *supra* note 192, at 814 (magistrate judges); see also discussion *infra* notes 327-28 and accompanying text. See generally Michael Ross & Fiore Sicoly, *Egocentric Biases in Availability and Attribution*, 37 J. PERSONALITY & SOC. PSYCHOL. 322 (1979).

195. See Guthrie et al., *supra* note 192, at 797; see also Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 176 (1997) (litigants); Linda Babcock et al., *Forming Beliefs About Adjudicated Outcomes: Perceptions of Risk and Reservation Values*, 15 INT'L REV. L. ECON. 289 (1995) (lawyers). Framing refers to the evaluation of outcomes relative to a neutral reference point. Outcomes are evaluated differently depending on whether they are framed as gains or losses. See generally Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341 (1984).

196. See Guthrie et al., *supra* note 192, at 809-10. Using the representativeness heuristic, decision makers make categorizations based on the degree to which the object of the evaluation is representative of the category to the neglect of other relevant considerations such as base-rates. See generally

number of studies have recently begun to compare the damage award decision-making of jurors and judges.

Several studies have asked judges to indicate their agreement with the juries in the cases they hear. Kalven and Zeisel, in the first major comparison of judges and jurors, found that across 4000 civil cases, judges reported that they would have made the same liability decisions as did the jury 78% of the time.¹⁹⁷ When both the judge and jury would have decided in favor of the plaintiff, judges reported that juries would have awarded more damages 52% of the time and judges would have awarded more damages 39% of the time, with approximate agreement in 9% of the cases. On the average, Kalven and Zeisel found that juries awarded 20% more in damages than judges reported they would have awarded.¹⁹⁸ Similarly, Heuer and Penrod found that across sixty-seven civil trials, judges indicated that their verdict would have been the same as that of the jury in 63% of the cases. Judicial disagreement with the jury was approximately equally split in favor of defendants (17.9%) and plaintiffs (19.4%).¹⁹⁹

Archival studies have compared the damage awards of juries and judges as well. Clermont and Eisenberg compared a large number of civil cases tried before judges and juries over a ten year period.²⁰⁰ They found that plaintiffs were more successful in front of judges in some types of cases (notably products liability, medical malpractice, and motor vehicle cases), but more successful in front of juries in other types of cases (marine and Federal Employer's Liability Act cases).²⁰¹ In some types of cases, juries awarded more in damages; however, in other types of cases, judges awarded more.²⁰²

Eisenberg and his colleagues used data from the Civil Trial Court Network to compare the punitive damage

Daniel Kahneman & Amos Tversky, *Belief in the Law of Small Numbers*, 76 PSYCHOL. BULL. 110 (1971).

197. Harry Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1065 (1964); see HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 63 (1966).

198. Kalven, *supra* note 197, at 1065.

199. Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Effects*, 18 LAW & HUM. BEHAV. 29, 48 (1994).

200. Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1175 (1992).

201. *Id.* at 1137 tbl.3.

202. *Id.* at 1141.

decisions of juries and judges across 9000 civil cases from 1996.²⁰³ Overall, they found that almost one-third of punitive damage awards were awarded by judges.²⁰⁴ They note that “[g]iven the overwhelming focus on jury punitive awards in the literature and policy debate, this share is surprisingly high.”²⁰⁵ Controlling for the size of the compensatory award, the status of the parties, and the type of case, they found no differences between judges and juries in the frequency with which they awarded punitive damages, in the amounts of the awards, or in the amount of punitive damages they awarded per unit of compensatory damages.²⁰⁶ They did find, however, that judges (more so than juries) became more likely to award punitive damages as compensatory damages increased.²⁰⁷ Eisenberg *et al.* also found mixed evidence suggesting that the punitive damage awards made by juries were somewhat more variable than were those of judges. However, jury and judicial awards were equally likely to be so extreme as to be outside the range in which 95% of the judges’ awards fell.²⁰⁸ Moreover, Eisenberg *et al.* noted that jury awards might be expected to be more variable if juries hear higher stakes cases or due to strategic choices by defendants as to how they present their cases. These case selection effects, they suggest, may account for differences in variability.²⁰⁹ Thus, overall, Eisenberg *et al.* concluded that there is little evidence of meaningful differences in the relative frequencies of punitive damages awarded by juries and judges or in the patterns of those awards.

It is quite possible that the strategic decisions litigants make result in collections of cases with different attributes going before jurors and judges. Thus, case selection effects confound these archival studies. Accordingly, there may be factors other than the identity of the factfinder that influenced the results in these cases. Nonetheless, the findings of the archival studies are informative and can be

203. Eisenberg *et al.*, *Juries, Judges*, *supra* note 75, at 747-48.

204. *Id.* at 752.

205. *Id.*

206. *Id.* at 760 tbl.3, 774 tbl.5.

207. *Id.* at 762 (finding that juries were more likely to award punitive damages when compensatory damages were low, judges were more likely to award punitive damages when compensatory damages were high).

208. *Id.* at 774-76.

209. *Id.* at 778-79.

compared with the results of studies using different methodologies. Experimental studies that ask jurors and judges to evaluate identical case facts allow for a comparison between the two sets of decision makers without the confound of different case mixes.

Several studies comparing the decisions of jurors and legally experienced decision makers in awarding compensatory damages are instructive. Vidmar and Rice found no differences in the amounts potential jurors and arbitrators awarded for pain and suffering in two different medical malpractice cases.²¹⁰ Jurors and arbitrators also did not differ in their perceptions of the case or in the self-reported reasoning behind their awards.²¹¹ The awards made by both groups were highly variable, although jurors' awards were more variable than awards made by the arbitrators.²¹² However, the awards made by "statistical juries" were not significantly different in magnitude than awards made by the arbitrators and were less variable.²¹³ Vidmar and Landau report similar results using a different case and comparing jurors and lawyers who were state certified mediators.²¹⁴

Similarly, Wissler, Hart, and Saks compared how jury-eligible citizens, judges, and attorneys make awards of non-economic compensatory damages in personal injury cases. They found that characteristics of the injuries influenced general damage awards in similar ways for jurors and judges.²¹⁵ In addition, juror awards were highly correlated with the awards of judges, suggesting that the two groups ranked the cases similarly, awarding higher amounts in the same cases.²¹⁶ However, the general damage awards jurors recommended for the same injuries were larger and more

210. Vidmar & Rice, *supra* note 166, at 893.

211. *Id.* at 894-95.

212. *Id.* at 892-93.

213. *Id.* at 897 n.58; *see also supra* note 143 (discussing statistical juries).

214. Neil Vidmar & David Landau, What Animates Jury Awards for Pain and Suffering in Medical and Automobile Negligence Cases? An Empirical Study, presented at the annual meeting of the Law & Society Association, Phoenix, Ariz. (June 1994) (reported in VIDMAR, *supra* note 91, at 230-232).

215. Wissler et al., *supra* note 94, at 782. Participants rated the degree of disability, mental suffering, disfigurement, and pain caused by an injury. For both groups disability had the greatest impact on awards, followed by mental suffering and disfigurement; pain had no independent significant impact on awards. *Id.*

216. *Id.* at 799.

variable than those that judges recommended.²¹⁷ Consistent with the findings of Vidmar, Wissler *et al.* found that statistical juries' general damage awards (based on the median of individual jurors' awards) were less variable than awards by individual jurors and less variable than the awards made by judges.²¹⁸

Several experimental studies have also specifically compared the punitive damage award decisions of jurors and judges. Viscusi presented a series of scenarios to jury-eligible citizens and to trial and appellate judges who were participants in a conference on law and economics.²¹⁹ One scenario compared the rates at which judges and jurors indicated that punitive damages should be awarded in response to a scenario involving an airplane with a malfunctioning cargo door. The airline did not repair the door and damage occurred. Judges and jurors were asked to determine whether a court should award punitive damages in response to three different versions involving different probabilities that an accident would occur and different levels, types, and manners of occurrence of loss.²²⁰ Across the cases, jurors indicated that punitive damages should be awarded between 74% and 96% of the time; judges indicated that punitive damages should be awarded between 18% and 70% of the time. Both groups were more likely to think that punitive damages were appropriate as the stakes increased; however, for each scenario, judges were less likely to think an award of punitive damages was appropriate.²²¹

In a second case (involving an unsafe oil well), Viscusi found that although all the judges made damage awards while 5% of jurors did not, damage awards by jurors were higher and more variable than awards made by judges.²²² In related research, Hastie and Viscusi asked citizens and

217. *Id.* at 798-99.

218. *Id.* at 801-02; *see also supra* note 143 and accompanying text.

219. Viscusi, *supra* note 71; *see also* W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. L. & ECON. REV. 26, 28 (1999).

220. Viscusi, *supra* note 71, at 111-15.

221. *Id.* at 112-14. If Viscusi is correct that in the scenarios described "the firm should not be found negligent, much less be punished with a punitive damages award," then it is notable that as many as 70% of the judges indicated that they thought punitive damages were appropriate. *Id.* at 111, 114 (personal injury/crash scenario).

222. *Id.* at 128-29. The type of damages participants were to award was not specified. *Id.*

judges to determine whether a railroad should pay punitive damages (liability had already been determined and compensation paid) after failure to improve the track resulted in an accident. Jurors appeared to be more likely to believe that punitive damages ought to be paid.²²³

In another experimental study, Robbennolt found that judges and jurors considered similar factors when determining punitive damage awards in response to a medical malpractice case against an HMO.²²⁴ Both jury-eligible citizens and trial court judges used information about the actual and potential severity of the injury to the plaintiff in making their punitive damage award decisions, awarding greater amounts in punitive damages when the actual and potential injury to the plaintiff was more severe than when the actual and potential injury to the plaintiff was lower.²²⁵ Similarly, the wealth of the defendant influenced the punitive damage awards of both groups, such that higher punitive damage awards were made against wealthier defendants.²²⁶ Moreover, judges and jurors did not award significantly different amounts in punitive damages and the awards of both groups were equally variable.²²⁷

Thus, the empirical results provide a somewhat mixed picture of possible differences between judges and jurors in the decisions they make about damages. Several studies find that judges are less likely to award punitive damages,²²⁸ while others find no differences.²²⁹ The evidence is similarly mixed with regard to the relative size and variability of punitive damage awards by jurors and judges. It is possible that in cases about which there is little agreement that punitive damages liability is appropriate, differences between judges and jurors are more likely to emerge. In the studies finding similarities between judges and jurors, punitive damages were awarded at relatively

223. Hastie & Viscusi, *supra* note 192, at 919; *see also* Viscusi, *supra* note 71, at 128-30 (discussing the same data).

224. Robbennolt, *supra* note 71.

225. *Id.*

226. *Id.*

227. *Id.* Consistent with prior studies, the compensatory damages of jurors, on the other hand, were marginally higher than those of judges and were more variable. *Id.*

228. *See* Hastie & Viscusi, *supra* note 192; Viscusi, *supra* note 71.

229. *See* Clermont & Eisenberg, *supra* note 200; Eisenberg et al., *Juries, Judges, supra* note 75, at 762; Robbennolt, *supra* note 71.

high rates.²³⁰ In contrast, for those studies finding differences, liability rates tended to be lower.²³¹ This suggests the possibility that differences between judges and jurors may be more likely to emerge in closer cases.²³²

Second, several of the studies finding differences between judges and jurors used a sample of judges who attended a conference on law and economics and included both trial and appellate state court judges.²³³ It might be expected that participants in a law and economics conference may not be representative of the larger population of judges, and might be more apt to focus on economic efficiency.²³⁴ In addition, there could be differences in the decision-making of trial and appellate judges stemming from either differences in their experiences or in their differing institutional goals.²³⁵

230. See Robbennolt, *supra* note 71 (91% of citizens and 85% of judges awarded punitive damages); Viscusi, *supra* note 71 (oil well scenario; 95% of citizens and 100% of judges awarded damages).

231. See Viscusi, *supra* note 71, at 125, 128-30 (airplane door scenario; 18-70% for judges and 74-96% for jurors); Hastie & Viscusi, *supra* note 192, at 917 (25% for judges and 67% for jurors).

232. It is also possible that in some subset of these less clear cases, judges would not instruct the jury on punitive damages in the first instance; thus, juries would not be asked to decide them. See Vidmar, *supra* note 137, at 709-10. Other differences among the scenarios used might also be found to differentially influence judges and jurors. See studies described *supra* Part II.A (finding that case characteristics matter); see also Eisenberg et al., *Juries, Judges, supra* note 75, at 765 n.75.

233. Hastie & Viscusi, *supra* note 192, at 905; Viscusi, *supra* note 71, at 109.

234. See Guthrie et al., *supra* note 192, at 818 n.201; Eisenberg et al., *Juries, Judges, supra* note 75, at 765 n.75; Lempert, *supra* note 38, at 893.

235. The U.S. Supreme Court recently hypothesized as to the potential differences in the relative abilities of trial and appellate court judges:

Differences in the institutional competence of trial judges and appellate judges are consistent with our conclusion. . . . Only with respect to the first *Gore* inquiry [the degree of reprehensibility of the defendant's misconduct] do the district courts have a somewhat superior vantage over courts of appeals, and even then the advantage exists primarily with respect to issues turning on witness credibility and demeanor. Trial courts and appellate courts seem equally capable of analyzing the second factor [the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award]. And the third *Gore* criterion [the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases], which calls for a broad legal comparison, seems more suited to the expertise of appellate courts.

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 121 S. Ct. 1678, 1687-88

Third, the studies varied in the set of legal decisions participants were asked to make.²³⁶ Jurors who were only given one mechanism through which to be able to express their outrage (i.e., a punitive damage award), might have been more likely to exercise that option than jurors in actual trials who have the ability to utilize a compensatory remedy as well.²³⁷ Eisenberg speculates that judges may be more likely to "understand that the existence of a compensatory award already expresses disapproval of the behavior."²³⁸ These are all, of course, empirical questions that merit further study. Finally, it is worth noting that no experimental studies have compared the punitive damages decision-making of judges and deliberating juries. As described earlier, deliberation may have a large impact on damage awards that have important implications for comparisons between juries and judges.²³⁹

At this early stage of the research there is no clear evidence to support the notion that judges will make qualitatively different decisions than juries across cases. The important task for future studies will be to shed light not only on whether the punitive damages awarded by judges and jurors differ in frequency, magnitude, or consistency, but also, more importantly, on the circum-

(2001) (footnote omitted). Archival research by Eisenberg and Wells found that cases that result in published opinions involve higher award levels and higher ratios of punitive damages to compensatory damages than do cases at state trial court level. Theodore Eisenberg & Martin T. Wells, *Punitive Awards After BMW, A New Capping System, and the Reported Opinion Bias*, 1998 WIS. L. REV. 387, 414. Thus, trial and appellate courts may see different mixes of cases. Exposure to different samples of cases may influence decision-making via the availability and anchoring heuristics. See *supra* notes 96-107 and accompanying text; see also Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501 (1989) (describing the different mix of constitutional tort cases at the trial and appellate level); Lempert, *supra* note 37, at 884-85 (noting that trial and appellate judges may have different values or experiences).

236. See Eisenberg et al., *Juries, Judges*, *supra* note 75, at 747-78 (actual cases in which juries determined liability and damages); Hastie & Viscusi, *supra* note 192, 902-03 (punitive damage liability only); Robbennolt, *supra* note 71 (compensatory and punitive damages only); Viscusi, *supra* note 71, at 112 (punitive liability only). The studies also differed in the response options available. For example, Viscusi gave participants responding to the oil well scenario five dollar ranges from which to select. Viscusi, *supra* note 71, at 140.

237. See Ellsworth, *supra* note 137, at 720.

238. Eisenberg et al., *Juries, Judges*, *supra* note 75, at 765 n.75.

239. See *supra* Part II.C.1.

stances under which any differences might emerge. Various factors have been articulated as reasons why differences might be expected in how judges and jurors make judgments including: differences in their attitudes toward wealth and corporations,²⁴⁰ differences in their emotional responses,²⁴¹ differences in education and experience,²⁴² and differences in how they perceive risk.²⁴³

Jurors, less wealthy on average than judges, are suspected of holding "stronger redistributive inclinations and biases against wealthy defendants" than judges²⁴⁴ and of being easily "swayed by arguments that seek to base the calculation of punitive damages on a percentage of the defendant's net wealth or income."²⁴⁵ Robbennolt found that although jury-eligible citizens had lower incomes and perceived the defendant company to be more wealthy, more successful, and more likely to engage in such conduct again in the future than did judges, these difference did not

240. See Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179, 210 (1998) ("Judges are better suited than juries to give appropriate weight to a defendant's finances. They are less likely to be swayed by arguments that seek to base the calculation of punitive damages on a percentage of the defendant's net wealth or income."); *The Paths of Civil Litigation, Problems and Proposals in Punitive Damages Reform*, 113 HARV. L. REV. 1783, 1801-04 (2000) [hereinafter *Problems and Proposals*] (suggesting that jurors tend to show bias against corporations); *Jury Determination of Punitive Damages*, 110 HARV. L. REV. 1513, 1527 (1997) (suggesting that jurors, who tend to have lower incomes than judges, may "possess stronger redistributive inclinations and biases against wealthy defendants").

241. See, e.g., Mogin, *supra* note 240, at 208 ("[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."); *Jury Determination of Punitive Damages*, *supra* note 240, at 1528 ("[J]udges are thought to be more dispassionate decisionmakers, whereas juries are less able to resist the sway of emotion and bias.").

242. See Lempert, *supra* note 38, at 893; Mogin, *supra* note 240, at 210-11 n.191; *Limits on Jury Discretion: Pacific Mutual Life Insurance Co. v. Haslip*, 105 HARV. L. REV. 216, 224-25 (1991) ("[J]udges are repeat players and hence are better able to ensure that damage awards do not 'exceed an amount that will accomplish society's goals of punishment and deterrence.'") (internal quotation omitted); Sunstein et al., *supra* note 70, at 2127.

243. Viscusi, *supra* note 71, at 130.

244. *Jury Determination of Punitive Damages*, *supra* note 240, at 1527; see also Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 665 (1980) (evidence of wealth may give rise to "Robin Hood syndrome").

245. Mogin, *supra* note 240, at 210.

significantly influence the amounts of punitive damages awarded to the plaintiffs.²⁴⁶

Another possible difference is that, as a result of their experience, judges are less susceptible to the influence of emotion or sympathy for the plaintiff than are jurors.²⁴⁷ The available evidence suggests that sympathy for plaintiffs does not play a major role in jury decision-making. Hans has found that jurors are concerned about frivolous lawsuits and are, accordingly, highly skeptical of plaintiffs and their claims.²⁴⁸ Experimental research also indicates that jurors do not favor plaintiffs when judging the plaintiff's comparative negligence.²⁴⁹ Hastie et al.'s analysis of jury deliberations about punitive damages liability found a notably low occurrence of jurors expressing sympathy for the plaintiff.²⁵⁰ Finally, Robbennolt found that jury-eligible citizens reported feeling more sympathetic for the plaintiff than did trial court judges. However, these differential sympathy ratings did not influence participants' punitive damage awards.²⁵¹ Thus, while jurors may feel more sympathy for injured plaintiffs, they may be able to make their damage award decisions without being unduly influenced by this information.

Judges, as a result of their legal experiences, may have different perceptions of the civil litigation system and the

246. Robbennolt, *supra* note 71. Instead, in contrast to the speculation that citizens would be biased against wealthy defendants, it was the compensatory damage awards made by judges, not citizens, that were marginally influenced by the wealth of the defendant. *Id.*

247. For a detailed discussion of the appropriate role of sympathy in legal decision-making see Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1 (1997).

248. Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 334-35 (1998); HANS, *supra* note 87, at 22-78; Hans & Lofquist, *Jurors' Judgments*, *supra* note 107, at 94-100.

249. See Douglas J. Zickafoose & Brian H. Bornstein, *Double Discounting: The Effects of Comparative Negligence on Mock Juror Decision Making*, 23 LAW & HUM. BEHAV. 577, 586 (1999); Neal Feigenson et al., *Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases*, 21 LAW & HUM. BEHAV. 597, 610-12 (1997).

250. Hastie et al., *Deciding Liability for Punitive Damages*, *supra* note 137, at 300, 308.

251. Robbennolt, *supra* note 71; see also Neal Feigenson et al., *The Role of Emotions in Comparative Negligence Judgments*, 31 J. APPLIED SOC. PSYCHOL. 576, 588 (2001) (finding that compensatory damages awards were not mediated by emotional reactions, including sympathy).

range of awards made than do jurors. Wissler et al. have noted that across their program of research on non-economic damages, damage awards are better predicted by case or injury attributes when participants are asked to judge multiple cases or injuries.²⁵² They suggest that judges may possess "a more complete cognitive reference scale of injuries to provide a context for thinking about the case now under consideration" and that this may account for any observed differences in the decisions of judges and jurors.²⁵³ As noted above, a number of studies have found a connection between perceptions of the civil litigation system and damage awards.²⁵⁴ Robbennolt found that judges and jurors did differ in their perceptions of the typical outcomes of civil litigation (estimates of the percentage of jury awards that are greater than \$1 million and of the percentage of jury awards that include punitive damages were higher than those of judges). Trial court judges, who have more experience with the routine distribution of awards than do lay jurors, made much smaller (and more accurate) estimates.²⁵⁵ While Robbennolt found that differences in perceptions of typical outcomes influenced the participants' compensatory damage awards, no differences in punitive damages were detected.²⁵⁶

Exploring another possible difference, Viscusi examined judges' and jurors' risk beliefs. By asking respondents to estimate the risk posed by a series of possible sources of mortality, Viscusi demonstrated that both groups tended to overestimate small risks and to underestimate large risks.²⁵⁷ This pattern is consistent with previous psychological research on risk perceptions.²⁵⁸ These effects were smaller in magnitude for judges than they were for jurors.²⁵⁹

252. Wissler et al., *supra* note 94, at 808 n.166.

253. *Id.*

254. *See supra* notes 103-11.

255. Robbennolt, *supra* note 71.

256. *Id.*

257. Viscusi, *supra* note 71, at 131-32.

258. *See* Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk*, in *HEURISTICS AND BIASES*, *supra* note 96, at 463, 467; Sarah Lichtenstein et al., *Judged Frequency of Lethal Events*, 4 *J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY* 551 (1978). *But see* HOWARD KUNREUTHER ET AL., *DISASTER INSURANCE PROTECTION: PUBLIC POLICY LESSONS* 237 (1978) (suggesting that some low risks are ignored).

259. Viscusi, *supra* note 71, at 131-32. No statistical test of these differences was provided. Viscusi reports the results of a second question assessing how

It is currently unclear whether this, or any other, difference in how judges and jurors think about risk impacts their decision-making in the courtroom, but the potential for such differences to influence decision-making warrants further study.

In sum, the research examining the processes by which jurors determine punitive damages suggests that jurors take into account important characteristics of the cases in making their punitive damage awards. Punitive damage awards are sensitive to variables such as the degree of harm risked or suffered, the outrageousness of the defendant's conduct, and the financial status of the defendant. Other influences on punitive damages are potentially more troubling. In particular, jurors appear to be influenced by media reports of high awards in complex ways, their intuitions about punishment emphasize retribution to the neglect of deterrence considerations, they have difficulty mapping their punishments onto a dollar scale, and they have difficulty understanding the legal instructions. Nonetheless, jurors do not appear to make decisions that clearly differ from the decisions that judges would make, certainly not to the dramatic extent that most critics of the jury would suggest.

The picture of punitive damages drawn by this research is increasingly important as policymakers promote changes to the civil litigation system, the law of punitive damages, and the role of the jury in determining damages. Empirical research provides a more solid foundation for policy decision-making than do anecdotes, misperceptions, and hyperbole. Potential reform of the manner in which punitive damages are awarded ought to specifically target the aspects of the process shown to be problematic. Instead, the most common reforms have been more consistent with the popular notion of unrestrained awards and have focused on limiting awards.

participants would trade off money and risk. However, it appears that the judges and jurors were asked questions that differed in critical ways, making any comparison difficult. Compare Viscusi, *supra* note 71, at 133 (asking jurors about reducing risk of dying in a car accident from 2/10,000 to 1/10,000), with Viscusi, *supra* note 219, at 37 (asking judges about reducing risk of dying at conference from 1/10,000 to zero).

III. A MISMATCH BETWEEN REFORMS AND PROBLEMS

Virtually every state has undertaken some reform of punitive damages.²⁶⁰ However, these reform efforts have not responded to the empirical research just described by addressing the demonstrated difficulties that jurors have with determining punitive damages. Rather, notions that punitive damages are out of control have driven the principal reform efforts. Consequently, the most popular reforms are focused on controlling awards that are perceived to be wildly unrestrained. However, the empirical research examining patterns of punitive damage awards suggests that punitive damages are not out of control in ways consistent with popular conceptions. Archival research examining overall patterns of awards find that punitive damages are infrequently awarded, moderate in size, awarded in response to outrageous conduct, and often reduced post-trial.

Moreover, the experimental research that specifically examines particular reform measures finds that such measures are unlikely to accomplish their intended purposes and may even have paradoxical effects. For example, under some circumstances caps may increase the size and variability of punitive damages and bifurcation has been shown to increase punitive damage awards as well. Rather than continuing to pursue reform measures that are aimed at the largely illusory problem of overly-generous punitive damage awards and do not take into account the complexities of the decision-making process, reform efforts ought to specifically target decision-making challenges. Psychological research suggests avenues that this targeted reform might take.

A. *Current Reforms Target an Illusory Problem*

Public attention has focused primarily on a few highly publicized cases. For example, most observers are aware of verdicts such as the \$2.7 million in punitive damages awarded to a McDonald's customer after she was seriously burned by a cup of coffee.²⁶¹ However, there are now a

260. See *infra* Part III.B.

261. See *Liebeck v. McDonald's Rests., P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (D.N.M. Aug. 18, 1994). Many more are unaware of the details of

number of empirical studies that have looked at overall patterns of punitive damage awards.²⁶² The studies have common findings: although there are variations across geographical area and type of case, punitive damages are not often awarded, are rarely extreme in size, are awarded

the case. Seventy-nine year old Stella Liebeck was hospitalized for a week after she suffered second and third degree burns when she spilled the coffee on herself while sitting in a parked car. McDonald's kept its coffee approximately 20° hotter than did other restaurants and had received approximately 700 burn complaints over the previous decade. See Gerlin, *supra* note 2, at A1. The award was later reduced to \$480,000 and the parties then settled for an undisclosed amount. See Hoole, *supra* note 2, at 472.

262. See, e.g., DANIELS & MARTIN, *supra* note 4, at 199-200, 213-43 (reporting on their program of research); CAROL DEFRANCES ET AL., CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES (Bureau of Justice Statistics Special Report No. NCJ-154346, 1995) (examining civil cases from forty-five of the seventy-five most populous counties in 1991-1992); ERIK MOLLER, RAND INST. FOR CIVIL JUSTICE, TRENDS IN CIVIL JURY VERDICTS SINCE 1985, at 33-38 (1996) (comparing awards in 1985-1989 with those in 1990-1994 from fifteen counties in six states); PETERSON ET AL., *supra* note 87, at 8-31 (examining punitive damages in two counties from 1960-1984); MICHAEL G. SHANLEY & MARK A. PETERSON, RAND INST. FOR CIVIL JUSTICE, POSTTRIAL ADJUSTMENTS TO JURY AWARDS 36-37 (1987); U.S. G.A.O., PRODUCT LIABILITY, *supra* note 76 (examining products liability cases from five states in 1983-1985); Daniels & Martin, *supra* note 23 (examining awards in civil cases from forty-seven counties in eleven states from 1981-1985 and from two counties in two states from 1970-1988); William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, REGULATION, Sept./Oct. 1986, at 33 (examining products liability cases from 1982-1984 (federal) and 1984-1985 (state)); Ostrom et al., *supra* note 98 (examining civil cases from forty-five of the seventy-five most populous U.S. counties); Rustad, *supra* note 76 (examining products liability cases over a twenty-five year period); Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15 (reviewing nine empirical studies on the pattern of punitive damages in the United States); Rustad & Koenig, *supra* note 76 (examining a nationwide sample of medical malpractice cases from 1963-1993); Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265, 280-98 (1998) (reviewing medical malpractice awards in three states); see also Stephen E. Chappellear, *Jury Trials in the Heartland*, 32 U. MICH. J.L. REFORM 241 (1999) (describing civil jury trials in Franklin County, Ohio over thirteen year period); Thomas A. Eaton et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 GA. L. REV. 1049 (2000) (describing patterns of civil litigation in six Georgia counties); Deborah Jones Merrit & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 332-98 (1999) (describing jury verdicts in Franklin County, Ohio over twelve year period); Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida: In Terrorem and in Reality*, 38 HARV. J. LEGIS. 487, 490-92 (2001) (examining Florida cases from 1988-2000).

in response to egregious conduct, and are not often collected in the amounts awarded by juries.

1. *Incidence.* Empirical studies of punitive damages in actual cases have found that juries award punitive damages relatively infrequently. Studies conducted by researchers at the RAND Corporation found that punitive damages are only awarded in 1-8% of civil cases.²⁶³ Other studies have found punitive damages to be awarded at similar rates. In the sample of cases examined by Daniels and Martin, punitive damages were awarded in only 4.9% of civil cases and in 8.8% of cases in which the plaintiff prevailed.²⁶⁴ Studies conducted by researchers at the Bureau of Justice Statistics and the National Center for State Courts both found that juries awarded punitive damages in roughly 3% of cases overall and in 6% of cases in which the plaintiff prevailed.²⁶⁵

Products liability and medical malpractice have received particular attention as areas in which punitive damages are supposedly out of control. However, the empirical studies have found that the incidence of punitive damages in these types of cases is notably low. The Bureau of Justice Statistics and National Center for State Courts studies found that punitive damages were assessed in only 2% of products liability cases and in only 3% of medical malpractice cases in which the plaintiff prevailed.²⁶⁶ Rustad

263. MOLLER, *supra* note 262, at 33; PETERSON ET AL., *supra* note 87, at 9 tbl.2.1. In some jurisdictions, incidence rates were rising, in others rates were falling. MOLLER, *supra* note 262, at 34.

264. DANIELS & MARTIN, *supra* note 4, at 214. An earlier study found similar results, 4.9% and 8.8% respectively. See Daniels & Martin, *supra* note 23, at 31.

265. See DEFANCES ET AL., *supra* note 262, at 5-6; Ostrom et al., *supra* note 98, at 233, 238. Ostrom *et al.* found that in two out of three courts punitive damages were awarded in fewer than 5% of cases in which the plaintiff prevailed. See *id.*

266. DEFANCES ET AL., *supra* note 262, at tbl. 8; Ostrom et al., *supra* note 98, at 238. Given plaintiff win rates of approximately one in three in these types of cases, these rates represent less than 1% of all cases of these types. See *id.*; see also Daniels & Martin, *supra* note 23, at 38 (punitive awarded in 2.9% of plaintiff wins in medical malpractice cases (0.9% of all medical malpractice cases) and 8.9% of plaintiff wins in products liability cases (3.5% of all products liability cases)); Rustad & Koenig, *supra* note 76, at 1006 (punitive damages are awarded in less than 1% of decided medical malpractice cases). Two smaller studies also found that punitive damages were rarely awarded in products liability cases. Landes and Posner found that punitive damages were awarded in only 10 of the 172 cases studied (5.8%). Landes & Posner, *supra* note 262, at

and Koenig studied both products liability cases and medical malpractice cases and concluded that punitive damages are rarely assessed in medical malpractice cases and that with the exception of asbestos cases, the incidence of punitive damage awards in product liability cases has declined since the mid-1980s.²⁶⁷ Similarly, Peterson, Sharma, and Shanley found that juries awarded punitive damages in only 1-2% of personal injury cases.²⁶⁸ In contrast, studies have found increases in the incidence of punitive damage awards in business tort and breach of contract cases.²⁶⁹

These incidence rates are based only on the small fraction of disputes that result in trials. One major study of civil litigation found that only 5% of grievances (cases in which an injury was noticed) were ultimately filed as cases.²⁷⁰ Moreover, fewer than 10% of filed cases result in trials.²⁷¹ The studies of punitive damages reviewed here only examine the few cases that actually make it to the trial stage. Thus, the number of cases that result in punitive damages represents an even smaller fraction of the total number of injury incidents. Nonetheless, the prospect of punitive damages may affect all cases in some way. For example, the possibility of liability for punitive damages may have an impact on litigation strategy or settlement negotiations.²⁷²

35. A study by the U.S. G.A.O. found that only 23 of the 305 cases in their sample (7.5%) resulted in a punitive damage award. See U.S. G.A.O., *PRODUCT LIABILITY*, *supra* note 76, at 29.

267. See Rustad, *supra* note 76, at 36 (products liability); Rustad & Koenig, *supra* note 76, at 1082 (medical malpractice).

268. See PETERSON ET AL., *supra* note 87, at 12. *But see* Moller et al., *supra* note 75, at 308 (finding that from the late 1980s to the early 1990s, the incidence of punitive damages in financial injury cases decreased).

269. See PETERSON ET AL., *supra* note 87, at 12.

270. See Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 544-45 (1980-81) (of 1000 grievances, 718 were brought to the attention of the wrongdoer, 449 were not resolved initially between the parties, 103 were brought to the attention of an attorney, and only 50 were filed as cases); see also Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1184 (1992).

271. See Saks, *supra* note 270, at 1212-13. Ostrom et al. found that approximately 2.7% of case dispositions are by jury trial. See Ostrom et al., *supra* note 98, at 234.

272. See Tom Baker, *Transforming Punishment into Compensation: In the Shadow of Punitive Damages*, 1998 WIS. L. REV. 211; Herbert M. Kritzer &

2. *Size.* Not only are punitive damages awarded infrequently, but they are typically not awarded in headline-grabbing amounts. As noted above, punitive damages tend to be closely related in size to compensatory damages.²⁷³ Median awards tend to be relatively low; several studies have found that the median award is approximately \$50,000.²⁷⁴ Daniels and Martin found that fifteen of the twenty counties with more than ten punitive damage awards for the period studied had median punitive damage awards below \$40,000 and thirteen of the twenty counties had median awards below \$30,000.²⁷⁵ Moreover, studies have found that median awards for the majority of

Frances Kahn Zemans, *The Shadow of Punitives: An Unsuccessful Effort to Bring Them into View*, 1998 WIS. L. REV. 157; Thomas Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 WIS. L. REV. 169; A. Mitchell Polinsky, *Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al.*, 26 J. LEGAL STUD. 663 (1997) (outlining possible ways in which threat of punitive damages could influence settlement).

273. See *supra* text accompanying notes 75-76. Rustad found that in more than one-third of the products liability cases he studies, the punitive damage award was lower than the compensatory damage award. See Rustad, *supra* note 76, at 50. The Bureau of Justice Statistics found that punitive damages were lower than compensatory damages in more than one-half of cases. DEFRANCES ET AL., *supra* note 262, at 10; see also Vidmar & Rose, *supra* note 262, at 500-01.

274. See DEFRANCES ET AL., *supra* note 262, at 6; Ostrom et al., *supra* note 98, at 239 (in tort cases the median was \$38,000).

275. See Daniels & Martin, *supra* note 23, at 42. Combining the above information about the incidence and size of punitive damages (using the data presented by the Bureau of Justice Statistics, see DEFRANCES ET AL., *supra* note 262), the expected punitive damages liability faced by a defendant who reaches a jury trial can be crudely demonstrated mathematically. Across all jury cases, plaintiffs win in 51.8% of cases, plaintiffs are awarded punitive damages in 5.9% of the cases they win, and the mean punitive damage award (when there is one) is \$735,000. Thus, the expected punitive damage verdict is \$22,463 (51.8% * 5.9% * \$735,000). The expected punitive liability in products liability and medical malpractice cases specifically is even lower. In products liability cases, the plaintiff win rate is 40.5%, punitive damages are awarded in 2.2% of plaintiff wins, and the mean punitive award is \$12,000 resulting in expected punitive liability of \$107. In medical malpractice cases, the plaintiff win rate is 30.3%, punitive damages are awarded in 3.1% of plaintiff wins, and the mean punitive awards is \$245,000, resulting in expected punitive liability of \$2,301. See DEFRANCES ET AL., *supra* note 262, at 4 tbl.5; (plaintiff win rates), 8 tbl.8 (punitive damage rates and mean awards). Moreover, this analysis does not take into account post-trial reductions in punitive awards. Approximately one-half of punitive damage awards are reduced post-trial and defendants ultimately pay only approximately 50% of the total award in these cases. See *infra* Part III.A.4.

cases with moderate award size have remained relatively stable.²⁷⁶

Median awards are consistently lower than mean awards, suggesting a pattern of a large number of moderate awards and a few high awards.²⁷⁷ Indeed, Daniels and Martin found that 88% of punitive damage awards were lower than the mean award.²⁷⁸ Conversely, extremely high awards are relatively rare. The National Center for State Court studies found that only 8% of all jury awards were greater than \$1 million.²⁷⁹ The Bureau of Justice Statistics study found that less than 25% of punitive damage awards were greater than \$250,000 and less than 12% were greater than \$1 million.²⁸⁰ Increases in punitive damage awards over time are largely attributable to these few cases with the largest awards, particularly a few large verdicts in business and contract cases.²⁸¹

3. *Conduct.* As noted earlier, punitive damages are only available when the defendant's conduct is egregious.²⁸² Therefore, it is not surprising that punitive damage awards are most likely to be awarded in intentional tort cases.²⁸³

276. See Daniels & Martin, *supra* note 23, at 52, 59-60 (finding only a slight increase in the 25th percentile of cases over time, that punitive awards are a stable percentage of total awards, and that the ratio of punitive damages to compensatory damages has declined); PETERSON ET AL., *supra* note 87, at 18 fig. 2.2 (showing relatively stable medians). Award levels have also found to be relatively stable in products liability and medical malpractice cases. See Daniels & Martin, *supra* note 23, at 56.

277. See Daniels & Martin, *supra* note 23, at 41; Ostrom et al., *supra* note 98, at 239; PETERSON ET AL., *supra* note 87, at 17.

278. See Daniels & Martin, *supra* note 23, at 41.

279. See Ostrom et al., *supra* note 98, at 237 (not taking into account post-trial reductions in awards).

280. See DEFRANCES ET AL., *supra* note 262, at 6. They found that during 1991-1992 fewer than one-third of punitive damage awards in medical malpractice cases were greater than \$250,000 and no awards were greater than \$1 million. See *id.* at 8. In products liability cases no awards were greater than \$250,000 during that time. See *id.*

281. See Daniels & Martin, *supra* note 23, at 52 (finding increases in the 75th percentile over time); Moller et al., *supra* note 75, at 308 (finding that the amounts awarded in financial injury cases have increased); PETERSON ET AL., *supra* note 87, at 17 (finding that the size of the largest awards has increased).

282. See *supra* note 29 and accompanying text.

283. See PETERSON ET AL., *supra* note 87, at 11-13. In the counties studied, between 33% and 40% of intentional tort cases that resulted in compensatory damages also resulted in a punitive damage award. MOLLER, *supra* note 262, at 34.

Several studies have found that rates of punitive damages are higher in cases involving fraudulent or intentional misconduct and in cases involving slander or libel, employment harassment or discrimination, or unfair business practices.²⁸⁴ Rustad found several types of "reprehensible" conduct which repeatedly resulted in punitive damage awards in products liability cases: "(1) fraudulent-type misconduct; (2) knowing violations of safety standards; (3) inadequate testing and manufacturing procedures; (4) failures to warn of known dangers before marketing; and (5) post-marketing failures to remedy known dangers."²⁸⁵ Similarly, Rustad and Koenig found that the most common basis for punitive damages in medical malpractice cases was an extreme deviation from the standard of care.²⁸⁶ These are the types of egregious behaviors that punitive damages are intended to address.

4. *Post-Trial Reductions.* Mechanisms such as remittitur, appellate review, and settlement all contribute to the post-trial reduction of punitive awards, and judicial review of damage awards has become increasingly important.²⁸⁷ Studies that have examined post-trial reductions in punitive damage awards have found that awards were commonly reduced post-trial and that plaintiffs rarely received the amount awarded by the jury.

Peterson, Sarma, and Shanley found that punitive damage awards were reduced post-trial in approximately one-half of the cases examined and that, overall, defendants ultimately paid approximately 50% of the total damages that were awarded.²⁸⁸ Moreover, they found reductions were

284. See DEFRANCES ET AL., *supra* note 262, at 6; MOLLER, *supra* note 262, at 36; PETERSON ET AL., *supra* note 87, at 45; Eisenberg et al., *Predictability*, *supra* note 75, at 636-37; Eisenberg et al., *Juries, Judges*, *supra* note 75, at 748-50; Ostrom et al., *supra* note 98, at 239-40; Vidmar & Rose, *supra* note 262, at 494-95.

285. See Rustad, *supra* note 76, at 68-73.

286. See Rustad & Koenig, *supra* note 76, at 1029.

287. See Colleen P. Murphy, *Judicial Assessment of Legal Remedies*, 94 NW. U. L. REV. 153, 188-98 (1999); see also *supra* notes 57-59.

288. See PETERSON ET AL., *supra* note 87, at 28. Of the thirty-three cases in their sample that were reversed (one) or reduced (thirty-two), twenty-one were reduced by settlement between the parties, eleven by the court, and one in a new trial. See *id.* Shanley and Peterson obtained similar results, finding that plaintiffs collected 57% of awards when they contained a punitive component. See SHANLEY & PETERSON, *supra* note 262, at 38; see also Ivy E. Broder,

more likely in cases with higher total awards, higher punitive damages, and higher punitive to compensatory damages ratios.²⁸⁹ Awards in medical malpractice and products liability cases are also quite likely to be reduced post-trial.²⁹⁰ Thus, the extremely large punitive damage awards that attract attention are precisely the awards that are likely to be reduced in some fashion post-trial. For example, in the McDonald's coffee spill case, the \$2.7 million punitive award was reduced to \$480,000 and the parties settled the case for an undisclosed amount of less than \$600,000.²⁹¹ The \$5 billion punitive damage award against Exxon in the *Valdez* oil spill case was recently overturned as well.²⁹²

Shanley and Peterson offer a number of reasons for the sizeable reductions of punitive damages post-trial:

First, there is often sharp disagreement about whether or not punitive damages were appropriately awarded. Second, courts are more likely to scrutinize punitive damage awards because they reflect jurors' outrage and, almost by definition, can be claimed to be a product of jury passions. Third, the basis for determining the amount of a punitive damage award is much less precise than for a compensatory award, which usually involves some measure of economic loss. Punitive damages have no such benchmark. Finally, defendants will often be insistent on appealing punitive damage awards to help eliminate the stigma that goes with paying such awards. In summary, defendants should be especially likely to appeal punitive damage awards, as both the basis and appropriate amount are likely to be disputed; and plaintiffs may be more

Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements, 11 JUST. SYS. J. 349, 353 (1986) (studying 198 cases of \$1 million or more occurring in 1984-1985 and finding that plaintiffs received the original amount awarded by the jury or more in slightly more than one-quarter of the cases); Brian Ostrom et al., *So the Verdict Is in—What Happens Next? The Continuing Story of Tort Awards in the State Courts*, 16 JUST. SYS. J. 97, 103 (1993).

289. See PETERSON ET AL., *supra* note 87, at 30.

290. See U.S. G.A.O., *PRODUCT LIABILITY*, *supra* note 76, at 42-43 (products liability); Landes & Posner, *supra* note 262 (products liability); Rustad, *supra* note 76, at 54-56 (products liability); Rustad & Koenig, *supra* note 76, at 1012 (medical malpractice); Vidmar et al., *supra* note 262, at 298 (medical malpractice).

291. See Hoole, *supra* note 2, at 470-72.

292. *Baker v. Hazelwood*, 270 F.3d 1215 (9th Cir. 2001) (remanding for the district court to set a lower award).

willing to discount such awards to avoid the uncertainty of judicial resolutions.²⁹³

Recent decisions increasing the role of appellate judges in reviewing punitive damage awards may add fuel to this trend.²⁹⁴

Due to these post-trial reductions, any increases in the incidence or size of punitive damage awards may be mitigated by corresponding increases in the operation of post-trial reduction mechanisms. Galanter and Luban have suggested that critics who are concerned about the unrestrained ability of juries to award large amounts of punitive damages should not forget the "equally unfettered discretion of judges in decreasing the size of punitive awards."²⁹⁵ The Supreme Court's recent decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* increases the discretion of appellate courts to reduce awards.²⁹⁶

B. *Some Surprising Effects of Punitive Damages Reforms*

It is clear that, at the very least, the reality of punitive damages does not live up to the reform rhetoric—awards are much more restrained than is commonly thought. However, it is the perception that there is a problem rather than empirical findings that tends to drive legislative action.²⁹⁷ In response to the widespread perception that juries are "out of control" when it comes to awarding punitive damages, a number of states have enacted and implemented a variety of measures designed to address punitive damage awards.²⁹⁸ Some of these reforms are intended to limit punitive damages, either in size (caps) or frequency (standards of proof). Others are intended to

293. SHANLEY & PETERSON, *supra* note 262, at 37.

294. See *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001).

295. Galanter & Luban, *supra* note 33, at 1409.

296. See 121 S. Ct. at 1689.

297. Songer, *supra* note 102, at 594 ("In politics, often the perception of reality has a greater impact on legislative action than the underlying reality itself.").

298. See generally Hurd & Zollers, *supra* note 31, at 195-97; Thomas Koenig & Michael Rustad, *The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability*, 16 JUST. SYS. J. 21, 27-33 (1993); James R. McKown, *Punitive Damages: State Trends and Developments*, 14 REV. LITIG. 419 (1995).

address specific concerns about punitive damages; bifurcation of the punitive damages portion of the trial addresses concerns that information about punitive damages will influence other trial decisions (i.e., liability and compensatory damages) and split-recovery statutes address concerns about windfalls to plaintiffs. Some seek to take the decision-making out of the hands of the jury entirely and allocate authority to determine punitive damage amounts to judges. And a few states have attempted to give more meaning to the jury's task by reforming jury instructions. However, until very recently, there had been little experimental examination of the possible effects of these reforms. A review of the recent research suggests that many of these reforms may have little effect, and some may in fact have counterintuitive effects on decision-making.

1. *Abolition.* While the vast majority of states have attempted to limit punitive damages in some way, there are a few states that do not allow punitive damages at all. These states have abolished punitive damages through constitutional provision,²⁹⁹ judicial determination,³⁰⁰ or statutory provision.³⁰¹

Anderson and MacCoun studied the possible effects of not allowing juries to award punitive damages. They found that students who were not allowed to award punitive damages in response to a personal injury scenario awarded more in compensatory damages (pain and suffering component) than did those who were allowed to make an award of punitive damages.³⁰² Similarly, in their recent investigation of limits on punitive damages, Greene, Coon, and Bornstein found that jurors who were not given the opportunity to award punitive damages awarded more in compensatory damages than did jurors who were allowed to make unrestrained punitive damage awards.³⁰³ Moreover, they found no differences in the total damages awarded by the two groups.³⁰⁴ The results of these studies suggest that,

299. See NEB. CONST, art. VII, § 5.

300. See *Spokane Truck & Dray Co. v. Hoefer*, 25 P. 1072, 1073-74 (Wash. 1891).

301. See N.H. REV. STAT. ANN. § 507:16 (1986) (prohibiting punitive damages unless specifically authorized by statute).

302. See Anderson & MacCoun, *supra* note 43, at 319-20.

303. Greene et al., *Limiting Awards*, *supra* note 81, at 226.

304. *Id.* at 228. That is, the compensatory damages awarded by the group

consciously or unconsciously, jurors who are blocked from expressing their punitive intent through punitive damages, will find other mechanisms through which to satisfy their goals.³⁰⁵

The relevance of these results extends beyond states that have prohibited punitive damages. Similar consequences could result in cases in which punitive damages are not requested by the plaintiff, in cases in which the court holds that an award of punitive damages would not be warranted and does not allow the jury to consider punitive damages, or in cases in which decisions about punitive damages are bifurcated from the rest of the trial.³⁰⁶

These results may not surprise all members of the legal community. The Wisconsin Supreme Court has noted that "it is generally recognized that if punitive damages are not allowed, juries give vent to their desire to punish the wrongdoer under the guise of increasing the compensatory damages, particularly those awarded for pain and suffering."³⁰⁷ However, such results indicate that prohibiting punitive damage awards may not be entirely successful in eliminating punishment from damage awards.

2. *Caps.* A number of states have limited the amount of punitive damages that can be awarded. Some states cap punitive damage awards at an absolute monetary level,³⁰⁸ other states allow punitive damages only up to a multiple of the compensatory damage award,³⁰⁹ and still others use some combination of the two.³¹⁰ Caps and multipliers have been criticized because they do not bear any relationship to the conduct of the defendant.³¹¹ Because the egregiousness of the defendant's conduct is not always directly related to the magnitude of the harm inflicted, many argue that caps and multipliers give some wrongful defendants a "free pass."³¹² In addition, limitations in general are thought to inhibit the purposes of punitive damages such as deterrence because they do not allow the damage amount to be large

not allowed to award punitive damages were no different from the total of the compensatory and punitive damages in the group allowed to award both. *Id.*

305. See Galanter & Luban, *supra* note 33, at 1406 ("[T]he legal line between punitive damages and compensatory damages does not accurately demarcate the presence of motives or perceptions of punishment.").

306. The effects of bifurcation on punitive damages are discussed *infra* Part III.B.4.

307. Wangen v. Ford Motor Co., 294 N.W.2d 437, 447 (Wis. 1980).

enough in some cases.³¹³ Finally, limitations on punitive damage awards are thought by some to invade the province of the jury and to frustrate individualized assessment of appropriate punishment and deterrence.³¹⁴

308. See, e.g., GA. CODE ANN. §51-12-5.1 (2000) (\$250,000 unless harm results from products liability or substance abuse); VA. CODE ANN. § 8.01-38.1 (Michie 2000) (\$350,000).

309. See, e.g., COLO. REV. STAT. § 13-21-102(1)(a) (2000) (exemplary damages shall not exceed actual damages); CONN. GEN. STAT. § 52-240b (2000) (punitive damages in product liability cases shall not exceed twice the compensatory damages awarded); 40 PA. CONS. STAT. § 1301.812-A(g) (1999) (except in cases alleging intentional misconduct, punitive damages against an individual physician shall not exceed 200% of compensatory damages).

310. See, e.g., ALA. CODE § 6-11-21(a)-(b), (d) (2000) (greater of three times compensatory damages or \$500,000, or \$1.5 million for physical injuries; for small businesses, greater of \$50,000 or 10% of net worth); ALASKA STAT. § 09.17.020(f)-(g) (Michie 2000) (greater of \$500,000 or three times compensatory damages; where defendant was motivated by financial gain, greatest of four times compensatory damages, four times financial gain, or \$7 million); FLA. STAT. ANN. § 768.73 (1)(a)-(b) (West 1997) (greater of three times the amount of compensatory damages or \$500,000, or, in certain cases, greater of four times the amount of compensatory damages or \$2 million); IND. CODE § 34-51-3-4 (1998) (greater of three times compensatory damages or \$50,000); KAN. STAT. ANN. § 60-3702(e)-(f) (1998) (lesser of defendant's annual gross income, 50% of net worth, or \$5 million; if profit from defendant's misconduct exceeds this measure, capped at 150% of such profit); NEV. REV. STAT. § 42.005 (1996) (greater of three times compensatory damages or \$300,000 in some cases); N.J. STAT. ANN. § 2A:15-5.14 (West 2000) (greater of five times compensatory damages or \$350,000); N.C. GEN. STAT. § 1D-25(b) (1999) (greater of three times compensatory damages or \$250,000); N.D. CENT. CODE § 32-03.2-11(4) (1996) (greater of two times compensatory damages or \$250,000); OHIO REV. CODE ANN. § 2315.21(D)(1)(a)-(b) (Anderson 1998) (lesser of three times compensatory damages or \$100,000; for large employers, greater of three times compensatory damages or \$250,000); OKLA. STAT. ANN. tit. 23, § 9.1(B) (Supp. 2001) (different caps relative to egregiousness of conduct); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (Vernon 1997) (greater of \$200,000 or two times economic damages plus amount equal to non-economic damages not to exceed \$750,000).

311. See Thomas M. Melsheimer & Steven H. Stodghill, *Due Process and Punitive Damages: Providing Meaningful Guidance to the Jury*, 47 SMU L. REV. 329, 347-48 (1994); see also Polinsky & Shavell, *supra* note 33, at 900 ("[C]aps cannot be justified on deterrence grounds because they might preclude the proper award of punitive damages."); *Common Sense Legal Standards Reform Act of 1995: Hearing on H.R. 10 Before the House Comm. on the Judiciary*, 104th Cong. (1995).

312. Melsheimer & Stodghill, *supra* note 311, at 347.

313. See Hurd & Zollers, *supra* note 31; Jacqueline Perczek, *On Efficiency, Punishment, Deterrence, and Fairness: A Survey of Punitive Damages Law and a Proposed Jury Instruction*, 27 SUFFOLK U. L. REV. 825, 865 (1993); Polinsky & Shavell, *supra* note 33, at 900.

314. See Perczek, *supra* note 313, at 864.

The experimental research suggests that caps may have the counterintuitive effects of increasing both the size and variability of punitive damage awards in some cases. Psychological theory suggests that caps on punitive damages may serve to anchor the decisions of jurors. Anchoring and adjustment is a cognitive bias in which decision makers begin with an initial value and then adjust that value to arrive at their final decision. Typically, decision makers fail to sufficiently adjust away from the anchor value.³¹⁵ Thus, if jurors anchor on the value of the cap, awards could, paradoxically, be pulled higher in some cases.

The first experimental study examining caps investigated the effects of caps on compensatory damage awards, particularly the pain and suffering component. Saks, Hollinger, Wissler, Evans, and Hart asked students to make awards for pain and suffering in response to a description of an injury; some participants were told that there was a cap on the amount they could award. They found that when the plaintiff's injury was more severe, caps on compensatory damage awards decreased the size and the variability of compensatory damage awards.³¹⁶ However, in cases in which the plaintiff's injury was less severe, a cap on compensatory damage awards increased both the size and variability of the compensatory damage awards.³¹⁷ Saks and his colleagues suggest that the cap served to anchor the jurors' responses, assimilating their awards toward the value of the cap.³¹⁸ In a similar study, Hinsz and Indahl found that mock jurors' damage awards were pulled toward an anchor value, whether the anchor was presented as a limit or as a recommendation.³¹⁹

315. See Tversky & Kahneman, *supra* note 193; Barry Markovsky, *Anchoring Justice*, 51 SOC. PSYCHOL. Q. 213 (1988).

316. See Michael J. Saks et al., *Reducing Variability in Civil Jury Awards*, 21 LAW & HUM. BEHAV. 243, 252-53 (1997).

317. See *id.* at 250-51.

318. *Id.* at 254.

319. Verlin B. Hinsz & Kristin E. Indahl, *Assimilation to Anchors for Damage Awards in a Mock Civil Trial*, 25 J. APPLIED SOC. PSYCHOL. 991, 1005, 1010, 1013-15 (1995). Results consistent with anchoring and adjustment processes have also been obtained in the context of attorney requests for damage awards. A number of studies have found that as the amount of compensatory damages requested by the plaintiff increased, the amount of compensatory damages awarded increased as well. *E.g.*, Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in*

Robbennolt and Studebaker specifically studied the effect of caps on punitive damage awards. Their results were similar to the findings of the studies examining compensatory damages. In two separate studies in which students were asked to award damages in response to a personal injury scenario, as the level of the cap on punitive damages increased, the size and variability of mock jurors' punitive damage awards increased as well.³²⁰ Notably, when the cap was set high relative to the typical amount of punitive damages mock jurors awarded in the case in the absence of the cap, the size and variability of punitive damage awards were higher than awards in a control condition in which no cap was presented.³²¹

Personal Injury Verdicts, 10 APPLIED COGNITIVE PSYCHOL. 519, 526, 531 (1996); Hastie et al., *supra* note 90, at 454; John Malouff & Nicola S. Schutte, *Shaping Juror Attitudes: Effects of Requesting Different Damages Amounts in Personal Injury Trials*, 129 J. SOC. PSYCHOL. 491, 494 (1989); see also Mollie W. Marti & Roselle L. Wissler, *Be Careful What You Ask For: The Effect of Anchors on Personal Injury Damages Awards*, 6 J. EXPERIMENTAL PSYCH: APPLIED 91 (2000) (finding plaintiff and defense request increased and decreased awards, respectively, although less so when the request was extreme). Jurors may also presume that the amount in damages requested by the plaintiff has some content, that is, that the amount of the request has some relation to the facts of the case and to the appropriate amount to award. Viscusi also purports to show an anchoring effect of the amount requested by the plaintiff's attorney. Viscusi, *supra* note 106, at 329. However, the introduction of the plaintiff's request as an anchor was accompanied by several arguments by the plaintiff about why a high award would be appropriate (e.g., the relevance of net worth and profits, suggestions about how to calculate the award, the necessity of protecting the public, the need to get the defendant's attention etc.). *Id.* at 348. The arguments provided confound the findings about the plaintiff's request as an anchor; it is impossible to distinguish the effect of the plaintiff's request from the effects of the persuasive arguments. Viscusi also examined the possible anchoring effects caused by media reporting and found that providing participants with a media report of a "similar case" influenced their punitive damage awards. *Id.* at 329; see also Guthrie et al., *supra* note 192 (anchoring effect of diversity amount on judges' damage awards); Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 OHIO ST. J. DISPUTE RES. 1, 18-19 (1994) (anchoring effect of first offer in settlement negotiation).

320. See Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 LAW & HUM. BEHAV. 353, 359, 361, 364-66 (1999).

321. See *id.* at 359; see also Greene et al., *Limiting Awards*, *supra* note 81, at 225 (finding that relatively low caps reduced awards). Some states explicitly provide that the jury is not to be informed of the cap. See, e.g., ALA. CODE § 6-11-21(g) (2000) ("jury may neither be instructed nor informed" of the cap); FLA. STAT. § 768.73(8) (2000) ("jury may neither be instructed nor informed" of the cap); IND. CODE § 34-51-3-3 (1998) (jury "may not be advised of" the cap); NEV.

Studies have found that jury awards are highly positively skewed such that the great majority of cases result in low and moderate awards and only a few cases result in high awards.³²² Accordingly, even with relatively moderate caps, a great many cases may be susceptible to the effects described here. Thus, while the intuition and the intent of tort reformers is that caps should keep awards down, the available experimental evidence suggests that caps on punitive damages could result in higher levels of punitive damages across cases.³²³

REV. STAT. § 42.005(3) (1996) (“jury must not be instructed, or otherwise advised” of the cap); N.J. STAT. ANN. § 2A:15-5.16 (West 2000) (“jury shall not be informed of the cap on punitive damages”); N.C. GEN. STAT. § 1D-25(c) (1999) (cap “shall not be made known to the trier of fact through any means, including voir dire, the introduction into evidence, argument, or instructions to the jury”); N.D. CENT. CODE § 32-03.2-11(4) (1996) (“jury may not be informed” of the cap); OHIO REV. CODE ANN. § 2315.21(F) (Anderson 1998) (“[T]he court shall not instruct the jury with respect to the limits on punitive or exemplary damages . . . and neither counsel for any party nor a witness shall inform the jury or potential jurors of those limits.”); VA. CODE ANN. § 8.01-38.1 (Michie 2000) (“jury shall not be advised of the” cap); see also Michael S. Kang, *Don't Tell Juries About Statutory Damage Caps: The Merits of Nondisclosure*, 66 U. CHI. L. REV. 469 (1999) (arguing that juries should not be told about damage caps). However, the effectiveness of such a “blindfolding” provision assumes that jurors will not know about the cap. If any juror has information about the cap, the anchoring effect of the cap may still occur. Moreover, jurors may have incomplete or incorrect information about damages caps. For example, a juror may be aware that there is a cap, but be incorrect about the level of the cap. To the extent that jurors are not informed about the cap and their assumptions about the law of damages vary (i.e., some juries end up with correct information, others end up with varying degrees of incorrect information), blindfolding the jury may result in even greater variability. See Diamond & Casper, *supra* note 143, at 518; see also Guthrie et al., *supra* note 192, at 793 (demonstrating that judges are susceptible to anchoring effects). Because judges will be aware of any damage cap, such caps might influence punitive damage awards determined by judges.

322. See generally Daniels & Martin, *supra* note 23.

323. The results of archival studies are mixed. Eisenberg and his colleagues conducted an analysis of civil trial outcomes from forty-five counties in 1996 in which they compared the rates of punitive damage awards in states with caps on punitive damage awards to states without punitive damage caps. They found no significant differences in the frequency or size of punitive damage awards between states with and states without punitive damage caps. Eisenberg et al., *Juries, Judges, supra* note 75, at 769-70; see also Patricia Danzon, *The Frequency and Severity of Medical Malpractice Claims*, 49 LAW & CONTEMP. PROBS. 57, 77-79 (1986) (finding that caps reduce total awards in medical malpractice cases); William P. Gronfein & Eleanor DeArman Kinney, *Controlling Large Mal Claims: The Unexpected Impact of Damage Caps*, 16 J. HEALTH POL. POL'Y & L. 441 (1991) (finding that awards in Indiana (with cap)

Caps may also have paradoxical effects on litigation strategy, particularly the settlement of cases. The presence of a cap on punitive damages is likely to influence the expectations that litigants and attorneys have about potential outcomes at trial in ways that might affect pretrial bargaining. In a series of studies, Babcock and Pogarsky experimentally examined the effects of damage caps on negotiation patterns.³²⁴ They found that when a damage cap was low enough to prohibit many awards that the participants might have predicted, participants who were subject to the cap were marginally more likely to settle and to settle at lower amounts than were those for whom damages were not capped.³²⁵ However, when the cap was high relative to participants' expectations, they found that participants in the capped condition were *less* likely to reach a settlement than were those in the uncapped condition.³²⁶

Babcock and Pogarsky found evidence that these effects of damage caps on settlement were mediated by the participants' judgments about the probable result at trial. Consistent with a growing body of research on the effects of egocentric biases on settlement negotiations, they found that plaintiffs made higher estimates of the factfinder's likely award than did defendants.³²⁷ This is an example of

are higher than awards in Michigan and Ohio (with no caps)). Frank A. Sloan et al., *Effects of Tort Reform on Value of Closed Medical Malpractice Claims*, 14 J. HEALTH POL., POL'Y & L. 663 (1989) (finding no effect of limitations on punitive damages, but finding caps on non-economic award or total award reduced size of indemnity payments).

324. See Linda Babcock & Greg Pogarsky, *Damage Caps and Settlement: A Behavioral Approach*, 28 J. LEGAL STUD. 341 (1999) [hereinafter Babcock & Pogarsky, *A Behavioral Approach*]; Greg Pogarsky & Linda Babcock, *Damage Caps, Motivated Anchoring, and Bargaining Impasse*, 30 J. LEGAL STUD. 143 (2001) [hereinafter Pogarsky & Babcock, *Damage Caps*]. In each study, participants were assigned to the roles of either plaintiff or defendant, provided with case facts, and asked to attempt to negotiate a settlement. Legal fees were assessed based on the length of time spent in reaching a settlement and students were graded based on the settlement results. Participants were either told there was a cap on damage awards or were told nothing about a cap. A *Behavioral Approach*, *supra*, at 359-63; *Damage Caps*, *supra*, at 150-53.

325. Babcock & Pogarsky, *A Behavioral Approach*, *supra* note 324, at 362 (the plaintiff's request was \$1 million, the average settlement in the uncapped condition was \$490,000, and the cap was set at \$250,000).

326. Pogarsky & Babcock, *Damage Caps*, *supra* note 324, at 154 (cap set at \$1 million); see also Robbennolt & Studebaker, *supra* note 320.

327. See Babcock & Pogarsky, *A Behavioral Approach*, *supra* note 324, at

egocentric bias, a cognitive heuristic under which a decision maker perceives and interprets information and forms expectations in a manner that is favorable to the decision maker.³²⁸ In addition, the cap served to anchor participants' predictions of judge's likely award.³²⁹ Thus, when the cap was relatively low, the disparity between the predictions of the plaintiffs and defendants was smaller in the capped condition than it was in the uncapped condition, facilitating settlement.³³⁰ However, when the cap was relatively high, plaintiffs' estimates increased to a greater degree than did defendants' estimates.³³¹ This disparity in the effects of a relatively high cap on plaintiffs' and defendants' predictions about trial outcomes discouraged settlement by increasing the discrepancy between the parties' positions.³³²

363-64; Pogarsky & Babcock, *Damage Caps*, *supra* note 324, at 155. Several studies have demonstrated that litigants form expectations about potential outcomes in a self-serving manner. In these studies, participants who were provided with the same case information, but were randomly assigned to the roles of plaintiff and defendant, made self-serving judgments about the case, with plaintiffs making higher estimates of a factfinder's likely award and of an objectively fair award than defendants. *See, e.g.*, Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337 (1995); Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109 (1997); George Loewenstein et al., *Self-Serving Assessments of Fairness and Pre-Trial Bargaining*, 22 J. LEGAL STUD. 135 (1993); Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Negotiation*, 51 ORG. BEHAV. & HUM. DECISION PROCESSES 176 (1992).

328. *See* MAX BAZERMAN, JUDGMENT IN MANAGERIAL DECISION MAKING 99-101 (4th ed. 1998); *see also* Eisenberg, *supra* note 194 (bankruptcy judges); Guthrie et al., *supra* note 192, at 811-16 (judges' reversal rates); Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129 (1954) (Princeton/Dartmouth football game); David M. Messick & Keith Sentis, *Fairness and Preference*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 418 (1979) (mechanisms for compensating joint work); Ross & Sicoly, *supra* note 194 (estimating percentage of household work performed).

329. *See* Babcock & Pogarsky, *A Behavioral Approach*, *supra* note 324, at 363-64; Pogarsky & Babcock, *Damage Caps*, *supra* note 324, at 155.

330. *See* Babcock & Pogarsky, *A Behavioral Approach*, *supra* note 324, at 364.

331. *See* Pogarsky & Babcock, *Damage Caps*, *supra* note 324, at 155.

332. These two studies investigate the effect of caps on total damages, rather than caps only on punitive damages (leaving compensatory damages unlimited). It is possible that if compensatory damages, particularly general damages, were unlimited, these effects might be attenuated. While further study is warranted, the results are nonetheless instructive about the unintended effects that caps might have on settlement.

3. *Standard of Proof.* In recent years, many states have heightened the evidentiary standard of proof that must be met in order to impose punitive damages, requiring "clear and convincing" evidence for a punitive damage award.³³³ While the standard for proving the defendant's compensatory liability in these states remains by a preponderance of the evidence, once such liability is proven, the plaintiff must prove by clear and convincing evidence that punitive damages are warranted. This higher burden of proof strikes the balance between the fact that punitive damages are awarded in a lawsuit between two private parties and the fact that punitive damages are assessed in order to punish the defendant.³³⁴ One state, Colorado, has adopted the even higher "beyond a reasonable doubt" standard for the determination of punitive damages.³³⁵ The remaining states continue to use the preponderance of evidence standard. The effectiveness of adopting a higher standard of proof for punitive damages assumes that jurors can distinguish between the varying standards and apply them appropriately.

Little empirical research has examined jurors' response to differing standards of proof in civil trials. However, the existing research suggests that the stated standard of proof may have little impact on decision-making. Kagehiro and Stanton asked students to render verdicts in civil cases using traditional legal instructions describing one of the three evidentiary standards. They found that participants' liability verdicts were unaffected by the standard they were instructed to use.³³⁶ More research is needed to determine

333. See, e.g., ALA. CODE § 6-11-20(a) (Supp. 2000); ALASKA STAT. § 09.17.020m (Michie 2000); CAL. CIV. CODE § 3294(a) (West 1997); FLA STAT. ANN. § 768.725 (West 2000); GA. CODE ANN. § 51-12-5.1(b) (2000); IDAHO CODE § 6-1604(1) (Michie 1998); IND. CODE ANN. § 34-51-3-2 (1998); IOWA CODE § 668A.1(1)(a) (1998); KAN. STAT. ANN. § 60-3702(c) (1998); MINN. STAT. ANN. § 549.20(a) (West 2000); MISS. CODE ANN. § 11-1-65(1)(a) (1999); MONT. CODE ANN. § 27-1-221(5) (2001); NEV. REV. STAT. § 42.005 (1996); N.J. STAT. ANN. § 2A:15-5.12 (West 2000); N.C. GEN. STAT. § 1D-15(b) (1999); N.D. CENT. CODE § 32-03.2-11(1) (1996); OHIO REV. CODE ANN. § 2315.21(D)(2) (Anderson 1998); OKLA. STAT. ANN. tit. 23, § 9.1(B) (Supp. 2001); OR. REV. STAT. ANN. § 18.537(1) (1999); S.C. CODE ANN. § 15-33-135 (1993); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon 2001); UTAH CODE ANN. § 78-18-1(1)(a) (2000); see also UNIF. MODEL PUNITIVE DAMAGES ACT §5 (1996).

334. See Hurd & Zollers, *supra* note 31, at 201.

335. COLO. REV. STAT. ANN. § 13-25-127(2) (West 1997).

336. Dorothy K. Kagehiro & W. Clark Stanton, *Legal vs. Quantified*

the robustness of these findings. Moreover, there are no studies specifically examining the impact of the standard of proof on punitive damage awards.

It is possible that even if raising the standard of proof did impact the frequency with which defendants are found liable for punitive damages, the impact might not be in the direction intended. It has been suggested that, in practice, requiring clear and convincing evidence that punitive damages are warranted could operate contrary to proponents' intentions:

Though "clear and convincing" is a higher *legal* burden than proving liability by a preponderance of the evidence, the new standard may work in a plaintiff's favor for common-sense reasons. The term "by a preponderance of the evidence" is often explained to the jury as 51% or the majority of the evidence. It could raise in the jurors' minds a mathematical requirement, a ratio, or an amount that must outweigh the opponent's evidence. "Clear and convincing" on the other hand, is solely [sic] ends oriented. The law mentions nothing of a specific amount of evidence required, but rather focuses on the feelings of the jury The standard thus becomes *subjective* in orientation and *focuses on quality rather than quantity*. Whether this will make any difference at all as a practical matter remains to be seen.³³⁷

Thus, while an increased standard of proof should make it more difficult for jurors to find punitive damages liability, there is some indication from previous research that little or no effect is likely. Moreover, the intuition of some commentators is that any effect might be to reduce the barriers to findings of punitive liability. A more definitive answer awaits research specifically examining the effect of the standard of proof on punitive damages.³³⁸

Definitions of Standards of Proof, 9 LAW & HUM. BEHAV. 159, 164, 168 (1985). (finding some differences between standards if the standards were expressed in quantified terms).

337. Crump, *supra* note 33, at 176 n.8 (citing Jan Woodward Fox & Kate McConnico, *Punitive Damages in Texas 1995: Chapter 41 of the Texas Civil Practice & Remedies Code*, 21 T. MARSHALL L. REV. 21, 27 (1996)) (emphasis added).

338. The symbolic function of such standards should not be ignored. Even if such standards prove to have little effect, they may still serve the expressive function of communicating a different balance of interests.

4. *Bifurcation*. Another reform that many states have adopted is the bifurcation of the trial into two parts, separating the issue of punitive damages from the rest of the trial.³³⁹ This is done out of a concern that some information relevant to a determination of punitive damages, such as the wealth of the defendant, may prejudice the jury in its initial determination of liability.³⁴⁰ In recent years, bifurcation of punitive damage claims has been one of the fastest growing areas of bifurcation under Rule 42(b) of the Federal Rules of Civil Procedure.³⁴¹

Landsman and his colleagues experimentally examined the effects of bifurcating the issue of punitive damages. Jury-eligible adults were asked to review a videotaped trial in a case involving exposure to a toxic substance and to assess liability and damages. They found that individual jurors who heard punitive damages testimony in a bifurcated trial were less likely to find the defendant liable for the injuries to the plaintiff than were mock jurors who

339. See, e.g., ALASKA STAT. § 09.17.020(a) (Michie 1997) (separate proceeding shall be conducted to determine amount of punitive damages); CAL. CIV. CODE § 3295(d) (West 1997) (defendant may apply for separate proceeding); GA. CODE ANN. § 51-12-5.1(2) (2000) (trial shall be recommenced to determine amount of punitive damages); KAN. STAT. ANN. § 60-3702(a) (1992) (amount of punitive damages shall be determined in a separate proceeding); MINN. STAT. ANN. § 459.20(3) (West 2000) (separate proceeding to determine liability for and amount of punitive damages); MO. REV. STAT. § 510.263(1) (2001) (any party may request bifurcated trial for punitive damages); MONT. CODE ANN. § 27-1-221(7)(a) (1996) (separate proceeding to determine amount of punitive damages); NEV. REV. STAT. § 42.005 (1999) (separate proceeding to determine amount of punitive damages); N.J. STAT. ANN. § 2A:15-5.13 (West 2000) (defendant may request bifurcation of punitive damages); N.C. GEN. STAT. § 1D-30 (2000) (defendant may request bifurcation of punitive damages); N.D. CENT. CODE § 32-03.2-11 (1999) (either party may elect to bifurcate punitive damages); OHIO REV. CODE ANN. § 2315.21 (West 2001) (any party may request bifurcation of punitive damages); OKLA. STAT. ANN. tit. 23, § 9.1 (West 2001) (amount of punitive damage to be determined in a separate proceeding); 40 PA. CONS. STAT. ANN. § 1301.812-A(e) (West 1999) (punitive damages shall be bifurcated); TEX. CIV. PRAC. & REM. CODE ANN. § 41.009 (Vernon 2001) (defendant may request bifurcation of amount of punitive damages); UTAH CODE ANN. § 78-18-1(2) (1996) (evidence of defendant's financial condition admissible only after finding of punitive liability); see also UNIF. MODEL PUNITIVE DAMAGES ACT § 11 (permitting bifurcation of punitive damage claim).

340. Hurd & Zollers, *supra* note 31, at 197; see also Edith Greene et al., *The Effects of Defendant Conduct on Jury Damage Awards*, 86 J. APPLIED PSYCHOL. 228, 232 (2001) (finding influence of nature of defendant's conduct on compensatory damage awards).

341. Landsman et al., *supra* note 180, at 305; FED. R. CIV. P. 42(b).

made this decision in a unitary trial.³⁴² However, jurors who found compensatory liability in bifurcated trials were more likely to find the defendant liable for punitive damages and awarded larger amounts of punitive damages than jurors who found liability in unitary trials.³⁴³ Landsman concluded that bifurcation may have effects that work at cross-purposes. On the one hand, bifurcation may protect defendants by preventing information that is relevant only to punitive damages from influencing compensatory liability decisions. Conversely, defendants who lose on liability in a bifurcated trial face the prospect of a more likely and larger punitive damage award.³⁴⁴ Similar results were obtained by Greene, Woody, and Winter who asked jury-eligible adults to award both compensatory and punitive damages in either a products liability case, an automobile negligence case, or a medical malpractice case. They found that jurors' punitive damage awards were higher in bifurcated trials than in unitary trials in all three cases.³⁴⁵

Horowitz and Bordens examined the effects of bifurcation in a toxic tort case. They found that jury-eligible adults were more likely to find the defendant liable for the plaintiff's injuries in the unitary trial than in the bifurcated trial.³⁴⁶ They also found higher damage awards in the bifurcated trial, although they found higher compensatory damage awards rather than higher punitive damage awards.³⁴⁷ Similarly, Robbennolt and Studebaker found that students awarded similar amounts in punitive damages, but higher compensatory damages in a unitary trial.³⁴⁸

Thus, there is experimental evidence that there is spillover or leakage between punitive damages and liability in unitary trials and that bifurcation can help to prevent such confusion. However, the research also suggests that

342. Landsman et al., *supra* note 180, at 316. This pattern did not hold for jurors who deliberated as a group. *Id.* at 322; see also Hans Zeisel & Thomas Callahan, *Split Trials and Time Savings: A Statistical Analysis*, 76 HARV. L. REV. 1606 (1963) (finding lower rates of liability in bifurcated trials than in unitary trials in a sample of federal civil trials).

343. *Id.* at 323-24.

344. *Id.* at 334.

345. Greene et al., *Is Bifurcation Necessary?*, *supra* note 81, at 198.

346. Horowitz & Bordens, *supra* note 82, at 278-79.

347. *Id.*

348. Robbennolt & Studebaker, *supra* note 320, at 364-65.

the effects of bifurcation are complex and that bifurcation may ultimately result in increased amounts of damages (compensatory or punitive) awarded against defendants who are found liable for the plaintiff's injuries.

5. *Split-Recovery Statutes.* In theory, plaintiffs are fully compensated through compensatory damages; punitive damages are awarded when an additional amount is required to adequately punish and deter the defendant. Responding to concerns that plaintiffs receiving a punitive damage award are receiving a windfall and that, accordingly, the punitive damage system is akin to a lottery or a jackpot, a number of states have enacted legislation that allocate some portion of the punitive damage award to the state.³⁴⁹ The portion of the award allocated to the state is

349. These are often referred to as "split-recovery" statutes. See, e.g., ALASKA STAT. § 09.17.020(j) (Michie 1997) (50% to general state fund); GA. CODE ANN. § 51-12-5(e)(2) (2000) (in products liability actions, 75% less costs and fees to Office of the Treasury and Fiscal Services); 735 ILL. COMP. STAT. ANN. § 2-1207 (West 1992) (court may apportion award among plaintiff, plaintiff's attorney, and State Department of Human Services); IND. CODE ANN. § 34-51-3-6 (West 1999) (75% to Violent Crimes Victims Compensation Fund); IOWA CODE ANN. § 668A.1(2) (West 1998) (under some circumstances, 75% to civil reparations trust fund); MO. REV. STAT. § 537.675 (1997) (50% to Tort Victims' Compensation Fund); OR. REV. STAT. ANN. § 18.540 (1999) (60% to Criminal Injuries Compensation Account); 73 PA. CONS. STAT. § 2105(3) (2001) (court has discretion to select organization(s) "engaged in charitable or educational activities involving the fine arts" to receive award); UTAH CODE ANN. § 78-18-1(3) (2000) (50% of amount in excess of \$20,000 less fees and costs to general state fund). *But see* ALA. CODE § 6-11-21(1) (1999) (no portion of the punitive damage award shall be allocated to the state). See generally James A. Breslo, *Taking the Punitive Damage Windfall away from the Plaintiff: An Analysis*, 86 NW. U. L. REV. 1130 (1992); Richard W. Murphy, *Superbifurcation: Making Room for State Prosecution in the Punitive Damages Process*, 76 N.C. L. REV. 463 (1998).

Provisions allocating punitive damage awards to the state have been challenged on constitutional grounds in some states. A Colorado provision was held unconstitutional in violation of the takings clauses of the state and federal constitutions. *Kirk v. Denver Publ'g Co.*, 818 P.2d 262 (Colo. 1991). *But see* *State v. Mosley*, 436 S.E.2d 632 (Ga. 1993), *cert. denied* 511 U.S. 1107 (1994) (holding that GA. CODE ANN. § 51-12-5.1(e)(2) does not violate takings clauses of state and federal constitutions).

Split-recovery statutes may also raise constitutional questions under the Excessive Fines Clause of the U.S. Constitution. In *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, the Supreme Court held that the Excessive Fines Clause does not apply to punitive damages awards "in cases between private parties." 492 U.S. 257, 260 (1989). Accordingly, the Court held that "when the government neither has prosecuted the action nor has any right to receive a

typically distributed to a state general revenue fund or to some specific fund, such as a fund to compensate tort victims. Measures like these are intended to remove at least some of the windfall to the plaintiff without directly inhibiting the deterrence and punishment functions of punitive damages by limiting their size.³⁵⁰ Chief Justice Rehnquist noted that:

Punitive damages are generally seen as a windfall to plaintiffs, who are entitled to receive full compensation for their injuries—but no more. Even assuming that a punitive “fine” should be imposed after a civil trial, the penalty should go to the State, not to the plaintiff—who by hypothesis is fully compensated.³⁵¹

However, in eliminating or reducing the benefits to the plaintiff, such measures may decrease the incentive for private law enforcement.³⁵²

It is the intuition of many that allocating punitive damage awards to the state will result in an increase in the size of such awards. First, it is thought that if punitive damages are awarded to the state, jurors will be relieved of any concern about awarding a windfall to the plaintiff and will feel free to fully punish the defendant.³⁵³ Second, because judges and jurors are residents and taxpayers in the states that would be receiving the award, they have some interest in the amount of the award and, accordingly, may award higher amounts in punitive damages than they would if the entire award was to go to the plaintiff.³⁵⁴ Moreover, if the portion of the punitive damage award allocated to the state is directed to a state fund which jurors

share of the damages awarded,” the Excessive Fines Clause is not implicated. *Id.* at 264. Thus, the Court stopped short of holding the Excessive Fines Clause applicable only to criminal cases, but limited its holding to those cases in which the government did not play a role in the prosecution or collect any of the proceeds. This ruling leaves open the question of whether the clause would place limits on awards if the state were to participate more directly, especially if the state were to receive a portion of the punitive damages award.

350. Polinsky & Shavell, *supra* note 33, at 921; Hoole, *supra* note 2, at 481.

351. *Smith v. Wade*, 461 U.S. 30, 59 (1982) (Rehnquist, J., dissenting).

352. Dede W. Welles, *Charitable Punishment: A Proposal to Award Punitive Damages to Nonprofit Organizations*, 9 STAN. L. & POL'Y REV. 203, 204-05 (1998).

353. E. Jeffrey Grube, *Punitive Damages: A Misplaced Remedy*, 66 S. CAL. L. REV. 839, 855 (1993).

354. Michelle Riley Stephens, *Punitive Damages: Making the Plaintiff Whole or Making the State Wealthy?*, 19 AM. J. TRIAL ADVOC. 698, 700 (1996); *Jury Determination of Punitive Damages*, *supra* note 240, at 1535.

perceive as a "good cause," the temptation, again, may be to increase the punitive damages assessed.³⁵⁵ One commentator stated the intuition thus: "If jurors realized that any punitive damage award were to be returned to public use, the size of the awards would not simply skyrocket. They would follow the Voyager spacecraft out of the solar system."³⁵⁶ Indeed, in response to such concerns, some states do not inform the jury that part of the punitive damage award will go to the state.³⁵⁷

However, the only experimental study to examine the effect of allocating the punitive damage award to the state rather than to the plaintiff found that such measures had precisely the opposite effect. In two studies, Anderson and MacCoun asked students to award damages in response to a personal injury case; in some conditions the punitive damages awarded were to go to the plaintiff, in other conditions the award was to go to the state. They found that jurors were more likely to award punitive damages when they were to be awarded to the plaintiff than when they were to be awarded to the state and found no differences in the size of the punitive damages awarded.³⁵⁸ This was true both when the state treasury was to receive the award³⁵⁹ and when a consortium of relatively uncontroversial state funds was to receive the award.³⁶⁰ Anderson and MacCoun suggest that perhaps punitive damages serve a symbolic restorative function that is dependent upon receipt by the plaintiff.³⁶¹ In such a relational capacity, punitive damages

355. *Jury Determination of Punitive Damages*, *supra* note 240, at 1535-36.

356. Steven J. Sensibar, *Punitive Damages: A Look at Origins and Legitimacy*, 41 FED'N INS. & CORP. COUNS. Q. 375, 387 (1991).

357. *See, e.g.*, ALA. CODE § 6-11-21(g) (1999) ("jury may neither be instructed nor informed"); IND. CODE ANN. § 34-51-3-3 (West 1999) (jury may not be informed of the allocation of punitive damage awards). *But see supra* note 321 (discussing the risks of blindfolding a jury to this kind of information).

358. Anderson & MacCoun, *supra* note 43, at 320-21.

359. *Id.* (study 1).

360. *Id.* at 325 (study 2). The charities used were adapted from the tax donation charities listed on the 1995 California state income tax form: State Children's Trust Fund for the Prevention of Child Abuse, California Breast Cancer Research Fund, California Firefighters' Memorial Fund, California Public School Library Protection Fund, and California Infectious Disease Research Fund. *Id.* at 323.

361. *Id.* at 326-27; *see also* G. Bazemore & M. Umbreit, *Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime*, 41 CRIME & DELINQ. 296 (1995).

may advance a societal interest in mending the breach caused by the defendant's reprehensible actions.³⁶²

6. *Judge-Determined Punitive Damages.* Responding to popular concerns about juries and punitive damages, a number of observers have advocated that "[t]he most obvious first step in promoting predictability and rationality is for judges instead of juries to make the primary determination of punitive awards."³⁶³ This type of reform is usually justified by arguments that judges are less susceptible to bias and prejudice and are more qualified, through training and experience, to determine damages.³⁶⁴ In his concurrence in *BMW of North America v. Gore*, Justice Breyer noted that one cannot "expect those jurors to interpret law like judges, who work within a

362. See also Baron & Ritov, *supra* note 119, at 25. The authors found that twenty-four of eighty-three participants were awarded greater amounts of compensation when the money was to be paid directly to the plaintiff than when a penalty was to go to the government, which would then compensate the injured party (only four participants awarded less). They concluded that "many people assign compensation not in terms of the injury but rather in terms of setting the balance right between the injurer, if any, and the victim." *Id.* at 31

363. *Problems and Proposals*, *supra* note 240, at 1802; see also Sunstein et al., *supra* note 70, at 2127 ("[A]n incremental shift from jury to judicial determinations of punitive damages appears to be the most promising [of proposed reforms].").

364. See Koenig & Rustad, *supra* note 37; Mallor & Roberts, *supra* note 244; Jane Mallor & Barry Roberts, *Punitive Damages: On the Path to a Principled Approach*, 50 HASTINGS L.J. 1001, 1012 (1999); Mogin, *supra* note 240; Lisa M. Sharkey, *Judge or Jury: Who Should Assess Punitive Damages?*, 64 U. CIN. L. REV. 1089 (1996); Viscusi, *supra* note 71. Specifically addressing the result of the Landsman *et al.* study of bifurcation, Mallor and Roberts argue that "It seems unlikely that this inflationary effect [of larger punitive damage awards in bifurcated trials than unified trials] would occur if the judge, rather than the jury, were assessing the damages." Mallor & Roberts, *Punitive Damages: On the Path to a Principled Approach*, *supra*, at 1012; cf. Landsman et al., *supra* note 180, at 335-36. But see David Luban, *A Flawed Case Against Punitive Damages*, 87 GEO. L.J. 359, 362 (1998):

The contrast between juries and judges is remarkable: jurors award punitive damages in only one or two plaintiff's victories in fifty, and make large awards in only a small fraction of those; but judges remit in one punitive damages case out of two. Critics of punitive damages frequently complain about the unfettered discretion of juries to award punitive damages of any size that tickles their fancy, but these same critics conveniently neglect the equally unfettered discretion of judges to reduce awards without explanation. Compared with remitting judges, jurors are models of restraint.

Id.

discipline and hierarchical organization that normally promotes roughly uniform interpretation and application of the law.³⁶⁵

Consistent with this reasoning, a few states have decided to allow judges to assess the amount of punitive damages to be awarded rather than juries.³⁶⁶ Under these provisions, the jury determines compensatory damages (both liability and amount) and determines liability for punitive damages; then the judge steps in and fixes the amount of punitive damages to be awarded. Even where the judge has not been specifically allocated the power to determine punitive damage awards in all cases, judges determine punitive damages in bench trials and have some measure of control over punitive damage awards through evidentiary rulings, the decision whether to allow a claim for punitive damages, and the formulation of jury instructions. In addition, judges have a central role in reviewing jury awards of punitive damages for excessiveness.³⁶⁷

However, the empirical evidence described above demonstrates notable similarity in the decision-making of jurors and judges.³⁶⁸ In particular, the existing research lends little clear support for the contention that judges would make smaller or more consistent punitive damage awards. Specifically, judges report a high degree of agreement with jury verdicts and archival studies report striking similarities in decision-making (and even find that

365. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 596 (1996) (Breyer, J., concurring).

366. *See, e.g.*, CONN. GEN. STAT. ANN., § 52-240b (West 1991) (court shall determine amount of punitive damages); KAN. STAT. ANN. § 60-3702 (court shall conduct separate hearing to determine amount of punitive damages); *see also, e.g.*, 15 U.S.C. § 2805(d)(2) (1994) (exemplary damages to be determined by the court, rather than by the jury); MODEL UNIFORM PRODUCTS LIABILITY ACT § 120(B). For discussion about whether judicial determination of punitive damages violates the right to trial by jury guaranteed in the Seventh Amendment of the U.S. Constitution, see Charles Jared Knight, *State-Law Punitive Damage Schemes and the Seventh Amendment Right to Jury Trial in the Federal Courts*, 14 REV. LITIG. 657 (1995); Murphy, *supra* note 287; Scheiner, *supra* note 186. While at least one state supreme court has upheld a statute providing for judicial assessment of punitive damages, *Smith v. Printup*, 866 P.2d 985 (Kan. 1993), at least one other state has found such a statute unconstitutional. *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397 (Ohio 1994).

367. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 524 (2001).

368. *See supra* Part II.D.

plaintiffs are often more successful in front of judges than before juries). Certainly, the research cannot rule out the possibility of systematic differences in the punitive damages decisions of judges and jurors in some circumstances. In particular, several studies show a greater tendency on the part of jurors to find punitive liability, although others find no differences. To the extent that judges determine that punitive damages are legally inappropriate in these cases, they may refuse to instruct the jury about punitive damages. Empirical research that identifies the circumstances under which differences between judges and jurors emerge and that paints a more nuanced picture of the conditions under which differences emerge will go a long way toward informing our understanding of punitive damages decision-making. In the meantime, it does not appear that reforms that reallocate punitive damages decision-making to judges will have the dramatic effects that proponents expect.

7. *Jury Instructions.* Traditionally, juries have been empowered to use their discretion to determine whether or not an award of punitive damages is justified, and if so, in what amount.³⁶⁹ However, the instructions that are provided to guide the jury's use of discretion in making these decisions generally provide little assistance. The following instruction is typical:

If you find that the defendant's conduct was willful and wanton and proximately caused injury to the plaintiff and if you believe that justice and the public good require it, you may, in addition to any other damages to which you find the plaintiff entitled, award an amount which will serve to punish the defendant³⁷⁰ and to deter the defendant and others from similar conduct.

Vague instructions such as this one raise the concern that juries are not being given sufficient guidance. Melsheimer and Stodghill argue that such vague instructions are "little better than advising the jury to 'do the right thing.' The jury is given no guidepost with which to measure whether one million dollars or one hundred is

369. *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991); Melsheimer & Stodghill, *supra* note 311, at 331.

370. ILL. SUPREME COURT COMM. ON JURY INSTRUCTIONS IN CIVIL CASES, ILL. PATTERN JURY INSTRUCTIONS—CIVIL 35.01 (2000).

appropriate punishment.”³⁷¹ Given the finding that jurors have difficulty translating their outrage into a dollar amount,³⁷² this lack of guidance should be of significant concern.

The U.S. Supreme Court has evaluated jury instructions on punitive damages on several occasions. In *Haslip*, the Court found that the jury’s inherent discretion was adequately limited by confining the jury to the purposes of punitive damages—punishment and deterrence—by requiring the jury to take into account the character and degree of the wrong, and by reminding the jury that they were not required to award any punitive damages.³⁷³ However, Justice O’Connor, in dissent, noted:

371. Melsheimer & Stodghill, *supra* note 311, at 337. At least one state supreme court has concluded that “BMW demands that we articulate objective standards for the imposition of punitive damages that can be communicated to the jury in the form of instructions and against which the imposition of the punitive award can be weighed in the process of judicial review.” *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040, 1045 (Wyo. 1998) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996)); *see also id.* at 1053 (“[T]he only sensible approach is to tell the arbiter of punitive damages [the jury] what the rules are.”); *Gerassy v. Digital Equip. Corp.*, 950 F. Supp. 519, 521 (E.D.N.Y. 1997) (“If the jury is to accomplish its task under the Seventh Amendment, it is entitled to be informed of its role.”). Lack of guidance to the jury may also create difficulty for reviewing courts. If juries are not given meaningful standards to apply to the facts in order to determine whether and in what amount punitive damages should be awarded, it is difficult for a trial or appellate court to adequately review the jury’s decision. Further, appellate review of punitive damages without adequate standards to guide the court becomes merely the court substituting its standardless determination for the jury’s standardless determination. Melsheimer & Stodghill, *supra* note 311, at 338-39. Ellis notes that without more meaningful standards to guide decisions about punitive damages, “judicial decisions reducing large awards make little contribution to consistency and certainty; they merely reduce the probability that very large awards will be upheld.” Ellis, *supra* note 32, at 55.

372. *See supra* Part II.C.2.

373. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991). The trial court instructed the jury:

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 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

States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so. Rarely is a jury told anything more specific than “do what you think best.”

... [There is] a strong need to provide juries with standards to constrain their discretion so that they may exercise their power wisely, not capriciously or maliciously. The Constitution requires as much.³⁷⁴

O'Connor concluded that the instruction at issue “identified the ultimate destination, but did not tell the jury how to get there. Due process may not require a detailed roadmap, but it certainly requires directions of some sort.”³⁷⁵ Making a similar assessment of the instruction at issue in *TXO*,³⁷⁶ Justice O'Connor concluded in dissent that

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.

499 U.S. at 6 n.1 (internal quotation marks omitted).

374. *Id.* at 42-43 (O'Connor, J., dissenting).

375. *Id.* at 49.

376. In *TXO*, the jury was instructed:

In addition to actual or compensatory damages, the law permits the jury, under certain circumstances, to make an award of punitive damages, in order to punish the wrongdoer for his misconduct, to serve as an example or warning to others not to engage in such conduct and to provide additional compensation for the conduct to which the injured parties have been subjected.

If you find from a preponderance of the evidence that TXO Production Corp. is guilty of wanton, wilful, malicious or reckless conduct which shows an indifference to the right of others, then you may make an award of punitive damages in this case.

In assessing punitive damages, if any, you should take into consideration all of the circumstances surrounding the particular occurrence, including the nature of the wrongdoing, the extent of the harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances which may operate to reduce the amount of the damages. The object of such punishment is to deter TXO Production Corp. and others from

"the lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict."³⁷⁷

A few states afford somewhat more guidance to jurors by providing statutory standards to guide the punitive damages decision. For example, the California jury instructions provide definitions of several legal terms and a list of factors that the jury is to consider in determining the amount of the award.³⁷⁸ Commentators have also proposed

committing like offenses in the future. Therefore the law recognizes that to in fact deter such conduct may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances.

TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 464 n.29 (1993).

377. *Id.* at 475 (O'Connor, J., dissenting).

378. The California jury instruction reads:

If you find that plaintiff suffered actual injury, harm, or damage caused by ___ (cause of action) you may then consider whether you should award punitive damages against defendant [___ only], for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by clear and convincing evidence that said defendant was guilty of [oppression] [fraud] [or] [malice] in the conduct on which you base your finding of liability.

["Malice" means conduct which is [intended by the defendant to cause injury to the plaintiff] [or] [despicable conduct which is carried on by the defendant with a willful and conscious disregard for the] [rights] [or] [safety] of others.] [A person acts with conscious disregard of the rights or safety of others when [he] [she] is aware of the probable dangerous consequences of [his] [her] conduct and willfully and deliberately fails to avoid those consequences.] ["Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.]

["Despicable conduct" is conduct which is so [vile,] [base,] [contemptible,] [miserable,] [wretched,] [or] [loathsome] that it would be looked down upon and despised by ordinary decent people.]

["Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.] The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

- (1) The reprehensibility of the conduct of the defendant.
- (2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition.
- [(3) That the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff.]

specific instructions with more substantive content,³⁷⁹ and the Model Punitive Damages Act includes a list of factors that the factfinder ought to consider in determining the amount of punitive damages to award.³⁸⁰ Specific standards are intended to give some substance to the task that juries and judges are required to perform.

However, the impact of these more substantive instructions on juror decision processes and the resulting damage awards remains largely untested. Scant research has examined the influence of punitive damages jury instructions. For instance, we know relatively little about how jurors interpret the legal concepts involved, how different instructions influence patterns of awards, and if

If you find that plaintiff is entitled to an award of punitive damages against defendant, you shall state the amount of punitive damages separately in your verdict.

CALIFORNIA JURY INSTRUCTIONS—CIVIL 14.71 (8th ed. 1994); *see also* CAL. CIV. CODE § 3294 (West 1997).

379. *See, e.g.*, Perczek, *supra* note 313, at 866-73; Melsheimer & Stodghill, *supra* note 311; Polinsky & Shavell, *supra* note 33; *see also infra* Part III.C.2 (discussing specific proposals).

380. Section 7 of the Model Punitive Damages Act reads, in relevant part:

(a) If a defendant is found liable for punitive damages, a fair and reasonable amount of damages may be awarded The court shall instruct the jury in determining what constitutes a fair and reasonable amount of punitive damages to consider any evidence that has been admitted regarding the following factors:

- (1) the nature of defendant's wrongful conduct and its effect on the claimant and others;
- (2) the amount of compensatory damages;
- (3) any profit or gain, obtained by the defendant through the wrongful conduct, in excess of that likely to be divested by this and any other actions against the defendant for compensatory damages or restitution;
- (4) the defendant's present and future financial condition and the effect of an award on each condition;
- (5) any fines, penalties, damages, or restitution paid or to be paid by the defendant arising from the wrongful conduct;
- (6) any adverse effect of the award on innocent persons; any remedial measures taken or not taken by the defendant since the wrongful conduct;
- (7) compliance or noncompliance with any applicable standard promulgated by a governmental or other generally recognized agency or organization whose function it is to establish standards; and
- (8) any other aggravating or mitigating factors relevant to the amount of the award.

UNIF. MODEL PUNITIVE DAMAGES ACT § 7 (1996), *available at* <http://www.law.upenn.edu/bll/ulc/mpda/MPDAFNAL.htm> (last visited Dec. 6, 2001).

so, in what manner. Given research suggesting low comprehension and ability to use punitive damages instructions,³⁸¹ simply providing additional substantive instructions may not be sufficient.

C. *Exploring Reforms Aimed at Improving Decision-Making*

While the empirical research has identified several aspects of punitive damages decision-making that pose difficulties for jurors, the reforms described above do not address these problems. Jurors are influenced by non-representative reports of awards in previous cases, jurors have difficulty coming up with a dollar equivalent for their intended punishment, juror decisions appear to stress retribution to the neglect of optimal deterrence goals, and jurors have difficulty understanding jury instructions about punitive damages. Rather than continuing to pursue reform measures aimed at the largely illusory problem of overly-generous punitive damage awards, effective reform ought to target these specific problems. Psychological research suggests several avenues that this targeted reform might take.

1. *Improving Jury Instructions.* Because jurors have difficulty understanding traditional jury instructions,³⁸² simply providing additional substantive instructions may not be adequate to improve juror comprehension. Attention must also be paid to the content of the instructions themselves and to the manner in which they are conveyed to jurors. A number of studies have had some success in improving jurors' comprehension of instructions on other legal issues by rewriting the instructions using principles of psycholinguistics such as using shorter sentences, using more logical organization, and minimizing or eliminating uncommon and abstract words, legalese, words with multiple interpretations, passive voice, complex sentence structure, and negatives.³⁸³ Other techniques such as

381. See *supra* Part II.C.3.

382. See *supra* Part II.C.3.

383. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); Elwork et al., *supra* note 177; Irene Glassman Prager et al., *Improving Juror Understanding for Intervening Causation Instructions*, 2 FORENSIC REP. 187 (1989); Laurence J. Severance & Elizabeth F. Loftus,

instructing jurors about the law prior to the presentation of evidence,³⁸⁴ providing jurors with written instructions,³⁸⁵ and allowing jurors to take notes³⁸⁶ have been demonstrated

Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions, 17 LAW & SOC'Y REV. 153 (1982); Laurence J. Severance et al., *Criminology: Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198 (1984); Walter W. Steele Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77 (1988). There is some evidence in other contexts that group deliberation improves juror understanding if instructions are rewritten according to psycholinguistic principles. For a review, see Lieberman & Sales, *supra* note 177, at 634-35.

384. See Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 LAW & HUM. BEHAV. 409, 424-25 (1989) (finding that jurors in criminal trials, but not civil trials, who were preinstructed performed marginally better in understanding the instructions and that judges were less surprised and more satisfied with the verdicts); Saul M. Kassin & Lawrence S. Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts*, 37 J. PERSONALITY & SOC. PSYCHOL. 1877, 1881 (1979) (preinstructed jurors demonstrated better recall of the evidence); JURY TRIAL INNOVATIONS 161-65 (G. Thomas Munsterman et al. eds., 1997) (discussing use of jury instructions before closing arguments and use of plain english instructions); Vicki Smith, *The Feasibility and Utility of Pretrial Instruction in the Substantive Law: A Survey of Judges*, 14 LAW & HUM. BEHAV. 235 (1990). Preinstruction has been studied in the context of compensatory damages. There is some evidence that preinstructed jurors are better able to apply the judge's instructions. Two studies have found that the compensatory awards of jurors who were preinstructed about compensatory damages demonstrated better differentiation among differently injured plaintiffs than did the awards of jurors who were not preinstructed. Preinstructed jurors also demonstrated better memory for trial evidence. Lynne ForsterLee & Irwin Horowitz, *Enhancing Juror Competence in a Complex Trial*, 11 APPLIED COGNITIVE PSYCHOL. 305 (1997); Lynne ForsterLee et al., *Juror Competence in Civil Trials: Effects of Preinstruction and Evidence Technicality*, 78 J. APPLIED PSYCHOL. 14, 18-19 (1993). In an additional study by the same researchers, this effect was not replicated. See Martin J. Bourgeois et al., *Nominal and Interactive Groups: Effects of Preinstruction and Deliberations on Decisions and Evidence Recall in Complex Trials*, 80 J. APPLIED PSYCHOL. 58 (1995) (study 1).

385. See Heuer & Penrod, *supra* note 384, at 418-20 (finding that while jurors who were provided with written instructions found them helpful, no difference in understanding was detected); Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401, 428 (1990) (finding better comprehension with written instructions); Prager et al., *supra* note 383, at 191-92 (finding better comprehension with written instructions).

386. See Lynne ForsterLee et al., *Effects of Notetaking on Verdicts and Evidence Processing in a Civil Trial*, 18 LAW & HUM. BEHAV. 567, 574-75 (1994) (finding that jurors who were allowed to take notes were better able to distinguish among differently injured plaintiffs when awarding compensatory

to improve comprehension and ability to apply instructions somewhat.³⁸⁷ None of these techniques have been examined in the context of instructions on punitive damages.

2. *Providing Reasons and Explanations.* Research in social psychology and jury decision-making suggests that another approach to helping jurors determine punitive damages would be to provide explanations and reasons for the legal rules in addition to the rules themselves. Providing this information to jurors has been shown to improve juror compliance with the substantive law. In particular, this approach may help jurors adopt a deterrence perspective where appropriate.

Polinsky and Shavell have proposed a jury instruction calculated to improve decision-making by providing juries with a specific technique for determining the appropriate level of punitive damages.³⁸⁸ The Polinsky and Shavell instructions ask jurors to determine three different dollar amounts. First, jurors are to determine the amount necessary for deterrence. According to optimal deterrence theory, punitive damages provide the additional deterrence that is necessary when the defendant has some chance of escaping liability.³⁸⁹ Following this analysis, then, the total damages assessed against a defendant ought to equal the harm caused multiplied by the reciprocal of the probability

damages); Irwin A. Horowitz & Lynne ForsterLee, *The Effects of Note-Taking and Trial Transcript Access on Mock Jury Decisions in a Complex Civil Trial*, 25 LAW & HUM. BEHAV. 373, 387 (2001) (same). But see Larry Heuer & Steven Penrod, *Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking*, 12 LAW & HUM. BEHAV. 231, 244-51 (1988) (no effect of notetaking on understanding of instructions).

387. See generally Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423 (1985). Other techniques such as allowing jurors to ask questions and to discuss the case may also influence understanding. But these effects have not been demonstrated in empirical research to date. See Heuer & Penrod, *supra* note 384, at 251-57; Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29, 42-43 (1994) (finding that jurors (but not judges) found that allowing juror questions helped them understand the law); Paula L. Hannaford et al., *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 LAW & HUM. BEHAV. 359 (2000) (permitting jurors to discuss evidence during trial).

388. Polinsky & Shavell, *supra* note 33, at 957-62.

389. *Id.* at 957-61.

of being found liable (the “damages multiplier”).³⁹⁰ Thus, jurors are asked to estimate the likelihood that the defendant will escape liability, to use a table to obtain the multiplier that corresponds with this assessed likelihood, and to calculate a deterrence value by multiplying their compensatory damage award by the multiplier. Second, jurors are to determine the amount they think is necessary to punish the defendant. Finally, jurors are to determine the appropriate level of punitive damages by selecting an amount³⁹¹ between these deterrence and punishment values.

Viscusi conducted an experiment designed to evaluate the potential impact of this proposal on jury decision-making. Viscusi asked jury-eligible adults to read scenarios in which the likelihood that the defendant’s wrongful conduct would escape detection was explicitly stated. Participants were then asked to assess punitive damages using instructions following the Polinsky and Shavell approach.³⁹²

Across the scenarios, Viscusi determined that only 15% of participants made a correct calculation of the appropriate optimal deterrence amount.³⁹³ It is not clear from the data reported why so few participants’ answers were correct. A number of possibilities exist. Participants may have failed to use the proper terms in the calculation. Using the incorrect probability of escaping liability or the incorrect amount of compensatory damages might indicate a problem with understanding or remembering the trial evidence. Using an incorrect multiplier could signal a problem in understanding how to use the table appropriately. Alternately, participants could have failed to do the mathematical

390. *Id.* at 889.

391. *Id.* at 957-62.

392. Viscusi first asked participants to determine an amount of damages that would accomplish deterrence. He provided participants with a table that linked a list of probabilities of escaping liability (in 10% increments) with an appropriate multiplier and asked them to multiply the compensatory damages (given in the scenario as a fine) by the multiplier. Viscusi next asked participants to determine an amount of damages that would accomplish punishment. Finally, participants were to indicate an amount between these two values (deterrence and punishment) as their final punitive damages award. Viscusi, *supra* note 106, at 317-18.

393. *Id.* at 326.

calculations properly. Finally, participants may have been unwilling to perform the calculation requested.³⁹⁴

Participants were much more successful at providing final damage awards in the appropriate range: 76% of all respondents provided responses between the values for deterrence and punishment.³⁹⁵ However, driven by the low numbers of respondents who made correct determinations of the appropriate deterrence value, only 14% of respondents correctly calculated the deterrence value *and* made a final damage award that fell in the proper range.³⁹⁶ Viscusi also reports that the median deterrence value of statistical juries was often incorrect. However, it is highly unlikely that using the median of the group members' individual judgments correctly models the effect of group deliberation in this context. Groups have been found to be most effective in determining solutions to problems with demonstrably correct answers. Research suggests that this is because groups tend to be better able to recognize correct answers and to reject incorrect solutions.³⁹⁷ Thus, it is likely

394. Viscusi concluded that because a high proportion of those who gave incorrect answers to the deterrence question had college or professional degrees, they were likely capable of completing the calculation (simple multiplication) but were simply unwilling to follow the instructions. *Id.* at 338.

395. *Id.* at 326.

396. *Id.* at 325. Viscusi also argues that the general influence of these instructions in this instance "appear[ed] to be to decrease the assessed value of punitive damages awards for scenarios in which there is no anchoring effect." *Id.* at 330. It is possible that these instructions decreased punitive damages. However, it is impossible to draw that conclusion from the data reported. In the scenarios using the Polinsky and Shavell instructions, the defendant company had been fined \$100,000 to cover the actual damages sustained; in the control scenario using more standard instructions, the company had been fined \$20,000. *See id.* at 319-20, 330 n.20. This difference clearly confounds the comparison between the Polinsky and Shavell instructions and the standard instructions. To the extent that punitive damages decisions are influenced by the severity of the harm caused, *see supra* notes 69-76 and accompanying text, this difference may have caused any decrease in punitive damage awards. Moreover, the instructions specifically told participants that amounts already paid in compensatory damages may have already led to punishment. *Id.* at 345. Clearly, participants may have found \$100,000 to have effected greater punishment than \$20,000.

397. *See* Reid Hastie, *Review Essay: Experimental Evidence on Group Accuracy*, in INFORMATION POOLING AND GROUP DECISION MAKING (Guillermo Owen & Bernard Grofman eds., 1986); Patrick R. Laughlin et al., *Collective Versus Individual Induction: Recognition of Truth, Rejection of Error, and Collective Information Processing*, 61 J. PERSONALITY & SOC. PSYCHOL. 50 (1991).

that had jurors actually deliberated in groups, more of them would have discerned the “correct” answer.

Viscusi concludes that not only are people intuitive retributionists rather than intuitive deterrence theorists,³⁹⁸ but they are also not able to give effect to the expectations of deterrence theory when explicitly asked to do so.³⁹⁹ Research by Darley, Carlsmith, and Robinson into the motivations for criminal punishment also suggests that people are intuitive retributionists; however, their research indicates that people are capable of assessing punishment from an alternative (non-intuitive) perspective when asked to do so.⁴⁰⁰ Participants were asked to assign punishment to an actor in response to a series of scenarios describing criminal behaviors without receiving any specific instructions. Subsequently, participants were asked to re-evaluate each scenario from a “just deserts” (retributive) perspective or an incapacitation (deterrence) perspective. Participants’ initial responses were similar to the responses they provided from a just deserts perspective and different from the responses they provided when considering the incapacitation perspective. Moreover, participants were sensitive to factors that should have influenced punishment from the appropriate perspectives, that is, recidivism had a greater influence on punishment when participants were asked to make their decisions from an incapacitation perspective while case seriousness was more influential when taking a retributive perspective.⁴⁰¹ They found further that under certain circumstances the incapacitation perspective was intuitively more salient.⁴⁰² Darley *et al.* concluded that “[a]lterations in the way that the punishment question is put to respondents may also alter the motives evoked to answer the question.”⁴⁰³

398. See *supra* Part II.B.2.

399. The U.S. Supreme Court noted in this regard: “However attractive such an approach [Polinsky and Shavell’s] to punitive damages might be as an abstract policy matter, it is clear that juries do not normally engage in such a finely tuned exercise of deterrence calibration when awarding punitive damages.” *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678, 1687 (2001).

400. See Darley *et al.*, *supra* note 113, at 676-78.

401. *Id.* at 666-71.

402. *Id.* at 674-75.

403. *Id.* at 677.

One mechanism that might influence jurors' inclination or ability to take a non-intuitive perspective is the inclusion of an explanation of the reasons for taking that perspective in the instruction. Wegener and Petty's general model of bias correction, the Flexible Correction Model, suggests that one meaningful factor in jury decision-making is the jurors' "motivation to implement judges' instructions."⁴⁰⁴ Thus, "the judge's instructions must sell them on the goal of adhering to the constraints of the law;" possibly by explaining why the law has particular expectations of their decisions.⁴⁰⁵ The Polinsky and Shavell instructions tested by Viscusi did not include an explanation for why the described calculations were appropriate.⁴⁰⁶ Thus, it is possible that including such an explanation will increase the degree to which jurors fulfill of the objectives of the instructions.

Consistent with this reasoning, several studies in other contexts have found that including an explanation of the reasons the jurors are being asked to take an action is more successful in effecting their compliance with the law. Diamond and Casper found that jurors who were told that their compensatory damage award would be trebled made smaller awards than did jurors who were unaware of the trebling provision.⁴⁰⁷ They found that a simple admonition to disregard the knowledge that their award would be trebled did not restore awards, but that the same admonition combined with an explanation of the rationale for the rule resulted in significantly higher awards.⁴⁰⁸ Similarly, Wissler, Huehn, and Saks found that instructing jurors not to adjust their compensatory damage awards in accordance

404. Duane T. Wegener et al., *Flexible Corrections of Juror Judgments: Implications for Jury Instructions*, 6 PSYCHOL. PUB. POL'Y & L. 629, 646 (2000). For discussion of the Flexible Correction Model, see generally Duane T. Wegener & Richard E. Petty, *The Flexible Correction Model: The Role of Naïve Theories of Bias in Bias Correction*, in 29 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 141 (Mark P. Zanna ed., 1997); Duane T. Wegener et al., *The Metacognition of Bias Correction: Naïve Theories of Bias and the Flexible Correction Model*, in METACOGNITION: COGNITIVE AND SOCIAL DIMENSIONS 202 (Vincent Y. Yzerbyt et al. eds., 1998).

405. Wegener et al., *supra* note 404, at 647.

406. See Polinsky & Shavell, *supra* note 33, at 957-62; Viscusi, *supra* note 106, at 344-46.

407. Diamond & Casper, *supra* note 143, at 532-33.

408. *Id.* But see Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 LAW & HUM. BEHAV. 407, 415 (1995) (finding that providing a legal explanation was not more effective).

with their uncertainty about the level of the defendant's culpability and the reasons that they should not do so was effective in diminishing the effect of perceptions of defendant responsibility on damage awards.⁴⁰⁹

3. *Providing Legally Appropriate Benchmarks.* Perhaps the key difficulty that decision makers experience is converting their desire to punish the defendant in a civil case into a monetary equivalent. Absent a constructive index against which to gauge their award, decision makers are forced to come up with their own frame of reference. It follows that a specific mechanism for better structuring punitive damage decisions would be to provide jurors with information about representative damage awards from a set of reference cases. This may be one answer to the difficulties posed by the task of mapping an assessment of moral reprehensibility onto a dollar value scale.⁴¹⁰ It also seems likely that providing jurors with information about actual jury awards in similar cases will give jurors a frame of reference from which to determine damages that is an alternative to the reference frame presented in the media⁴¹¹ or by the plaintiff's or the defense attorney.⁴¹² "Unlike judges, jurors are systematically denied any information about decisions by other juries in prior cases, depriving them of information that could help them treat like cases alike."⁴¹³ Comparative information offers structure to the determination of punitive damages as it "sharpens the proportionality issues and disciplines the decision-making process."⁴¹⁴

409. Roselle L. Wissler et al., *The Impact of Jury Instructions on the Fusion of Liability and Compensatory Damages*, 25 LAW & HUM. BEHAV. 125, 134-35 (2001).

410. See *supra* Part II.C.2.

411. See *supra* notes 103-06 and accompanying text.

412. See *supra* note 319 and accompanying text; Hastie et al., *supra* note 90, at 449, 463.

413. Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities*, 6 PSYCHOL. PUB. POL'Y. & L. 712, 718 (2000).

414. David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1156 (1995) (speaking of efforts at quantification of punitive damage through comparative review by judges).

Saks, Hollinger, Wissler, Evan, and Hart have examined the influence of such referent information on juror decision-making regarding compensatory damages. Saks et al. provided student-jurors with various types of guiding information about damage awards: the average dollar amount awarded in similar cases, the range in which 80% of similar cases fell, both of these types of information, or a range of example awards from similar cases. They found that while none of the types of jury guidance affected award variability when the injury to the plaintiff was low, in the moderate severity condition all four types of guidance reduced award variability, and in the high severity condition, three of the four types (all except the average) reduced compensatory damage award variability.⁴¹⁵

Legally appropriate benchmarks to aid jurors' decision-making could consist of summary statistics to help jurors see the typical distribution of awards, as in the above study. Alternately, jurors could be given sets of cases with which to compare the case they are being asked to decide. In the most straightforward version of this approach, attorneys would be allowed to present comparable cases to the jury.⁴¹⁶ The jury could then calibrate its punitive damages award in light of awards in other similar cases.⁴¹⁷

415. Saks et al., *supra* note 316, at 249-52. Providing jurors with this type of information was more effective than were caps on damages. *Id.*

416. Diamond et al., *supra* note 94, at 321. A more structured approach would have the legislature or judiciary create a set of standardized scenarios from which to select. See Randall R. Bovbjerg et al., *Public Policy: Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 953 (1989) (raising such a proposal in the context of damages for pain and suffering).

417. For other proposals on scheduling damages and discussion of the practical issues raised by such an approach, see Baldus et al., *supra* note 414 (comparative additur/remittitur for general damages and punitive damages); Bovbjerg et al., *supra* note 416, at 953-56 (addressing the issues involved in presenting injury scenarios to juries to guide their decisions about damages for pain and suffering); James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. REG. 171 (1991); Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763 (1995) (proposing a grid by which pain and suffering damages could be calculated); Diamond et al., *supra* note 94, at 318-22 (pain and suffering); see also Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. (forthcoming 2002) (raising the possibility of cross-category comparisons but raising concerns about cognitive overload and the risks of manipulation); *Geressy v. Digital Equip. Corp.*, 980 F. Supp. 640 (E.D.N.Y. 1997). In *Geressy*, Judge Weinstein conducted a statistical analysis of cases comparable to the plaintiffs' cases to determine whether the jury awards

The research reviewed here suggests that lay decision makers may be well suited to make comparisons between cases. Jurors rank cases in similar orders when determining their level of outrage, punitive intent, and punitive damage awards.⁴¹⁸ Across a large number of different injuries, jurors' ratings of injury severity and their general damage awards are highly correlated with those of judges', implying that the two groups rank cases in similar ways.⁴¹⁹ In addition, Baldus found that law students were able to rank cases in order of the severity of the injury and to make judgments about cases' relative levels of compensable non-economic damage with reasonable reliability.⁴²⁰ This suggests that jurors may perform well if asked to make judgments about where a case falls within a distribution of cases. Overall, these results suggest that jurors might be quite able to make the relevant comparisons between cases, particularly if the comparison was made explicit. Thus, there is preliminary evidence that providing guiding information to jurors can help to reduce the variability in their awards.

CONCLUSION

The depiction of punitive damage awards that emerges from the systematic empirical research is a picture that is much more complex than the simple images of civil litigation as a lottery, of punitive damages as bonanzas for lucky plaintiffs, and of unprincipled, out-of-control juries routinely awarding multi-million dollar punitive damage awards out of sympathy for injured plaintiffs and bias against large corporations.

First, the empirical research suggests that jurors have a range of competencies, performing some aspects of their

"deviate[d] materially from what would be reasonable compensation." 980 F. Supp. at 653. The "reported opinion bias" identified by Eisenberg and Wells suggests that caution ought to be exercised in making comparisons only to cases that result in reported opinions. Eisenberg & Wells, *supra* note 235, at 413-16.

418. Kahneman et al., *supra* note 70, at 59-60.

419. Wissler et al., *supra* note 94, at 798-99. Thus, the groups saw the same injuries as being more serious and awarded more in general damages in response to the same injuries. *Id.* Ratings of injury severity were also highly correlated with general damage awards, greater amounts were awarded to plaintiffs with more severe injuries. *Id.* at 795-96.

420. Baldus, *supra* note 414, at 1145, 1151.

decision tasks quite well, and demonstrating difficulty with other functions of their role. On the one hand, juries seem to operate quite successfully as intuitive retributivists, gauging outrage in a consistent manner, and reflecting community standards as they punish reprehensible behavior. Moreover, jurors seem to respond appropriately to a number of factors thought to be important legal underpinnings of punitive damages, adjusting their awards in accordance with the degree to which the defendant has violated important social norms, the damage the defendant risked and ultimately caused, and the financial status of the defendant. On the other hand, the research suggests that jurors have difficulty understanding legal instructions, giving effect to optimal deterrence, and translating their outrage into a monetary equivalent. In addition, the information that is available to jurors in the media is not representative of most cases and can have complex effects on decision-making. Despite these difficulties, however, it is not clear that decisions by juries differ dramatically from those of judges.

Second, current reforms have not been responsive to this literature. To a large extent, punitive damage reform has been, at least in part, a "solution in search of a problem."⁴²¹ Archival research has consistently found that punitive damages are seldom awarded, tend to be of low to moderate size, are typically awarded in response to egregious conduct, and are routinely reduced post-trial in some fashion. In addition, the magnitude of punitive damage awards varies appropriately with characteristics that differentiate cases—larger punitive damage awards tend to be assessed when a plaintiff is seriously injured by egregious conduct. Still, increases in punitive damage amounts have been found at the high end of the distribution and it is these awards that are well publicized. The threat of punitive damages, even if the possibility is remote, may have a substantial impact on behavior, particularly if behavior is driven by perceptions of awards influenced by the non-representative information about awards that is presented in the media and by reform advocates. Perceptions of the threat of punitive damages are likely to drive decisions about appropriate conduct and to color

421. Eisenberg et al., *Juries, Judges*, *supra* note 75, at 778.

evaluations of settlement offers.⁴²² And it is these perceptions of awards that are likely to drive legislative reform decisions. To the extent that policymakers have a set of perceptions about punitive damages that is at odds with what the empirical data show, it is unlikely that efforts to improve the system will be appropriately targeted. Indeed, with few exceptions, most current reform efforts have been largely aimed at restraining awards rather than at improving the quality of punitive damages decision-making.

Moreover, the research suggests that the assumptions behind several of the primary reform efforts are overly simplistic (at best) or inaccurate (at worst). Thus, for example, caps on punitive damages may not simply truncate awards over the level of the cap, leaving the balance of the distribution unchanged. Rather, caps operate as a factor that changes the nature of the decision-making task, changing the distribution of awards in non-intuitive ways. The determination of punitive damages is not a decision made in a vacuum. Jurors faced with the decision whether to award punitive damages and in what amount are also charged with finding the facts of the case and making determinations about liability and compensatory damages. Changes in the system intended to influence determinations of punitive damages may also have implications for these other decisions. Decision makers do not necessarily make a clear distinction between compensatory and punitive damages, decisions about liability may influence decisions about punitive damages and vice versa, and changes in trial structure may change how decision makers resolve the mix of issues they face. Thus, abolishing punitive damages may have important effects on other decisions, such as compensatory damage awards. The study by Landsman and his colleague of the effects of bifurcation is a notable example of this interdependence.

Surely there are ways in which jury determinations of punitive damages can be improved. The research described here suggests several enhancements to punitive damages decision-making that specifically target the shortcomings in decision-making that have been identified. Measures such as improving jury instructions to increase comprehension and motivate juror compliance and providing benchmark information to facilitate the process of translating outrage

422. See Koenig, *supra* note 272, at 172.

into a monetary award explicitly address the difficulties jurors show in understanding instructions, giving effect to principles of optimal deterrence, and converting punishment to dollars. Ideally, these improvements to the system should be carefully designed and evaluated with an eye for unintended effects.

There is still much more to be learned about how punitive damages are determined. The questions for this future research are many and varied, ranging from evaluating particular efforts at improving the system to inquiring into the perceptions of legislators, judges, and attorneys. In particular, very little research has examined the potential effects of punitive damage reform efforts on patterns of litigation and settlement behavior.⁴²³ There are many phases of the process of disputing that exist in the "shadow" of punitive damages about which we know very little.⁴²⁴ Changes to the processes by which punitive damages are determined at trial are likely to influence case filings, to alter demands, and to affect the likelihood, timing, structure, and size of settlements.⁴²⁵ The Babcock and Pogarsky research into the effects of damage caps on settlement demonstrates the complex effects that reforms targeted at juries may have on other stages of the process. Effects of reform on these other stages of the process may result if legal actors recalibrate their reference points in response to changing verdict patterns. However, even in the absence of changes in verdicts, behavior may change to the extent that decision makers believe that reform has or will change outcomes. Given that most cases are resolved before trial, any effects of reform on pre-trial processes have the potential to be significant. Certainly, "without more information on the settlement process, it is hard to predict the impact of punitive damages tort reforms."⁴²⁶

Additional studies will attempt to replicate and build upon the findings reported here and to extend the knowledge base by examining questions that have not yet

423. For notable exceptions see Babcock & Pogarsky, *A Behavioral Approach*, *supra* note 324, at 346-47; Pogarsky & Babcock, *Damage Caps*, *supra* note 324.

424. See generally Saks, *supra* note 270 (discussing the overall difficulty in quantifying what we "know" about the punitive damage system).

425. See generally Kritzer & Zemans, *supra* note 272; Koenig, *supra* note 272.

426. Koenig, *supra* note 272, at 208.

been addressed. These questions ought to be examined from a variety of perspectives, using a variety of methodologies, with the goal of providing convergent validity to the results. Confidence in our understanding of punitive damages decision-making will increase as the effects described here are demonstrated under a variety of conditions and by multiple methodologies. Through systematic examination of potential influences, hypothesized explanations, and considered solutions, our understanding of punitive damages decision-making will become more nuanced and our ability to enhance such decision-making will improve.

