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PUNITIVE DAMAGES, EXPLANATORY VERDICTS, AND THE *HARD LOOK*

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Abstract: Juries in most American jurisdictions can inflict punitive damages awards against tortfeasors who have committed especially blameworthy torts. Sometimes their awards are startlingly large—multi-billion dollar awards have become increasingly frequent. Nonetheless, juries are generally under no obligation to explain their use of this vast power—a punitive damages verdict typically takes the form of an unexplained number.

Courts can and should change this practice. Under Federal Rule of Civil Procedure 49(b) and analogous state rules, courts could require juries to return "explanatory verdicts" that set forth the bases for their punitive damages awards. Several advantages would flow from adopting this simple reform. First, taking a cue from the "hard look" doctrine of administrative law, courts could review such verdicts to ensure that juries exercise their punitive discretion reasonably and legally. In some cases, where an explanatory verdict revealed error, a court could correct it efficiently by asking the jury to reconsider in light of supplemental instructions. Second, punitive damages awards are supposed to "send messages"; these messages would be clearer if juries used words as well as numbers to express them. Third, the power of civil juries to inflict punitive damages is controversial. Finding out how real juries in real cases justify their verdicts would shed light on whether they should possess this power.

Both the jury foreman and the judge . . . took the unusual step yesterday of making statements after the verdict [ordering Radovan Karadzic to pay $3.9 billion in punitive damages to victims of rape, torture, and genocide].

. . . Mr. Walters, a retired stage hand, said he and other members of the jury felt that they had a duty to express their outrage over the conduct of Bosnian Serb soldiers under the political leadership of Dr. Karadzic, who did not appear in court. "I hope the world gets the message," he said. "What happened was reprehensible."[1]

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1. David Rohde, *Jury in New York Orders Bosnian Serb to Pay Billions*, N.Y. TIMES, Sept. 26, 2000, at A10.

I. INTRODUCTION

On September 25, 2000, a civil jury in New York ordered Dr. Radovan Karadzic to pay $3.9 billion in punitive damages to victims of rape, torture, and genocide.[2] The size of this award was remarkable but not unique—juries have granted four multi-billion dollar punitive damages awards over the last two years and eight over the last sixteen years.[3] Certainly, this dollar figure sent a strong message that the jury despised Karadzic. The jury, however, wanted to clarify this message with *words*. With the permission of the judge, the jury foreman made a brief statement on the record explaining that the jury knew that "money cannot compensate" the plaintiffs for their suffering and that awarding damages was "a pitiful way to go about this procedure."[4] The jury's attempt to put its verdict into context represented a departure from procedural norms. Verdict forms typically do not ask juries to explain the reasoning behind their punitive damages awards, which thus take the form of unexplained numbers.[5]

Courts should abandon this practice and instead require juries to submit "explanatory" verdicts that describe the grounds for their punitive damages awards. Requiring such explanations would equip courts with information they need to ensure that these awards reflect legal and minimally reasonable deliberations. In addition, explanatory verdicts would help jurors to better express what they think of defendants and their conduct. The law has recognized since 1763 that one of the primary functions of punitive damages is to express jury outrage.[6] Money talks, but sometimes not clearly; courts should encourage juries to speak their minds with words as well as dollar figures. Lastly, granting civil juries a discretionary power to punish is a controversial (and to some, deeply alarming) part of American tort law.[7] Perhaps nothing could shed more

2. Tr. of Verdict (Excerpt) at 3–28, Jane Doe I v. Karadzic, No. 93 Civ. 878, (S.D.N.Y. Sept. 25, 2000) [hereinafter, *Karadzic* Tr.] (granting 39 awards of $100 million each to plaintiffs) (on file with author).

3. *See infra* notes 9–16 and accompanying text.

4. *Karadzic* Tr., *supra* note 2, at 29.

5. *Cf.* Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179, 212 (1998) (arguing that one reason judges should determine amounts of punitive damages awards is because they, unlike juries, can be required to explain the bases for their decisions).

6. Wilkes v. Wood, 98 Eng. Rep. 489, 498–99 (C.P. 1763).

7. *See, e.g.*, Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) (complaining that "skyrocketing" punitive damages awards stifle valuable innovation).

light on whether juries are competent to exercise this power than asking them to explain their punitive damages verdicts and then collecting and studying their answers.

Commentators debate whether punitive damages awards are "rare" or not.[8] Regardless of one's view on this matter, it is hard to dispute that every now and then a *really big* verdict comes along. The multi-billion dollar punitive damages hit parade includes: a $3 billion verdict a California jury awarded in July 2001 against Philip Morris;[9] a $3.42 billion verdict an Alabama jury awarded in December 2000 against ExxonMobil;[10] the $3.9 billion verdict a New York jury awarded in September 2000 against Dr. Karadzic;[11] a $145 billion verdict a Florida jury awarded in July 2000 against the "Big Five" tobacco companies;[12] a $4.8 billion verdict a California jury awarded in August 1999 against General Motors;[13] a $3.4 billion verdict a Louisiana jury awarded in 1997

8. A recent study reported that, in state courts of general jurisdiction in the 75 largest counties in the nation, roughly 3% of plaintiffs who won tort trials were awarded punitive damages. Perhaps surprisingly, plaintiffs were more likely to win punitive damages in bench trials (7.9% of plaintiff wins) than in jury trials (2.5% of plaintiff wins). Marika F. X. Litras et al., *Civil Justice Survey of State Courts, 1996: Tort Trials and Verdicts in Large Counties*, BUREAU OF JUSTICE STATISTICS BULLETIN, at 7, tbl.7 (Aug. 2000), *available at* http://www.ojp.usdoj.gov/-bjs/pub/pdf/ttvlc96.pdf [hereinafter BOJS BULLETIN]; *see also* Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 631–34 (1997) (reporting that, during fiscal year 1991–1992, in state courts of general jurisdiction in 45 of the 75 most populous counties in the nation, punitive damages were awarded in roughly 6% of tort cases with plaintiff wins (177 out of 2,849 cases)).

9. Marc Kaufman, *Lung Cancer Victim Awarded $3 Billion*, WASHINGTON POST, June 7, 2001, at A9 (reporting verdict holding Philip Morris liable on six counts of fraud, negligence, and making a defective product; awarding $3 billion in punitive damages and $5.54 million in compensatory damages to lung cancer victim); *California: Lower Tobacco Award*, N.Y. TIMES, Aug. 23, 2001, at A15 (reporting plaintiff's agreement to court's remittitur of $3 billion award to $100 million and defendant's intent to appeal this lower amount).

10. *Big Judgment Against Exxon*, WASHINGTON POST, Dec. 20, 2000, at E2 (reporting verdict holding ExxonMobil liable for $87.7 million in compensatory damages and for $3.42 billion in punitive damages for defrauding state of natural gas royalty payments).

11. *Karadzic* Tr., *supra* note 2, at 3–28.

12. On November 6, 2000, the trial judge in this matter rejected the defendant tobacco companies' post-trial motions to overturn this $145 billion punitive award and entered final judgment. *See* Nov. 6, 2000, Final Judgment and Amended Omnibus Order, Engle v. R.J. Reynolds Tobacco, Case No. 94-08273 CA-22, at 16, 62, *available at* http://news.findlaw.com/cnn/docs/tobacco/englerj finaljudorder.pdf; *see also* James V. Grimaldi, *Florida Decision Hurts Deal On Tobacco Suits*, WASHINGTON POST, Nov. 7, 2000, at A8.

13. *See, e.g., GM Damages Cut by Over $3 Billion in Gas Tank Case*, N.Y. TIMES, Aug. 27, 1999, at A18 (reporting trial court's reduction of jury's $4.8 billion punitive damages award for defective design of gasoline tanks to $1.09 billion and GM's intention to appeal this remitted amount).

against various transportation companies;[14] a $5 billion verdict an Alaska jury awarded in 1994 against Exxon for the *Exxon Valdez* spill;[15] and a $3 billion verdict a Texas jury awarded in 1985 against Texaco.[16] These mega-verdicts are extreme outliers.[17] Still, they illustrate the potential scope of the punitive damages power and highlight the importance of understanding how and why juries choose to use it.

The first advantage of requiring juries to explain their punitive damages awards would be to help courts acquire just such an understanding of jury motivations. Courts face the problem of distinguishing legitimate from illegitimate punitive damages awards and reducing those they deem "excessive." Under current practice, because punitive damages verdicts typically take the form of unexplained numbers, excessiveness review is necessarily a form of *outcome* review. Simplifying somewhat, a court must ask itself whether a minimally reasonable jury could have reached the actual jury's verdict. Recent Supreme Court activity suggests how difficult it has proven to make this process coherent. Since 1989, the Court has heard at least six cases

14. More specifically, the jury found five defendants liable for $3.365 billion in punitive damages. All defendants but one, CSX Corp., eventually settled. The jury had found CSX liable for $2.5 billion in damages; the trial court remitted this amount to $850 million, which was affirmed on appeal. *In re* New Orleans Train Car Leakage Fire Litig., No. 2000-CA-0479, 2001 WL 737680, at *3, *19 (La. Ct. App. June 27, 2001).

15. *See, e.g.*, Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Serv., Co., 206 F.3d 900, 903 (9th Cir. 2000), *cert. denied sub nom*, Exxon Mobil Corp. v. Baker, 531 U.S. 919 (2000). Multi-billion dollar verdicts make for lengthy post-trial and appellate proceedings. For instance, six years after the jury granted its $5 billion award and four years after entry of judgment, the Ninth Circuit affirmed the district court's denial of Exxon's Rule 60(b)(2) motion to set aside the verdict. Exxon had based its motion on a first juror's testimony that she had received death threats during deliberations and a second juror's testimony that a bailiff, referring to the first juror outside her presence, had pulled out his gun and remarked that it might help deliberations if "you put her out of her misery or something." *Id.* at 904. The Ninth Circuit agreed with the district court that Exxon had failed to show prejudice from the bailiff's "tasteless joke" and that the other "threats" were figments of the first juror's imagination. *Id.* at 908, 910–14. The actual merits of the $5 billion award are the subject of a still-pending appeal before the Ninth Circuit.

16. Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 784, 866 (Tex. App. 1987) (ordering remittitur to $1 billion of jury's $3 billion punitive damages award against Texaco for tortiously interfering with Pennzoil's purchase of Getty Oil), *cert. dismissed*, 485 U.S. 994 (1988).

17. *See* BOJS BULLETIN, *supra* note 8, at 7, tbl.7 (reporting median jury-determined punitive damages award of $27,000 in state courts of general jurisdiction in 75 most populous counties in 1996; maximum jury-determined punitive damages award in sample was $138 million); Eisenberg, *supra* note 8, at 632–34 & tbl.1 (reporting median jury-determined punitive damages award of $50,000 in study of jury verdicts in state courts of general jurisdiction in 45 of 75 most populous counties during fiscal year 1991–1992). *Mean* punitive damages awards tend to be far higher than medians due to a relatively small number of extremely large verdicts. *See id.* at 634 (reporting a mean jury-determined punitive damages award of $534,000 for same sample).

raising significant issues concerning control of punitive damages and, along the way, has created some mild due-process restrictions on them: (a) jury instructions must give jurors some vague idea what punitive damages are for; (b) courts must possess a measure of power to reduce them; and (c) "grossly excessive" punitive damages awards violate due process.[18]

Absent from these efforts to control punitive damages has been a clear recognition that a court cannot ensure the propriety of a punitive damages award without knowing something about why a jury selected it—one must step beyond the *outcome* and review the *deliberative process* as well. The law limits jury discretion to punish by telling juries what kinds of "facts" they should consider as relevant to their task. For example, they should consider the reprehensibility of the defendant's tort but not that the defendant happens to be from out-of-state. Having found the "facts" that fit the requisite categories, a jury must transmute them into a dollar figure. This step of spinning facts into dollars—of deciding how much the defendant *ought* to suffer for its tort—is a matter of policymaking, not fact-finding. In forming its "punishment policy," a jury could make two prominent kinds of mistakes: (a) it might base its award on consideration of facts the law deems irrelevant to punishment; or (b) its punitive reaction to the facts might be outlandishly harsh (e.g., a billion dollar sanction for minor misconduct). To best determine whether a jury has made either kind of mistake, a court must first identify what facts the jury deemed material to punishment; with this information, the court can discern whether the jury considered the "right kind" of facts and whether these facts can reasonably support the jury's chosen punishment.

The judicial need for information concerning deliberative processes is not unique to punitive damages review. In the context of administrative law, courts invoke "hard look" review of agency policy choices to ensure that they are based on consideration of "relevant factors" and are not tainted by "clear errors of judgment."[19] To determine whether a choice

18. *See infra* notes 106–22 and accompanying text (discussing recent Supreme Court decisions wrestling with punitive damages issues).

19. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40–43 (1983) (summarizing standard of review applicable to agency policymaking). Originally, the "hard look" doctrine was understood as a way for courts to make sure that *agencies* themselves take "hard looks" at the problems confronting them. *See, e.g.*, Greater Boston Tel. Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970). As the doctrine evolved, usage shifted, and it is now often understood to require *courts* to take "hard looks" at agency reasoning to ensure minimal rationality and legality.

passes this test, a reviewing court must know what the agency thought about in the course of making it.[20] Courts therefore require agencies to explain the bases for their policy choices. If review indicates that an agency erred in its deliberations (it considered an "irrelevant factor," for instance), then the court generally will remand to the agency for reconsideration in light of corrective instructions.[21]

A form of this "hard look" approach could transfer neatly and usefully to judicial review of punitive damages. Juries should base their punishment choices upon the kinds of facts the law deems relevant, and these facts should "connect" in some minimally sensible way to the punitive damages verdicts they select. To police whether a punitive damages award satisfies these criteria, a court must obtain from the jury an explanatory verdict that summarizes the reasoning behind its punishment selection—it must learn the jury's "punishment story." Ideally, if a reviewing court determines that the jury made a deliberative error that it is capable of correcting (it considered an "irrelevant factor," for instance), the court should "vacate" the jury's preliminary verdict and "remand" for reconsideration in light of clarifying instructions. Such an approach would help ensure that we obtain from juries what we purport to want but do not always get: punitive damages awards that reflect legal, reasonable exercises of jury discretion to determine fair punishment.

In addition to rationalizing judicial review, a second advantage of explanatory verdicts would be to help juries to "send their messages" more clearly. No doubt there is nothing like a huge punitive damages verdict to concentrate the mind of a tortfeasor; surely the $5 billion award granted in the *Exxon Valdez* matter got Exxon's attention.

See Nat'l Lime Ass'n v. EPA, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980) (describing this evolution). In any event, regardless of how one characterizes which entities do the "hard looking," this form of review necessarily requires a court to immerse itself in the administrative record underlying an agency's action to make sure that its decision-making process was legal and minimally rational. *See* Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 324 (1996) (discussing general contours of judicial scrutiny of administrative explanations by hard-look review).

20. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (noting that Court could not review propriety of agency decision to spend federal funds to construct highway through park without access to "administrative record" before the agency); Lawson, *supra* note 19, at 318–19 (observing that the APA's "arbitrary and capricious" test requires agencies to base their discretionary policy choices on "rational decisionmaking mechanism[s]" and "imposes a substantial duty of explanation" on agencies to support these choices).

21. *See, e.g.*, ALFRED L. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 527–29 (2d ed. 2001) (discussing circumstances under which a court will remand due to agency failure to rely on reasoned decision making).

However, to infer the "message" behind a verdict, one must first infer the jury's reasons for granting it. Trying to figure out these reasons from an unexplained number creates needless room for distortion—a point demonstrated by cases such as the infamous *BMW of North America, Inc. v. Gore*,[22] in which an Alabama jury became a poster child for tort reform by inflicting a $4 million punitive damages award against BMW for failing to disclose that it had touched up the paint on an expensive sports sedan sold as new.[23] Actually, as explored below, the jury likely had a sensible message to communicate that an explanatory verdict could have made clear.

A third advantage of explanatory verdicts would be that they could provide useful information for assessing whether juries should possess the power to inflict punitive damages in the first place. In recent years, scholars have injected an increasing amount of empirical research into the debate on this subject.[24] Still largely missing is information concerning how actual juries would justify their awards given the chance. We could obtain this data by asking juries to include it in their verdicts. Over time, studying their answers could help demonstrate whether juries are up to the task of wielding this controversial power (or as competent as anyone else available, such as judges and bureaucrats).

Of course, concluding that it would make good policy sense for juries to "explain" their punitive damages awards raises a procedural question: Can courts require them to do so? At first glance, some might object that requiring such explanations would unduly intrude upon the privacy of deliberations in the jury room. Actually, the practice of asking juries to explain the grounds for their verdicts in limited procedural contexts dates back hundreds of years and was discussed with approval by the Supreme Court in the late nineteenth century.[25] A modern-day authorization for a form of this practice exists in Federal Rule of Civil Procedure 49(b) (and parallel state rules), which permit a court to submit to a jury "written interrogatories upon one or more issues of fact the decision of which is

22. 517 U.S. 559 (1996).

23. *Id.* at 564–65.

24. *See infra* notes 255–61 and accompanying text.

25. *See* Walker v. N. M. & S. Pac. R.R., 165 U.S. 593, 597 (1897) (quoting with approval, *inter alia*, *Spurr v. Shelburne*, 131 Mass. 429, 430 (Mass. 1881) ("It is within the discretion of the presiding justice to put inquiries to the jury as to the grounds upon which they found their verdict, and the answers of the foreman, assented to by his fellows, may be made a part of the record, and will have the effect of special findings of the facts stated by him.")).

necessary to a verdict."[26] With a just a touch of (legally permissible) creativity, courts could use this rule to require juries to submit explanatory verdicts that describe the factual findings that motivate their punitive damages awards.

The plan: Part II of this Article provides an overview of the law governing juries as they determine punitive damages awards and courts as they review them. A notable conclusion of this overview is that punitive damages law attempts to channel jury *deliberations*, but judicial review, notwithstanding rhetoric to the contrary, generally reviews punitive damages *outcomes*. Part III explores how courts could bridge this gap and obtain the information they need to review deliberative processes by using interrogatories to require juries to explain the grounds for their punitive damages awards. Part IV explores in more detail the benefits of doing so—better judicial review, more articulate verdicts, and the chance to study them systematically. Finally, Part V briefly responds to objections some might have to this proposal.

II. DETERMINING PUNITIVE DAMAGES AWARDS—CONTROLLING PROCESSES AND OUTCOMES

Under the traditional common-law model that has existed for nearly 240 years, juries have possessed vast discretion to determine the amount of punitive damages necessary to inflict proper retribution and deterrence upon defendants who have committed particularly awful torts.[27] In other words, juries have the power to determine how much tort should equal how much money. Judges, in general, should defer to jury-determined awards that do not strike them as outrageous.

This basic model has evolved in different ways in different jurisdictions, so one must be careful when making generalizations concerning the modern law of punitive damages.[28] Variance has

26. A substantial majority of the states have modeled their rules on jury interrogatories on this federal model. *See, e.g.*, ALA. R. CIV. P. 49(c); ALASKA R. CIV. P. 49(c); ARIZ. R. CIV. P. 49(h); ARK. R. CIV. P. 49(a); COLO. R. CIV. P. 49(b).

27. *See infra* notes 36–49 and accompanying text.

28. For instance, most states, whether by common law or statute codifying the common law, permit juries to award discretionary punitive damages to punish and deter especially egregious torts. In a few states, however, courts have ruled that punitive damages are impermissible for state causes of action absent express legislative authorization. *See, e.g.*, Int'l Harvester Credit Corp. v. Seale, 518 So. 2d 1039, 1041 (La. 1988) ("Under Louisiana law, punitive . . . damages are not allowable unless expressly authorized by statute."); Crowley v. Global Realty, Inc., 474 A.2d 1056, 1058 (N.H. 1984) (recognizing similar rule for New Hampshire); Dailey v. N. Coast Life Ins. Co., 129 Wash. 2d 572,

increased in recent years as many states have taken aggressive steps to limit or modify this jury power. For instance, state legislatures have imposed caps on awards,[29] raised burdens-of-proof,[30] and passed allocation statutes requiring victorious plaintiffs to split their punitive damages winnings with the state.[31]

Of most interest for present purposes, many states have tried to limit jury discretion by providing more specific guidance for their

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575, 919 P.2d 589, 590–91 (1996) (prohibiting "punitive damages without express legislative authorization"). The Nebraska Supreme Court has held that punitive damages for state causes of action violate the Nebraska constitution. *See, e.g.*, State *ex rel.* Cherry v. Burns, 602 N.W.2d 477, 484 (Neb. 1999).

29. *See* ALA. CODE § 6-11-21 (1993) (setting default rule that punitive damages may not exceed greater of three times compensatory damages or $500,000); COLO. REV. STAT. ANN. § 13-21-102(1)(a) (West 1997) (providing that punitive damages generally may not exceed actual damages); CONN. GEN. STAT. ANN. § 52-240b (West 1991) (limiting punitive damages in product liability cases to double compensatory damages); FLA. STAT. ANN. § 768.73(1)(a)–(b) (West Supp. 2001) (establishing rebuttable presumption that punitive damages should not exceed greater of treble compensatory damages or $500,000); GA. CODE ANN. § 51-12-5.1(g) (2000) (limiting punitive damages to $250,000 for some categories of tort); KAN. STAT. ANN. § 60-3702(e) (1994) (limiting punitive damages generally to lesser of defendant's recent gross annual income or $5 million); NEV. REV. STAT. ANN. § 42.005(1) (Michie 1996) (limiting punitive damages for certain categories of torts to $300,000 where compensatory damages are less than $100,000 and to three times compensatory damages where compensatory damages are $100,000 or greater); N.D. CENT. CODE § 32-03.2-11(4) (Supp. 1999) (limiting punitive damages to the greater of $250,000 or double compensatory damages); OKLA. STAT. ANN. tit. 23, § 9.1(B)–(D) (West Supp. 2001) (limiting punitive damages to greater of $100,000 or actual damages for reckless conduct and imposing other limits for malicious conduct); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (Vernon 1997) (limiting punitive damages for certain categories of tort to double economic damages plus up to $750,000 in noneconomic damages); VA. CODE ANN. § 8.01-38.1 (Michie 2000) (limiting punitive damages to $350,000).

30. *See, e.g.*, ALA. CODE § 6-11-20(a) (requiring clear and convincing evidence); ALASKA STAT. § 09.17.020(b) (Michie 2000) (same); CAL. CIV. CODE § 3294(a) (West 1997) (same); COLO. REV. STAT. ANN. § 13-25-127(2) (requiring proof beyond reasonable doubt); GA. CODE ANN. § 51-12-5.1(b) (requiring clear and convincing evidence); MINN. STAT. ANN. § 549.20.1(a) (West 2000) (same); MONT. CODE ANN. § 27-1-221(5) (1999) (same); UTAH CODE ANN. § 78-18-1(1)(a) (1996) (same).

31. *See, e.g.*, ALASKA STAT. § 09.17.020(j) (2000) (requiring 50% of punitive damages award to be paid to state); GA. CODE ANN. § 51-12-5.1(e)(2) (requiring 75% of punitive damages award, less proportionate part of litigation costs, to be paid to state); 735 ILL. COMP. STAT. ANN. 5/2-1207 (West Supp. 2000) (granting court discretion to allocate punitive damages between plaintiff and state); IOWA CODE ANN. § 668A.1(2)(b) (West 1998) (requiring 75% of punitive damages award net of costs and fees to be paid to state if defendant's conduct was not directed specifically at claimant); MO. REV. STAT § 537.675.2 (West 2000) (requiring 50% of punitive damages award net of costs and fees to be paid to state); OR. REV. STAT. § 18.540(b) (1999) (requiring 60% of punitive damages award to be paid to state); UTAH CODE ANN. § 78-18-1(3) (1996) (requiring 50% of punitive damages award in excess of $20,000, net of costs and fees, to be paid to state).

deliberations.[32] Jury instructions in many jurisdictions have been transformed from general admonitions to consider the need for retribution and deterrence into commands to base punishment on consideration of long lists of factors such as defendant reprehensibility, defendant "financial position," and the ratio of compensatory to punitive damages.[33]

Judicial review of punitive damages awards has long used rhetoric that suggests that judges should examine jury deliberative processes for error—for example, they should look for evidence that jurors have been swayed by impermissible "passion and prejudice."[34] Actually, courts cannot review deliberations because they do not make a practice of asking juries for the information necessary to do so. More generally, although the law attempts to channel jury punishment discretion, courts have not taken the steps necessary to determine whether juries stay within those channels.

Instead, judicial review under the current regime generally boils down to checking whether awards are too big, or "excessive," to use the legalese. The standards for excessiveness review have, like jury instructions, tended to become more complex over recent years—many courts now ostensibly determine whether an award is too big in light of long factor lists. The Supreme Court has recently constitutionalized this fray, holding that "grossly excessive" awards violate due process and providing vague guideposts for gauging when they do.[35]

A. Origins of the Basic Model: Wilkes v. Wood *and* Huckle v. Money

The English common law first expressly recognized that civil juries have discretion to award plaintiffs extra-compensatory damages for the purpose of punishing defendants in the 1763 companion cases *Wilkes v. Wood*[36] and the aptly named *Huckle v. Money*.[37] These two cases created a model for determining and reviewing punitive damages awards that, in its essentials, remains in place to this day in many jurisdictions. *Wilkes* discusses when civil juries may award punitive damages and for what

32. *See infra* note 56 and accompanying text.

33. *See supra* note 56 and accompanying text.

34. *See infra* notes 76–79 and accompanying text.

35. *See infra* notes 109–16 and accompanying text.

36. 98 Eng. Rep. 489 (C.P. 1763).

37. 95 Eng. Rep. 768 (K.B. 1763).

reasons; *Huckle* addresses how courts are to review and control such awards.

Both cases arose out of the publication of the pamphlet *The North Briton*, No. 45, which executive authorities concluded defamed King George II. Lord Halifax, the Secretary of State, issued a general warrant authorizing a search of the house and papers of John Wilkes, a member of Parliament and the author and publisher of the pamphlet. Pursuant to the warrant, the defendant Wood and several other officials searched Wilkes' house and seized his papers.[38]

Wilkes sued Wood for trespass, seeking £5000 in damages. His counsel argued that the jury should award this princely sum of "large and exemplary damages" because "trifling damages would put no stop at all" to the government's terrible misconduct.[39] For the defense, the Solicitor-General argued that Wilkes was only entitled to what we would now call compensatory damages, that the £5000 figure amounted to "tenfold damages," and that, if there were any punishing (as opposed to compensating) to be done, the Crown should handle it through criminal prosecution.[40] In other words, the government should police itself.[41]

The judge, Lord Chief Justice Pratt, thought little of this argument and denounced the general warrant before the jury, calling it "a point of the greatest consequence he had ever met with in his whole practice" and opining that "[i]f such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."[42] Turning to the power of the jury to bring the state to heel, he continued that

> a jury have it in their power to give damages for more than the injury received.
>
> Damages are designed not only as a satisfaction to the injured person, but likewise as a *punishment* to the guilty, to *deter*, from any such proceeding for the future, and as *proof of the detestation* of the jury to the action itself.[43]

38. *Wilkes*, 98 Eng. Rep. at 489–90.
39. *Id.* at 490.
40. *Id.* at 493.
41. Hmmm.
42. *Wilkes*, 98 Eng. Rep. at 498.
43. *Id.* at 498–99 (emphasis added).

Thus, the judge invited the jury to use punitive damages for retributive punishment, deterrence, and, in the parlance of our day, "to send a message" to the defendant. The jury accepted this invitation to the extent of awarding £1000 in damages.[44]

Inevitably, recognizing that juries possess discretionary power to inflict extra-compensatory damages raised the question of how courts should review and control the exercise of this power—an issue addressed by *Huckle*. As part of the *North Briton* crackdown, authorities arrested Huckle, a journeyman printer, and held him for six hours, feeding him "beef-steaks and beer."[45] This might sound like a nice evening out, but Huckle sued his captors for trespass, assault, and false imprisonment.[46] The jury awarded him £300; the defense moved for a new trial on the ground that these damages were excessive.[47]

The Lord Chief Justice deferred to the jury's judgment and denied the defendant's motion. He admitted that Huckle could not have suffered more than £20 in compensatory damages.[48] He nonetheless held "that it is very dangerous for the Judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages."[49]

Thus, combining *Wilkes* and *Huckle* provides the following principles: Juries have vast discretion to inflict punitive damages to several ends—retributive punishment, deterrence, and to send a message of jury "detestation." They control the formula of how much malicious tort should equal how many dollars. Judges should show great deference to jury judgments on punitive damages but have discretion to reduce those they deem outrageous.

44. *Id.* at 499.

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

46. Sometimes it's a matter of principle.

47. *Huckle*, 95 Eng. Rep. at 768.

48. *Id.*

49. *Id.* at 769.

B. *The* Wilkes *Problem Today—Jury Determinations of Punitive Damages*

Lengthy treatises discuss the evolving law of punitive damages in this country and how its particulars vary from jurisdiction to jurisdiction.[50] Even so, the following essentials generally hold true. Before awarding punitive damages, a jury must make two preliminary determinations. First, because there is no such thing as a freestanding punitive damages claim, the jury must conclude that the plaintiff has proven all of the elements of an underlying tort.[51] Second, the jury must determine that the defendant committed the tort with a sufficiently malicious intent to justify punishment. For example, an Alabama statute that is typical in this regard requires a showing that the defendant "consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff."[52] Obviously, such abstract formulations of "badness" leave juries with a great deal of practical power to determine which defendants deserve punitive liability and which do not.[53]

Once a jury has determined that a defendant's conduct warrants punitive liability, the jury must then determine how big an award to inflict. Jury instructions for this purpose take different forms but ultimately boil down to instructing the jury that if it decides to grant punitive damages, jurors should determine the amount by considering the

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50. *See, e.g.*, GERALD W. BOSTON, PUNITIVE DAMAGES IN TORT LAW (1993); LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES (3d ed. 1995).

51. *See* BOSTON, *supra* note 50, Ch. 31 (1993) (discussing general rule that "actual harm" or "actual damage" is a prerequisite for punitive damages because it is generally a prerequisite to underlying torts).

52. ALA. CODE § 6-11-20(a) (1993); *see also e.g.*, MINN. STAT. ANN. § 549.20.1(a) (West 2000) (providing that defendant must show "deliberate disregard for the rights or safety of others"); RESTATEMENT (SECOND) OF TORTS § 908(2) (1979) (stating that punitive damages may be awarded "because of the defendant's evil motive or his reckless indifference to the rights of others"). The most refreshingly direct statement of this standard came from the Supreme Court of West Virginia, which opined that punitive liability requires a finding that a defendant has committed an act that is either "really mean" or "really stupid." TXO Prod. Corp. v. Alliance Res. Corp., 419 S.E.2d 870, 887–88 (W. Va. 1992), *aff'd*, 509 U.S. 443 (1993) (plurality).

53. Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 840 n.29 (1989) (noting that, with regard to the abstract standard for punitive liability, "[w]e probably cannot go beyond saying the conduct must be seriously wrong . . . and that it must be accompanied by a bad state of mind").

defendant and its conduct in light of the purposes of punitive damages—retribution and deterrence.[54]

Some jurisdictions offer virtually no further guidance. For instance, a New York pattern instruction advises:

> There is no exact rule by which to decide the amount of punitive damages. The amount that you award as punitive damages need not have any particular ratio or relationship to the amount you award to compensate the plaintiff for (his, her) injuries. If you find that the defendant's act was (wanton and reckless, malicious), you may award such amount as in your sound judgment and discretion you find will *punish* the defendant and *discourage* the defendant or other (people, companies) from acting in a similar way in the future.[55]

Increasingly, however, jury instructions (and the statutes on which they are based) attempt to provide more detailed guidance by listing various factors that might bear on one's sense of proper retribution and deterrence if one stopped to think of them. Minnesota's pattern instruction is a good example, providing that:

> If you decide to award punitive damages, consider, among other things, the following factors:
>
> 1. The seriousness of the hazard to the public that may have been or was caused by defendant's misconduct
>
> 2. The profit defendant made as a result of the misconduct
>
> 3. The length of time of the misconduct and if the defendant hid it
>
> 4. The amount defendant knew about the hazard and of its danger
>
> 5. The attitude and conduct of defendant when the misconduct was discovered
>
> 6. The number and level of employees involved in causing or hiding the misconduct

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54. *Cf.* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19–20 (1991) (holding that instruction that vaguely advised jury that punitive damages serve punishment and deterrence functions satisfied due process); *see also infra* note 107 (setting forth parts of *Haslip* instruction).

55. N.Y. Pattern Jury Instructions–Civil 2:278, Damages–Punitive (3d ed. 1996) (emphasis added).

7. The financial state of defendant

8. The total effect of other punishment likely to be imposed on defendant as a result of the misconduct. This includes compensatory and punitive damage awards to plaintiff and other persons

9. The severity of any criminal penalty defendant may get.[56]

Of course, regardless of whether a state takes a terse or wordy approach to such factor listing, neither offers any guidance to jurors concerning *what to make of these factors*. Suppose a jury reflects on the first factor listed in the Minnesota instruction above and determines that the defendant's misconduct was really "serious." Beyond the trivial observation that more serious torts should be punished more seriously than less serious torts—so what? Jurors cannot turn to the law for clear instructions on how harshly to punish.

The facts of a case offer little help in this regard either. For retribution, no matter how many factors about a case a state might insist that a jury consider, the facts cannot provide a logically sufficient basis for inferring how harshly the defendant "should" be punished—one cannot get *ought* from *is* that easily. One could learn all there is to know about Exxon; Prince William Sound; supertankers; the *Exxon Valdez*; alcoholism; Captain Hazelwood; his drinking habits; industry standards for staffing supertankers; the effects of crude oil spills on the environment; the number of seabirds, seals, and otters smothered by the spill; the amount in fines Exxon paid to Alaska; the cost of Exxon's cleanup efforts; etc., and all these facts still would not provide a logically sufficient basis for inferring that a $5 billion sanction would cause Exxon the proper amount of "corporate pain" to right the scales of justice and

56. Minn. Civ. JIG 94.10 at 356–57 (1999) (internal parentheses and brackets omitted). This pattern instruction was based on the Minnesota punitive damages statute, MINN. STAT. ANN. § 549.20. Other jurisdictions also provide lengthy punitive damages factor lists. *See, e.g.*, Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 900–02 (Tenn. 1992) (adopting similar, 9-factor test); Crookston v. Fire Ins. Exch., 817 P.2d 789, 808 (Utah 1991) (setting forth seven factors for consideration); Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 909 (W.Va. 1991) (setting forth list based on list of factors discussed with approval by the Supreme Court in *Haslip*, 499 U.S. at 21–22); Farmers Ins. Exch. v. Shirley, 958 P.2d 1040, 1052 (Wyo. 1998) (similar); *see also* ALASKA STAT. ANN. § 09.17.020(c) (2000) (similar); KY. REV. STAT. ANN. § 411.186(2) (Michie 1992) (similar); N.C. GEN. STAT. § 1D-35 (1999) (similar); N.D. CENT. CODE § 32-03.2-11(5) (Supp. 1999) (similar); OKLA. STAT. ANN. tit. 23, § 9.1(A), (E) (West Supp. 2000) (similar); OR. REV. STAT. ANN. § 30.925(2) (1998) (similar); TEX. CIV. PRAC. & REV. CODE ANN. § 41.011(a) (West 1997) (identifying six factors for consideration).

provide just retribution for the misconduct culminating in the *Exxon Valdez* oil spill.

The deterrence purpose of punitive damages has the potential to be more fact-driven depending on the model of deterrence one adopts. For instance, a law-and-economics approach would suggest that awards be scaled to ensure that profit-maximizing parties only act where the benefits of doing so exceed the harms.[57] If a party thinks it can avoid paying for all the damages its actions cause, then it may act in ways that cause more harm than benefits. For instance, suppose *A* thinks that polluting a river will cause $100 in damages to *B* but that there is only a 50% chance that it will be caught and held liable for compensatory damages in that amount. The expected monetary value of *A*'s compensatory liability is only $50 and, if *A* is risk-neutral, it will pollute if its expected profits from doing so would exceed that amount. To correct for this enforcement error and ensure efficient deterrence, a jury would have to divide the amount of harm caused by *A* by the chance *A* perceived of incurring liability. If, for example, the jury determined *A* caused $100 in damages and had perceived a 50% chance of being caught, then it should divide $100 by ½ for a total damages award of $200. If *A* knows that juries compute damages in this manner, then, *ex ante*, *A* would expect liability of $100 for its action and will only pollute if the benefits it would accrue by doing so exceed that amount.[58]

Punitive damages law does not, however, require juries to adopt this "efficiency approach" to deterrence.[59] An efficiency-eschewing jury would know that, the bigger the award, the greater the deterrence on the defendant and others. Neither the law nor the facts of a case offer juries any clear stopping point on this scale; they do not help a jury determine how strong a deterrence message to send.

Thus, with due regard for the mushiness of words like "fact," "law," and "policy," to determine punitive damages awards, juries must tread

57. For a recent exploration of a law-and-economics approach to reform of punitive damages, see A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998).

58. *See generally id.* at 954.

59. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, ___, 121 S. Ct. 1678, 1687 (2001) (noting that juries need not award punitive damages in economically efficient amounts); Cass R. Sunstein et al., *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237, 250 (2000) (concluding that juries do not generally adopt efficiency-based approaches to determining punitive damages).

beyond the law and the facts to create their own punishment policies.[60] They must first, of course, figure out the who-did-what-to-whom facts of a case. Punitive damages law then instructs them which of these facts they should focus upon as they consider punishment. Connecting these facts with a given punishment dollar figure requires juries to turn to their personal values and emotional reactions to determine how harshly the defendant *should* be punished. This "should" determination requires not fact-finding, but policymaking.

To make any sense at all, granting juries such power *presupposes* that they possess special insights into the nature of fair punishment that ought to be respected.[61] The argument must run something like this: someone needs to make the connection between the facts of a case and punishment dollars. That somebody should have some sense of how punishment ought to be handled. One place to find such "oughts" is community sentiment, i.e., punishment is fair if a cross-section of the community thinks it is fair. Juries provide that cross-section and therefore are suited to the art of determining fair punishment. This argument may be wrongheaded; there are lots of reasons not to put punishment up to a "community" vote.[62] However, if juries lack any particular power to serve as a sort of "community conscience" for punishment purposes, then it is difficult to understand why the state should authorize them to determine punitive damages other than as an unfortunate accident of

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60. *See, e.g.*, Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc., 99 F.3d 587, 594 (4th Cir. 1996) ("The jury's determination of the amount of punitive damages . . . is not a factual determination about the degree of injury but is . . . an almost unconstrained judgment or policy choice about the severity of the penalty to be imposed, given the jury's underlying factual determinations about the defendant's conduct."); *see also Cooper Indus., Inc.*, 121 S. Ct. at 1686 ("Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury.") (internal citations omitted); Mogin, *supra* note 5, at 214 (noting that determination of amount of punitive damages generally requires "subjective judgment" regarding amount necessary to punish and deter).

61. *See, e.g.*, Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2105 (1998) (noting that "a conventional understanding of such awards sees the jury as a sample from the community whose function is to provide an estimate of community sentiment"); *see also* Angela P. Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 ALA. L. REV. 1079, 1113 (1989) (discussing the communitarian perspective that "the jury, as the repository of shared communal values, is already in possession of the necessary yardstick" for determining punitive damages awards). For an argument that juries are poorly equipped to serve as community consciences for determination of punitive damages awards, see Mogin, *supra* note 5, at 215.

62. For instance, members of the community might be ignorant of past punishment practices or might feel animus toward minority groups.

history.[63] Jury punishment expertise is an *axiom* of the current punitive damages regime.

Recent empirical work suggests that this axiom rests on shaky ground.[64] To determine punitive damages awards, a jury must typically map bad conduct onto an unbounded dollar scale. Research indicates that people just are not good at this sort of thing. For some kinds of bad conduct, communal "outrage" standards exist. For instance, when researchers presented study participants with a series of descriptions of bad acts that led to personal injury and asked them to rank the acts in order of outrageousness, they tended to rank them the same way.[65] Presumably, jurors, when they determine the amount of punitive damages awards, can and do access such communal outrage standards, at least in some contexts. However, when researchers asked the same study participants to determine appropriate financial sanctions to punish the same conduct, their responses were highly variable and unpredictable.[66] It appears to be the case that, although as human beings living in a given culture we develop rough standards for determining (or at least rank ordering) the outrageousness of some forms of bad conduct, we do not develop shared mental formulae for converting badness into dollars.

Recent research also suggests how extraneous, irrelevant information may unduly affect punitive damage awards. For instance, in the absence of firm badness-to-dollars formulae, juries may be subject to the "anchoring effects" of various irrelevant numbers they hear at trial. In other words, dollar figures that may have no genuine bearing on proper punishment, such as the plaintiff's demand, may exercise a sort of gravitational pull on a jury's ultimate punitive damages award.[67]

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63. "It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1921).

64. *See* Sunstein et al., *supra* note 61, at 2098–2100.

65. Sunstein et al., *supra* note 61, at 2098–2100.

66. Sunstein et al., *supra* note 61, at 2103, 2106–07. *But see* Eisenberg, *supra* note 8, at 637 (contending that punitive damages awards are predictable because they bear a statistically significant relationship to compensatory damages awards).

67. *See, e.g.*, Sunstein et al., *supra* note 61, at 2109–10; Michael J. Saks et al., *Reducing Variability in Civil Jury Awards*, 21 LAW & HUM. BEHAV. 243, 254 (1997) (discussing anchoring effects of legislative caps on pain-and-suffering awards); Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Personal Injury Jury Verdicts*, 10 APPLIED COG. PSYCHOL. 519, 537 (1996) (discussing anchoring effects of plaintiff demands).

Of related interest, a recent study of a large sample of punitive damages awards concludes that they bear a statistically significant relationship to underlying compensatory damages awards and are therefore in some sense rational and predictable, contrary to popular belief. *See* Eisenberg et al.,

Thus, even if various juries were similarly outraged by similar bad acts, we could not expect these juries to transmute their outrage into dollars in a way that ensures similar punishment for similar defendants. To the degree proportionality of punishment presents a legitimate concern, this lack of a shared formula for transmuting badness into dollars suggests that perhaps it is not such a good idea to charge juries with the task of acting as *ad hoc* administrative bodies to determine and apply punishment policy in one case and then disband.[68] Be that as it may, that is what the law of punitive damages requires juries to do.

Summarizing, the law grants juries tremendous discretion to determine the amount of punitive damages awards. One of the more notable patterns in tort reform over recent years is that many jurisdictions have attempted to channel this discretion by offering more detailed instructions to focus jury attention on certain categories of facts bearing on retribution and deterrence. Having focused jury deliberations in this manner, such instructions do not, however, help juries figure out how to

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supra note 8, at 637. It would be interesting to determine what motivates this observed link between compensatory damages and punitive damages. Jury instructions commonly require juries to consider the seriousness of the harm caused to the plaintiff when determining the amount of a punitive damages award. Therefore, juries following such an instruction might be expected to link the size of their punitive damages awards to the size of their compensatory damages awards. It is also possible, however, that this linkage, rather than reflecting a "rationally" devised connection between compensatory and punitive damages, instead reflects an extra-legal anchoring effect. If this latter hypothesis is correct, then, even if punitive damages awards are predictable due to anchoring effects, they are perhaps not "rational" in any helpful sense of that term. *Cf.* Sunstein et al., *supra* note 61, at 2110 (noting that compensatory damages awards are arbitrary anchors insofar as deterrence theory suggests that they have no bearing on the proper size of punitive damages awards).

68. A number of commentators have suggested that, to help assuage proportionality concerns, judges rather than juries should determine the amount of punitive damages awards or at least play a more substantial role in that process. *See, e.g.*, Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc., 99 F.3d 587, 594 (4th Cir. 1996) (arguing that judges, because they get more practice punishing people, have a comparative advantage over juries when it comes to determining punitive damages); Mogin, *supra* note 5, at 212 ("Because judges are in a better position to impose a punishment that is in line with the punishments imposed for similar misconduct, determination of the amount of punitive damages by judges would promote the interest in treating like cases alike."); *cf.* Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 739–40 (1993) (stating that, given judicial professional experiences, "the judge presumably effectuates public policy goals with greater consistency than the one-time jury"). Of course, judicially-determined punishments also raise proportionality concerns—there are hanging judges and more merciful types. The perception that scattering criminal sentencing among judges in the federal system caused unfair disparities in punishment was one of the factors that motivated promulgation of the United States Sentencing Guidelines to control judicial sentencing discretion. U.S. Sentencing Guidelines Manual § 1A1.3 ("Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.").

weigh these factors. Neither the law nor the facts of a case provide a formula for converting jury-thoughts-on-punitive-damages-factors into dollars. Each jury must create its own formula for this purpose as a largely unconstrained policy choice based inevitably on juror values and intuitions concerning fair punishment. Entrusting juries with this power is troubling because, among other reasons: (a) people do not carry around stable formulae in their heads for this task, so different juries may be expected to punish similar misconduct dissimilarly; and (b) in the absence of clear standards to monetize punishment, juries (and perhaps other decision-makers, too, for that matter) may be subject to the "anchoring" effects of irrelevant numbers that they encounter during trial.

C. *The* Huckle *Problem: Judicial Control of Jury Punitive Damages Verdicts*

Today, jury punitive damages verdicts are subject to two very different kinds of control. First, a significant minority of states has taken the procrustean approach of capping punitive damages awards.[69] Second, there is judicial review for "excessiveness," which now comes in both common-law and constitutional flavors. On the common-law side, courts have reviewed punitive damages verdicts for excessiveness since 1763, when the *Huckle* court held that judges could interfere with damages awards that "all mankind at first blush" would find "outrageous."[70] On the constitutional side, the Supreme Court has, over the last decade or so, crafted due-process limitations on punitive damages, most notably holding in the 1996 *BMW* decision that "grossly excessive" awards are unconstitutional.[71]

What these approaches have in common is that, at the end of the day, they only permit a reviewing court to determine whether an award is too big for it to accept as permissible punishment—they focus on *outcome* review. This limitation is in tension with judicial rhetoric that suggests that courts should check for mistakes in jury *deliberative processes*, e.g., they should determine whether "passion," "prejudice," or other

69. *See supra* note 29 (citing examples).

70. Huckle v. Money, 95 Eng. Rep. 768, 769 (K.B. 1763); *see also* Honda Motor Co. v. Oberg, 512 U.S. 415, 425–26 (1994) (discussing the history of judicial review of jury punitive damages verdicts).

71. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996).

illegitimate factors have tainted verdicts. Courts cannot put teeth into process review, however, without information concerning the reasoning supporting verdicts.

1. Common-Law Based Review

The traditional procedural device courts use to reduce punitive damages awards they deem too big is remittitur—which grants a defendant's motion for a new trial on damages unless the plaintiff agrees to accept some lower figure determined by the judge.[72] Recently, some legislatures and courts, stressing skepticism of juror abilities to determine appropriate punishment, have declared that judges should aggressively use this power to carefully police punitive damages awards with little deference.[73] In keeping with a tradition dating back to *Huckle*, however, most courts claim to be far more deferential, frequently holding, for instance, that remittitur to cure excessiveness is only proper where a jury's award "shock[s] the conscience."[74] Appellate courts have reviewed trial court remittitur decisions for abuse of discretion.[75]

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72. *See, e.g., Atlas Food Sys. & Servs.*, 99 F.3d at 593 (defining remittitur).

73. For instance, a Minnesota Court of Appeals has remarked:

> A trial court . . . has broad discretion in determining whether to set aside a verdict as being excessive and should not hesitate to do so where it feels the evidence does not justify the amount, even if the verdict was not actuated by passion and prejudice. The "open-ended and volatile nature of punitive damages" requires a reviewing court to exercise close supervision over the award.

Mrozka v. Archdiocese of St. Paul and Minneapolis, 482 N.W.2d 806, 813 (Minn. Ct. App. 1992) (internal citation omitted); *see also, e.g.*, Clifton v. Mass. Bay Transp. Auth., 2000 WL 218397, at *33 (Mass. Super. Ct., Feb. 3, 2000) ("The fact of the matter is that, while deference is owed to every jury verdict, courts have traditionally given far less deference to the award of punitive damages than to the award of compensatory damages for emotional distress."). For an example of a legislative effort to tighten review, see FLA. STAT. ANN. § 768.74(3) (West 1997) ("It is the intention of the Legislature that awards of damages be subject to close scrutiny by the courts and that all such awards be adequate and not excessive.").

74. *See, e.g.*, Paracelsus Health Care Corp. v. Willard, 754 So. 2d 437, 444 (Miss. 1999) (citing "shock-the-conscience" standard); Barnes v. Okla. Farm Bureau Mut. Ins. Co., 11 P.3d 162, 177 (Okla. 2000) ("A punitive damage verdict lies peculiarly within the province of the jury and will not be casually interfered with on appeal."); *cf.* Honda Motor Co. v. Oberg, 512 U.S. 415, 424–26 (1994) (surveying history of judicial review of punitive awards in United States and observing that common law courts "emphasized the deference ordinarily afforded jury verdicts, but they recognized that juries sometimes awarded damages so high as to require correction").

75. *See, e.g., Atlas Food Sys. & Servs.*, 99 F.3d at 594 (applying abuse of discretion standard); *see also* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 434–35 (1996) (noting that abuse-of-discretion standard applies to denial of motion for new trial).

against the defendant for the same conduct, these also to be taken in mitigation.[84]

Courts, like juries, however, have little or no clear guidance vis-à-vis how they should weigh such factors; judges must therefore largely base excessiveness review on their own policy intuitions regarding fair punishment.[85] Without commenting whether this result is a good or a bad thing, it seems that such review amounts to a judicial gut-check to make sure that awards are not too big.[86] That said, this gut-check can have real

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84. *Id.* at 21–22 (emphasis added) (citing Cent. Ala. Elec. Coop. v. Tapley, 546 So. 2d 371, 377 (Ala. 1989)). For examples of factor lists that seem modeled on *Haslip*, see, for example, MISS. CODE ANN. § 11-1-65 (1)(f)(ii) (Supp. 2001); MONT. CODE ANN. § 27-1-221(7) (1999); *see also* Gamble v. Stevenson, 406 S.E.2d 350 (S.C. 1991) (adopting *Haslip* factors for judicial review of punitive damages awards); Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992) (same).

85. Justice Kennedy has described the problem this way:

> To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what? The answer excessive in relation to the conduct of the tortfeasor may be correct, but it is unhelpful, for we are still bereft of any standard by which to compare the punishment to the malefaction that gave rise to it. A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution. This type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend.

TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 466–67 (1993) (Kennedy, J., concurring). Examination of efforts by courts to develop clearer standards to guide review only dramatizes the force of Justice Kennedy's point. For example, the Supreme Court has repeatedly stressed the importance of comparing the ratio of punitive to compensatory damages awards in assessing excessiveness. *See Haslip*, 499 U.S. at 18, 23 (observing that punitive damages award four times the size of compensatory award might be "close to the line" of violating due process, but eschewing "bright-line," "mathematical" test); *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996) (declaring that ratio is a "guidepost" for excessiveness review). Lower court cases demonstrate how difficult it has been to turn this admonition into any kind of clear guidance. *See, e.g.*, Cont'l Trend Res., Inc. v. Oxy USA Inc., 101 F.3d 634, 639 (10th Cir. 1996) (suggesting that in economic injury cases where "damages are significant and the injury not hard to detect, the ratio of punitive damages to harm [or potential harm] generally cannot exceed a ten to one ratio"); *cf., e.g.*, Tronzo v. Biomet, Inc., 236 F.3d 1342, 1349–50 (Fed. Cir. 2001) (rejecting claim that 38,000:1 ratio between punitive and compensatory awards presented exceptional circumstances sufficient to justify review of punitive damages award where that issue was foreclosed by mandate of earlier appeal).

86. The potential of anchoring effects to affect punitive damages awards raises interesting questions concerning the psychology of their judicial review. Recall that studies suggest that jurors, faced with the problem of determining damages on an unbounded dollar scale, may be unduly influenced by "anchoring" numbers—i.e., their awards may be drawn toward dollar figures they hear at trial that may be of little or no relevance to fair punishment. *See supra* note 67 and accompanying text. If judges, too, are subject to this effect, then it would seem to follow that a judge reviewing an illegitimate punitive damages award would find her judgment concerning the "proper" amount of punitive damages subject to the "gravitational pull," as it were, of the jury's award. In other words, the higher a jury award, the higher the amount a judge might deem acceptable. More concretely, suppose a jury awards $1 million in punitive damages and a judge, on post-trial review, determines

consequences; a 1987 study suggested that, by the time post-trial and appellate review ends, plaintiffs on average only collect about fifty percent of the punitive damages that juries award.[87]

2. *The* Atlas *Outlier—The Fourth Circuit Wrestles with Juries as Punishment Policymakers*

In light of this Article's focus on the policymaking role juries play in determining punitive damages awards, no discussion of judicial review would be complete without exploration of the Fourth Circuit's innovative and relatively recent discussion of that same topic in *Atlas Food Systems & Services Inc. v. Crane National Vendors, Inc.*[88] The key to the court's analysis was to recognize, correctly, that juries engage in policymaking when they determine punishment.[89] The court then reasoned that jury policymaking merits less deference than jury fact-finding.[90]

In the first *Atlas* trial, the plaintiff, who alleged that the defendant had sold it defective vending machines that allowed customers to steal food without paying, won $3 million dollars in punitive damages.[91] The trial court found this amount to be excessive and ordered a new trial unless the plaintiff accepted a remitted award of $1 million.[92] The plaintiff gambled on a new trial and won $4 million in punitive damages.

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that this figure is unacceptably high and reduces the award 50% to $500,000. The existence of anchoring effects suggests that, if the jury had awarded $2 million instead, the judge would not have remitted to the same $500,000 figure. Instead, influenced by the higher initial jury award, she would have remitted to some larger amount; for example, she might have remitted 50% again down to $1 million. The possibility that such effects may exist (as common sense suggests they may) makes it all the more important, of course, that judges understand the grounds underlying jury-determined punitive damages awards so that they can avoid the "gravitational pull" of those tainted by error.

87. *See generally* MARK PETERSON ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, PUNITIVE DAMAGES: EMPIRICAL FINDINGS 27–29 (1987) (estimating that, after post-trial and appellate review and attendant settlement discussions, defendants actually pay approximately 50% of the punitive damages awarded by juries). *But see* Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions, the Impact of* BMW v. Gore *on Punitive Damages Awards, and Forecasting Which Punitive Awards Will Be Reduced*, 7 SUP. CT. ECON. REV. 59, 64–65, 79 (1999) (reviewing published opinions issued in the year following the Supreme Court's opinion in *BMW* that discuss the excessiveness of punitive damages awards; finding that courts reduced punitive awards in 13.1% of cases in which they affirmed punitive liability and plaintiffs had received substantial compensatory damages).

88. 99 F.3d 587 (4th Cir. 1996).

89. *Id.* at 594–95.

90. *Id.*

91. *Id.*

92. *Id.*

Undeterred by juries that kept disagreeing with him, the trial judge again ordered remittitur to $1 million. Rather than face a third trial on damages before the same judge, the plaintiff took an interlocutory appeal.[93]

The Fourth Circuit began its affirmance by observing that federal district courts, when reviewing punitive damages awards granted under the authority of state law, must apply "the state's substantive law of punitive damages under standards imposed by federal procedural law."[94] The award had been granted pursuant to South Carolina law, which provides that punitive awards should be reviewed in light of a typical laundry list of factors (i.e., defendant's culpability, duration of misconduct, etc).[95] The federal procedural law governing the propriety of ordering a new trial is Federal Rule of Civil Procedure 59; the specific question before the Fourth Circuit was whether the district court had abused its discretion by ordering a new trial pursuant to Rule 59.[96] The court observed that

> Rule 59 standards are well established in the Fourth Circuit: On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that (1) the verdict is against the clear weight of the evidence, or (2) is based upon evidence which is false, or (3) will result in a *miscarriage of justice*, even though there may be substantial evidence which would prevent the direction of a verdict.[97]

The court then noted that the first two prongs of this Rule 59 standard address "purely factual questions: whether the jury's damages award is (1) 'against the weight of the evidence' or (2) 'based upon evidence which is false.'"[98] To review such "fact questions," a court need only compare a jury's verdict to the factual record created at trial. This approach cannot work for punitive damages awards, however, because the determination of the amount of such an award "is not a *factual* determination about the degree of injury but is, rather, an almost unconstrained judgment or *policy* choice about the severity of the penalty to be imposed, given the jury's underlying factual determinations about

93. *Id.*

94. *Id.*, at 593 (citing Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279 (1989)).

95. *Id.* at 593 n.2.

96. *Id.* at 593.

97. *Id.* at 594 (emphasis added and citation omitted).

98. *Id.*

the defendant's conduct."[99] The court reasoned that, "[b]ecause the factual record provides no direct foundation for the *amount* of punitive damages" independent of jury policymaking, the fact prongs of Rule 59 analysis cannot apply.[100] Instead, "review of the size of the jury's award best utilizes the third prong of the Rule 59 review standard—whether the jury's award would result in a miscarriage of justice."[101]

The Fourth Circuit then advised that jury policymaking does not merit the same extreme deference as jury factfinding.[102] It supported this conclusion with the observation that judges, unlike juries, frequently impose criminal sentences and review punitive damages awards; courts therefore have a "comparative advantage" over juries when it comes to punishment policymaking in particular.[103] It follows that, when invoking the "miscarriage of justice" standard to review a punitive damages award, "the district court has a participatory decisionmaking role that it does not have when reviewing a jury's findings based solely on facts."[104] The upshot: courts should review punitive damages awards "less deferentially than . . . factual findings which may be measured against the factual record."[105]

The importance of *Atlas* lies in its frank recognition that the policymaking role juries play when deciding punitive damages awards should have *procedural* consequences—a proposition this Article also explores, though to different effect. *Atlas* does little, of course, to clarify for judges how large punitive damages awards should be as a matter of good policy; it does, however, encourage them to overcome any scruples they might have to refrain from interfering with jury punishment policy decisions.

3. *The Supreme Court, Due Process, and "Gross Excessiveness"*

Since 1989, the Supreme Court has heard at least six cases raising significant punitive damages issues, which together have fashioned a set

99. *Id.* (emphasis added).

100. *Id.* at 594.

101. *Id.*

102. *See id.* at 594–95.

103. *Id.*

104. *Id.* at 594.

105. *Id.* at 595.

of loose due-process limits on awards.[106] Some restrictions relate to required procedures. For instance, due process requires that trial court instructions give juries at least some idea concerning the purposes that punitive damages are supposed to serve;[107] it also requires that courts enjoy some measure of real power to reduce those awards they deem excessive.[108]

Most critically, in its 1996 decision *BMW of North America, Inc. v. Gore*,[109] the Supreme Court held that punitive damages awards that are "grossly excessive" violate due process, and the Court provided "three

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106. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, ___, 121 S. Ct. 1678, 1687–89 (2001) (holding that appellate courts should review *de novo* district court determinations of whether punitive damages awards are so "grossly excessive" as to violate due process); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996) (setting forth three "guideposts" to aid courts in determining whether punitive damages awards are "grossly excessive" and thus violate due process); Honda Motor Co., v. Oberg, 512 U.S. 415, 420 (1994) (holding that the Oregon procedures for reviewing punitive damages awards violated due process because they improperly limited court authority to reduce excessive awards); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462 (1993) (plurality) (rejecting argument that $10 million award of punitive damages for slander of title that had caused $19,000 in compensatory damages was so grossly excessive as to violate due process); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19–23 (1991) (holding that Alabama's procedures for determining and reviewing punitive damages awards did not violate due process); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 264 (1989) (holding that punitive damages awards are not subject to the Excessive Fines clause at least where the government neither prosecutes the action nor collects a share of the proceeds).

107. *See Haslip*, 499 U.S. at 19–22. This was the instruction the Court held provided sufficient guidance with regard to punitive damages:

> This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award punitive damages.
>
> Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, it does to the plaintiff, by way of punishment to the defendant and for the added purpose of protecting the public by detering [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.

Id. at 6 n.1 (internal quotation marks omitted).

108. *Honda Motor*, 512 U.S. at 420 (holding that Oregon constitutional provision that forbade courts from reducing punitive damages awards if any evidence at all supported punitive liability violated due process).

109. 517 U.S. 559 (1996).

guideposts" for gauging when an award transgresses this standard.[110] The facts of *BMW* are irresistible: Dr. Gore sued BMW for failing to disclose that it had touched up the paint on an expensive sports sedan sold to him as new.[111] The jury awarded Dr. Gore $4000 in compensatory and $4 million in punitive damages for his trouble, which the Alabama Supreme Court, for reasons that remain mysterious, remitted to $2 million.[112] The Supreme Court ruled that this remitted award violated due process because Alabama had given BMW no notice that it could be walloped with a $2 million punishment for its conduct.[113]

The "three guideposts" for determining "gross excessiveness" require courts to consider: (1) the reprehensibility of the defendant's conduct; (2) the ratio between a punitive award and the harm the defendant's conduct caused (or might likely have caused); and (3) the size of any civil or criminal sanctions the relevant legislature has created for punishing similar misconduct.[114] Applying these guideposts to the facts before it, the Court observed that BMW's nondisclosure was not really all that bad; that there was a 500:1 ratio between the $4000 in compensatory damages that Dr. Gore had won and the remitted punitive damages award of $2 million; and that Alabama's maximum civil penalty for deceptive trade practices was a mere $2,000.[115] In light of these circumstances, the Court concluded that Alabama had not given BMW reasonable notice that its undisclosed paint-job could lead to a multi-million dollar fine.[116]

Although *BMW* expresses a hostile mood toward punitive damages, it is questionable whether its guidelines represent much of an advance on traditional, common-law-based excessiveness review. For one thing, the *BMW* "gross excessiveness" test suffers from the same problem as any other form of excessiveness review—it offers courts no clear formula for

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110. *Id.* at 574–75.

111. *Id.* at 563.

112. *Id.* at 565–67.

113. *Id.* at 574–75. This "notice" dimension of *BMW* makes it seem a mix of substantive and procedural due process concepts. On the one hand, *BMW* instructs that awards must not be too big, which smacks of substantive due process. On the other, it hints that the problem was that Alabama gave BMW no warning that its conduct could be subject to such a massive penalty, which suggests a procedural due process issue. If the Court were serious about hanging *BMW* on a procedural hook, then it would seem to follow that the remitted award might have stood if Alabama's deceptive trade practices act had provided for sanctions on the order of $2 million rather than $2,000.

114. *Id.*

115. *Id.* at 575–85.

116. *Id.* at 585.

weighing its "guideposts" and instead simply tells courts some factors they should think about when deciding how big awards should be.[117] For another, some states' highly malleable factors for excessiveness review already largely encompassed the guideposts.[118] Finally, a recent study of published opinions reviewing punitive damages verdicts both before and after *BMW* suggests that it did not immediately lead lower courts to review awards more aggressively.[119]

Nonetheless, the Supreme Court has recently issued an opinion, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[120] which may give *BMW* more bite in the future. In this case, the Court resolved a circuit split regarding whether appellate courts should review district court determinations of "gross excessiveness" under an abuse-of-discretion or *de novo* standard.[121] The Court chose the stricter *de novo* standard in part on the ground that appellate courts need such control to develop case law that gives meaning to the abstract concept of "gross excessiveness."[122]

4. *A Summary of Judicial Review*

Courts have often used rhetoric suggesting that they review jury *deliberations* for "passion and prejudice." In the absence of information from juries concerning their deliberations, however, passion-and-

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117. Justice Scalia remarked in his *BMW* dissent, "[t]he Court has constructed a framework that does not genuinely constrain, that does not inform state legislatures and lower courts—that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not 'fair.'" 517 U.S. at 606 (Scalia, J., dissenting).

118. For instance, the influential *Haslip* list of review factors expressly contains the first and second *BMW* guideposts—reprehensibility and ratio of harm to punishment. *See supra* text accompanying note 84. *See also* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, ___, 121 S. Ct. 1678, 1691 (2001) (Ginsburg, J., dissenting) (observing that two of the three *BMW* guideposts were derived from common-law standards of excessiveness "that typically inform state law"); Vandevender v. Sheetz, Inc., 490 S.E.2d 678, 692–93 (W. Va. 1997) (concluding that *BMW* required no change to West Virginia procedures for review of punitive damages awards because the *BMW* guideposts were consistent with standards already in place).

119. Eisenberg & Wells, *supra* note 87, at 79 (comparing published opinions reviewing punitive damages awards in the year preceding the *BMW* decision with those in the year following; concluding that *BMW* appeared to have had no statistically significant effect on percentage of cases in which courts remit punitive damages awards).

120. 532 U.S. 424, ___, 121 S. Ct. 1678 (2001).

121. *Id.* at 1687–89.

122. *Id.*

prejudice review must reduce to a form of *outcome* review for excessiveness. Judicial review of punitive damages awards for excessiveness (in both common-law and constitutional flavors) requires courts to determine whether an award is too big in light of various retribution and deterrence-related factors, e.g., the gravity of the defendant's misconduct, its profitability, etc. Courts, like juries, have no settled formulae for weighing such factors and instead must largely rely on their own idiosyncratic notions of fairness to guide their review. In keeping with tradition, many courts—at least in their rhetoric—continue to stress deference to jury punitive damages awards. Some courts (sometimes at the bidding of their legislatures) have abandoned this rhetoric of deference in light of their suspicions that juries are not particularly competent to determine punishment.

III. WE HAVE THE PROCEDURAL POWER TO FIND OUT MORE: RULE 49(B), EXPLANATORY VERDICTS, AND ITERATIVE INSTRUCTIONS

The law places very few limits on jury discretion to determine punitive damages awards, but prominent among such loose constraints as *do* exist are: (a) the law tells juries what factors they should consider as relevant to punishment; and (b) judges can set aside awards they deem so "excessive" as to "shock the conscience."[123] Neither of these constraints can function well in the absence of information concerning the grounds for a jury's punitive damages award. Without such an explanation, a judge cannot tell whether the jury based its award on consideration of irrelevant factors with no proper bearing on punishment. Moreover, whether a jury's award is "excessive" should depend on what precisely it sought to punish. A judge reviewing an unexplained award can only guess as to jury motivations. Thus, for these and other reasons that will be discussed in more detail in Part IV, it would be good for reviewing courts to learn juries' justifications for their punitive damages verdicts.

From this conclusion, two procedural questions follow: First, how much such information could courts obtain? The answer seems to be: a lot more than they generally seek. Courts could and should ask juries to answer open-ended interrogatories that ask them to describe the factual bases for their punitive damages awards. Second, where an

123. The third, procrustean constraint is the arbitrary caps that some states have placed on awards. *See supra* note 29.

"explanatory" verdict reveals that an award has been tainted by error, what steps might a court take to correct it? At least in those cases where the error does not suggest jury prejudice or incompetence, the court could and should ask the jury to reconsider its award in light of supplemental, corrective instructions. Adopting such procedures would enable courts to better ensure that punitive damages awards are both legal and minimally reasonable.

A. A Creative Approach to Rule 49(B)—Asking Juries for "Explanatory Verdicts"

Our litigation system places a high value on ensuring the privacy of jury deliberations and the finality of verdicts. For these reasons, jurors generally cannot offer admissible testimony to explain the reasoning (or lack of it) underlying their verdicts.[124] In other words, juries enjoy a form of work-product protection for their deliberations. Not all jury thoughts are immune from scrutiny, however—those embodied in a verdict could not be more public, obviously, and courts have a great deal of relatively untapped power to shape the form of verdicts. The upshot: for the most part courts cannot force juries to *explain* their verdicts *after the fact*, but they can insist that juries issue *explanatory* verdicts, which may shed a great deal of light on jury reasoning.

1. The Logic of Asking

Stepping back, an observer from another procedural planet might conclude that one of the odder aspects of our civil litigation system is the way in which courts arm juries with the legal concepts necessary to reach a general verdict. In civil litigation, a general verdict merely requires a jury to declare whether the defendant is liable and, if so, how much the defendant owes in damages. To reach these conclusions, a jury must first determine the material facts of the case and then apply these facts to the law as set forth in the court's instructions, which are often long and filled with jargon.[125] Courts read these instructions to juries, which then retire to deliberate. A trial judge has discretion with regard to whether to

124. *See infra* notes 130–31 and accompanying text.

125. *See, e.g.*, Walker v. N. M. & S. Pac. R.R., 165 U.S. 593, 596 (1897) ("[A] general verdict embodies both the law and the facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be and express their conclusions in the verdict.").

supply jurors with written copies of their instructions—traditionally, however, there has been some thought that this is a bad idea.[126] Of course, a jury might find such legal training confusing (not to mention dispiriting) and ask for clarifying instructions.[127] Courts have sometimes responded to such requests by repeating the instructions that confused the jury in the first place.[128] To state the obvious, the law's usual approach to teaching juries the law they ostensibly need to learn is—pedagogically speaking—a joke.[129]

If the goal were to provide juries with a correct understanding of the law for them to apply to the facts of cases, it would be easy to imagine better ways to go about it. For instance, judges could sit in on jury deliberations. They would detect legal errors as juries made them and correct them through appropriate curative instructions. In addition, judges in the jury room could learn exactly what facts juries are finding and ensure that they are supported by substantial record evidence.

Less aggressively, rather than observe deliberations, courts might require juries to summarize the grounds for their verdicts. Such explanatory verdicts might similarly expose legal errors and isolate dubious fact-finding while at the same time preserving the privacy of

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126. 9A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2555, at 435–36 (2d ed. 1995) (observing that "[s]ome believe that providing the jury a copy of the instructions enhances the danger that the jurors may pick passages out of context contrary to the rule that the jury must consider the charge as a whole").

127. See Roger M. Young, *Using Social Science to Assess the Need for Jury Reform in South Carolina*, 52 S.C. L. REV. 135, 156–62 (2000) (collecting studies demonstrating that juries have grave problems comprehending their instructions).

128. *See, e.g.*, Weeks v. Angelone, 528 U.S. 225, 229, 234 (2000) (holding that trial court in capital case did not err when it responded to jury's query concerning its discretion to sentence defendant to life instead of death by referring jury to relevant portion of original instructions).

129. A recent study suggests the enormity of this joke in the context of punitive *liability* instructions. Researchers asked 726 mock jurors to determine punitive liability for four fact patterns closely based on cases in which appellate courts had ruled as a matter of law that the defendants could *not* be held liable for punitive damages. Reid Hastie et al., *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 LAW & HUM. BEHAV. 287, 290–91 (1998). Study participants were read jury instructions (which were approximately 500 words long and excerpted from those used in the *Exxon Valdez* matter) and provided with copies to consult during deliberations. *Id.* at 291. After the mock juries returned their verdicts, the researchers asked the participants to fill out questionnaires designed to determine how well they had understood their instructions. *Id.* at 292. The median score on that test was 5% correct; the mean was 9% correct. *Id.* at 295. The authors of the study suspect that jurors may have had trouble distinguishing recklessness from negligence—a conclusion consistent with the fact that 67% of the mock juries that were able to reach a verdict found punitive liability even though appellate courts had ruled out such liability as a matter of law for the fact patterns at issue. *Id.* at 293, 303.

deliberations. Where an explanatory verdict brought such errors to light, a judge might, in an appropriate case, help the jury by offering clarifying instructions and recharging it for further deliberations. The process for educating juries could thus become a sort of stylized conversation rather than an exercise in issuing confusing legal commands once and then hoping for the best. No doubt such an approach would change the outcome of at least some cases.

2. *Rule 606(b) Does Not Stop Courts from Asking*

To some, however, the suggestion that judges require juries to summarize their deliberations in explanatory verdicts may run counter to a long-held habit of thinking of the jury room as something of a black box. Federal Rule of Evidence 606(b) exemplifies this view of the jury room as semi-sacrosanct, providing:

> Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror . . . .[130]

The thrust of this complicated provision is that, subject to various confusing exceptions, jurors cannot provide competent evidence explaining how they reasoned their way to a verdict.

At first glance, one might think that Rule 606(b) creates an obvious roadblock to courts requiring juries to explain the grounds for their punitive damages awards because seeking such information would amount to forbidden investigation into juror "mental processes." This rule, however, forbids *post*-verdict inquiries into jury deliberations as a means of preserving the finality of verdicts—the thought being that, without such a rule, losing lawyers would harass and attempt to corrupt

130. FED. R. EVID. 606(b).

jurors to obtain testimony to undo trial outcomes.[131] Rule 606(b), in short, protects verdicts from jurors and lawyers; it does not speak to what can go into a jury's verdict in the first place. Requiring a jury to return a verdict of a certain form cannot violate this rule.

3. Rule 49(b) Authorizes Asking: The Mechanics of Explanatory Verdicts

Eliminating any Rule 606(b) objection clears the way for an analytically distinct procedural question: Do courts enjoy an affirmative power to require juries to explain their grounds for awarding punitive damages? The answer to this question seems to be yes—at least in federal court and in those states (a substantial majority) that have based their rules of civil procedure governing verdict forms on the federal model.[132] Underlying any punitive damages award, there must be some sort of "punitive story"—some set of factual findings about the defendant and its conduct that motivated the jury to punish. Generally speaking, there are three different kinds of verdict forms in civil litigation—the general verdict, the special verdict, and the general verdict with interrogatories.[133] Courts could use this last form to require juries to report their "punitive stories."

As discussed above, in a civil case a general verdict may simply state whether the defendant was liable and the amount of damages owed. To reach a general verdict, a jury must apply the facts of a case to the law. This process leaves ample room for jury legal error.

Federal Rule of Civil Procedure 49 (and parallel state rules) authorizes courts to use either of two alternative verdict forms to diminish this problem. First, Rule 49(a) provides for "special verdicts," which require a jury to issue a "special written finding upon each issue of fact" in response to a series of questions posed by the judge.[134] The judge then applies the jury's factual findings to the law to determine the case's outcome. In theory, special verdicts can remove room for jury legal error; in practice, they tend not to do so because courts often pose

131. *See* Tanner v. United States, 483 U.S. 107, 119–20 (1987) (discussing policy considerations of verdict finality supporting Rule 606(b) and its common-law precursor); *see also* FED. R. EVID. 606(b), advisory committee's notes (observing that rule promotes "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment").

132. *See supra* note 26 (listing examples of state rules based on FED. R. CIV. P. 49).

133. 9 JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 49.02[1]–[2] (3d ed. 2001).

134. FED. R. CIV. P. 49(a).

questions at a level of abstraction that requires application of legal concepts (e.g., "Did the defendant materially breach the contract?" or "Was the defendant's conduct negligent?"). Also, special verdicts can be treacherous to use because if a court omits an issue of fact from its verdict form without objection, the parties waive the right to trial by jury on that issue.[135]

Rule 49(b) provides a second alternative, the "general verdict accompanied by answer to interrogatories," which, as the name suggests, is an intermediate form designed to avoid both the opacity of general verdicts and the technical difficulties of special verdicts. Pursuant to Rule 49(b), a "court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict."[136] Because the jury reaches a general verdict, this hybrid form avoids the technical pitfall of special verdicts that they must cover each material issue of fact on pain of waiver. At the same time, however, the use of select interrogatories permits a court to illuminate the jury's fact-finding and minimize room for jury legal error.

Federal district courts have nearly blanket discretion to choose which of these verdict forms to use in a given case.[137] Given the frequency of attacks on the competency of civil juries over recent decades, one might expect courts to use special verdicts or general verdicts with interrogatories frequently to exercise greater control over jury deliberations. Nonetheless, it seems that, in federal court at least, the general verdict is the form of choice.[138]

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135. *Id.*

136. FED. R. CIV. P. 49(b).

137. *See, e.g.*, Bills v. Aseltine, 52 F.3d 596, 605 (6th Cir. 1995) ("Whether a court uses a special or general verdict rests in its discretion . . . ."), *cert. denied*, 516 U.S. 865 (1995); Jarrett v. Epperly, 896 F.2d 1013, 1020 (6th Cir. 1990) (stating that the court has discretion to determine form of jury verdict, and that the court's exercise of that discretion is usually unreviewable); Barton's Disposal Servs., Inc. v. Tiger Corp., 886 F.2d 1430, 1434 (5th Cir. 1989) (noting that the court has "great latitude in the framing and structure of the instructions and special interrogatories").

138. Going beyond impressionistic surveys to determine the actual rates at which courts use these various forms would present an onerous research project. That said, see Elizabeth G. Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 FORDHAM L. REV. 1837, 1840 (1998) (observing that "[c]ourts and commentators agree that the majority of federal jury-tried civil cases are submitted to the jury using a general charge"); *see also* WRIGHT & MILLER, *supra* note 126, § 2505, at 172 (2d ed. 1995) (observing that "the use of Rule 49(a) [special verdicts] never has been widespread in the federal courts").

A court that does choose to use one of the Rule 49 alternatives has similarly vast discretion to choose the form of the questions it will pose to the jury.[139] Rule 49(a) speaks to this issue directly, providing,

> the court [using a special verdict form] may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; *or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate.*[140]

Although Rule 49(b) lacks parallel language, courts have interpreted it to incorporate Rule 49(a)'s broad grant of power over form.[141]

Some courts have suggested that this discretion is limited by the principle that they should only pose questions of "ultimate fact," which ask juries to categorize events in terms of legal concepts (e.g., "Did George drive negligently?").[142] On this view, courts should refrain from posing questions of "evidentiary fact," which, roughly speaking, ask juries to describe events in "lay" terms without plugging them into legal pigeonholes (e.g., "Did George run the red light?").[143] This limitation is suspect for three reasons. First, the distinction between ultimate and evidentiary facts is famously unhelpful—there is no clear boundary

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139. *See, e.g.*, Romano v. Howarth, 998 F.2d 101, 104 (2d Cir. 1993) (noting that district courts have broad discretion to determine form of special interrogatories posed to jury); Lummus Indus., Inc. v. D.M. & E. Corp., 862 F.2d 267, 273 (Fed. Cir. 1988) (observing that trial judge has broad discretion to determine form of jury verdict and that exercise of that discretion is not ordinarily reviewable); Thornburg, *supra* note 138, at 1842 (observing that "[s]ix decades of case law" have failed to provide district courts with meaningful guidance vis-à-vis drafting special verdicts and interrogatories and collecting cases demonstrating that courts have approved use of extremely broad "omnibus questions" as well as extremely narrow questions directed at specific factual and legal contentions).

140. FED. R. CIV. P. 49(a) (emphasis added).

141. WRIGHT & MILLER, *supra* note 126, § 2512, at 221.

142. WRIGHT & MILLER, *supra* note 126, § 2512, at 221; *see also, e.g.*, Act Up!/Portland v. Bagley, 988 F.2d 868, 876 (9th Cir. 1993) (Norris, J., dissenting from denial of petition for rehearing en banc) (noting that special verdicts generally pose questions of ultimate fact). For a discussion of the definition of "ultimate fact," see *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir. 1981) ("An ultimate fact is usually expressed in the language of a standard enunciated by case-law rule or by statute, e.g., an actor's conduct was negligent; the injury occurred in the course of employment; the rate is reasonable; the company has refused to bargain collectively.") (internal citations omitted).

143. *See Univ. Minerals*, 669 F.2d at 102 (contrasting "basic facts" and "inferred factual conclusions" concerning "historical and narrative events" from "ultimate facts" which depend upon application of "legal precepts").

separating the two.[144] Second, notwithstanding the haziness of this distinction, one can find examples of cases in which courts have asked juries to find extremely specific facts that surely fall on the "evidentiary" side of the line.[145] Third, the plain text of Rule 49 contains no such limitation.

Despite the breadth of their discretion, in practice, courts seem to have adopted a crabbed approach to Rule 49 that tends to minimize the information that special verdict forms and interrogatories obtain from juries. For liability issues, courts will often pose questions in yes/no or check-a-box formats (e.g., "Do you find by a preponderance of the evidence that the defendant was negligent?").[146] For damages, courts seem generally to ask juries to fill in a blank (e.g., "The defendant is liable to the plaintiff for $_____.").[147]

On its face, however, Rule 49 authorizes courts to use whatever verdict forms they deem "most appropriate."[148] This broad language suggests that, where "appropriate," courts could ask juries much more open-ended questions. For example, rather than ask a jury "Was the defendant negligent?," a court might instead ask a jury to "Describe the defendant's negligent acts." By asking questions that invite descriptive

144. WRIGHT & MILLER, *supra* note 126, §1218, at 179:

> Unfortunately, as was amply demonstrated by years of frustrating experience, it was difficult, if not impossible, to draw meaningful and consistent distinctions among 'evidence,' [ultimate] 'facts,' and 'conclusions [of law].' These concepts tended to merge to form a continuum and no readily apparent dividing markers developed to separate them.

145. *See, e.g.*, Warlick v. Cross, 969 F.2d 303, 305 (7th Cir. 1992) (using interrogatory to determine if police officer planted evidence); Tillman v. Great Am. Indem. Co. of N.Y., 207 F.2d 588, 591 (7th Cir. 1953) (making detailed inquiries concerning defendant's control of automobile); Gelfand v. Strohecker, Inc., 150 F. Supp. 655, 663 (N.D. Ohio 1956) (taking the extreme position that "[a]n interrogatory which sought merely to determine whether the defendant was negligent, without requiring the determination of the supporting facts would be improper"), *aff'd* 243 F.2d 797 (6th Cir. 1957).

146. *See, e.g.*, 9 BENDER'S FEDERAL PRACTICE FORMS, 49:1-11, at 49-13-38 & 49:30-36, at 49-45-59 (2001) (collecting 18 sample special verdict and general verdict with interrogatories forms; each sample form poses questions in simple yes-no, check-a-box, or fill-in-the-blank form).

147. *See, e.g., id.* For another typical example of jury interrogatories exemplifying this practice, see, for example, *Dreiling v. General Electric Co.*, 511 F.2d 768, 774 (5th Cir. 1975). In that case, the jury was asked to answer the following questions:

> 1. Was General Electric Company negligent? Yes____ No____
>
> 2. Did the Pacemaker have a defect at the time General Electric sold it? Yes____ No____
>
> 3. What is the total amount of damages suffered by Mrs. McLelland? $_____

Id.

148. FED. R. CIV. P. 49(a).

responses or "explanatory verdicts," courts obviously could learn a great deal more information concerning jury reasoning than by spoonfeeding leading questions that must be answered by an unexplained "yes" or "no."

Perhaps surprisingly, it is difficult to find published opinions discussing the propriety of asking open-ended interrogatories. One federal district court in a cursory opinion rejected the notion that they "must be put to the jury" in response to a defendant's request.[149] On the other hand, one can find cases in which courts have asked juries to give descriptive, explanatory answers in their verdicts without exploring the propriety of doing so.[150] In short, the law on this point remains somewhat

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149. Phillips v. N.W. Nat'l Ins. Co., 516 F. Supp. 762, 765 (W.D. Pa. 1981). In *Phillips*, the court rejected the defendant insurer's request for an interrogatory asking the jury to identify specific language in its policy providing coverage to the plaintiff. The court noted that the insurer had "cited no cases that suggest such an open-ended interrogatory must be put to the jury." *Id.* It then ruled that its decision "to submit only those interrogatories capable of simple and direct answers seems in accord with the preferred view." *Id.* (citing Bertinelli v. Galoni, 200 A. 58, 60 (Pa. 1938); 89 C.J.S. TRIAL § 531 (1981)). The court's discussion is interesting for two reasons. First, it does not explain why the jury's answer to an interrogatory asking for identification of material contractual language would be anything other than "simple and direct." Second, the insurer's failure to cite supporting cases in tandem with the court's reliance on a forty-three-year-old state court case and unclear secondary authority suggests the paucity of law on point.

150. The Supreme Court itself has supplied an example of the use of "open-ended" jury interrogatories—albeit in a case that did not discuss their propriety. In *Walker v. New Mexico & South Pacific Railroad*, the appellant challenged the constitutionality of a statute of the territory of New Mexico that authorized courts to require juries to return "special findings of fact" and to enter judgment on such findings even where they conflicted with a jury's general verdict. Walker v. N.M. & S. Pac. R.R., 165 U.S. 593, 594–95 (1897). In holding that this precursor to Rule 49(b) did not violate the Seventh Amendment, the Court noted that the use of special verdicts had been recognized at common law and that "[i]t was also a common practice when no special verdict was demanded and when only a general verdict was returned to interrogate the jury upon special matters of fact." *Id.* at 597. Later in the opinion, the Court quoted some of the jury interrogatories and their answers, including the following:

> Q. 9. If you state in answer to the last question that there was such an arroyo, state where it is, its length, breadth, and the height of its banks. A. West of the city of Socorro and east of the Catholic graveyard; its banks are about two feet, its width about sixty feet, and about a mile in length, more or less.
>
> Q. 14. How far from the main line of the railroad, in a westerly direction, are the mouths of the arroyos testified to by the witnesses? A. Three quarters mile to main arroyo, and one quarter of a mile to lower arroyo.
>
> Q. 15. What is the character of the land lying between the mouths of the arroyos and the main line of the railroad is it level or sloping, and for what purposes was it used in 1886? A. It is level now, and in 1886 it was an arroyo, and there is no ditch now excepting the company drain.

Id. at 601. For an especially interesting example of the use of open-ended interrogatories, see *Rowland v. Mad River Local School District*, 730 F.2d 444, 456–60 (6th Cir. 1984). Appendix A to

unsettled. That said, given the expansive language of Rule 49 and the many cases stressing the breadth of trial court discretion over verdict forms, a court that deemed it "appropriate" to ask a jury to answer an open-ended interrogatory should have ample authority to do so.

B. Fixing Errors by Recharging Juries with Corrective Instructions

Moving past issues of form, the point of asking juries to answer interrogatories is that it sometimes exposes errors, which raises the question of how courts should act to correct them. For instance, in a negligence case, a jury might find that the defendant exercised due care yet at the same time find it liable for damages. Rule 49(b) offers courts the following options for dealing with such inconsistencies:

> When the answers [to interrogatories] are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, *or the court may return the jury for further consideration of its answers and verdict or may order a new trial.* When the answers are inconsistent with each other or one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but *the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.*[151]

To avoid undue interference with jury power, a court should make every reasonable effort to reconcile apparent inconsistencies among

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the dissent in this case set forth in full the special verdict form that the magistrate judge had submitted to the jury. *Id.* Several of its questions asked the jury to explain its responses to other yes/no questions. For instance, the form queried:

> 1. Did Mrs. Rowland's statement . . . regarding Mrs. Rowland's love for another woman in any way interfere with the proper performance of either Mrs. Rowland's or Elaine Monell's duties . . . ?
>
> 2. If your answer to question 1 was "YES," state in the notebook provided how the statement in question interfered with the performance of duties . . . .

Id. at 456; *see also* Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN L. REV. 15, 93 (1990) (praising use of combination of "Yes/No" and "Explain How" questions in *Rowland* for enabling "jurors to expand upon their responses in narrative fashion while at the same time confining them to the pivotal fact disputes"). For a third example of use of open-ended interrogatories, see *infra* note 175 (setting forth portion of verdict form in death-penalty case that invited jurors to describe mitigating factors).

151. FED. R. CIV. P. 49(b) (emphasis added).

interrogatory answers and a general verdict.[152] But, where a court's reconciliation efforts fail, the court may order a jury to deliberate further in the hope that it will resolve the inconsistency.[153] Where inconsistent answers indicate that the jury found the court's initial instructions confusing, the court should offer clarification.[154] In other words, rather than simply ignore a jury's errors or order a new trial, a court may take appropriate steps to *help* the jury fix its mistakes. Alternatively, if the jury's responses suggest an unwillingness or inability to follow the law, the court should order a new trial.[155]

The court's post-verdict power to help the jury is not limited to correcting the *jury's* mistakes but extends to correcting *its own* mistakes. If a jury goes astray because the court gave incorrect or incomplete instructions on the law, it may, in an appropriate case, recharge the jury for further deliberations in light of corrective instructions. For instance, in the sexual harassment case *Bonner v. Guccione*,[156] the district court determined that the jury's special verdict answers, though not plainly inconsistent, had been affected by a mistaken instruction concerning the applicable statute of limitations under the New York State Human Rights Law (NYSHRL).[157] The plaintiff's attorney brought this problem to the

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152. *See, e.g.*, Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364 (1962) (observing that "[w]here there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way"); Wilks v. Reyes, 5 F.3d 412, 415–16 (9th Cir. 1993) (observing that courts must make every reasonable effort to harmonize components of jury verdicts and holding that general verdict that defendant was liable for violating plaintiff's civil rights was not inconsistent with jury's determination to award no damages).

153. *See, e.g.*, McLaughlin v. Fellows Gear Shaper Co., 786 F.2d 592, 596–97 (3d Cir. 1986) (upholding resubmission of case to jury for further deliberations to resolve inconsistencies in light of supplemental interrogatories).

154. *See, e.g.*, Hafner v. Brown, 983 F.2d 570, 573–75 (4th Cir. 1992) (upholding district court's supplemental, post-verdict instructions to jurors clarifying rules for awarding compensatory and punitive damages where jury had assessed punitive damages against some defendants without finding them liable for compensatory damages); *McLaughlin*, 786 F.2d at 596–97 (upholding, in products liability case, trial court's submission of supplemental interrogatories on the issue of forseesability intended to resolve inconsistencies in jury's answers to special interrogatories). *But cf.* Jacobs Mfg. Co. v. Sam Brown Co., 19 F.3d 1259, 1267 (8th Cir. 1994) (finding that trial court may not invite inconsistency by submitting supplemental, post-verdict interrogatories to a jury that has delivered a clear, unambiguous verdict), *cert. denied*, 513 U.S. 1190 (1995).

155. WRIGHT & MILLER, *supra* note 126, § 2513, at 233 (observing that a court's decision whether to order a new trial "should reflect the degree of confidence it has in the jury's ability to straighten the inconsistency out satisfactorily without compromising the fairness of the process or the integrity of the result").

156. 178 F.3d 581 (2d Cir. 1999).

157. *Id.* at 584–85, 587.

court's attention after the faulty instructions had been read to the jury but before it had retired to deliberate.[158] Rather than seek immediate correction, which, in the plaintiff's attorney's strategic view, would have "emphasize[d] something that the jury hasn't indicated they are in a quandary over," she instead requested that the charge be corrected, if necessary, by a post-verdict interrogatory.[159] The jury returned special verdicts finding the defendant liable for creating a hostile work environment but awarding no damages, a result that suggested to the court that the jury's damages analysis had been affected by the incorrect statute-of-limitations instruction, which permitted the plaintiff to recover damages for only a very short period of time.[160] The district court responded by giving the jury a supplemental instruction on the correct statute of limitations under the NYSHRL, and the jury, given the chance to reconsider, awarded $90,000 in damages.[161]

The Second Circuit upheld the trial court's decision to issue the supplemental instruction.[162] The defendants had urged on appeal that it was improper for the trial court to correct its mistake because, among other reasons, the plaintiff had waived her objection to the original instruction by failing to seek immediate correction.[163] The defendants based this argument on Federal Rule of Civil Procedure 51, which governs jury instructions and provides, in pertinent part, that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict . . . ."[164] The appellate court rejected this argument. As one ground for doing so, it noted that the purpose of Rule 51 is "to prevent unnecessary new trials because of errors the judge might have corrected if they had been brought to his attention at the proper time."[165] Because

158. *Id.* at 584.

159. *Id.*

160. *See id.* at 585.

161. *Id.*

162. *Id.* at 586–88.

163. *See id.* at 586.

164. FED. R. CIV. P. 51. In most Circuits, appellate courts will review objections that are untimely under Rule 51 (where it applies) only for "plain error"; the Second and Ninth Circuits are even more draconian and generally treat failure to satisfy Rule 51 as a complete block to appellate review of instructional error. 9 JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 51.21[2], at 51-49-50 (Matthew Bender 3d ed.).

165. *Bonner*, 178 F.3d at 586 (quoting Cohen v. Franchard Corp. 478 F.2d 115, 122 (2d Cir. 1973)).

the trial court had corrected its instructional error before discharging the jury, there was no need for a retrial, and Rule 51 was not implicated.[166]

As further support for this analysis, the court cited the Supreme Court's decision in *City of Newport v. Fact Concerts, Inc.*[167] In that civil rights action, a jury found the defendant city liable for punitive damages and set forth the amount in a special verdict form that distinguished punitive from compensatory damages (i.e., it was clear from the verdict form how much of the total award was compensatory and how much was punitive—this is not always the case).[168] The city sought to overturn the punitive damages award on the ground that municipalities cannot be held liable for such damages under Section 1983.[169] The plaintiff argued that, under Rule 51, the city had waived this argument by failing to timely object to the district court's instructions, which had authorized the jury to award punitive damages.[170] The district court first rejected the plaintiff's waiver argument and then rejected the city's belated defense on its merits.[171]

On appeal, the plaintiff continued to press its waiver argument. The Supreme Court also rejected it, taking a functional view of Rule 51 and noting that, "[b]ecause the District Court reached and fully adjudicated the merits, and the Court of Appeals did not disagree with that adjudication, no interests in fair and effective trial administration advanced by Rule 51 would be served if we refused now to reach the merits ourselves."[172] In this pragmatic vein, the Court observed that the district court's waiver analysis

> may have been influenced by the unusual nature of the instant situation. Ordinarily, an error in the charge is difficult, if not impossible, to correct without retrial, in light of the jury's general

166. *Id.* at 586–88; *see also* Barrett v. Orange County Human Rights Comm'n, 194 F.3d 341, 349 (2d Cir. 1999) (plaintiff could object to instructions issued midway through deliberations even though plaintiff could have but failed to make same objection at time of original instructions). *But cf.* Parker v. City of Nashua, 76 F.3d 9, 13 (1st Cir. 1996) (noting that few cases address whether waiver principles block a party that has failed to properly object to instructions before a jury first retires to deliberate from later objecting to same instructions when they are reissued to jury midway through deliberations).

167. 453 U.S. 247 (1981).

168. *Id.* at 253.

169. *Id.*

170. *Id.* at 255.

171. *Id.* at 253–55.

172. *Id.* at 256.

> verdict. In this case, however, we deal with a wholly separable issue of law, on which the jury rendered a special verdict susceptible of rectification without further jury proceedings.[173]

In other words, the district court could have granted the defendant city's post-trial motion to strike the punitive damages portion of the verdict without any need for a new trial. Therefore, Rule 51 did not block the city's belated objection because the rule's efficiency rationale was largely inapplicable.

In short, regardless of whether the source of legal error is a court's mistaken instruction or a jury's misunderstanding of a correct instruction, Rule 49 and cases like *Bonner* teach that trial courts can, with due care, ask juries to reconsider their verdicts in light of corrective instructions. Sometimes, instructing the jury can be an iterative process.

C. Explanatory Verdicts, Iterative Instructions, and Punitive Damages

It could prove fairly simple and highly informative for courts to use open-ended jury interrogatories and iterative instructions to improve procedures for determining and reviewing punitive damages verdicts. Again, the law typically requires juries to determine the amount of punitive damages awards in light of their consideration of a list of factors bearing on retribution and deterrence. For example, juries may be required to consider, among other factors, the seriousness of the defendant's tort, its awareness of the dangers it created, the profitability of the misconduct, and the defendant's financial state.[174] In other words, the law instructs jurors to mull over various categories of facts concerning the defendant and its conduct. Having thought about the "right" facts, juries are then to choose how harshly to punish. Knowing which facts a jury deemed material to punishment would enable a reviewing court both: (a) to make sure that the jury thought about the "right stuff"; and (b) to make sure that these facts can "reasonably" support the jury's award (i.e., that the jury has not made a crazy policy choice).

Courts could obtain such information by using open-ended interrogatories to ask juries to identify the facts that motivate their

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173. *Id.* at 256 n.12.

174. *See supra* note 56 and accompanying text.

punishment decisions. A court adopting such an approach might submit an interrogatory looking something like this to a jury:

> If you decide that the defendant committed [fill in name of tort] with reckless disregard for the rights of others, the law permits but does not require you to award punitive damages against the defendant to punish the defendant and discourage it or others from committing such acts in the future. As you decide how much, if any, in punitive damages to award, you should think about: [fill in the jurisdiction's punitive damages factors].
>
> If you award punitive damages, explain what facts about the defendant and its conduct influenced your decisions to award punitive damages and how much to award.[175]

The jury's response to such an interrogatory would form part of the verdict read in court. With such an explanatory verdict in hand, the court—with the assistance and insistence of counsel—could, to use administrative law terms, take a "hard look" at the jury's punitive

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175. There are, of course, many different ways one could pose interrogatories to try to learn the "punitive story" behind an award. One might, for instance, pose a separate interrogatory for each punitive damages factor the jury was instructed to consider (e.g., "Identify any facts about the defendant's financial condition that influenced your decision concerning how much to award," etc.). Such an approach could have the advantage of focusing jury consideration on each of the factors the law declares relevant. It might, however, also encourage juries to confabulate and make up reactions that they did not have. My perhaps naïve psychological speculation is that one would obtain the most insight into jury deliberations by using open-ended interrogatories that are as general as possible and thus do not force juries to describe their findings in preconceived pigeonholes.

A recent death-penalty case, *United States v. Bin Laden*, provides an example of a hybrid approach. The verdict form listed a specific set of mitigating factors on which the defense had based its argument for mercy. The form also, however, informed jurors:

> The law does not limit your consideration of mitigating factors to those that can be articulated in advance. Therefore, you may consider during your deliberations any other factor or factors in [the defendant's] background, record, character, or any other circumstances of the offense that mitigate against imposition of a death sentence.
>
> The following extra spaces are provided to write in additional mitigating factors, if any, found by any one or more jurors. If more space is needed, write 'continued' and use the reverse side of this page.

United States v. Bin Laden, No. S(7) 98 Cr. 1023, Transcript of Trial at 7254 (S.D.N.Y., June 5, 2001), *available at* http://www.cryptome.org/usa-v-ubl-59.htm. In response, the jury described five "unlisted" mitigating factors: killing the defendant would make him a martyr; killing him would not necessarily alleviate the suffering of the victims; lethal injection would not make him suffer; life imprisonment was worse than death; and the defendant was "raised in a completely different culture and belief system." *Id.* at 7335 (S.D.N.Y., June 12, 2001), *available at* http://cryptome.kaizo.org/-usa-v-ubl-63.htm.

damages verdict to ensure that its punishment policy decision was minimally reasonable and based on consideration of facts that the law deems relevant to punishment.

A court that discovered that a jury erred by basing punishment on the wrong kinds of considerations could take steps to correct such error in an efficient manner. As discussed in more detail below, it is clear that, in *BMW of North America, Inc. v. Gore*,[176] an Alabama jury improperly punished BMW for conduct that occurred outside Alabama.[177] There is also strong evidence that, in *Texaco, Inc. v. Pennzoil Co.*[178]—the first case to culminate in a multi-billion dollar punitive damages verdict—the jury improperly based its punishment of Texaco on the conduct of Getty Oil representatives.[179] It is impossible to know how often juries have made similar errors in other cases because we do not make a general practice of asking them to explain the grounds for their awards, but no doubt there have been other such incidents.

Confronted with such a mistake in an explanatory verdict, a judge would not be helpless. Punitive damages instructions should not aspire to be complete guides for jury deliberations, e.g., a court cannot, as a practical matter, list for a jury every "irrelevant factor" that should not affect punishment. Nonetheless, where a jury bases punishment on an "irrelevant factor," one could "blame" the instructions—i.e., if only the court had clearly told the jury that it should not base punishment on factor *X*, the jury would not have done so. As *Bonner* demonstrates, where an instructional error taints deliberations, a judge may recharge the jury with clarifying instructions to help it correct its verdict.[180] Thus, a court could ask a jury to reconsider its punitive damages award in light of an instruction that factor *X* has no bearing on punishment.[181]

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176. 517 U.S. 559 (1996).

177. *See infra* text accompanying notes 211–16.

178. 729 S.W.2d. 768, 866 (Tex. App. 1987) (reducing jury's $3 billion punitive damages award to $1 billion), *cert. dismissed*, 485 U.S. 994 (1980).

179. *See infra* note 232 and accompanying text.

180. *See supra* notes 156–66 and accompanying text.

181. In some cases, a court might determine that a jury is incapable of discounting from punishment an irrelevant factor it has considered—it cannot psychologically "unring the bell." In such situations, a court could order remittitur or a new trial. On the other hand, there is no reason to think that the *BMW* jury, for example, could not have cured its verdict of legal error given the benefit of corrective instructions and thus saved the parties years of post-trial litigation. *See infra* text accompanying notes 211–24.

The chief obstacle to adopting such an approach could prove to be judicial attitudes toward waiver. Courts have frequently rejected appeals of punitive damages awards on the ground that defendants have waived the right to claim instructional error by failing to make timely objections.[182] Similarly, one could blame a court's failure to instruct a jury that factor *X* is irrelevant to punishment on the failure of defense counsel to seek such an instruction in a timely manner. As discussed above, however, it is important to understand Rule 51 in light of its purpose, which is to give trial courts a chance to fix instructional errors before their correction requires the time and expense of a retrial.[183] By the time a case reaches an appellate court, the only way to fix a faulty instruction is generally by ordering a new trial. In such situations, one should expect courts to aggressively apply waiver rules. As cases such as *City of Newport* and *Bonner* demonstrate, however, where a court can correct an error without retrying a case, there is little reason to take a draconian approach to waiver.[184] The instant suggestion that courts should issue corrective instructions to help juries fix errors in punitive damages determinations fits within the logic of these latter cases—the whole point of this iterative approach to instructions is to fix errors *without* new trials.

It should also be noted that a strict waiver approach is especially unsuited to punitive damages determinations in light of their open-ended nature. Again, punitive damages instructions *cannot* list for juries every factor they should *not* consider as a basis for punishment, and it would be foolish and counterproductive to try.[185] It therefore makes no sense to insist on dogmatic application of waiver rules premised on the idea that the instructions should be absolutely complete and correct the first time.

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182. *See, e.g.*, Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc., 181 F.3d 446, 463 (3d Cir. 1999) (ruling that defendant waived objection to punitive damages instructions by failing to timely object), *cert. denied*, 528 U.S. 1076 (2000); Grynberg v. Citation Oil & Gas Corp., 573 N.W.2d 493, 503–04 (S.D. 1997) (same).

183. *See, e.g.*, Reynolds v. Green, 184 F.3d 589, 595 (6th Cir. 1999) (noting that Rule 51 "was not intended to require pointless formalities" but was instead "designed to prevent unnecessary new trials"); Bonner v. Guccione, 178 F.3d 581, 586 (2d Cir. 1999); Greaser v. Mo. Dept. of Corrs., 145 F.3d 979, 984 (8th Cir. 1998) (noting that Rule 51 prevents litigants from strategically using defective instructions as grounds for new trial where they could have sought correction in time for court to cure error without new trial).

184. *See supra* notes 156–73 and accompanying text.

185. Listing everything that a jury should not think about is impractical for at least two reasons: (1) there is an infinite number of irrelevant factors; and (2) listing a factor tends to draw attention to it, compare, an apocryphal cure for the hiccups—run around the house three times without thinking of the word "wolf."

Instead, a court that discovers that its instructions need clarification or correction—rather than cry waiver and ignore the error—should help the jury to follow the law by asking it to reconsider its award in light of supplemental instructions.

Requiring juries to submit explanatory verdicts that tell the "stories" behind their punitive damages awards is a legitimate procedural option. Moreover, in appropriate cases, where an explanatory verdict indicates that such an award has been tainted by correctable error, a court may ask the jury to reconsider its award in light of corrective instructions.

IV. COURTS SHOULD ASK JURIES TO EXPLAIN THEIR PUNITIVE DAMAGES VERDICTS AND TAKE "HARD LOOKS" AT THE RESULTS

Requiring juries to describe the factual bases for their punitive damages awards would offer at least three important advantages over current practice. First, although this mild reform would not fundamentally alter the power of juries to make punishment policy by intuiting formulae for transmuting malicious torts into dollars, it would enable courts to take "hard looks" at jury verdicts to ensure that they are at least based on minimally sensible consideration of legally relevant factors. Second, explanatory verdicts would enable juries to express themselves more clearly. The law has recognized since 1763 that punitive damages awards are supposed to send messages[186]—let these messages be as articulate as possible. Third, explanatory verdicts would provide useful information for determining whether juries should possess the power to inflict punitive damages in the first place.

A. A Closer Look at the "Hard Look" and Its Suitability for Punitive Damages Review

It is a fundamental principle of modern administrative law that regulatory agencies must explain the bases for their significant discretionary policy choices that are subject to judicial review.[187] If such a choice is subjected to legal challenge, a reviewing court will examine

186. *See supra* note 43 and accompanying text.

187. *See* Lawson, *supra* note 19, at 319 ("Where [agency] discretion involves an issue of policy significance, well-settled principles of administrative law typically impose a substantial duty of explanation on the agency.").

the agency's explanation to ensure that the agency based its decision on legal and minimally sensible deliberations.[188] Exploring why courts have taken this approach to review of agency policymaking will shed light on why they should adopt a similar approach for reviewing punitive damages verdicts.

Our legal system once took the view that a reviewing court should affirm those administrative policy decisions for which it could dream up *any* minimally rational, marginally sane, supporting rationale.[189] Under such a system, it would not matter if the EPA promulgated rules to control air pollution based on its reading of goat entrails so long as, at the end of the day, a reviewing court concluded that the regulations so promulgated happened to amount to minimally reasonable ways to implement the Clean Air Act.[190] This is a form of outcome review and in this respect akin to review of punitive damages awards for excessiveness under current practice.

Courts no longer cede this much power to agencies. For starters, they now refuse to make up hypothetical rationales to support agency choices. Instead, under the venerable precedent of *SEC v. Chenery Corp.*,[191] "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."[192] A primary reason for this refusal is that relying on judge-made rationales to support administrative action obviates much of the point of setting up "expert" agencies in the first place. To stick with the Clean Air Act example, we want the *EPA's* considered judgment on how much air pollution to permit, *not* the views of generalist courts.[193] Of course, to judge the

188. *See infra* notes 195–98 and accompanying text.

189. *See* Pac. States Box & Basket Co. v. White, 296 U.S. 176, 185–86 (1935) (turning back challenge to Oregon regulation requiring uniform sizes for berry containers and holding that administrative action, like legislative action, must be upheld "if any state of facts reasonably can be conceived that would sustain it").

190. The EPA might get lucky, or animal divination might work. "There are more things in heaven and earth, Horatio, than are dreamt of in your philosophy." WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET act I, sc. 5; *see also* Lawson, *supra* note 19, at 318–19 (providing an illuminating discussion of judicial review of agency decisionmaking processes and noting that under current doctrine, an agency decision based on astrological divination would fail the Administrative Procedure Act's "arbitrary or capricious" test).

191. 318 U.S. 80 (1943).

192. *Id.* at 87.

193. *Cf. id.* at 88 ("If an [administrative] order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment.").

sufficiency of an agency's rationale supporting its policy choice, a reviewing court must require the agency to explain that rationale.[194]

Technically, under the Administrative Procedure Act, courts will vacate those agency policy choices they deem "arbitrary and capricious."[195] Courts developed the "hard look" doctrine as a standard for determining whether an agency explanation satisfies this ostensibly deferential standard in certain contexts.[196] The Supreme Court offered the standard summary of this type of review in *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*,[197] stating,

> [t]he scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a *rational connection* between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on *consideration of the relevant factors* and whether there has been a *clear error of judgment.* Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[198]

194. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419–21 (1971) (noting that Court could not determine whether Secretary of Transportation's informal adjudication authorizing expenditure of federal funds to construct highway through park was arbitrary and capricious without access to the "administrative record" before the agency; remanding to district court for review "based on the full administrative record that was before the Secretary at the time he made his decision").

195. 5 U.S.C. § 706(2)(A) (1995) (providing that courts should set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

196. *See, e.g.*, Nat'l Lime Ass'n v. EPA, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980) (describing evolution of the "hard look" doctrine); Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 999–1003 (2000) (same).

197. 463 U.S. 29 (1983).

198. *Id.* at 43 (quotation marks and citations omitted; emphasis added).

The "hard look" requires agencies to base their policy choices on reasoned decision-making that can be documented to a court's satisfaction. One can crudely divide agency violations of this requirement into two kinds of error. First, the *legal* dimension of hard-look review ensures that, during its deliberations, an agency has thought about the kinds of things the law has told it to think about, i.e., that the agency has based its action on consideration of the "relevant factors." Second, the *rationality* dimension of hard-look review ensures that an agency's explanation makes some minimal amount of sense, i.e., the agency's policy choice and the reasoning underlying it are not tainted by "clear error[s] of judgment."

A federal agency must always base its actions on consideration of the "relevant factors" that Congress has told it to think about in the agency's organic statute. For instance, under the Clean Air Act (CAA), the EPA has a duty to set national ambient air quality standards (NAAQs) for pollutants at levels that "are requisite to protect the public health" with "an adequate margin of safety."[199] Thus, the "relevant factors" to consider when promulgating a NAAQ are health and safety. Stipulate that it would make vastly more policy sense for the EPA also to consider industry implementation costs when it sets permissible pollutant levels—affected industries think so anyway. No doubt the EPA could promulgate fabulously "reasonable" NAAQs based on careful cost-benefit analyses that would surely survive substantive review for "clear errors of judgment." The Supreme Court has nonetheless observed that such fabulous NAAQs would be illegal for the simple reason that Congress did not tell EPA to consider cost—it is an *irrelevant factor* so far as this portion of the CAA is concerned.[200] The best reasoned, most sensible agency policy choice in the world must fail if the agency based that choice on illegal consideration of categories of facts and goals that Congress did not instruct it to consider.

In addition to satisfying legal requirements, an agency must also satisfy a reviewing court that its deliberations were minimally reasonable. Inevitably, the strictness of this rationality review varies from court to court and from agency to agency both because rationality is

199. 42 U.S.C. § 7409(b)(1) (1994).

200. *See* Whitman v. Am. Trucking Ass'n, 531 U.S. 457, ___, 121 S. Ct. 903, 911 n.4 (2001) (observing that if respondents challenging EPA's rules on particulate matter and ozone standards could prove that EPA was "secretly considering the costs of attainment without telling anyone," then there would be "grounds for vacating [these rules] because the Administrator had not followed the law").

often in the eye of the beholder and because courts must review many different kinds of actions taken by many different agencies.[201] Still, the Supreme Court has stressed that this standard is supposed to be highly deferential—a court is "not to substitute its judgment for that of the agency."[202]

Having determined that an agency's action failed a "hard look," a court should not order implementation of its own favorite policy choice in place of the agency's flawed one. To do so would usurp the role that the legislature assigned to the agency, not the court. Instead, the court should issue an opinion explaining where the agency went wrong and remand—leaving the agency free to attempt its policymaking process again.[203]

There are clear parallels between the structure of administrative policymaking and jury punishment selection that make the "hard look" especially suitable for judicial review of punitive damages awards. In both contexts, the state has granted decision-makers a measure of discretion to make policy choices in light of various legally constraining "relevant factors." Congress has told the EPA to clean up the air; it has not told the agency exactly how to accomplish this task in part because Congress does not have this information. The EPA is supposed to exercise its technical expertise to figure this out—that is its role. Congress has, however, limited this discretion by telling the EPA to be sure and focus on public health and safety concerns as it makes its policy choices.[204]

Similarly, various jurisdictions have commanded juries to inflict punitive damages as necessary to punish malicious torts properly. They have not told juries exactly how much to award; instead, punitive damages law operates on the assumption that juries are our policy "experts" in charge of choosing just punishment.[205] Jury discretion is

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201. *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 385 (4th ed. 1999) (noting that "[h]ard look review is necessarily highly contextualized" and "inherently open-textured," which gives "courts considerable latitude in the intensity of their 'supervision' of agency exercise of discretion").

202. *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43.

203. *See* BREYER ET AL., *supra* note 201, at 347 (noting that "normal remedy" for agency's failure to satisfy a "hard look" is to "remand for further proceedings" in which "agency remains free to try again").

204. *See supra* note 199 and accompanying text.

205. *Cf. supra* note 60 (citing case law discussing the "policymaking" nature of punitive damages determinations).

constrained, however, by law instructing jurors to base punishment on consideration of various "relevant factors" bearing on retribution and deterrence.

Judicial review for rationality is supposed to be quite deferential in both of these contexts. In the punitive damages context, "rationality" review takes the form of common-law "excessiveness" and constitutional "gross excessiveness" review. A court engaging in "excessiveness" review does not ask itself whether the award is greater than the amount the judge would order given the chance. Rather, in most jurisdictions, the court asks a more deferential question akin to "Does this award shock my conscience given the factors I am to consider?"[206] The "gross" part of the Supreme Court's "gross excessiveness" test likewise requires deference—a court that deems an award merely "excessive" should not strike it for violating due process; only those awards that go so far beyond the pale as to be "grossly excessive" merit this treatment.[207] This deference to juries parallels deference to agency judgment in the administrative context—a policy choice does not amount to a "clear error of judgment" merely because a court disagrees with it.

In neither context is deference *carte blanche*, of course. A policy choice might strike a court as so totally senseless as to indicate a "clear error of judgment" (e.g., suppose that the EPA banned gasoline to reduce air pollution or that a jury inflicted a punitive damages award of $1 trillion against a defendant for a trivial tort). Or a decision-maker's explanation for an action might demonstrate that its choice was tainted by consideration of an "irrelevant factor" (e.g., suppose a jury based a punitive damages award on a defendant's nationality, or that the EPA considered industry costs in promulgating a NAAQ). In either case, the court should set aside the policy choice at issue.

The court should not, however, impose its own judgment to replace one that it has thrown out—to do so would usurp another body's policymaking role. Thus, where an agency policy action fails review, a court typically will remand to give the agency a chance to revisit its

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206. *See generally supra* notes 69–79 and accompanying text (discussing judicial review of punitive damages awards). *But cf.supra* notes 73, 88–105 and accompanying text (discussing cases suggesting more aggressive review of punitive damages awards).

207. The Supreme Court's recent opinion in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, is not to the contrary. In *Cooper*, the court held appellate courts should conduct *de novo* review of district court evaluations of "gross excessiveness." 532 U.S. 424, ___, 121 S. Ct. 1678, 1687–89 (2001). This holding did not alter the deferential relation between courts and jury that the "gross excessiveness" test entails. *See id.* at 1682 n.4 (noting this limitation of *Cooper*).

choice in light of the court's correction. In the punitive damages context, juries do not get this same chance, but the logic of their policymaking role suggests they should. For instance, suppose a court determines that a jury's explanatory punitive damages verdict fails "hard look" scrutiny because the jury based punishment on consideration of an irrelevant factor. Suppose also that nothing about the error suggests that the jury could not correct its mistake if given the benefit of appropriate clarifying instructions. Rather than impose its own punitive damages award through remittitur, the court should instead "remand" to the jury for further deliberations in light of corrective instructions. Alternatively, if the nature of the jury's error suggests that it is incompetent or prejudiced, the court should order remittitur and/or a new trial on damages.[208]

Thus, it would make sense to apply some form of "hard look" review to punitive damages verdicts given the structure of punitive damages determinations and the premise that we want awards to reflect jury policy judgments. The only barrier to such application turns out to be lack of information concerning the basis of jury awards, and the only barrier to obtaining such information seems to be inertia. As discussed above, a strong argument can be made that courts *have* authority to ask juries for explanatory verdicts that describe the factual bases for their punitive damages awards.[209] Moreover, a strong argument can be made that where an explanatory verdict indicates that a jury has made a correctable mistake in its deliberations, a court *has* authority to ask the jury to reconsider its award in light of corrective instructions.[210] Thus, courts both *could* and *should* subject punitive damages verdicts to the "hard look."

B. *Illustrations of How the "Hard Look" Could Help Ensure Legal, Rational Punishment*—BMW, Texaco *et al.*

Two especially famous punitive damages cases—*BMW* and *Texaco*—provide perfect, concrete examples of how a "hard look" approach could improve procedures for ensuring the legality and rationality of punitive damages awards. In *BMW*, a "hard look" would have revealed that a

208. A wildly excessive award, e.g., a trillion dollar award for a trivial tort, might suggest that the jury is irremediably incompetent or prejudiced and could not fix its error with the benefit of corrective instructions. In this sort of situation, a court should order remittitur and/or a new trial on damages.

209. *See supra* notes 148–50 and accompanying text.

210. *See supra* notes 151–73 and accompanying text.

seemingly absurd verdict was the product of a reasonable jury's legal mistake that it could have corrected if given the chance to learn the law. In *Texaco*, the "hard look" would have revealed that the world's first multi-billion dollar punitive damages award was an illegal attempt to punish someone other than the defendant.

Recall that Dr. Gore sued BMW for selling him an expensive sports sedan as new without disclosing that it had been repainted to touch up acid rain damage and that the jury awarded him $4 million in punitive damages.[211] Critics of punitive damages sometimes portray this award as an archetypal example of jury lunacy.[212] This characterization is unfair—to all appearances, the *BMW* jury actually took an extremely rational approach to punitive damages that might make a law-and-economics scholar proud. Testimony at trial showed that the car sold to Dr. Gore was worth $4000 less than it would have been had it never been damaged and repainted; there was also evidence that BMW had sold 983 cars nationwide with undisclosed minor repairs.[213] The jury determined that selling these cars without disclosing their repairs amounted to "gross, oppressive or malicious" fraud for which Alabama law authorizes punitive damages.[214] From the plain math of the case, it seems apparent that the jury reached its $4 million punitive award by multiplying $4000 (Dr. Gore's compensatory damages, which the jury used as a proxy for the profit BMW made from each nondisclosure) times 1000 (the approximate number of nondisclosures nationwide).

On appeal, the Alabama Supreme Court agreed that taking away BMW's nationwide profits from nondisclosure was probably what the jury had in mind.[215] But there was a problem—the court also ruled that the jury could only punish conduct that had occurred in Alabama, where BMW had sold only fourteen of the cars at issue.[216]

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211. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 563 (1996).

212. *See, e.g.*, Dick Thornburgh, *No End in Sight as Punitive Damages Go Up, Up, Up*, WALL ST. J., Mar. 13, 2000, at A47 (former United States Attorney General reminding readers that "[i]n *BMW*, for those who have forgotten, a jury slapped the auto company with $2 million [sic] in punitive damages for the high crime of performing an unacknowledged touch-up paint job").

213. *BMW*, 517 U.S. at 564.

214. *Id.* at 565.

215. BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 627 (Ala. 1994), *rev'd*, 517 U.S. 559 (1996).

216. *Id.* More specifically, the court held that, although the jury could consider extra-Alabama conduct to determine whether BMW had engaged in a "pattern or practice" or nondisclosure, the jury could not, as a matter of law, "use the number of similar acts that a defendant has committed in other jurisdictions as a multiplier when determining the *dollar amount* of a punitive damages

Suppose that, confronted with this problem, the court had tried to remit the award to a level that matched what we will call the jury's punitive reaction—the policymaking step by which the jury transmuted the "bad" facts it had found into the dollar figure of $4 million. The jury's punitive reaction was simply to "take away the profits." To honor this punitive reaction, the court should have remitted the award to $56,000—the product of $4000 (estimated profit per nondisclosure) times fourteen (the number of nondisclosures in Alabama).[217]

The court instead set itself the task of determining a "constitutionally reasonable" amount of punitive damages to punish the fourteen offending sales in Alabama.[218] To this end, it purported to use a "comparative analysis" that considered verdicts in other cases "involving the sale of an automobile where the seller misrepresented the condition of the vehicle and the jury awarded punitive damages to the purchaser."[219] On the basis of this "analysis," the court remitted the jury's sensible (if legally mistaken) $4 million award to $2 million—a number which seems to have absolutely nothing to do with anything about the case except that it marked a 50% reduction in the jury's punitive damages verdict.[220]

BMW appealed to the Supreme Court, which later ruled that this $2 million remitted award violated due process because it was "grossly excessive" punishment for the fourteen Alabama nondisclosures under the three-guidepost analysis the Court devised for the occasion.[221] Regardless of this due process point, however, it is clear that the real scandal of the case was not the jury's original $4 million punitive

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award." *Id.* Thus, the jury could think about the nondisclosures that occurred outside Alabama, but not punish BMW for them.

217. *BMW*, 517 U.S. at 567 n.11 (making this point).

218. *BMW*, 646 So. 2d at 629.

219. The Supreme Court was justly skeptical of the Alabama Supreme Court's "comparative analysis." It noted that "other than *Yates v. BMW of North America, Inc.*, 642 So. 2d 937 (Ala. 1993), [another Alabama nondisclosure case] in which *no punitive damages were awarded*, the Alabama court cited no such cases [involving misrepresentation by sellers of vehicle condition]." *BMW*, 517 U.S. at 567 n.11 (emphasis added).

220. *BMW*, 646 So. 2d at 629. Perhaps we see in the Alabama Supreme Court's opinion an example of anchoring effects at work. According to that court's own analysis, the jury's $4 million verdict was badly tainted due to legal error. *Id.* at 627. Nonetheless, at the risk of naïve cognitive speculation, it seems brutally obvious that, absent encountering the $4 million verdict, the Alabama Supreme Court would *never* have dreamed of awarding $2 million for failing to disclose minor repairs to 14 cars. One hopes not, anyway.

221. *BMW*, 517 U.S. at 574–75; *see also supra* Part II.C.3.

damages verdict but rather that the Alabama Supreme Court substituted *its own* (rather bizarre) policymaking punitive reaction for that of the jury in the name of excessiveness review. Again, the jury's punitive reaction was merely to "take away the profits"—to connect roughly 1000 nondisclosures to a $4 million award. The Alabama Supreme Court's substitute punitive reaction connected fourteen nondisclosures with a $2 million award. If one estimates, as the jury seems to have done, that BMW fraudulently profited $4000 per car, then the $2 million remitted award equaled roughly *thirty-six times* BMW's improper profits from the Alabama sales. There is no reason to think that a jury that had decided on a take-away-the-profits "punishment policy" would have fined BMW this amount.

Instead of subjecting the jury's $4 million award to standard, outcome-based review, suppose that the Alabama courts had applied the proposed hard-look approach. To start, the court would have asked the jury to identify the facts upon which it had based punishment. The jury might well have responded with a punitive story something like:

> Touching up the paint of a $40,000 BMW 535i sports sedan that some doctor bought is not the worst thing ever. But the law says its gross fraud, and BMW should not make money by violating the law. It profited about $4000 per car from nondisclosure. It failed to disclose repairs to "new car" buyers about 1000 times, give or take. So we've awarded $4 million in punitive damages to take away BMW's illegal profits.

Surely such an explanation, which accords perfectly with the jury's verdict, would show a highly rational chain of reasoning connecting the facts with the verdict and could not be said to constitute a "clear error of judgment."[222]

By way of contrast, imagine that the jury's explanation had made clear that it had awarded the $4 million solely to punish BMW for *the sale of just one car* to Dr. Gore. Adoption of a "punishment policy" connecting

222. Indeed, in fairness, this hypothetical *BMW* explanation is perhaps *too* "reasonable" to serve as a model of how hard-look review of punitive damages awards for minimal deliberative rationality would generally work. The jury's economic approach to punishment lends itself to an instrumental, means-end analysis—it wanted to deter wrongdoing by a profit-seeking entity, so it took the profit out of fraud. It is more difficult to say what it means for an award based on *retributive* concerns to be "reasonable." How much financial pain does it take to right the scales of justice? The answer is not clear, which, indeed, is part of the reason that jury punishment selection is best regarded as policymaking rather than fact-finding. A court crediting the jury's role in punishment policymaking must certainly give due regard to the difficult, values-infused nature of such choices.

one undisclosed paint touch-up with a $4 million award would presumably strike most people as evidence that the *BMW* jury does not live in the same moral universe as most of the rest of us. A judge applying the "hard look" to such an explanation would instantly detect the jury's irrational "clear error of judgment" and throw out its verdict.

By obscuring the facts that motivate punishment, current practice impedes detection of such errors. By way of illustration, now suppose that the *BMW* jury had enjoyed legal authority to punish extra-Alabama sales but that it nonetheless awarded the full $4 million just to punish a single failure to disclose to Dr. Gore. Under standard excessiveness review principles, a reviewing judge would have to determine whether she could make up any rationale minimally sufficient to support this $4 million award. She might conclude that the jury's punishment was reasonable because one could reach this figure by multiplying a plausible estimate of BMW's profits per nondisclosure ($4000) times an approximation of the number of nondisclosures (1000). Given such an eminently reasonable hypothetical rationale, the judge should uphold the award, but by doing so she would unintentionally affirm the jury's absurd punishment policy choice. Of course, were the judge to obtain an explanatory verdict, she would immediately perceive the jury's irrational punitive reaction.

Returning to the facts and law of the real *BMW*, the actual problem with the jury's verdict was not irrationality or bad judgment, but rather that it was illegal because the jury had considered an irrelevant factor—it had sought to punish sales that took place outside Alabama and that had not affected Alabamans.[223] A "hard look" at an explanatory verdict would have revealed this error and memorialized it in the record in short order. Unlike the $4-million-punishment-for-one-nondisclosure hypothetical just discussed, this error would not suggest that the jury was in any way incompetent, crazy, or "out-of-control." Ideally, therefore, the court should have given the jury a chance to fix its verdict by asking it to reconsider its punitive damages award in light of clarifying instructions that it could not punish BMW for its conduct outside Alabama. It is, of course, impossible to know how the jury would have responded to this request; most likely, however, it would have returned an unassailably reasonable and legal punitive damages verdict of $56,000.[224]

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223. *See supra* note 216 and accompanying text.

224. Mildly ironic postscript: the legal system eventually reached something like this result. After the Supreme Court threw out the $2 million remitted award, the Alabama Supreme Court ordered

The *BMW* case is unusual in the sense that the mathematics behind the punitive damages award provided more information than is typically available regarding the jury's reasoning. Most of the time, a court will not be able to ignore such information because it will not have it in the first place. A particularly bad side effect of this ignorance is that it can cause courts to affirm awards that do not reflect jury punishment policy. When reviewing an unexplained punitive damages award for excessiveness, a court must indulge the (frequently incorrect) assumption that the jury properly understood its instructions.[225] Simplifying somewhat, the reviewing judge must determine whether, in her view, a jury that properly understood the law reasonably *could* have reacted to the evidence in the case by awarding punitive damages in the amount selected. The hypothetical punitive reaction a judge must imagine for purposes of review may have no relation at all to the jury's actual punitive reaction. Suppose, as in *BMW*, a jury makes a mistake of law that causes it to inflate its punitive damages award, i.e., if the jury had properly understood the law, it would have granted a smaller amount of damages given its level of outrage at the defendant's conduct. The judge assumes the jury understood her instructions, however, and therefore will tend to assume that the jury's punitive reaction was more severe than it really was. A court that affirms in such a situation effectively gives its stamp of approval to an award that does not reflect accurately the jury's punitive reaction. Such a result makes hash of the notion that juries have a special "expert" role to play in determining punishment.

Texaco provides another excellent example of a case in which a hard-look approach to punitive damages might have radically changed the outcome. Recall that a Texas jury imposed a $3 billion punitive damages verdict against Texaco for tortiously interfering with Pennzoil's contract to buy Getty Oil.[226] During deliberations, jurors sought clarification whether Texaco could be held liable for the conduct of certain Getty Oil

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remittitur to $50,000, which the parties subsequently accepted. The majority offered no explanation for the "missing" $6000. BMW of N. Am., Inc. v. Gore, 701 So. 2d 507 (Ala. 1997); *cf. id.* at 516 (Cook, J., concurring) (accepting remittitur to $50,000 on the ground that this figure was less than the $56,000 that the jury would have presumably awarded had it used a legally acceptable "multiplier").

225. *See supra* note 129 (discussing results of study testing mock juror comprehension of instructions on punitive liability).

226. Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 866 (Tex. App. 1987) (ordering remittitur to $1 billion of jury's $3 billion punitive damages award against Texaco for tortiously interfering with Pennzoil's purchase of Getty Oil), *cert. dismissed*, 485 U.S. 994 (1988).

representatives.[227] Texaco, in that particular case, was liable only for its own conduct. Unfortunately, its counsel, incorrectly believing that the instructions already informed the jury of this legal proposition, did not immediately press for a supplemental instruction.[228] That evening, Texaco's counsel realized that the instruction at issue had been in Texaco's *proposed* instructions, but that the judge had not included it in the final charge.[229] The next morning, he requested that the court issue a supplemental instruction that "a party is only responsible for the actions of its own employees, agents or representatives acting within the scope of their employment."[230] Although the jury had not yet returned a verdict, the judge denied this request.[231] Post-verdict juror interviews and statements revealed that the desire to punish Getty Oil's representatives strongly influenced the jury's decision to inflict a $3 billion punitive damages award against Texaco.[232]

The jury considered an "irrelevant factor" when it determined Texaco's punishment. That punishment was illegal. Had the court asked the jury to explain the basis for its punitive damages award and then invoked hard-look review, it could have easily detected the jury's error and then given it a chance to reconsider its decision in light of clarifying instructions. That this approach to the business of determining punishment would be preferable to playing "gotcha" with jury instructions should be self-evident.

The Supreme Court's recent decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[233] provides yet another example of how a jury might go astray in determining punitive damages.[234] In this case, the plaintiff had sued the defendant for trademark infringement and false advertising in connection with its manufacture and promotion of a multi-

227. THOMAS PETZINGER, JR., OIL & HONOR: THE TEXACO PENNZOIL WARS 406 (1987).

228. *See id.*

229. *Id.* at 407.

230. *Id.*

231. *Id.*

232. *Id.* at 406; JAMES SHANNON, TEXACO AND THE $10 BILLION JURY 479–80 (1989) (jury member, in a book he authored, discussing punitive damages deliberations and recounting that "[t]he brazen acts of the Texaco officials *and the Getty parties* they indemnified had robbed Pennzoil of the benefits of what this jury had already found was a binding agreement"; that "Texaco had brought three of the men we thought were the principal bad actors on the Getty side to court and vouched for their testimony"; and that court had provided no guidance when jury had queried extent to which Texaco was liable for the misconduct of these Getty "bad actors") (emphasis added).

233. 532 U.S. 424, ___, 121 S. Ct. 1678 (2001).

234. *Id.* at 1687–89.

function pocket tool.[235] On the infringement claim, the district court incorrectly instructed the jury that the defendant's deliberate copying of the plaintiff's product had been wrongful.[236] The jury found that the defendant had infringed, but awarded no damages on that claim. The jury also found that the defendant had engaged in false advertising and, for this claim, awarded $50,000 in compensatory and $4.5 million in punitive damages.[237] The Supreme Court noted that, in light of the district court's incorrect instruction that copying was "wrongful," the jury's punitive damages award for the false advertising claim might "have been influenced by an intent to deter Cooper from engaging in . . . copying in the future."[238] In other words, the Supreme Court speculated that the incorrect instruction on one claim might have "leaked" over into the jury's punitive damages determination for another claim. To repeat a now familiar refrain—a "hard look" approach would remove the need for such speculation.

Another potential mistake that springs to mind: Some states now instruct juries to factor into their punitive damages determinations the effect of other sanctions the defendant has already incurred for the same course of conduct.[239] The rough idea is that juries should subtract from their awards the value of punishment dollars the defendant has already paid elsewhere. A defendant might reasonably fear, however, that a jury would instead use information concerning other punishments as evidence of the blameworthiness of the defendant's conduct and as a *benchmark* for further punishments (i.e., a jury might conclude, "*that other* jury determined the defendant deserved $10 million in punishment, that sounds good to us—fine the defendant another $10 million").[240]

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235. *Id.* at 1679–81.

236. *Id.* at 1688.

237. *Id.* at 1680.

238. *Id.* at 1688.

239. *See, e.g.*, MINN. STAT. ANN. § 549.20, Subd. 3 (West 2000) (instructing juries to consider "the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject").

240. *See* Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1056 (D.N.J. 1989), *judgment vacated on reh'g*, 718 F. Supp. 1233 (D.N.J. 1989) (noting that a defendant might well be reluctant to present "such prejudicial evidence" to a jury); Mogin, *supra* note 5, at 214–15 ("Evidence that another jury, court, or agency has sanctioned the defendant is at least as likely to lead a jury to increase its award as it is to lead it to reduce the award."); *cf. supra* note 67 and accompanying text (discussing "anchoring" effects).

Of course, these last two examples are speculative, but, along with *BMW* and *Texaco*, they illustrate a general point: jury "punishment policy" determinations are multi-faceted, fact-sensitive, value-laden, and intuitive. There are *many* wrong turns a jury might take in performing the difficult task of turning malicious torts into dollars. Moreover, jury instructions are often confusing, and even the most verbose cannot address every twist and turn deliberations might take. It therefore seems inevitable that some punitive damages awards juries grant will be tainted by consideration of improper factors or will amount to "clear errors" in judgment. If these sanctions take the form of unexplained numbers, then these errors are more likely to go undetected. "Hard look" review of explanatory punitive damages verdicts could catch and correct at least some such errors.

C. *Show Juries the Respect of Asking Them To "Speak" Clearly*

As the Lord Chief Justice remarked back in 1763 in *Wilkes*, one of the purposes of a punitive damages award is to serve as "proof of the detestation of the jury to the [defendant's] action itself."[241] In more modern vernacular, as frequently observed by courts and perhaps even more frequently by plaintiffs' attorneys, punitive damages are supposed to "send a message" to malicious tortfeasors that society will not tolerate their misbehavior. Rendering punitive damages verdicts as unexplained dollar figures makes such condemnatory messages needlessly inarticulate.[242]

The "message" behind a given award is a function of the purpose behind it—misread the rationale and misread the message. To draw yet another lesson from *BMW*, one might infer from the $4 million punitive damages award that the jury was absolutely infuriated by BMW's nondisclosure of one minor paint repair and had concluded that just *retribution* for this one transgression required a punishment 1000 times greater than Dr. Gore's $4000 compensatory award. The attendant message, then, was to shout to the world the jury's contempt for and fury at BMW's "fraud." Were this description accurate, one might conclude

241. Wilkes v. Wood, 98 Eng. Rep. 489, 499 (C.P. 1763).

242. *See, e.g.*, Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1439–40 (1993) (arguing that juries should explain their punitive damages awards to increase their expressive power).

with some justification that the jurors were, in a word, crazy, which seems to be the view of some critics.[243]

Of course, in all likelihood, the *BMW* jury's primary motivation was to *deter* fraud. Understood in this light, the jury's analysis and "message" were eminently rational. It determined that BMW had made about $4 million in illegal profits from its nondisclosure practice and decided to take this profit away. The jury's attendant message was simply to tell BMW and other firms that they cannot keep ill-gotten gains. That the award was tainted by a legal error was not the jury's fault, but rather that of a judicial system that fails to provide adequate help.

On a closely related point, in addition to clarifying condemnatory messages, asking jurors to explain their punishment choices would show them a measure of respect by treating them as thoughtful persons who might have something to say worth memorializing in official judicial records. The infamous "hot coffee" case, *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*,[244] like *BMW*, provides an example of a case in which a jury might have benefited from such respect. In that case, Liebeck, an octogenarian, sued McDonald's for selling her scalding coffee at a drive-through window, which she spilled on herself, causing third-degree burns.[245] A New Mexico jury awarded her $160,000 in compensatory damages and $2.7 million in punitive damages,[246] which the trial judge later remitted to $480,000.[247]

The *Liebeck* jury became another prime exhibit of the "out-of-control" jury.[248] To determine whether that jury was "out-of-control," however, one ought to know how it justified its award to itself. Post-trial

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243. *See* Thornburgh, *supra* note 212, at A47.

244. No. CV-93-02419, 1995 WL 360309 (D.N.M. Aug. 18, 1994).

245. Andrea Gerlin, *A Matter of Degree: How a Jury Decided That a Coffee Spill Is Worth $2.9 Million*, WALL ST. J., Sept. 1, 1994 at A1.

246. *Id.*

247. Greene v. Boddie-Noell Enters. Inc., 966 F. Supp. 416, 418 n.1 (D.W.Va. 1997) (reporting remittitur to $480,000 of *Liebeck* punitive damages award and that the parties later settled before appeal).

248. *See, e.g.*, Gerlin, *supra* note 245, at A1:

> Public opinion is squarely on the side of McDonald's. Polls have shown a large majority of Americans—including many who typically support the little guy—to be outraged at the verdict. And radio talk-show hosts around the country have lambasted the plaintiff, her attorneys and the jurors on air. Declining to be interviewed for this story, one juror explained that he already had received angry calls from citizens around the country.

interviews indicate that, if asked to do so, the jury might have issued an explanatory verdict something like:

> Before hearing the evidence, we would never have dreamed of awarding millions of dollars for serving coffee too hot. But at trial we learned that because of the temperature of McDonald's coffee, Ms. Liebeck suffered third degree burns when she spilled McDonald's coffee on herself that she bought at a drive-through window. The burns were so severe she had to spend seven days in the hospital and have skin grafts done.
>
> We also learned that McDonald's keeps its coffee much hotter than most other restaurants. It has gotten at least 700 complaints about coffee burns over the last ten years; it has paid some people more than $500,000 because of their burns. A McDonald's employee testified that even though they knew of the risks of such burns, they hadn't consulted burn experts on the danger and they had no plans to turn down the heat. McDonald's just doesn't care that it burns people with its coffee.
>
> We also heard that McDonald's sells about $1.35 million worth of coffee per day. To punish McDonald's and make it pay attention to this burn problem, we decided to take away two days' worth of these sales, $2.7 million.[249]

Whatever else might be said about such an explanation, it is not patently crazy. The jury's "message" was not that one spill of a drink that is supposed to be hot in the first place should equal millions of dollars in punishment. Rather, the message was something like: Where a company engages in a pattern of conduct that harms hundreds of people, it can expect a punishment that will get its attention. On this view, the only arguably "arbitrary" part of the jury's decision was its policymaking linkage between the facts it found and the decision to fine McDonald's two days worth of coffee sales—why not one day or three days? But, given the intuitive nature of the problem of converting tort into dollars, a certain amount of this kind of "arbitrariness" in this policymaking step is inevitable absent wholesale reform of punitive damages (e.g., by providing that punitive damages will be determined by simply trebling compensatory damages, as in antitrust law).

249. *See generally id.* (discussing evidence that the jury heard at the *McDonald's* hot-coffee trial).

This is not to suggest that the jury's punitive damages award was unassailably "correct." It is, however, to acknowledge that the jury might have had something sensible to say regarding McDonald's conduct. Had the jury been asked to state that message clearly as part of its verdict, it might not have been subjected to so much ridicule. Or, more realistically, perhaps an explanatory verdict would not have changed public reaction at all; people with an agenda to follow likely would have ignored the jury's explanation in their eagerness to condemn it. In either event, however, the judicial system that asked this jury to perform the difficult task of determining punishment ought to have accorded it the respect of asking for its "side of the story" in some official way that would have been memorialized in court records and easily found by those interested in learning it.

Some juries might actually want this chance. Recall that in the *Karadzic* case, the jury foreman made a brief post-verdict statement for the record explaining why the jury had awarded $3.9 billion in punitive damages against a man whom it knew would likely never pay a cent to anyone in response to an American judgment.[250] It was apparently at least somewhat important to the group of ordinary citizens asked to "punish" Dr. Karadzic that the court record some of its thoughts as well as its dollar figure.[251]

Punitive damages verdicts are supposed to express jury reactions to defendant conduct. They will serve this function better if juries use words as well as dollars to speak their minds. Asking for explanatory verdicts would also show juries a measure of respect by indicating that our civil litigation system regards them as capable of providing explanations worth reading and preserving.

D. Explanatory Verdicts and the Fearless Search for Information

A big understatement: Granting juries the discretionary power to impose punitive damages is one of the more controversial aspects of our civil litigation system. Critics of the current regime often argue that juries, given their lack of experience and training, are incapable of

250. *See supra* note 4 and accompanying text.

251. *Cf.* Mark Curridan, *Power of Twelve*, A.B.A.J., Aug. 2001, at 36 (reporting anecdotal evidence that frustrated juries are more frequently volunteering explanations for their verdicts); *see also* Brodin, *supra* note 150, at 69 (observing that "jurors themselves have on occasion spontaneously provided explanation and elaboration of their decision[s] in obvious frustration over the confines of the general verdict"; collecting and discussing cases).

making reasonable punishment determinations and often inflict absurd, "out-of-control" verdicts that create a terrible drag on the economy and stifle innovation while offering little or no offsetting social benefit.[252] Proponents counter that punitive damages are a rarely invoked but vital means for juries to punish and deter terrible corporate misconduct.[253] Moreover, civil juries are especially appropriate bodies for determining awards because they can speak to community standards of decency and justice.[254]

This debate is ideologically charged and carries high economic stakes; it may therefore be somewhat immune from factual resolution. That said, researchers have over recent years unearthed increasing amounts of interesting information regarding, *inter alia*: the frequency with which juries and judges award punitive damages,[255] the amounts of median and mean punitive awards,[256]and the types of torts most likely to trigger them.[257] Scholars have studied the ability of jurors to comprehend punitive liability instructions;[258] whether communal outrage standards exist;[259] whether jurors can "map" their outrage onto an unbounded dollar

252. *See, e.g.*, Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (opining that "[a]wards of punitive damages are skyrocketing" and are preventing the marketing of new prescription drugs, airplanes, and motor vehicles) (O'Connor, J., concurring in part and dissenting in part); Theodore B. Olson, *The Parasitic Destruction of America's Civil Justice System*, 47 SMU L. REV. 359, 359 (1994) (suggesting that runaway civil damages awards have helped transform the civil justice system in this country into an insatiable, almost-invisible "giant underground fungus").

253. *See, e.g.*, Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 81–82 (1992) (listing examples of safety changes manufacturers have purportedly made in response to punitive damages awards); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1276 (1993) ("This Article contends that the awarding of punitive damages is a necessary remedy against the abuse of power by economic elites.").

254. *See, e.g.*, Angela P. Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 ALA. L. REV. 1079, 1113 (1989) (discussing the communitarian perspective that "the jury, as the repository of shared communal values, is already in possession of the necessary yardstick" for determining punitive damages awards).

255. *See, e.g.*, *supra* note 8 (citing BOJS BULLETIN and Eisenberg studies).

256. *See e.g.*, *supra* note 17 (citing BOJS BULLETIN and Eisenberg studies).

257. *See, e.g.*, Eisenberg, *supra* note 8, at 645 (reporting frequency of punitive damages awards by tort category).

258. *See supra* note 129 (discussing Hastie study reporting abysmal levels of mock jury comprehension of punitive liability instructions excerpted from those used in *Exxon Valdez* matter).

259. *See supra* note 65 and accompanying text (discussing Sunstein study reporting that, when asked to rank outrageousness of various injury-causing acts, study participants tended to respond similarly).

scale in a consistent manner;[260] and the statistical relationships between punitive damages awards and their underlying compensatory damages awards.[261]

What is still missing from these efforts is systematic reporting of how real juries would justify real punitive damages verdicts.[262] It might prove to be the case that juries are perfectly capable of providing rough summaries of their punitive damages deliberations that show that they consider relevant facts in a reasonable manner to determine punishment (or that they do at least as good a job as judges in this regard).[263] Such a result would tend to diminish concerns that juries are poorly suited for the job of determining punishment in civil litigation. Or, explanatory verdicts might suggest that juries are woefully inept at this task. Either result would add useful data to the punitive damages debate.

V. DISSOLVING SOME OBJECTIONS: FRAMING EXPECTATIONS AND RESPECTING JURIES

This Article proposes that courts take a "hard look" approach to "explanatory" punitive damages verdicts. Of potential objections to this proposal, three spring to mind as apt for brief preemptive response: (a) asking juries, untrained in the law, to explain their verdicts asks for the impossible and will not clarify much of anything anyway; (b) "hard look" review would show insufficient deference to juries; and (c) asking for explanatory verdicts is really just a ploy to make life easier for defendants. None of these objections justifies refusing to try the proposal

260. *See supra* note 66 and accompanying text (reporting that same study participants who had ranked injury-causing acts in similar order of outrageousness, when asked to select appropriate financial punishment for these acts, gave highly variable and unpredictable responses).

261. Eisenberg, *supra* note 8, at 647–49 (reporting robust statistical relationship between logarithms of punitive damages awards and logarithms of underlying compensatory damages awards).

262. *Cf.* Sunstein et al., *supra* note 61, at 2111–12 (suggesting that it is unlikely that real juries actually base punitive damages awards on deterrence and instead probably focus on retribution).

263. Requiring juries to meet the "judicial" standard for punitive damages explanations would not necessarily hold them to all that high a standard. Remittitur decisions are often extremely perfunctory and conclusory. *See, e.g.*, Dunn v. HOVIC, 1 F.3d 1371, 1391 (3d Cir. 1993) (en banc) (providing perfunctory two-paragraph explanation for remittitur to $1 million of $2 million punitive damages award that district court had previously remitted down from jury's award of $25 million); BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 628–29 (Ala. 1994) (engaging in conclusory "comparative analysis" of jury's punitive damages award of $4 million; ordering remittitur to $2 million with no real explanation of why court chose that figure), *rev'd*, 517 U.S. 559 (1996).

to see how it works. The first two, however, should affect how courts *apply* the "hard look" approach and what they can expect of it.

A. Explanatory Verdicts Need Not Ask for the Impossible

Whether juries are, in general, up to the task of explaining the grounds for their punitive damages verdicts depends on how we frame our expectations concerning what constitutes an adequate explanation. In this regard, it is useful to bear in mind the steps a jury must follow to determine the amount of an award. It must: (1) find the who-did-what-to-whom facts of the case; (2) determine which of these facts it should focus upon given its instructions on the law; and then (3) take the policymaking step of connecting these facts to a specific dollar amount.[264] Presumably, most juries should be more than capable of roughly describing which facts they deemed material to punishment; doing so would "explain" the first two steps of the jury's deliberative process.

The problem, if any, comes in "explaining" the final policymaking step. In certain respects, this step may be irreducibly intuitive, particularly as it relates to retribution. One of the axioms of the current punitive damages regime is that it is a good thing for jurors to consult their personal values concerning fair punishment; juries should rely on their "punitive reactions" to connect the facts of a case to a given dollar amount. This punitive reaction may not be something easy to put into words; it may just *seem* to be the case to a jury that, given Exxon's conduct in connection with the *Exxon Valdez* oil spill and its effects, $5 billion is the right-sized sanction. Judicial review of explanatory verdicts would need to respect the limitations of language and the intuitive dimensions of punishment selection—a verdict should not be considered defective for failure to put into words what cannot usefully be said.

So stipulate the explanatory punitive damages verdicts would only amount to very rough and partial reports of jury reasoning. Recognition of this fact would not rob the "hard look" approach of meaning. Sometimes, notwithstanding the relatively unconstraining nature of punitive damages law, the jury *just gets it really wrong*. As demonstrated by analysis of *BMW* and *Texaco* above, rough explanatory verdicts could likely reveal (and memorialize for purposes of post-trial motions and appeal) instances in which juries base punishment on improper factors—

264. *See supra* notes 54–60 and accompanying text.

e.g., the *BMW* jury's punishment of extra-Alabama conduct and the *Texaco* jury's punishment of Texaco for the conduct of Getty Oil representatives.[265]

Also, even the roughest explanatory verdicts would better equip courts to determine the general nature of the jury punitive reactions that connect the facts of cases to verdicts. To state the obvious, the reasonability of the *BMW* jury's punitive reaction depended in part on whether it intended its $4 million punitive damages award to punish the one "fraudulent" sale to Dr. Gore or the (roughly) 1000 sales that happened nationwide. If the jury intended the former, then its award amounted to a "clear error of judgment" that should have been thrown out on that ground. If the latter, then the jury's verdict arguably displayed excellent judgment that was unfortunately tainted by legal error that was not the jury's fault. Explanatory verdicts would take some of the guesswork out of searching for "clear errors of judgment."

B. The "Hard Look" Need Not Improperly Diminish Deference to Juries

A closely related objection is that it would be inappropriate to import administrative law concepts into judicial review of jury verdicts because doing so would tend to lessen deference to juries. The essence of the proposed "hard look" approach, however, is simply to provide better information to courts. Nothing inherent in this proposal requires courts to show juries less than their "usual" level of judicial deference as they scrutinize such information for legal error or irrationality.

Again, to determine a punitive damages award, a jury should take three steps: it must find the "facts" of the case; determine which of these facts are legally relevant given its instructions; and then make the policy choice of selecting punishment. With regard to the first step, nothing in the instant proposal requires or suggests that courts show anything other than their usual level of deference to jury fact-finding.

At the second step, a "hard look" would check whether a jury has based punishment on legally relevant factors. As a practical matter, this sort of check would tighten control on juries, but it would do so in a perfectly legitimate way. Juries currently have no legal right to base punishment on the "wrong" kinds of facts—that they sometimes do so is

265. *See supra* notes 223–24, 232 and accompanying text.

a function not of legitimate deference but rather of courts' lack of information.

Courts review the rationality of how juries take the third step of making punishment policy whenever they review for excessiveness. The problem is that, under current practice, courts conduct their rationality review without the benefit of jury explanations for their decisions. The proposed approach would supply this information and allow courts to engage in *informed* excessiveness review that determines whether a jury's award was minimally rational in light of the facts it actually deemed material to punishment. Of course, "minimal rationality" is hardly a bright-line test; scholars have noted that the aggressiveness with which courts conduct rationality review of agency action varies from court to court and agency to agency.[266] The key point for present purposes once again, however, is that nothing inherent in the instant proposal would require courts to change the "quantum" of rationality they expect from juries. Instead, the proposal would simply give courts information they have always needed to properly check that verdicts survive a rationality test that they were always supposed to pass.[267] In short, asking juries to explain their punitive damages verdicts need not and should not cause courts to improperly interfere with jury decisionmaking prerogatives.

C. *Explanatory Verdicts Would Not Unfairly Tip the Balance in Favor of Defendants*

The great virtue of the punitive damages verdict as an unexplained number is that it provides the clarity of ignorance—we cannot challenge what we do not know. By providing information concerning deliberations, explanatory verdicts would create avenues for attacking some punitive damages awards, which might lead some to conclude that the hard-look proposal has a pro-defendant edge.

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266. *See supra* note 201 and accompanying text.

267. Moreover, those concerned that the instant proposal would lessen deference to juries should bear in mind that remittitur rates (and scattered case law) suggest that review of punitive damages awards is frequently quite aggressive under the current regime. *See supra* note 87 (discussing remittitur rates); *cf. supra* notes 73, 88–90 and accompanying text (citing cases calling for aggressive review of jury punitive damages awards). By contrast, at least as a matter of judicial rhetoric, court review of agency policy decisions is supposed to be highly deferential. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.").

On one level, the answer to this objection is: good. It is *supposed* to be hard to use the machinery of the state to punish. Contrast the procedures for criminal punishment with those used in civil litigation seeking punitive damages. Generally speaking, for criminal punishment, a legislature must proscribe conduct; a prosecutor must decide that the defendant's conduct merits investigation and prosecution; a judge or jury must determine guilt beyond reasonable doubt; and a judge must then determine sentence, perhaps subject to punishment guidelines promulgated by an administrative body.[268] In many jurisdictions, to win punitive damages, a private plaintiff need only persuade a jury that a preponderance of the evidence shows that the defendant committed a "malicious" tort worthy of some sort of financial sanction in light of various punishment-related factors.[269] Prima facie, to add another level of control to this process and make it more transparent would seem a good thing.

Moreover, it is not at all clear that explanatory verdicts would only benefit defendants. Judges might find some jury explanations sufficiently persuasive to affect remittitur decisions in plaintiffs' favor. For instance, in the *McDonald's* hot-coffee case, the judge remitted the jury's $2.7 million punitive damages award to $480,000.[270] Post-trial interviews indicated that the jury might have had a pretty good explanation for its award, and its apparent punitive reaction—that McDonald's should pay two days' worth of its coffee sales to ensure that the verdict got its attention—had a certain plausibility.[271] Perhaps an explanatory verdict in that case would have persuaded the judge to deny the defendant's remittitur request.[272]

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268. *See, e.g.*, Richard W. Murphy, *Superbifurcation: Making Room for State Prosecution in the Punitive Damages Process*, 76 N.C. L. REV. 463, 534–36 (1998) (observing that punishment of crime provides an archetypal example of the liberty-protecting function of separation-of-powers as it requires cooperative action by legislatures, prosecutors, courts, and juries); *see also* Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 991–95 (1989) (noting that criminal conviction requires proof beyond a reasonable doubt whereas most jurisdictions require only a preponderance of the evidence for punitive damages liability).

269. *See generally supra* note 52 and accompanying text.

270. *See* Greene v. Boddie-Noell Enters., Inc., 966 F. Supp. 416, 418 n.1 (W.Va. 1997) (noting that judge in *Liebeck* matter remitted jury's $2.7 million punitive damages award to $480,000 and that the parties later settled prior to appeal).

271. *See supra* text accompanying note 249.

272. *See* Galanter & Luban, *supra* note 242, at 1439–40 (arguing that requiring juries to explain their punitive damages awards would not constitute an "antiplaintiff rule" because "the price of unexplained exercises of discretion in jury awards is often an unaccountable decision by the judge to remit").

VI. CONCLUSION

Civil juries in most American jurisdictions possess vast discretion to inflict punitive damages awards to punish defendants who have committed "malicious" torts. This power has been controversial since the common law first recognized it over 200 years ago, and courts continue to struggle to find coherent procedures and standards to control it. They have frequently stated that they review punitive damages verdicts for improper jury "passion and prejudice," but a court cannot review an unexplained number for deliberative error.

The only thing standing between courts and a better, more transparent process is inertia. Given a slightly creative but legally permissible approach to Federal Rule of Civil Procedure 49 (and its state analogues), courts could require juries to answer open-ended interrogatories that ask them to explain the bases of their punitive damages awards. Taking a page from administrative law, courts could subject the "explanatory" verdicts they thus obtain to a form of hard-look review. In appropriate cases, where an explanatory verdict indicated that an award was tainted by correctable error, a court might ask the jury to reconsider in light of clarifying instructions.

Adopting these procedures would help rationalize judicial review by giving courts information they need to ensure that juries base punishment on the kinds of facts the law deems relevant to the task. It would also enable courts to ensure that the factual findings upon which juries actually base punishment can reasonably support the punitive damages awards they inflict, i.e., that juries make "reasonable" punishment policy choices. In addition to improving judicial review, asking juries to speak with words as well as dollars would help them send clearer condemnatory "messages" and, more than incidentally, would show them respect. Lastly, explanatory verdicts could shed light on the controversial question of whether juries should exercise the power to inflict punitive damages.