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PUNITIVE DAMAGES VS. THE DEATH PENALTY: IN SEARCH OF A UNIFIED APPROACH TO JURY DISCRETION AND DUE PROCESS OF LAW

José Felipé Anderson*

I. INTRODUCTION

The role of the jury in awarding monetary damages to plaintiffs in a wide range of civil cases has captured the attention of the media,[1] contemporary non-fiction writers,[2] and reform-minded politicians[3] in recent years. Particular

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* Professor of Law, University of Baltimore School of Law, Founding Director, Stephen L. Snyder Center for Litigation Skills (2000-2008). I would like to thank the legendary Oscar S. Gray, my professor and mentor at the University of Maryland School of Law, who invited me as a guest to the 2000 American Law Institute Annual meeting to observe the important proceedings before I was elected to the Institute in 2002. Through my observations of the Institute's important work I gained great insight into this organization and its contribution to the development of the law. I would also like to thank my primary research assistant, Anastasia Albright, on this article for her outstanding research and written contribution. Additionally, I would like to thank Brendan Thompson, Marc Campsen, Sarah Conkwright, and Jakisha Frierson, students from my spring 2007 Recent Supreme Court Decisions seminar, who provided their insight into the punitive damages cases recently decided by the Court at that time and helped shape my views. I would like to thank the University of Baltimore Foundation for the research grant that supported this project.

[1] With modern day instant access to media, jury trials can be closely followed by an interested public. High profile trials like the O.J. Simpson case have brought the issue of jury reform to the attention of the general public in recent decades. *See* Steven C. Serio, Comment, *A Process Right Due? Examining Whether a Capital Defendant has a Due Process Right to a Jury Selection Expert,* 53 AM. U. L. REV. 1144 (2004).

[2] Some writers argue that the jury system is deeply flawed. Journalist Stephen Adler, for example, describes jury deliberations as "missing key points, focusing on irrelevant issues, succumbing to barely recognized prejudices, failing to see through the cheapest appeal to sympathy or hate, and generally botching the job." STEPHEN J. ADLER, THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM xiv (1994). In the context of the civil jury trial, Adler recognizes that the primary reason advanced for their continued use is:

> [J]uries are more likely than individual judges to be incorruptible and impartial. In addition, civil cases often involve question of how the community wants people to behave towards one another, and it has often been said that the jury, as the voice of the community, is in the best position to serve as both constable and referee.

Id. at 118.

[3] Former Vice President and United States Senator Dan Quayle wrote that his interest in product liability reform went back to his early days in Congress. He complained that "people look for a way to trap someone in the regulatory forest and squeeze some money out of him in an outrageous settlement just to end the expensive emotionally draining litigation. *Nuisance suits* is the familiar term; *legalized extortion* might be even a better one." DAN QUAYLE, STANDING FIRM: A VICE-PRESIDENTIAL MEMOIR 284 (1994) (emphasis in the original). John Silber, a college dean at the University of Texas at Austin, was a candidate for Governor of Massachusetts when he wrote:

> [T]here is . . . a growing war between business and the legal profession, as manufacturers large and small find themselves the target for product liability suits in ever increasing numbers, and with ever increasing awards to the plaintiffs. And of course some lawyers who defend businesses from product

attention has been focused on huge jury awards, which has led many commentators to criticize the wisdom of permitting juries to move so much money from one place to another.[4] Although the right to a jury trial, and with it the exercise of broad judicial discretion, is constitutionally based,[5] many reform efforts have moved toward removing juries from cases both as to the subject matter of cases[6] and the amount of money they can award.[7]

An extensive report from commission after commission has moved for more substitutes for the traditional jury trials as a means of resolving disputes.[8] Proponents of expanding the right to jury trial see most reform efforts as an attack on the ancient sanctity of the trial by jury.[9]

At the center of the controversy have been the sometimes staggering punitive damages awards that result from jury deliberations in high profile cases.[10] Corporations perceived to have deep pockets have sometimes been subject to citizen jurors rendering sizable verdicts, leading to calls for limitations on their discretion.[11] It may well be that the potential for a devastating punitive

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> liability suits might well grieve as much as lawyers on the other side if product liability law were to be substantially reformed.

JOHN R. SILBER, STRAIGHT SHOOTING: WHAT'S WRONG WITH AMERICA AND HOW TO FIX IT 228 (1989).

[4] As one insightful commentator has noted, "[f]reedom from restraint allows the exercise of the great power of juries. This power is tempered by the sobering effect of the great responsibility. A juror is and feels himself to be an integral part of our system of self government." SAMUEL W. MCCART, TRIAL BY JURY: A COMPLETE GUIDE TO THE JURY SYSTEM 151 (1964).

[5] U.S. CONST. amend. VII.

[6] Many states have imposed severe statutory limitations on jury awards. *See* Joseph Sanders, *Reforming General Damages: A Good Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 115, 132 (2008).

[7] Since the mid-1970s, there has been a considerable legislative reduction in the power of the jury to award damages in certain categories of cases. JETHRO K. LIEBERMAN, THE LITIGIOUS SOCIETY 87 (1983).

[8] Many states, like Arizona, have engaged in extensive studies and reports in an effort to reform jury trials. *See* G. Thomas Munsterman & Paula L. Hannaford, *Reshaping the Bedrock of Democracy: American Jury Reform During the Last 30 Years*, 36 JUDGES' J. 5 (1997).

[9] The former Chief Justice of the Supreme Court of New Jersey, Arthur T. Vanderbilt, has insightfully written that:

> The jury is undoubtedly the institution that most distinguishes common-Law procedure from the Roman and civil law. . . . As a substitute for trial by ordeal, trial by battle or wager of law, trial by jury was a daring innovation as was ever attempted in the history of the common law. . . . For it, no praise has been too extravagant; it has been hailed as the palladium of individual freedoms and the bulwark of life and property.

ARTHUR T. VANDERBILT, CASES AND MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION 1190 (1952).

[10] Multi-million dollar punitive awards in tobacco cases have fueled the controversy over the legitimate power of the jury to assess damages. For example, the punitive civil damages jury award of $229 million against the manufacturer of Vioxx has gained media attention. *Jury Finds Merck Liable in Landmark Vioxx Case: Widow of Texas Man Who Died After Taking Drug Awarded $253 Million*, ASSOCIATED PRESS, Aug. 19, 2005, http://www.msnbc.com/id/9006921/.

[11] Juries have traditionally been given broad discretion to determine damages with very little guidance beyond jury instructions. Michael Freedman, *The Tort Mess*, FORBES, May 13, 2002, at

damages award might be characterized as the equivalent of a corporate "death penalty."[12] Like capital punishment in the criminal law context, the perceived need for an "ultimate punishment"[13] in the civil litigation arena has been justified as way to address the wrongful conduct of the worst of the worst.[14]

This article is an attempt to examine what reasonable reforms should be made to jury discretion, particularly with regard to the jury's consideration of punitive damages.[15] My hope is to advance a process that will strike a balance between jury discretion and the valid concerns of those who perceive a need to protect against arbitrary and unfair damages verdicts. Others have also insightfully written in this area,[16] but my approach builds on the structure for controlling jury discretion fashioned by the American Law Institute ("ALI") in its important work dealing with capital juries.[17]

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90 ("Out-of-control lawsuits are shutting down medical practices, killing businesses and costing the economy $200 billion a year.").

[12] A punitive damage award of many million dollars could easily bankrupt a company and put it out of business. *Id.*

[13] In a report on capital punishment, the American Law Institute noted:

> Capital punishment constitutes only a tiny part of the criminal justice system. Fewer than 50 people were executed and slightly over 100 people were sentenced to death nationwide in 2007, while considerably over two million people remain incarcerated in the non-capital criminal justice system. The death penalty does not even constitute a substantial part of our system for punishing *homicide*. In a country that has experienced between 15,000 and 20,000 homicides per year nationwide over the past decade, the number of capital sentences and executions last year looks particularly trivial. The relative paucity of death sentences and executions does not disappear if we focus on the high-water marks for death-sentencing and executions in the modern era, with highs for death sentences in the 300s (per year, nationwide) and executions hovering close to 100 (per year, nationwide).

THE AMERICAN LAW INSTITUTE, REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY 44 (Apr. 15, 2009), *available at* http://www.ali.org/doc/Capital%20Punishment_web.pdf.

[14] Gregg v. Georgia, 428 U.S. 153, 193 (1976) ("While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded 'that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case.'" (emphasis in original)).

[15] State and federal judges already have a host a civil procedure rules that allow them to alter the size of jury awards. *See* Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damage Caps*, 80 N.Y.U. L. REV. 391 (2005) (reviewing literature on damages).

[16] David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Finding from Philadelphia*, 83 CORNELL L. REV. 1638 (1998).

[17] The ALI stated in its report on capital punishment:

> The main provision of the Model Penal Code concerning capital punishment, § 210.6 . . . defines cases appropriate for capital punishment as follows: only murder, then only if there are "aggravating circumstances," and even then, not if "substantial mitigating circumstances call for leniency" or if the evidence at trial "does not foreclose all doubt respecting . . . guilt." The section also proscribes the death sentence for those under age 18 at the time of the murder

The focus of my suggested reforms will examine the drafts of the ALI's Model Penal Code that suggested reforms to the structure of how death penalty decisions are made. In an interesting, indeed ironic twist, the very model ALI statute that led to upholding the death penalty in many American jurisdictions has recently been totally rejected, with the ALI deciding that it is no longer appropriate to impose the penalty. In 2009, the ALI Council issued a position that repealed its support for the death penalty provisions it had created.[18] Many of its provisions were designed to separate criminal act determinations from sentencing determinations to guide the discretion of the jury.[19]

> and for those whose "physical or mental condition calls for leniency." Section 210.6 then mandates a special sentencing procedure in capital cases and allocates sentencing authority between judge and jury. Specifically, the section lays out two formulations from which states adopting the MPC would choose. The one preferred by the Institute is for use of a jury in contested cases but with the judge retaining discretion to reject a jury verdict of death. But the section also sets forth an alternative procedure whereby the judge acts without the aid of a jury. Thus, under either procedure, final discretion to sentence a defendant to death lies with the judge. Additionally, the section requires the judge, and when aided by a jury also the jury, to consider the aggravating circumstances and mitigating circumstances delineated in the final subsections of the section.

THE AMERICAN LAW INSTITUTE, *supra* note 13, at 2.

[18] At the 2009 Annual Meeting, ALI members were asked to approve the following motion regarding the death penalty:

> MOTION: That the Institute withdraws § 210.6 of the Model Penal Code.
>
> The motion will be presented on behalf of the Council, which approved the same motion at its December 2008 meeting. In order to be the position of the Institute, the approval of a majority of the ALI members present when it is put to a vote at the Annual Meeting is required.
>
> The Council makes one further recommendation: If a motion to endorse or oppose the abolition of capital punishment is presented for a vote at the 2009 Annual Meeting, the Council recommends that the members present vote against the motion.
>
> To assist the members in preparing for the consideration of this matter at the 2009 Annual Meeting, the following report is being distributed in advance to the entire membership. The report provides important background information, including the history of the 1962 Model Penal Code's approach to the death penalty, a recitation of why the matter is before us in 2009, and a review of the process in which the Institute has been engaged over the past two years to arrive at this point. In Section V, we discuss some of the considerations and reasons for the Council's recommendations and decisions, including its decision not to undertake a project to revise or replace § 210.6. Section VI outlines the major concerns regarding the state of the death-penalty systems in the United States today, as set forth more fully in a paper prepared by Professor Carol Steiker and Professor Jordan Steiker at the request of ALI Director Lance Liebman. The paper is summarized in and also annexed to this report for information and not for approval.

Id. at 1.

[19] Some of those provisions include:

> § 210.6. Sentence of Death for Murder; Further Proceedings to Determine Sentence.

A. The Current Model Penal Code

When the ALI drafted the Model Penal Code in 1962, it offered no opinion on whether the death penalty is an appropriate punishment:

> Despite the views of the Code's Chief Reporter (and later ALI Director) Herbert Wechsler, the other Reporters, and most of the Advisers, who favored excluding the death penalty as a sanction available in the United States, the minutes of the March 1959 Council meeting report "that it is undesirable for the Institute to take a position on . . . the abolition of capital punishment on the ground that this was a

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(1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:

(a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or

(b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or

(c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or

(d) the defendant was under 18 years of age at the time of the commission of the crime; or

(e) the defendant's physical or mental condition calls for leniency; or

(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

(2) Determination by Court or by Court and Jury. Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. The proceeding shall be conducted before the Court alone if the defendant was convicted by a Court sitting without a jury or upon his plea of guilty or if the prosecuting attorney and the defendant waive a jury with respect to sentence. In other cases it shall be conducted before the Court sitting with the jury which determined the defendant's guilt or, if the Court for good cause shown discharges that jury, with a new jury empanelled for the purpose.

In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence, not legally privileged, which the Court deems to have probative force, may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut such evidence. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Id.

> political question on which the opinion of either the Council or the Institute could be of little help in settlement of the matter."[20]

The drafters of the Model Penal Code believed that if states were going to have a death penalty,[21] then any decision-making process should limit the class of persons properly eligible for the punishment. [22] A primary tool that the ALI

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[20] *Id.*

[21] The American Law Institute made no recommendation in the 1962 Model Penal Code as to whether capital punishment should be a sentencing option:

> Despite the views of the Code's Chief Reporter (and later ALI Director) Herbert Wechsler, the other Reporters, and most of the Advisers, who favored excluding the death penalty as a sanction available in the United States, the minutes of the March 1959 Council meeting report this conclusion: "that it is undesirable for the Institute to take a position on . . . the abolition of capital punishment on the ground that this was a political question on which the opinion of either the Council or the Institute could be of little help in settlement of the matter." In presenting the Proposed Official Draft of the MPC at the 1962 Annual Meeting, one of the Reporters, Professor Louis Schwartz of the University of Pennsylvania, said: "The Institute went through a great struggle over whether to approve or disapprove the death penalty. We finally took the course of providing the most reasonable standards and procedures for application of the death penalty for use by those jurisdictions which chose to retain it. Therefore we have bracketed the references to the death penalty, to show the contingent character of the Institute's approval of the capital punishment provisions."

Id. at 1-2.

[22] *Id.* at 4. The ALI took a unique approach in determining that section 210.6 should be withdrawn:

> The Program Committee's and Council's review and consultation, informed by the papers produced by the Meltzer Committee and by the Steikers and by the New Orleans conference, as well as by other sources, provide ALI with a sufficient basis to proceed with the withdrawal of § 210.6 without undertaking a traditional ALI project and to recommend that the Institute neither endorse nor oppose the abolition of capital punishment. Among the reasons that motivated many members of the Council are these:
>
> A. Section 210.6 was an untested innovation in 1962. We now have decades of experience with death-penalty systems modeled on it. The section played an influential role in the evolution of American capital-punishment systems and capital- punishment law over the last half century. However, since the provision was approved by ALI, U.S. Supreme Court decisions have reshaped the constitutional landscape with respect to sentencing generally and the death penalty specifically, raising questions about some aspects of § 210.6. Even though other aspects of the section—in particular, the categorical exclusion of capital punishment as a punishment for juveniles and for crimes other than murder and its doubts about it as a punishment for the mentally ill—proved to be prescient as confirmed in later constitutional jurisprudence, on the whole the section has not withstood the tests of time and experience.
>
> B. Many on the Council have concerns, convincingly described in the Steikers' paper and other sources, about the administration of the law of capital punishment in the United States, including the administration of death-penalty laws derived from § 210.6. A number of these concerns are outlined in Section VI, infra. Unless we are confident we can recommend procedures that would

suggested is the process of weighing and balancing aggravating circumstances,[23] those characteristics of the crime which indicate eligibility for an ultimate punishment, against mitigating circumstances,[24] reasons that tend to reduce more severe punishment.

Although there are similarities between death penalty determinations and punitive damages determinations, I do not intend to suggest that the taking of a human life should be lightly compared to financial awards designed to deter

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> meet the most important of the concerns, the Institute should not play a further role in legitimating capital punishment, no matter how unintentionally, by retaining the section in the Model Penal Code.

Id.

[23] Some questioned whether the ALI should play a different role in its handling and assessment of the death penalty:

> Some Council members believe that since the death penalty will continue to be imposed in some jurisdictions in the United States, the ALI could play a useful role in recommending procedures that are consistent with current constitutional requirements. Other members, supported by the arguments in the Steikers' paper, believe that real-world constraints make it impossible for the death penalty to be administered in ways that satisfy norms of fairness and process. As ALI's current Sentencing project progresses, Director Liebman will evaluate and may recommend new projects in the area of criminal law. At this time, the Director, the Program Committee, and a large majority of the Council are not convinced that an ALI effort to offer contemporary procedures for administering a death penalty regime would succeed intellectually, institutionally within what would surely be a divided membership, and politically in terms of influence outside the Institute. Thus ALI will not undertake a project concerning the death penalty.

Id. at 5.

[24] Although nearly three quarters of the states have the death penalty as a sentencing option, "many thoughtful and knowledgeable individuals doubt whether [these procedures] meet or are likely ever to meet basic concerns of fairness in process and outcome." Concerns include:

> (a) the tension between clear statutory identification of which murders should command the death penalty and the constitutional requirement of individualized determination;
> (b) the difficulty of limiting the list of aggravating factors so that they do not cover (as they do in a number of state statutes now) a large percentage of murderers;
> (c) the near impossibility of addressing by legal rule the conscious or unconscious racial bias within the criminal-justice system that has resulted in statistical disparity in death sentences based on the race of the victim; (d) the enormous economic costs of administering a death-penalty regime, combined with studies showing that the legal representation provided
> to some criminal defendants is inadequate; (e) the likelihood, especially given the availability and reliability of DNA testing, that some persons sentenced to death will later, and perhaps too late, be shown to not have committed the crime for which they were sentenced; and
> (f) the politicization of judicial elections, where—even though nearly all state judges perform their tasks conscientiously—candidate statements of personal views on the death penalty and incumbent judges' actions in death-penalty cases become campaign issues.

Id.

improper business conduct.[25] Nevertheless, much can be learned from the Model Penal Code regarding structural mechanisms to control jury discretion.[26] Challenging jury discretion through a more or less fixed formula can provide important guidance to both jurors and advocates in structuring litigation.[27]

I also will suggest that lessons learned from the Model Penal Code will provide a structural opportunity to encourage the use of alternative dispute resolution tools into the litigation process even after the trial has begun.[28] This may provide an opportunity for parties to resolve disputes before subjecting them

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[25] The Supreme Court has a long and complex history dealing with the constitutionality of the death penalty:

> Ten years after the MPC was promulgated, the Supreme Court, in *Furman v. Georgia* (1972) (5-4), effectively invalidated traditional, discretionary systems for the imposition of capital punishment. Each of the nine Justices wrote an opinion. Two Justices thought capital punishment was per se unconstitutional. The other three Justices in the majority found the death penalty unconstitutional because of the lack of standards for determining how, among the many persons convicted of murder, the decision was made to sentence only a few to death; the resulting system, in the view of these three Justices, led to the arbitrary and/or discriminatory imposition of the death penalty.
>
> By 1976, 35 states and the Congress had enacted new capital punishment laws that attempted to address the concerns expressed by the three decisive Justices in *Furman*. About half the states opted for mandatory death penalties—an approach that the Supreme Court held to be unconstitutional in 1976 in *Woodson v. North Carolina* and *Roberts v. Louisiana*, which reasoned that contemporary standards of decency require individualized consideration of the appropriateness of a sentence of death in the particular case. The other states enacted schemes seeking to confine discretion, typically by prescribing aggravating and mitigating factors, and the majority of those states patterned their efforts, more or less closely, on MPC § 210.6. In 1976, the Supreme Court upheld statutes from Florida, Georgia, and Texas, in each case by a vote of 7-2. *See* Proffitt v. Florida; Gregg v Georgia; Jurek v. Texas. The Florida and Georgia statutes were patterned, more or less closely, on the MPC; Texas's statute took a quite different form, limiting capital murder to five categories of murder and putting three yes/no questions to the jury that, in the Court's judgment, adequately narrowed the reach of capital punishment while permitting consideration of mitigating evidence.
>
> The Commentaries to section 210.6, published in 1982, stated that the Supreme Court's decisional law "amounts to a broad endorsement of the general policy reflected in the Model Code provisions." And as a generalization, the legislative response to the 1976 decisions did tend to follow the general approach of the MPC. Today, 38 states and the federal government authorize the death penalty, and most have looked for guidance in some way to section 210.6.

Id. at 13-14.

[26] Again, the Institute prefers the use of a jury in contested cases, but with the judge retaining discretion to reject a jury verdict of death. *Id.* at 2.

[27] *See supra* note 25.

[28] There are several scholars who suggest juries do not fully understand their responsibility. Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627, 628 (2000).

to consideration of punitive damages by a jury.[29] Such an opportunity could avoid lengthy and costly appeals.[30]

Perhaps by resolving the most troublesome concerns of critics of the civil jury trial system, other parts of the system can remain largely unaltered.

B. Implementing the Model Penal Code Approach

The great advantage of implementing the Model Penal Code approach in civil jury trials for punitive damages is that by requiring the identification of aggravating and mitigating circumstances, guidance would be given to the jury who is in effect being asked to impose a "death penalty" on a corporate defendant. For example, in the criminal death penalty context, an aggravating circumstance like "murder for hire" places society on notice that paying someone to kill another human being places one in a special category of offender that would deserve the ultimate punishment.[31] That hired killer behavior contemplates a quantity of maliciousness that exceeds other types of murderers. On the other hand, a mitigating circumstance like "no prior serious criminal violations" seems to provide a fair opportunity to demonstrate that whatever aggravating circumstance might be shown by the evidence, it should be balanced against the absence of habitual dangerous behavior.[32]

Such an approach is much sounder than an arbitrary ratio of punishment approach currently embraced by the Supreme Court. One obvious reason that

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[29] There are many challenges inherent when valuing of life within a jury trial. *See* Patrick B. Murray, *Hedonic Damages: Properly a Factor within Pain and Suffering under 42 U.S.C. Section 1983*, 10 N. ILL. U. L. REV. 37 (1989).

[30] It has been noted that in the death penalty context:

> [T]he existence of an extensive web of constitutional regulation with minimal regulatory effect stands in the way of *non* constitutional legislative reform of the administration of capital punishment—not only because such reform is generally extremely unpopular politically, but also because political actors and the general public assume that constitutional oversight by the federal courts is the proper locus for ensuring the fairness in capital sentencing and that the lengthy appeals process in capital cases demonstrates that the courts are doing their job (indeed, maybe even *over*-doing their job, considering how long cases take to get through the entire review process).

THE AMERICAN LAW INSTITUTE, *supra* note 13, at 9.

[31] For example, Maryland's death penalty statute contains the following provision for aggravating circumstance: "(vi) the defendant committed the murder under an agreement or contract for remuneration or promise of remuneration to commit the murder; (vii) the defendant employed or engaged another to commit the murder and the murder was committed under an agreement or contract for remuneration or promise of remuneration." MD. CODE ANN., CRIM. LAW § 2-303(g)(1)(vi)-(vii) (LexisNexis 2010).

[32] See State v. Smith, 673 P.2d 17, 21 (Ariz. 1983). After considering all the mitigation presented, including Smith's lack of a prior serious crime, the Court found the cumulative mitigation "significant," but not sufficiently substantial to call for leniency in light of the extreme cruelty and brutality of the crime.

such an approach is desirable is because those aggravating and mitigating circumstances have legislative sanction. When this legislative sanction is then combined with jury discretion, it enhances the public policy to guide punishment while at the same time respects the traditional role of the jury to fix punishment.

If no aggravating circumstances are found, then a case would be deemed inappropriate for punitive damages. If aggravating circumstances exist, the jury will be instructed to consider them alongside whatever mitigating circumstances exist. The legislature could also require mandatory appeals before such jury awards would become final. Such a system would also provide parties additional opportunities to explore settlement of cases before a jury's consideration of punitive damages.

C. Judging the American Jury

There is no institution made by man more controversial than the American Jury system.[33] It has been praised and hated by people from all walks of life.[34] The business community complains that it has paralyzed its ability to grow.[35] Politicians have used it as grist for their mills calling for jury reform.[36] Television and movies have dramatized its workings so that people who have never actually served believe it to be a meaningless exercise.[37] Even in the Internet age, Web sites ridicule the work of juries in an effort to show that it is a system prone to fail.[38]

In many ways this general uninformed critique of the jury has done the institution a disservice because it discounts the truly important daily work of the institution in case after case without much notice.[39] Ordinary citizens who are called on any given day in any state, federal, or county courthouse to resolve disputes of all kinds between people or entities serve a critical societal function.[40] A juror's responsibilities range from deciding whether a human being should be executed for life-ending criminal conduct[41] to deciding small disputes between

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[33] *See* LESTER B. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 408-13 (1947).

[34] It has been noted that at the heart of the dispute over the value of the jury is the concern that "juries are incapable of adequately understanding evidence or determining issues of fact . . . [any] better than a role of dice." Duncan v. Louisiana, 391 U.S. 145, 157 (1968).

[35] Businesses often complain that the fear of frivolous litigation gets in the way of efficient operation and profit. *See* Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225 (2004) (discussing tort reform as an economic and business issue).

[36] *See* Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. REV. 723 (1994).

[37] *Id.*

[38] *Id.*

[39] ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791, at 208 (1955).

[40] *Id.*

[41] *Id.* On an earlier occasion I wrote at length about my concerns over the United States Supreme Court's approval of the use of victim impact testimony at death penalty sentencing hearings in its two decades old decision in *Payne v. Tennessee*, 501 U.S. 808 (1991). *See Will the Punishment Fit the Victims? The Case for Pre-Trial Disclosure. and the Uncharted Future of Victim Impact*

neighbors.[42] With only a notice received in the mail, a carpenter, fisherman, or salesman could be sitting in judgment of a multi-national corporation; a plumber, a housewife, or a government official may be required to answer to the process of court adjudication.[43] In the most important disputes, the potential for a jury decision always plays an important role in how the dispute is resolved.[44] Although most cases that are eligible for jury determination will never result in one,[45] it is the profound threat that such a determination may be necessary that drives the entire litigation system in the United States[46] and indeed, the world.[47] Still, the question of whether ordinary citizens should judge such important matters without training or experience has troubled many observers of the legal

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Information in Capital Jury Sentencing, 28 RUTGERS L.J. 367 (1997). All my concerns voiced in that earlier work remain, but the use of such information has been ruled constitutional. However, I am at a loss to reconcile how it might violate Due Process to put a company out of business by the use of broad victim information but does not offend Due Process to end a life by using similar information of victim harm.

[42] At an earlier time in my legal career I was counsel in a three-day jury trial that involved a fist fight between feuding neighbors that began over, among other things, a parking dispute. The loser of the fistfight sought civil damages in his lawsuit. I represented the winner of the fight who had already been convicted of simple assault in criminal court and received a minimal sentence that did not involve incarceration. After a short deliberation the jury found that the defendant had committed the assault but awarded no damages. The trial judge, a veteran of many decades of jury trials, had urged the plaintiffs to accept our settlement offer in chambers before jury selection, essentially stating, "I see these cases all the time and the jury is going to give you about one dollar, they do not like losing time from work or their families to give money to neighbors who cannot get along even if they are clear who started the fight." Interviews with members of the jury after the verdict confirmed the judge's comments in chambers.

[43] Even a failure to report could lead to a citation for contempt or incarceration. An interesting newspaper story reported:

> Like two schoolboys ordered to stay after class, Donald Carstens and Athanasios Katsoulis sat fidgeting in a Baltimore courtroom yesterday, watching the clock and waiting until they could go home. They were lectured, scolded about their behavior and ordered to remain in a paneled, windowless circuit courtroom until 5 p.m. after Judge Edward J. Angeletti held them in contempt as part of a crackdown on those who fail to appear for jury duty. After a morning of hearing excuses, Angeletti ordered Carstens and Katsoulis to stay for the day, fined them $100 and ordered them to pay $115 in court costs.

Dennis O'Brien, *Two No-Shows for Jury Duty Have Day in Court: 23 Scofflaws Appear*, BALTIMORE SUN, June 26, 1998, http://articles.baltimoresun.com/keyword/jury-duty.

[44] *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 18-19 (1955) (discussing the importance of a jury being made up of plain people).

[45] About ninety-five percent of civil cases settle before trial. Large jury verdicts are often altered or set aside by trial judges' settlement, remittitur, and reversal on appeal. See Michael G. Shanley, *The Distribution of Post Trial Adjustments to Jury Awards*, 20 J. LEGAL STUD. 463, 464 (1991).

[46] The United States litigation system has been described as cumbersome and expensive. *See* Lasson, *supra* note 36, at 755.

[47] Several international writers have attacked the efficiency of the American litigation system. Our Constitution, which has been the envy of many nations forming democracy, holds in high regard the right to a jury trial. James Madison was reported to have described it as among the "most valuable rights" in the Bill of Rights. RUTLAND, *supra* note 39.

system.[48] Intense debate surrounds[49] concerns over whether juries are even capable of understanding the instructions on the law they are routinely given,[50] warnings not to discuss the case until all the evidence is received,[51] and complex expert testimony.

Certainly there are other ways to resolve disputes rather than submitting disputes to the trial by jury. The long-abandoned methods of combat,[52] strange ordeals,[53] and other more mystical forms of proof have all been used and have failed the test of time.[54] However, our current system of jury trial has been criticized as bearing too much resemblance to a trial by combat, with lawyers who use "scorched earth" tactics in a win-at-all-costs approach.[55] Some believe that a jury trial is more theater than law, concluding that decisions ultimately are votes for the best lawyer rather than the reasoned examination of the facts and the law.[56] These concerns have prompted some bar association disciplinary committees to more tightly control how lawyers may conduct themselves during the news coverage of high profile trials.[57] Such rules are imposed for fear that

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[48] Some European systems use professional jurors. *See* John H. Langbien, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195 (1981).

[49] *See infra* notes 50-51.

[50] There is considerable concern whether jurors listen to the instructions they are given. One scholar has called into question whether death penalty jurors understand instructions given to them by a trial judge, especially when they ask questions seeking clarification. Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627, 628 (2000).

[51] Jurors are not permitted to talk about a case while they are in the process of deciding it:

> The courts have recognized that the exposure of jurors to news media reports during trial has been a "very real problem for a long time." *State v. Jones*, 50 N.C. App. 263, 268 (1981). When there is a *substantial reason to fear* that the jury has become aware of improper and prejudicial matters such as media reports, inquiry by the trial judge is required.

UNC School of Government, *Jury Misconduct*, 1 NC DEFENDER MANUAL ch. 24, at 6 (draft 2008), http://www.ncids.org/Def%20Manual%20Info/Defender_Manual_Vol%202/DefenderManual_CH24.pdf. It should be noted that "although some may criticize the use of juries as factfinders because of the potential to be influenced by pretrial publicity . . . no research proves that judges are immune from these same factors." Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235, 282 (2009).

[52] *Id.*

[53] *See* IAN WILLOCK, THE ORIGINS AND DEVELOPMENT OF THE JURY IN SCOTLAND 3-105 (1966).

[54] In some parts of the world, professional jurors are used. *See supra* note 48.

[55] WILLOCK, *supra* note 53.

[56] *Id.*

[57] The *First Amendment Handbook* notes several cases addressing the ways a lawyer may properly interact with the media:

> *See e.g., Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark. *order issued* Oct. 27, 1997) (restraining litigants and counsel from discussing the timing and substance of discovery and identifying persons from whom discovery is sought); *United States v. McVeigh*, 964 F. Supp. 313 (D. Colo. 1997) (upholding trial court order restricting access and prohibiting all out-of-court comments by trial participants). . . .

jury pools and even actual sitting jurors will be influenced by statements made to the media.[58] This is true in spite of the fact that judges frequently instruct jurors to disregard media reports regarding the case.[59] These problems, combined with the longstanding skepticism about lawyers,[60] have encouraged reformers to examine the jury trial and how it should be conducted.

Despite its detractors, many believe that the jury is the essence of our democracy, demonstrating our commitment to a decentralized process through citizen involvement in decision-making.[61] Although praised for its democratic character, it is often called too unpredictable to be reliable.[62] The sometimes inexplicable results of jury trials have led some critics to conclude that jurors are simply getting "dumber."[63] Many countries have largely dispensed with its use.[64] Others, like Great Britain, where the jury trial was born, while not eliminating it, have drastically altered the control of lawyers selecting those who will serve.[65]

The process of selecting jurors has been the source of much frustration as of late.[66] The controversial concept of the peremptory challenge[67] has inflamed

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> [*But*] *see United States v. Salameh*, 992 F.2d 445 (2d Cir. 1993) (striking order preventing attorneys and law enforcement officials involved in World Trade Center bombing case from speaking to the press; stating that courts may impose some restrictions when necessary to protect the, but holding that the order in *Salameh* was not narrowly tailored).

The Reporters Committee for Freedom of the Press, *Chapter 6—Gag Orders*, The FIRST AMENDMENT HANDBOOK, ch. 6 nn.4 & 11 (2011), http://www.rcfp.org/handbook/?pg=6-1&PHPSESSID=1df0d027a26caa0a3008fdd332569881.

[58] WILLOCK, *supra* note 53.

[59] *Id.*

[60] As one observer documented several decades ago:

> The most comprehensive American poll of the public's attitude toward lawyers was undertaken in 1960 by the Missouri Bar . . . . [The poll revealed that] most of the public and the lawyers themselves believed contingent fees in personal injury cases were much too high. Many of the complaints about lawyers overcharging came from people in the Kansas City area where the prevailing contingent fee in the personal injury cases is 50 percent. Most people thought 25 percent or less would be fair. Nearly 57 percent of the people who used lawyers thought lawyers created lawsuits unnecessarily, and that they didn't make enough effort to settle cases as they should.

MURRAY TEIGH BLOOM, THE TROUBLE WITH LAWYERS 341-42 (1969). It is "those flamboyant personal injury lawyers who really besmirch the profession, starchy Big-Firm lawyers grumble. They swoop down on disasters like vultures, sometimes even disguising their runners as Red Cross workers or priests to sign up clients." DAVID W. MARSTON, MALICE AFORETHOUGHT: HOW LAWYERS USE OUR SECRET RULES TO GET RICH, GET SEX, GET EVEN . . . AND GET AWAY WITH IT 35 (1991).

[61] *See*, José Felipe Anderson, *Catch Me If You Can: Resolving the Ethical Tragedies in the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 343 (1998).

[62] HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 200 (1996).

[63] *Id.*

[64] *See* Anderson, *supra* note 61.

[65] *Id.*

[66] *Id.*

[67] *Id.*

the passion of the public[68] and been the subject of considerable judicial attention.[69] The Supreme Court has extended the controversy over potential racial[70] and gender[71] discrimination from criminal cases[72] to civil cases,[73] thus bringing battles over the proper selection of jurors to all high stakes litigation.[74] This has resulted in making the selection of juries a more complicated proposition than ever before.[75]

Trials of noteworthy black men like O.J. Simpson[76] and former Washington D.C. Mayor Marion Barry[77] have resulted in heightened interest in how juries make decisions in criminal cases.[78] In both of these trials, the jury acquittal resulted in calls from segments of society to control juries, particularly those including black jurors, from too easily acquitting black defendants.[79] The notion that black jurors would favor black defendants has become known as "racial jury nullification."[80] It contemplates that in some cases jurors would ignore the facts and the law and decide the case on racial considerations alone.[81]

The idea that juries would ignore the facts and the law in order to acquit is a longstanding exercise of jury power that dates to the foundation of our

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[68] *Id.*

[69] *Id.*

[70] The ALI, too, made note of racial prejudice in its report on capital punishment:

> Several empirical studies have explored the subtle role of race discrimination in death penalty attitudes. *See, e.g.,* Steven E. Barkan & Steven F. Cohn, *Racial Prejudice and Support for the Death Penalty by Whites*, 31 J. of Research in Crime & Delinquency 202 (1994) (reporting empirical study in which two indexes of racial prejudice were significantly linked to greater support for the death penalty among whites, even after controlling for relevant demographic and attitudinal variables); Robert L. Young, *Race, Conceptions of Crime and Justice, and Support for the Death Penalty*, 54 Social Psychology Quarterly 67 (1991) (empirical analysis finding that racial prejudice significantly predicts both support for the death penalty and tougher crime control policies).

THE AMERICAN LAW INSTITUTE, *supra* note 13, at 29 n.119.

[71] *See* Anderson, *supra* note 61.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] In analyzing this theory, the ALI noted:

> Empirical research has found a strong association between life verdicts and the presence of at least one African-American male on the jury in capital cases involving African-American defendants and white victims. William J. Bowers, et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 192 Table 1 (2001) (asserting "black male presence effects").

THE AMERICAN LAW INSTITUTE, *supra* note 13, at 31 n.124.

democracy.[82] Indeed, its tradition predates the Declaration of Independence.[83] In 1670 a jury acquitted Quaker activists William Penn[84] and William Mead,[85] who were charged with unlawful assembly.[86] Ample evidence existed to support their convictions, but despite being denied food and water the jury acquitted the men, sending a strong political statement against the British monarchy that prosecuted them.[87]

That type of jury power is what the late Supreme Court Justice William O. Douglas said "takes the sharp edges off the law and uses conscience to ameliorate a hardship."[88] Former President and Supreme Court Chief Justice William Howard Taft called broad jury power a "protection of the individual . . . against the power of government . . . ."[89]

Still many argue that such power should not be used to address perceived racism in the criminal justice system where statistical disproportion of all kind exists in the prosecution of African Americans.[90] Some commentators have gone so far to suggest that proposals encouraging black jurors to engage in such conduct are "foolish and dangerous."[91]

It is unavoidable that jurors will sometimes act in race-conscious ways,[92] and race alone is an improper basis on which to engage in nullification of the law or the facts. However, when race becomes entangled with questionable political considerations,[93] racial motivation of prosecuting officials,[94] or prosecutorial excess and abuse of discretion,[95] a jury may reach the conclusion that it will not participate in furthering the unfairness in the case even though the facts suggest guilt.[96]

A jury, properly selected from the peers of the community, should be the last word before someone loses their liberty in a free society.[97] Recently, lawyers have been going to great expense to develop techniques they believe will lead them to predict what a jury is likely to do when it deliberates a case.[98] The use of

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[82] *See* Anderson, *supra* note 61.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] "The Jury takes the sharp edges off a law and uses conscious to ameliorate a hardship. Since it is of the community, it gives the law acceptance which verdicts of judges could not." WILLIAM O. DOUGLAS, AN ALMANAC OF LIBERTY 112 (1954).
[89] William H. Taft, *The Administration of Criminal Law*, 15 YALE L.J. 1, 4 (1905).
[90] *See* Anderson, *supra* note 61.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*

professional jury consultants have become a typical tool in high profile jury cases.[99] Incorporating science and psychology,[100] they have they have explored ways to shape jury decisions rather than selecting merely impartial jurors.[101] Such techniques have relied in large part on racial and gender stereotyping[102] in an attempt to predict likely decisions in particular cases.[103]

The Supreme Court has complicated this area of the law, making it unclear whether jury selection consultants are in any way prohibited from helping lawyers select juries by using race and gender bases demographic data.[104]

Some modifications are obviously needed, but examining which reforms make the most sense requires some restraint in proposing change.[105]

D. The Model Penal Code and Control of Jury Discretion

In an effort to control juries in the death penalty process from making arbitrary decisions, the American Law Institute made several proposals at its May 1959 meeting in the form of tentative drafts.[106] The Institute took no position on the appropriateness of the death penalty.[107] Instead, it recognized that the death penalty ranked high among issues of public controversy in the criminal law.[108] The drafters explained:

> [T]he reporters favored abolition of the capital sanction. The Advisory Committee recommended by a vote of 17-3 that the Institute express itself upon the issue, of retention or abolition but substantially united in the view that the institute could not be influential in its resolution and therefore should not take a position either way.[109]

The drafters believed that "it was clear that many jurisdictions would retain the sentence of death for some form of murder for many years . . . ."[110] This illustrated their belief that it was essential that the Institute address at least two problems. "[F]irst, in what cases should capital punishment be possible; and second, what agency and what procedure should determine whether the sentence of death should be imposed."[111]

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[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] MODEL PENAL CODE AND COMMENTARIES § 210.6 n.107 (Official Draft and Revised Comments 1980).
[107] *Id.*
[108] *Id.* at 110.
[109] *Id.* at 111.
[110] *Id.*
[111] *Id.*

The wisdom in the Institute's judgment on this point cannot be overstated. Because of the philosophical differences that abound regarding capital punishment,[112] the legal processes by which it might be imposed are varied.[113] The detail of the procedural framework for controlling juror discretion reflects the potentially harsh consequences that the Institute perceived from an unguided jury making such a serious decision.[114]

In order to make it clear that the attempt to develop a suitable decision-making framework for capital decisions would not be misunderstood, the Institute emphasized its cautionary tone: "It bears repeating, however, that inclusion of this provision in the Model Code does not signal Institute endorsement of capital punishment, nor does the optional authorization of this penalty under the statute reflect an Institute decision in favor of abolition."[115]

The first level of protection, that of the identification of aggravating circumstances, contemplates a need for legislative determinations about what crimes and circumstances should be considered the worst of the worst in order to impose the ultimate penalty.[116] Requiring a jury to make findings of the existence of these circumstances prior to being permitted to move on to the question of whether death should be imposed is a reasonable control over decision-making discretion.[117]

The constitutional violations that occurred are particularly egregious because they involve fundamental protections that were contemplated by the Supreme Court in its early post-*Furman v. Georgia*[118] capital punishment jurisprudence. The Supreme Court has reminded us that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[119]

In *Gregg*, the Supreme Court held that the Georgia capital punishment statute was not unconstitutional because, among other things, it provided adequate procedural safeguards to prevent the jury from considering issues in a manner that was not unfairly prejudicial to the accused.[120] The court pointed out that "bifurcation" of the capital sentencing hearing was the primary safeguard needed to prevent the jury from misusing the information they had been given.[121] In this case the absence of bifurcation at petitioner's resentencing was

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[112] *See* Peter Arenella, *Rethinking Functions of Criminal Procedure: The Warren and Burger Court's Competing Ideologies*, 72 GEO. L.J. 185, 198-99 (1983).
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *See supra* note 23.
[117] *Id.*
[118] 408 U.S. 238 (1972).
[119] Gregg v. Georgia, 428 U.S. 153, 189 (1976).
[120] *Id.*
[121] *Id.*

particularly prejudicial because that jury heard evidence about the impact of the crime on the victims before any evidence was presented, or findings made, about the perpetrator or perpetrators of the crime.[122]

The Supreme Court has never contemplated that a constitutional sentencing procedure could occur in the complete absence of the procedural protection that is supplied by bifurcation. "Given the gravity of the decision to be made at the penalty phase, the state is not relieved of the obligation to observe fundamental constitutional guarantees."[123]

The procedural protection lost at the resentencing because of the highly unusual order of proof, permitted the jury to consider the evidence in a manner likely to produce a decision that was "wanton[,]" "freakish" and as arbitrary as being "stuck by lightening[.]"[124] The Supreme Court has required that any decision to impose the death penalty be based on reason rather than emotion or caprice.[125] The standard for assessing the constitutional violation is not reduced because the proceedings at issue are a resentencing trial. As the Supreme Court has clearly recognized, "fundamental principles of procedural fairness apply with no less force to the penalty phase of a capital case than they do in the guilt-determining phase of any criminal trial."[126] It is certainly possible that the resentencing jurors, relying only on the prior findings of guilt by another jury and the emotional content of victim impact testimony, will render a death sentence. Indeed, the Supreme Court has gone so far as to hold that a death sentence must be vacated if it is possible that the jury may have improperly delegated some of the responsibility for rendering the death sentence to another part of the criminal justice system.[127] The resentencing jury, already aware that the petitioner was convicted of committing a capital crime, should have made the factual determination that the petitioner was a principal to the crime before assessing the other emotionally-charged evidence in the case. Otherwise, they would be tempted to rely too heavily on the work of the prior jury.

The Supreme Court further never contemplated that in a resentencing a jury be permitted to issue a death decision with adequate guidance from the sentencing judge and sentencing forms.[128]

The petitioner is entitled to have his sentence set by a jury that is properly instructed.[129] There can be no presumption that the jury understood the charge in a constitutional manner when there "exists the reasonable possibility

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[122] *Id.*

[123] Estelle v. Smith, 451 U.S. 454, 463 (1981).

[124] *See* Furman v. Georgia, 408 U.S. 238, 309-310 (1972).

[125] *See* Gardner v. Florida, 430 U.S. 349, 362 (1977).

[126] Presnell v. Georgia, 439 U.S. 14, 16 (1978).

[127] *See* Caldwell v. Mississippi, 472 U.S. 320 (1985) (holding that a prosecutor's argument that the death penalty case would be reviewed by the state supreme court made their findings invalid).

[128] *See* Mills v. Maryland, 486 U.S. 367 (1988) (holding that confusion created by a sentencing form required the death sentence be vacated).

[129] *See* Hicks v. Oklahoma, 447 U.S. 343 (1980).

that the jury relied on an unconstitutional understanding of the law. . . . [Under these circumstances,] that verdict must be set aside."[130]

E. The Lightning Rod of Punitive Damages Awards

The specter of punitive damages awards in civil litigation is among the most controversial areas in all of American law.[131] The possibility that they may be awarded lurks a constant threat to American business.[132] The potential that one day punitive damages may not be available has been seen as the denial of a critical right of the injured and the loss of a necessary deterrent to extreme misconduct.[133]

II. TREATMENT OF PUNITIVE DAMAGES BY THE SUPREME COURT: *PHILIP MORRIS V. WILLIAMS* AND *EXXON SHIPPING COMPANY V. BAKER*

> [T]he generality of men are naturally apt to be swayed by fear rather than reverence, and to refrain from evil rather because of the punishment that it brings than because of its own foulness.
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> Aristotle[134]

A. Background

Arousing much criticism and discussion, punitive damages are a civil remedy whose purpose sprouts from the same seed as criminal punishment.[135]

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[130] Francis v. Franklin, 471 U.S. 307, 324 n.8 (1985).

[131] The constitutionality of punitive damages has been both validated and invalidated in different states. Sonja Larsen, Annotation, *Validity, Construction, and Application of Statutes Requiring that Percentage of Punitive Damages Awards Be Paid Directly to State or Court Administered Funds*, 16 A.L.R.5th 129 (1993). Such laws have been invalidated under the Equal Protection Clause when they apply to plaintiffs in some circumstances and not others, and under the Taking Clause of the Fifth Amendment. *Id.* For an analysis of Oregon's law specifically, see Junping Han, Note, *The Constitutionality of Oregon's Split-Recovery Punitive Damages Statute*, 38 WILLAMETTE L. REV. 477 (2002).

[132] *Id.*

[133] *See* Carl T. Bogus, *Introduction to* Symposium, *Genuine Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 1, 5-6 (2008):

> Lawsuits shine light into dark corners, exposing corporate wrongdoing or shortcuts that have placed citizens at risk. Indeed it may be the exposure function that matters most, even more than money judgments. But of course money matters too, providing incentives for businesses and health care providers to find ways to reduce injuries.

Id.

[134] ARISTOTLE, THE NICOMACHEAN ETHICS 346 (F.H. Peters trans., Kegan Paul, Trench & Co. 2d ed. 1884).

[135] Exxon Shipping Co. v. Baker, 554 U.S. 471, 504 (2008) (stating that punitive damages and criminal sanctions serve the common purpose of punishment and deterrence) (citing Browning-

Punitive damages or exemplary damages are often viewed as society's "moral condemnation" of a civil defendant's misconduct and are expressed by imposing a monetary penalty on the defendant in order to punish and deter.[136] In particular, punitive damages are not awarded to "redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," but rather are awarded to a plaintiff in a tort case, in addition to compensatory damages, when the defendant's action was reckless or malicious.[137] The imposition of punitive awards is not a modern-day innovation, but is traceable to the Code of Hammurabi.[138] In early American jurisprudence, cases imposing punitive damages, or damages in excess of actual injury to the plaintiff, took the position that punitive damages were administered both to penalize the defendant and to compensate the plaintiff for intangible wrongs.[139] By the 1850s American courts

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Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1995)); *see Developments in the Law—The Paths of Civil Litigation III: Problems and Proposals in Punitive Damages Reform*, 113 HARV. L. REV. 1783, 1784-88 (2000) [hereinafter *Developments in the Law*] (describing punitive damages as having "a questionable logic" and detailing the "widespread" criticism of punitive damages); *see also* Jeffery L. Fisher, *The Exxon Valdez Case and Regularizing Punishment*, 26 ALASKA L. REV. 1 (2009) (discussing the Supreme Court's decision in *Exxon Shipping Co. v. Baker* and the notion of regularizing punishment); Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1298-1303 (2005) (disagreeing with the portrayal of punitive damages as unpredictable and out of control, and discussing tort reform in the area of punitive damages).

[136] Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001) (holding that a federal appellate court should apply a *de novo* standard when reviewing a district court's determination of the constitutionality of a punitive damage award); Day v. Woodworth, 54 U.S. 363, 371 (1851) (noting that punitive awards are exemplary and penalizing rather than compensatory); LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES 19 (4th ed. 2000).

[137] *Cooper Indus., Inc.*, 523 U.S. at 432; BLACK'S LAW DICTIONARY 418 (8th ed. 2004); Rustad, *supra* note 135, at 1304 (explaining that the majority of states mandate a plaintiff to prove the defendant acted maliciously to be eligible to receive punitive damages, but no state allows the recovery of punitive damages for mere negligence).

[138] SCHLUETER & REDDEN, *supra* note 136, at 1. The Code of Hammurabi is a collection of Babylonian laws that formed during the rule of Hammurabi, which spanned from 1792-1750 BC. *Code of Hammurabi*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/253710/Code-of-Hammurabi (last visited Mar. 1, 2011). The Code includes Hammurabi's legal decisions that were gathered near the end of his rule and inscribed in a Babylonian temple. *Id.* An example of exemplary damages found in the Code of Hammurabi includes a penalty that requires a common carrier, who did not deliver goods entrusted to him, to pay fivefold their value. SCHLUETER & REDDEN, *supra* note 136, at 1-2; *see also* Exxon Shipping Co. v. Baker, 554 U.S. 471, 490-92 (2008) (discussing the historical roots of punitive damages).

[139] *See* SCHLUETER & REDDEN, *supra* note 136, at 14-16 (discussing punitive damages in Colonial America); Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383, 1390 (2009) (briefly outlining the history of punitive damages in America). The concept that punitive damages were not strictly awarded to deter and punish the defendant's conduct arose from the English Common Law. SCHLUETER & REDDEN, *supra* note 136, at 7. Some authors theorize that punitive damages developed in part to compensate for mental anguish and other non-pecuniary loss such as insult or hurt feelings, which were not recoverable in English courts during the eighteenth and nineteenth centuries. *Id.* at 6-8.

pronounced that punitive damages were predominately aimed at punishment, and not compensation.[140]

In addition to the trail of history that has led to the present day status of punitive damages, it is important to note that states, as entities separate from the federal government, may exercise significant discretion in determining how and when to impose punitive damages in order to further their "legitimate interests in punishing unlawful conduct and deterring its repetition."[141] Although the scope of this Article does not encompass the variation of punitive damage regimes among states, it is worthwhile to illuminate that state regulation of punitive damages and the procedure by which punitive damages may be awarded is far from uniform.[142] For example, Nebraska prohibits punitive damages altogether while four other states only allow punitive damages when sanctioned by state statute.[143] Other states limit the awarding of punitive damages by imposing monetary caps.[144] For states that allow punitive awards, the amount is generally first calculated by a jury and then "reviewed by trial and appellate courts to ensure that it is reasonable."[145]

Diverse state approaches to punitive damages should not be misguiding, for the discretion is not unlimited, but must be exercised within the confines of

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[140] *See* Day v. Woodworth, 54 U.S. 363, 371 (1851) (explaining that punitive or exemplary damages are awarded based upon the egregious nature of the defendant's conduct in order to punish rather than compensate); SCHLUETER & REDDEN, *supra* note 136, at 16 (summarizing the current status of punitive damages in America). In addition, the transition of punitive damages to a non-compensatory function is suggested to be a result of the broadening of injuries considered compensatory over time. *See Cooper Indus., Inc.*, 532 U.S. at 437 n.11 (2001).

[141] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996).

[142] *Exxon Shipping Co.*, 554 U.S. at 494.

[143] *Id.* (reviewing the diversity in state approaches to punitive damages); Flesner v. Technical Commc'ns Corp., 575 N.E.2d 1107, 1112 (Mass. 1991) (stating that punitive damages are prohibited unless expressly authorized by statute); Distinctive Printing and Packaging Co. v. Cox, 443 N.W.2d 566, 574 (Neb. 1989) (holding that punitive damages prohibited under Nebraska Constitution); Fisher Properties, Inc. v. Arden-Mayfair, Inc., 726 P.2d 8, 23 (Wash. 1986) (stating that punitive damages are prohibited unless expressly authorized by legislature); *see also* N.H. REV. STAT. ANN. § 507:16 (2009) (holding that no punitive damages shall be awarded in any action, unless otherwise provided by statute); Rustad, *supra* note 135, at 1304-05.

[144] *Exxon Shipping Co.*, 554 U.S. at 494. Some examples include ALA. CODE § 6-11-21(a) (2009) (holding that no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive damages or five hundred thousand dollars ($500,000), whichever is greater); GA. CODE ANN. § 51-12-5.1(e)-(g) (2009) (imposing a monetary cap on punitive damage award for tort actions not statutorily stated to be without a cap, such as products liability); IDAHO CODE ANN. § 6-1604(3) (2009) (imposing a monetary cap on punitive awards); MO. ANN. STAT. § 510.265(1)-(2) (West 2009) (imposing a monetary cap on punitive awards); NEV. REV. STAT. ANN. §42.005(1)(a)-(b) (West 2009) (imposing a monetary cap on punitive damage except in stated actions); VA. CODE ANN. § 8.01-38.1 (West 2009) (requiring that the total amount of punitive damages may not exceed $350,000). For a detailed analysis of state punitive damage regimes see Rustad, *supra* note 135, at 1370-1417 app. A.

[145] Pacific Mut. Life Ins. v. Haslip, 499 U.S. 1, 15 (1991); *see also* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003) (noting that generally jury instructions provide juries with wide latitude in designating the amount of a punitive award).

the United States Constitution.[146] The Supreme Court has held that punitive damages exceed the limits of the Due Process Clause of the Fourteenth Amendment when the amount is grossly excessive or arbitrarily determined.[147] Punitive damages that reach the point of arbitrariness are reasoned to violate the principle of fairness and notice guaranteed by the Due Process Clause.[148] In other terms, a person is constitutionally entitled to fair notice of the severity of the punishment that a state may impose, and obtaining fair notice is unachievable when a civil penalty is so extraordinarily exorbitant when compared to the interests it is alleged to further.[149] Moreover, when punitive damages are deemed grossly excessive, the Court has concluded their award no longer furthers any legitimate state purpose and constitutes "an arbitrary deprivation of property" in violation of the Fourteenth Amendment.[150]

In *BMW of North America, Inc. v. Gore*, the Supreme Court in a five-to-four decision outlined "three guideposts" to be utilized by reviewing courts to determine whether a punitive damage award is grossly excessive and consequently unconstitutionally denied the defendant fair notice.[151] The three

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[146] *See BMW of N. Am.*, 517 U.S. at 568 (1996) (explaining that states may exercise "considerable flexibility" when determining whether to allow punitive awards and, if so, for what cases and how much, but awards that are "grossly excessive" violate the Due Process Clause of the Fourteenth Amendment).

[147] *Id.*

[148] *State Farm*, 538 U.S. at 417. An article authored by Jeffery L. Fisher discusses *Exxon Shipping Co. v. Baker* and the Supreme Court's jurisprudence on punitive damages. Fisher, *supra* note 135, at 1-2. Fisher believes that it is not absolutely clear whether the Court has instituted constitutional guidelines for punitive damages based upon procedural due process or substantive due process. *Id.* at 3. If the holdings of the Supreme Court stem from substantive due process, Fisher reasons that then the ultimate conclusion is the Due Process Clause always forbids a jury from issuing grossly excessive punitive awards. *Id.* However, if the holdings are procedural in nature, Fisher concludes that then legislatures and courts are able to allow excessively high punitive damage awards as long as the "law provides fair notice, the court gives clear jury instructions, and related rules of fair play are followed." *Id.* In his article, Fisher takes the position that the Court's holdings are substantive in nature. *Id.* at 4.

[149] *See State Farm*, 538 U.S. at 417.

[150] *See id.* In addition to concerns of fair notice, the Supreme Court has also expressed heightened worries surrounding punitive awards due to the fact they are often administered in an "imprecise manner." *Id.* The Court views this as especially distressing because criminal penalties and punitive damages serve the same aim of punishment and deterrence, yet a civil defendant does not receive the same protections as those present in a criminal trial. *Id.* It appears that others share the Court's concern; in an Article regarding punitive damages, Dan Markel opines that the Court has yet to provide defendants susceptible to punitive damages the protections generally afforded during criminal proceedings. Markel, *supra* note 139, at 1393.

[151] *See BMW of N. Am.*, 517 U.S. at 574 (1996). The *BMW* case arose after an Alabama jury found BMW liable to Dr. Ira Gore for $4000 in compensatory damages and four million dollars in punitive damages. *Id.* at 562-65. The jury found BMW, an automobile distributor, liable for fraud based upon its nationwide policy of not disclosing damages that occurred to its new cars prior to delivery when the cost of repair did not exceed three percent of the suggested retail price. *Id.* at 562. The Alabama Supreme Court reduced the amount of punitive damages to two million dollars based upon its finding that the jury improperly calculated the punitive award by multiplying Dr. Gore's compensatory damages by the number of similar sales in other states. *Id.* at 567. The

guideposts consist of the reprehensibility of the defendant's unlawful conduct, the disparity between the harm or potential harm suffered by the plaintiff and the punitive damage amount, and the difference between the damages awarded and the civil penalties authorized or imposed in similar cases.[152]

Reprehensibility is considered to be the pivotal indication of whether a punitive award is grossly excessive.[153] Yet, a state cannot impose punitive damages in order to punish a defendant for conduct that lawfully occurred outside of the state's jurisdiction.[154] In regard to the second guidepost, the Court has not imposed an absolute constitutional limit on the ratio between the amount of compensatory damages and the punitive sum, but has reflected that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[155] In addition, a

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Supreme Court held that the two million dollar punitive award was grossly excessive in violation of the Fourteenth Amendment. *Id.* at 585. In reaching this conclusion, the Court explained that states maintain diverse approaches to what automobile distributors are required to disclose in regard to car damage prior to sale. *Id.* at 569. The Court found that Alabama could not impose punitive damages on BMW in order to deter or punish its conduct that was lawful in other states. *Id.* at 572. In light of this rule, the Court applied the three guideposts only as they related to the interests of Alabama consumers, not the entire nation. *Id.* at 574. In other words, the reprehensibility of BMW's conduct did not include an evaluation of BMW's non-disclosure policy in other states. *See id.* at 574-80.

[152] *Id.* at 574-75. One commentator criticizes the Supreme Court's guideposts set forth in *BMW* because, despite the achievement of "systematically reduc[ing] some of the highest awards," there was no success in remedying the unfairness of punitive awards among similarly situated defendants and the unpredictability of the size of the award. *See Developments in the Law*, *supra* note 135, at 1788-89.

[153] *BMW of N. Am.*, 517 U.S. at 572. When determining the reprehensibility of a defendant's conduct, courts are to consider:

> [Whether] the harm caused was physical as opposed to economic; the tortious conduct evidenced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm, 538 U.S. at 419. In *State Farm*, the Court explained that the defendant should only be held accountable for punitive damages if after the imposition of compensatory damages, the defendant's blameworthiness is "so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.* at 419.

[154] *BMW of N. Am.*, 517 U.S. at 572, 575; *State Farm*, 538 U.S. at 421. As explained, a jury must be instructed not to utilize evidence of out-of-state conduct to punish the defendant for conduct that was legal in the jurisdiction where it took place. *BMW of N. Am.*, 517 U.S. at 572-73 (referring to BMW's nationwide non-disclosure policy). Moreover, in *State Farm* the Court reasoned that a state may not impose punitive damages to punish and deter actions of the defendant that were unrelated to the plaintiff's actual harm. 538 U.S. at 422. Specifically, the Court stated that the reprehensibility guidepost may not be used by courts to allow a defendant to be punished for all possible wrongdoing committed against anyone when such acts are dissimilar to the conduct shown to harm the plaintiff. *See id.* at 424. In *State Farm*, evidence was introduced of State Farm's malfeasance in regard to the handling of insurance claims, but the only commonality to the plaintiff's case was the involvement of State Farm, which the Court found irrelevant in an analysis of State Farm's reprehensibility. *Id.* at 423-24.

[155] *Id.* at 425.

federal appellate court must apply *de novo* review when assessing a district court's analysis of the constitutionality of a punitive award.[156]

B. *Philip Morris U.S.A. v. Williams*

Eleven years after the Supreme Court guaranteed fair notice to civil defendants by eliminating grossly excessive punitive awards, the Court faced the question of exactly for whose injury a jury may punish the defendant under the Constitution. Set against the backdrop of a widow's legal battle against a cigarette company for the smoking-related death of her husband, the Supreme Court held in *Philip Morris U.S.A. v. Williams* that it is unconstitutional for a jury to take into account its "desire to punish the defendant for harming persons who are not before the court (e.g., victims whom the parties do not represent)" when calculating a punitive damage award because this constitutes a taking of property from the defendant without due process of law.[157]

The *Philip Morris* case arose when Mayola Williams brought suit against Philip Morris, at the time the largest manufacturer of cigarettes in the United States, alleging negligence and fraud, and seeking compensation and punitive damages for her husband's death.[158] An Oregon jury found Philip

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[156] Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 443 (2001).

[157] Philip Morris, U.S.A. v. Williams, 549 U.S. 346, 349 (2007).

[158] Williams v. Philip Morris, Inc., 48 P.3d 824, 828 (Or. 2002). The Oregon Court of Appeals summarized the evidence regarding the defendant's advertising campaign as follows:

> [T]he industry established its strategy and began developing its public image in response to a decline in cigarette sales in 1953 that was the apparent result of studies that showed that cigarette tar could cause cancer in mice and that established the existence of statistical correlations between smoking and lung cancer. . . .
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> Between 1954 and the 1990s, [research organizations created by Phillip Morris and other companies] developed and promoted an extensive campaign to counter the effects of negative scientific information on cigarette sales. The individual tobacco companies, including [Philip Morris], were part of the organizations and acted in cooperation with them. At first, the industry publicly denied that there was a problem; for example, in the 1950s and early 1960s, [Philip Morris'] officials told the public that [Philip Morris] would "stop business tomorrow" if it believed that its products were harmful. For most of that period, however, the industry did not attempt to refute the scientific information directly; rather, it tried to find ways to create doubts about it. The industry's goal was to create the impression that scientists disagreed about whether cigarette smoking was dangerous, that the industry was vigorously conducting research into the issue, and that a definitive answer would not be possible until that research was complete. As one of [Philip Morris'] vice-presidents explained in an internal memo, the purpose was to give smokers a psychological crutch and a self-rationale that would encourage them to continue smoking. . . .
>
> [Philip Morris'] director of research in the late 1970s and 1980s explained to a subordinate that his job was to attack outside research that was inconsistent with the industry's position by casting doubt on it. . . .

Morris liable and awarded $79.5 million in punitive damages on the fraud claim, which was found to be grossly excessive by the trial court and reduced to thirty-two million dollars.[159] Philip Morris argued that the jury's award was unconstitutional because it was issued in part to punish it for harm to victims other than the plaintiff.[160] This argument mainly centered around the trial court's refusal to give Philip Morris' proposed jury instruction No. 34, which specifically told the jury it could not issue punitive damages to punish Philip

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> At least by the 1970s, there was absolutely no scientific basis for denying the connection between cigarette smoking and cancer and other diseases. However, [Philip Morris] continued to assert that the hazard of cigarette smoking to health was uncertain when it actually knew that there was no legitimate controversy about that subject.

Williams v. Philip Morris, Inc., 92 P.3d 126, 128-129 (Or. Ct. App. 2006).

[159] *Id.* The procedural history surrounding the Philip Morris case is somewhat complex. After the trial court reduced the jury's punitive award from $79.5 million to thirty-two million dollars, both Williams and Philip Morris appealed. Williams v. Philip Morris, Inc., 176 P.3d 1255, 1258 (Or. 2008). The Oregon Court of Appeals reversed the trial court's reduction and reinstated the $79.5 million punitive award. Williams v. Philip Morris, Inc., 48 P.3d 824, 842, *adh'd to on recons.*, 51 P.3d 670 (Or. Ct. App. 2002). The Court of Appeals also affirmed the trial's court's refusal to adopt Philip Morris' proposed jury instruction No. 34, which specified the jury cannot award punitive damages to punish Philip Morris for harm allegedly caused to nonparties. *Id.* at 837-38. The Oregon Supreme Court declined to review the appellate court's decision. Williams v. Philip Morris, Inc., 61 P.3d 670 (Or. 2002). The Supreme Court granted certiorari, vacated the Oregon Court of Appeals decision and remanded to the Court of Appeals for further consideration in light of *State Farm*, 538 U.S. 408. Philip Morris U.S.A., Inc. v. Williams, 540 U.S. 801 (2003). On remand, the Oregon Court of Appeals adhered to its previous decision that the $79.5 million punitive award did not violate due process and the trial court did not err in refusing Philip Morris' proposed jury instruction No. 34. Williams v. Philip Morris, Inc., 92 P.3d 126, 126 (Or. Ct. App. 2004). The Supreme Court of Oregon accepted Philip Morris' petition for review and affirmed the decision of the Oregon Court of Appeals. Williams v. Philip Morris U.S.A., Inc., 127 P.3d 1165, 1167-68 (Or. 2006). The Supreme Court then granted certiorari for a second time, but only discussed the Constitution's "procedural limitations" surrounding the use of punitive damages to punish a defendant for injury to nonparties, and did not address whether the punitive award in the particular case was grossly excessive. Philip Morris U.S.A. v. Williams, 549 U.S. 346, 353 (2007). The Court explained that prior cases did not expressly state a jury may not issue punitive damages in order to punish the defendant for harm to nonparties and as a result the Oregon Supreme Court applied an incorrect constitutional standard when reviewing Philip Morris' appeal. *Id.* at 356-57. Due to the possibility that applying the standard set forth by the Court may call for a new trial or change in the amount of punitive damages, the Court did not evaluate whether the award was grossly excessive in violation of the Constitution. *Id.* at 357-58. The Court vacated the decision of the Oregon Supreme Court and remanded for further proceedings so that the Oregon Supreme Court could apply the correct constitutional standard. *Id.* at 357-58. On remand, the Oregon Supreme Court discovered that Philip Morris' jury instruction No. 34 incorrectly stated Oregon law so that the trial court properly refused to give it and as a result reaffirmed the decision of the Oregon Court of Appeals reinstating the jury's punitive award of $79.5 million. Williams v. Philip Morris U.S.A., Inc., 176 P.3d 1255, 1263-64 (Or. 2008). The Supreme Court granted certiorari for a third time on the issue regarding the Oregon Supreme Court's holding and then certiorari was dismissed as improvidently granted. Philip Morris U.S.A. v. Williams 553 U.S. 1093 (2008); Philip Morris U.S.A. v. Williams 129 S. Ct. 1436 (2009).

[160] *Philip Morris U.S.A.*, 549 U.S. at 350.

Morris for harm allegedly caused to victims who are not party to the action and who may file lawsuits of their own.[161]

The Court, in an opinion authored by Justice Breyer, gave three reasons for holding that a jury may only constitutionally use punitive damages to punish the defendant for harms inflicted upon parties to the litigation.[162] First, the Court concluded that since the Due Process Clause forbids a state from punishing a defendant without first providing "an opportunity to present every available defense," the Due Process Clause also prohibits a state from punishing a defendant for harm against anyone besides the plaintiff.[163] This is so because one cannot fairly defend against accusations concerning harm caused to individuals not party to the litigation since there is no opportunity to establish facts that could, for example, demonstrate that the nonparty would not be entitled to damages if actually a party or the nonparty's factual standing is distinguishable from the current plaintiff.[164] Stated differently, the Court viewed the direct punishment of a civil defendant for injury allegedly caused to strangers to the litigation as constitutionally unfair because it removes the defendant's ability to present an effective defense in regard to such harms.[165]

The second reason arose from the fear that an opposite result would intensify the arbitrariness, absence of fair notice, and uncertainty surrounding punitive damages and as a result create increasing "fundamental due process concerns" about punitive awards in general.[166] If a jury is constitutionally able to take into account injury to nonparties when formulating the amount of a punitive award, the jury would be able to apply limitless speculation when defining and determining a corresponding sum to penalize and deter for the alleged injury to such nonparties.[167] This is so, the majority concluded, because generally the trial would not provide evidence as to the number, condition, and circumstances of nonparty victims.[168] The third reason was that no prior authority existed suggesting that juries may award punitive damages for the direct punishment of the defendant for harm allegedly caused to anyone other than the plaintiff.[169]

Although the Court found that due process disallows the use of punitive damages to penalize a defendant for injury to nonparties, harm to nonparties may be shown by the plaintiff in order to establish that the defendant's conduct was

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[161] *See id.* at 350-51. Philip Morris asserted the necessity of its jury instruction because Williams' attorney made remarks to the jury encouraging the jury to contemplate the harm Philip Morris caused to all other smokers in the state. *Id.* at 350.

[162] *Id.* at 353-54.

[163] *Id.* at 353.

[164] *See id.* at 353-54.

[165] *See id.* at 353.

[166] *Id.* at 353-54 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003)).

[167] *See Philip Morris*, 549 U.S. at 354.

[168] *Id.*

[169] *Id.*

more reprehensible than if it had only injured the plaintiff.[170] Accordingly, when calculating a punitive award, a jury is constitutionally restricted from forming an amount based in part on the desire to punish the defendant directly for harms committed against nonparties and constitutionally free to take into account harm to nonparties when determining the degree of reprehensibility of the defendant's conduct.[171] The idea seems to be that action that threatens injury to many is more reprehensible and in need of a greater punitive award to punish and deter than action that threatens only some.[172] The use of nonparty harm to show heightened reprehensibility was found by the Court to be comparable to recidivism statutes.[173] Just as a criminal can be subject to a harsher penalty for a recent crime based on past crimes under recidivism statutes, so can a civil defendant be subject to a higher civil penalty based on intensified misconduct when the harm is claimed to reach beyond the plaintiff to nonparties.[174]

Due to this distinction and the "risks of unfairness" to the defendant if the jury does not comprehend the difference between direct punishment and reprehensibility, the Court held the Due Process Clause mandates that states provide some kind of procedures to give surety that when calculating punitive damages, juries are giving effect to harm to nonparties only to the extent of figuring reprehensibility.[175] This procedural protection was considered vital given the "constitutional importance" of ensuring the defendant is given fair notice of the possible penalty faced for the illegality, the award is not arbitrary, and the defendant is fairly able to defend against the charges.[176]

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[170] *Id.* at 355. Presenting evidence of harm to nonparties allegedly caused by the defendant is relevant in determining the reprehensibility of the defendant's conduct because actions are more reprehensible when they pose a greater risk of harm to the general public in addition to the harm caused to the plaintiff. *See id.*

[171] *See id.*

[172] *Philip Morris*, 549 U.S. at 357.

[173] *Id.* The Court cites to *Witte v. United States*, which concerned what constitutes "punishment" under the Double Jeopardy Clause. 515 U.S. 389, 400 (1995). In this vein, the *Witte* Court confirmed that recidivism statutes do not violate the Double Jeopardy Clause because the enhanced punishment for the subsequent crime is not an "additional penalty," but rather the most recent crime is viewed as an "aggravated offense" worthy of a heightened penalty because it is repetitive. *Id.* at 400.

[174] *See Philip Morris*, 549 U.S. at 357.

[175] *Id.* at 355.

[176] *See id.* In regard to the kind of procedures required to ensure the jury makes the correct distinction, the majority admitted it is an unachievable task for state courts to actually know if the jury derives an amount in order to directly punish the defendant for injury caused to nonparties or indirectly as part of the reprehensibility calculus. *Id.* at 357. The solution calls for states to adopt procedures that do not create an unreasonable and unnecessary risk of the jury confusing reprehensibility and direct punishment of nonparties. *Id.* The Court leaves the configuration of such procedures up to the states, but warns that some protection is essential to protect the defendant from an award issued by a jury that misunderstands the distinction. *Id.* The Court references the instruction Philip Morris urged the trial court to adopt by noting it distinguishes between using nonparty injury to determine reprehensibility and using nonparty injury to directly punish, but did not expressly hold such an instruction satisfies due process concerns. *Id.* at 356. It is unclear how

Justice Stevens authored a dissent that discarded the Court's three reasons for denying states the ability to punish civil defendants for harm to nonparties due to the belief that there is "no reason" to exclude such information from the jury's calculation process.[177] Justice Stevens emphasized the difference between compensatory damages, which are an embodiment of the harm the defendant caused to the plaintiff, and punitive damages, which share the same aim of criminal sanctions, deterrence and punishment.[178] Given the similarity to criminal punishment, Justice Stevens argued that a defendant's harm to third parties is a relevant consideration in formulating a proper sanction for the public harm caused.[179] In other words, the thrust of punitive awards and criminal penalties is to punish and a state may legitimately punish a defendant, civil or criminal, for harm inflicted upon society, which includes individuals outside parties to civil litigation.[180]

C. *Exxon Shipping Company v. Baker*

A year after the Supreme Court struck down the use of punitive damages to directly punish a defendant for harm to anyone other than parties to the

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broadly or narrowly *Philip Morris U.S.A. v. Williams*, 549 U.S. 346 (2007) will be interpreted by lower courts. In 2008, the United States District Court for the District of Colorado refused to broadly interpret *Philip Morris* and held that a jury instruction that defined "willful and wanton conduct" to include actions that were done without taking into account the "rights and safety of others" was constitutional because it did not create a significant risk that the jury awarded punitive damages in part to punish the Defendant for harm to nonparties. Cook v. Rockwell Internal Corp., 564 F.Supp. 2d 1189, 1212 (D. Colo. 2008).

[177] *Philip Morris U.S.A. v. Williams*, 549 U.S. 346, 358, 360 (2007) (Stevens, J., dissenting).

[178] *Id.* at 359. Justice Stevens points out that in Oregon, punitive damages are especially analogous to criminal sanctions where the punitive award is paid partially or entirely to the state and not to the plaintiff. *Id.* at 359.

[179] *Id.* at 358-59. Justice Stevens refers in his dissent to the Oregon statute governing the allocation of punitive damages. *Id.* at 359. This statute provides in part:

> (1) Upon the entry of a verdict including an award of punitive damages, the Department of Justice shall become a judgment creditor as to the punitive damages portion of the award . . . [which] shall be allocated as follows:
>
> (a) *Forty percent shall be paid to the prevailing party.* The attorney for the prevailing party shall be paid out of the amount allocated under this paragraph, in the amount agreed upon between the attorney and the prevailing party. However, in no event may more than 20 percent of the amount awarded as punitive damages be paid to the attorney for the prevailing party.
>
> (b) *Sixty percent shall be paid to the Criminal Injuries Compensation Account* of the Department of Justice Crime Victims' Assistance Section to be used for the purposes set forth in ORS chapter 147.

OR. REV. STAT. § 31.735(1) (2003) (emphasis added).

[180] *See id.* at 360. Justice Ginsburg authored a dissent joined by Justice Scalia and Justice Thomas. *Id.* at 362-64 (Ginsburg, J., dissenting). Justice Ginsburg argued that the Court should not have vacated the Oregon Supreme Court's judgment because the judgment was consistent with the Court's punitive damage jurisprudence in *BMW* and *State Farm*. *See id.* Justice Thomas wrote separately only to emphasize his position that the Constitution does not restrain the amount of punitive awards. *Id.* at 361-62 (Thomas, J., dissenting).

litigation on due process grounds, the Court examined a punitive damages case of first impression, not through a constitutional lens, but as a common law court adjudicating maritime law.[181] In *Exxon Shipping Company v. Baker*, the Court held that a punitive award under maritime law cannot exceed the compensatory award when the defendant's conduct constitutes recklessness.[182] The Court found that such is a "fair upper limit" because it adequately guards against punitive awards that are "unpredictable and unnecessary, either for deterrence or for measured retribution" and as a result no longer serve their purpose.[183]

In 1989, the *Exxon Valdez*, owned by Exxon Shipping Company, spilled eleven million gallons of oil into the Prince William Sound after it ran aground on the Bligh Reef off the coast of Alaska.[184] Joseph Hazelwood captained the *Exxon Valdez* on the night of the spill and was seen by witnesses consuming five double vodkas before the ship left port that night.[185] Commercial fishermen, Native Alaskans, and landowners (collectively Baker) filed suit against Exxon seeking compensation for their economic loss caused by the spill.[186] Exxon stipulated that it was negligent for the spill and liable for compensatory damages.[187] The trial consisted in part of deciding if Exxon was reckless and consequently liable for punitive damages.[188] The jury found Exxon liable for five billion dollars in punitive damages, which was eventually reduced to $2.5 billion.[189] The Supreme Court granted certiorari to address, among other matters, the boundaries of punitive awards under maritime common law.[190]

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[181] Exxon Shipping Co. v. Baker, 554 U.S. 471, 488-89 (2008). The Court explained that it has federal jurisdiction over maritime law and will decide the case as a common law court that is subject to the legislation of Congress.

[182] *Id.* at 512-13. Justice Ginsburg notes in her dissent that although such a rule may make sense in the present case, the Court did not make clear what punitive limit would be appropriate in a case of malice. *Id.* at 524 (Ginsburg, J., concurring in part and dissenting in part).

[183] *Id.* at 513.

[184] *Id.* at 476, 478.

[185] *Id.* at 477. In addition, Captain Hazelwood had received alcohol treatment while working for Exxon. *Id.*

[186] *Id.* at 476. The plaintiffs all relied on the Prince William Sound for income and living. *Id.* After the spill, Exxon expended $2.1 billion in cleanup and pleaded guilty to several federal criminal violations, which resulted in Exxon paying twenty-five million dollars in fines and $100 million in restitution. *Id.* at 479. In addition, Exxon entered into a consent decree to pay a minimum of $900 million to restore natural resources in relation to a civil action filed by the United States and Alaska for environmental harms. *Id.* Finally, Exxon paid $303 million to fishermen, property owners, and others affected by the spill in voluntary settlements. *Id.*

[187] *Id.* at 479.

[188] *Id.* The trial also involved the question of the recklessness of Hazelwood, the capital of the *Valdez*, and his possible punitive liability. *Id.*

[189] *Id.* at 481.

[190] *Id.* The Court also addressed the issues of "whether maritime law allows corporate liability for punitive damages on the basis of acts of managerial agents [and] whether the Clean Water Act (CWA), 86 Stat. 816, 33 U.S.C. § 1251 *et seq.* (2000 ed. and Supp. V) forecloses the award of punitive damages in maritime spill cases." *Id.* at 481-90.

In a comprehensive and detailed opinion delivered by Justice Souter, the Court examined the history of punitive damages, rationales for awarding punitive damages, state regulation of punitive damages, foreign treatment of punitive damages, and a survey of current punitive damage awards prior to reaching the conclusion that under federal maritime law, a punitive award may not exceed a 1:1 ratio to compensatory damages in cases of recklessness.[191] In regard to the current status of punitive awards, the Court evaluated "recent studies" and concluded that the availability of a punitive remedy and the discretion of judges and juries to figure its dollar amount have "not mass-produced runaway awards."[192] Rather, the actual trouble is large, unpredictable outlier awards.[193]

The unpredictable feature of punitive awards, which encompasses inconsistent punitive sums awarded in comparable cases, amounts to, in the Court's opinion, a violation of the law's "sense of fairness."[194] The Court

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[191] *Id.* at 489-501, 512-13. The Court began its discussion of the limitations of punitive damages in federal maritime law by providing a short review of the history of punitive damages, including its first appearance in America in 1763 and deeper roots in ancient times. *Id.* at 490-91. The Court next detailed the historical reasons for awarding damages beyond those necessary for compensating the plaintiff. *Id.* Such justifications include punishment for exceptional wrongdoing, deterrence, and compensation for intangible wrongs. *Id.* at 490-92. The Court explained that in contemporary society punitive damages are predominately awarded for the purpose of punishing and deterring wrongful conduct and not to compensate the plaintiff. *Id.* at 492. Given the dual aims of punishment and deterrence, more culpable conduct, such as malicious acts, would be subject to a higher punitive award because such conduct is deserving of greater punishment and a greater need for deterrence. *See id.* at 493-94. In addition, greater punitive awards are viewed as acceptable, regardless of the defendant's blameworthiness, if the "wrongdoing is hard to detect" or "when the value of injury and the corresponding compensatory award are small (providing low incentive to sue)." *Id.* at 494. Next, the Court provided an overview of state regulation of punitive damages, including examples of states that impose monetary caps on punitive awards by statute or use a maximum ratio of punitive damages to compensatory damages. *Id.* at 495-96. The Court then briefly compared the United States to other countries in regard to punitive damages, highlighting that even with state imposed limitations punitive damage awards are larger and given more often in the United States than other countries. *See id.* at 497 (internal citations omitted).

[192] *Id.* at 497 (referencing T. Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. OF EMPIRICAL LEGAL STUD. 263, 269 (2006)). The Court explains that most studies show that the median ratio of punitive to compensatory awards is less than 1:1. *Exxon Shipping Co.*, 554 U.S. at 497. In a footnote, the Court reveals that a median ratio of 0.62:1 of punitive to compensatory awards was reported in a study using Bureau of Justice Statistics from 1992, 1996, and 2001. *Id.* at 499 n.14 (referencing Eisenberg et al., *supra*). This statistic indicates that generally punitive awards do not exceed compensatory awards and the Court believes this suggests that a punitive award that is much larger than a compensatory award is not needed to accomplish the goal of punishment or deterrence. *See id.* at 498-99.

[193] *Id.* at 499-500.

[194] *See id.* at 502. The Court expresses that punitive awards that are consistent and predictable are fair. *See id.* at 499. In light of statistical data on punitive damages, the Court determines that punitive awards are varied in amount and outlier awards are disturbingly higher than compensatory awards. *Id.* at 499-500 (referencing Eisenberg et al., *supra* note 192). Such information in isolation could be positive if it meant that amounts are wide-ranging because they reflect the different circumstances of each case and are configured to award a sum most favorable to

stressed that the "constitutional significance of the unpredictability of high punitive awards" is not within the realm of review because the Court approaches this issue as a common law court that retains the duty to regulate common law remedies, such as punitive damages, in absence of legislation.[195] With the goal of regulating punitive damages, as a common law remedy, the Court declares that punitive damages as a penalty should consistently be of a similar amount for similar factual circumstances.[196] Interestingly, the Court analogizes to *Koon v. United States*, a criminal case, for the proposition that in order for punitive damages to effectively deter misconduct they must be "reasonably predictable in severity" and consistent in amount between similar cases.[197] In *Koon*, the Court made clear that sentencing guidelines in criminal cases allow for predictability and uniformity in the criminal justice system.[198]

Given the similar aims of punishment and deterrence, the Court looked to the tribulations of federal criminal sentencing for insight in its search for a judicial solution.[199] The Court rejected a verbal approach like mandating stricter judicial review of jury punitive awards through the use of specified criteria.[200] The Court did not think such an approach would produce consistency where the "old federal sentencing system of general standards" was eliminated due to its failure to produce consistent sentences for similarly situated offenders.[201] The

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accomplish punishment and deterrence in a particular circumstance. *Exxon Shipping Co.*, 554 U.S. at 499-500. Based upon anecdotal evidence, it appears to the Court that cases with similar circumstances do not result in similar punitive awards. *Id.* For example, in the *BMW* case, where the jury awarded four million dollars in punitive damages, the Court's opinion highlighted that another case in the same state with very similar facts resulted in a similar amount of compensatory damages, but no punitive award. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 565 n.8 (1996). Therefore, high outlier punitive awards are unpredictable because high punitive sums are not consistently awarded "in cases involving similar claims and circumstances." *Exxon Shipping Co.*, 554 U.S. at 499-500.

[195] *Id.* at 502.

[196] *See id.* Some commentators suggest that the *Exxon* case served as an opportunity for the Court to illustrate the faults it perceives in the punitive damage system and as a result reveals "the Court's motivation for its current regulation of punitive damages." Fisher, *supra* note 135, at 15.

[197] *Exxon Shipping Co.*, 554 U.S. at 502; Koon v. United States, 518 U.S. 81, 113 (1996) (remarking that the aim of Sentencing Guidelines in criminal cases is to "reduce unjustified disparities" and achieve "evenhandedness and neutrality" that are key components of "any principled system of justice").

[198] *Id.* at 113.

[199] *Exxon Shipping Co.*, 554 U.S. at 505-06. Although in *Exxon* the Court references and relies on criminal sentencing reforms in its punitive damage analysis, such as not always been the case. See Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1051 (2004) (arguing that the Supreme Court's jurisprudence has been inconsistent in its approaches to criminal sentencing and punitive damages).

[200] *See Exxon Shipping Co.*, 554 U.S. at 503-04. The Court points to Maryland as an example of a state that has implemented such an approach. *Id.* Under its common law authority, the Maryland Court of Appeals established nine factors for reviewing courts to utilize in determining whether a punitive award is excessive. Bowden v. Caldor, Inc., 710 A.2d 267, 278 (Md. 1998).

[201] *See Exxon Shipping Co.*, 554 U.S. at 505. Before the Sentencing Reform Act of 1984 was made into law, there were no legal restraints on the sentencing power of a judge, except extremely high maximum punishments. Fisher, *supra* note 135, at 17. This discretion dominated system allowed

old federal sentencing system was replaced by a statutory "system of detailed guidelines tied to exactly quantified sentencing results."[202] The quantified system removed the discretion of judges that had led to arbitrarily diverse sentences for offenders in similar situations.[203] For that reason, the Court believed a similar approach would be necessary to eliminate unpredictable outlier punitive awards that are bound to occur without numerical limits.[204]

In correspondence with the need for a numerical standard to limit discretion and hence minimize unpredictable and inconsistent awards, the Court determined that linking punitive awards to compensatory damages through a mandatory ratio would best serve such a desire.[205] In figuring the proper ratio, the Court sought numerical reasonableness and located it in studies examining the ratio of punitive to compensatory verdicts.[206] These studies implied what juries and judges have deemed reasonable "economic penalties" in cases ranging from recklessness to malice.[207] Such studies place the median ratio at less than 1:1, which means that for the most part punitive awards do not surpass compensatory awards.[208] Therefore, the Court held a 1:1 ratio of punitive damages to compensatory damages is a "fair upper limit" in maritime cases and properly accomplishes the dual aims of punishment and deterrence.[209] Since the District Court calculated compensatory damages at $507.5 million, the punitive award could not exceed that amount.[210]

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judges to "impose any length of punishment for virtually any reason," which led to varied sentencing results among felons. *Id.*

[202] *Exxon Shipping Co.*, 554 U.S. at 505.

[203] *Id.*

[204] *Id.*

[205] *Id.* at 506. The Court rejects setting an absolute monetary cap on punitive awards, which it admits would most mirror criminal law's use of maximum sentences. *Id.* This is so because it would be difficult to figure a dollar amount that would be proper in all civil cases and it appears that the legislature would be better suited to institute such a scheme. *Id.*

[206] *Id.* at 512.

[207] *Id.* One commentator points out that the Court's method closely resembles the acts of Congress when it undertook the Sentencing Reform Act of 1984. Fisher, *supra* note 135, at 18. Specifically, data regarding what punishment was actually given for certain crimes was viewed as a whole and the median was the basis for the Federal Sentencing Guidelines. *Id.*

[208] *Exxon Shipping Co.*, 554 U.S. at 513 (referencing Eisenberg et al., *supra* note 192).

[209] *Id.*

[210] *Id.* at 515. The Court vacated and remanded the case in order for the Court of Appeals to remit the punitive award in conformity with the decision. *Id.* Justice Scalia and Justice Thomas joined the majority opinion, but composed a brief concurrence emphasizing that the Constitution does not place limits on punitive damages. *Id.* (Scalia, J., concurring). Justice Stevens concurred in part and dissented as to the Court's opinion regarding the punitive damage aspect of the case. *Id.* at 516 (Stevens, J., concurring in part and dissenting in part). Justice Stevens dissented mainly because of his disagreement with the Court's formation of an empirical judgment because he felt Congress, not the Court, should make such decisions. *Id.* at 516-23. Justice Ginsburg also dissented in regard to the Court's opinion addressing punitive damages and agreed with Justice Stevens that the decision to repair punitive damages in maritime law is one that should be made by Congress. *Id.* at 523-25 (Ginsburg, J., concurring in part and dissenting in part). Justice Breyer also dissented in regard to the punitive damage portion of the Court's opinion. *Id.* at 525-26 (Breyer, J., concurring in part and dissenting in part). Justice Breyer argued there was not a need to reduce the punitive award in

The Supreme Court's ratio approach is no more logical than allowing a jury to freely award punitive awards without structure or guidance. Yet, as the court has embraced this approach, plaintiffs will feel their potential recovery has been artificially limited.

III. CONCLUSION

The Supreme Court's efforts to control jury discretion in both death penalty and punitive damages cases have been clearly met with mixed results. The death penalty jurisprudence which has waffled between protecting against arbitrary sentences brought about by victim impact evidence created a roller coaster ride of unstable precedents in the Supreme Court which allowed only vague due process protection from inflammatory victim information. The punitive damages cases took an ironically different approach, limiting victim information in order to protect corporations from possible debilitating verdicts in civil damages cases. Both approaches have a certain intellectual inconsistency. There is no way to reconcile the due process doctrine in either line of authority without more concrete guiding principles.

The American Law Institute's Model Penal Code offers some hope of placing a proper due process framework around civil damages issues where it failed in death penalty cases. It offers the advantage of protecting corporations from total exposure to arbitrary juries. It also avoids the current broad "ratio approach" approved by the Supreme Court to limit the historical role of juries to provide punitive judgments in civil cases. Use of an approach that heavily embraces the Model Penal Code principles of identifying and weighing aggravating and mitigating factors when imposing punitive damages awards provides adequate protection for corporate defendants while respecting the traditional role of the jury as monitor and conscious of the community.

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this case, but did agree with the Court that punitive awards need to be issued in compliance with "meaningful standards" so that defendants have notice of the severity of their possible punishment and to ensure consistency of awards for similar conduct. *Id.* This position corresponds to Justice Breyer's reputation as the "architect of the Federal Sentencing Guidelines and the Court's chief defender of the Guidelines." However, Justice Breyer felt that the facts of this case would warrant an exception to the 1:1 ratio rule because Exxon's conduct was exceedingly reprehensible. *Id.* at 525 (Breyer, J., concurring in part and dissenting in part).