PUNITIVE DAMAGES IN AN ERA OF CONSOLIDATED POWER*

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Punitive damages are back in the news, and the Supreme Court's jurisprudence surrounding them is a mess. The Court's decisions do, however, reveal one striking and unifying theme: the Court does not trust others to assess punitive damages fairly. Instead, at every turn, the Court has adopted rules that move the locus of power over punitive damages away from juries, factfinders, states, and communities, and toward appellate judges (including the Court itself). The result is that the amounts of punitive damages—historically, firmly within the power of juries—are now subject to an unprecedented level of centralized control, a phenomenon I call judicial centralization. This Article traces the rather remarkable narrative of the Court's punitive damages jurisprudence through the lens of judicial centralization and considers whether it is desirable, concluding that it is not. The primary justifications for judicial centralization are uniformity and predictability, but the flip sides—particularity and variability—serve similarly important functions. Institutional competence also does not provide a compelling explanation, as both judges and juries have real claims to the type of moral expertise that punitive damages implicate. Ultimately, the deciding factor in this inquiry is democratic values. In an age where power is increasingly consolidated in large corporations and the ability of the "little guy" to affect the world is ever-diminishing, punitive damages can serve as an important opportunity for voice, and judicial centralization undermines this important value.

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INTRODUCTION

The Supreme Court's jurisprudence on punitive damages—developed almost entirely over the course of the last three decades—is a conceptual mess. Commentators have spent the greater part of those decades critiquing the Court's approach[1] or attempting to construct theoretical models that could

1. *See, e.g.*, Anthony Sebok, *Normative Theories of Punitive Damages: The Case of Deterrence*, *in* PHILOSOPHICAL FOUNDATION OF THE LAW OF TORTS 317 (John Oberdiek ed., 2014) [hereinafter Sebok, *Normative Theories*] (noting that the Court's "theory of common law punitive damages leaves many questions unanswered"); Steve P. Calandrillo, *Penalizing Punitive Damages: Why the Supreme Court Needs a Lesson in Law and Economics*, 78 GEO. WASH. L. REV. 774, 777 (2010) (arguing that the Court's varied efforts to limit arbitrary punitive damages awards "has been completely arbitrary in its own right"); Michael L. Rustad, *Happy No More: Federalism Derailed by the Court That Would Be King of Punitive Damages*, 64 MD. L. REV. 461, 464 (2005) (characterizing the Court's approach to punitive damages as "judicial miniaturism because of its myopic focus on one-on-one torts," thereby preventing states from responding to corporate wrongdoing); Anthony J. Sebok, *Punitive Damages: From Myth to*

provide coherent conceptual support for different portions of the Court's jurisprudence[2] with varying degrees of success. Essentially no one, however, defends the body of jurisprudence on its own terms.

The Court's lack of clarity mirrors the deep disagreement in the academic literature about what purposes punitive damages may legitimately serve in our tort system.[3] While the Court has long explained that punitive damages are

Theory, 92 IOWA L. REV. 957, 1029 (2007) [hereinafter Sebok, *Myth to Theory*] (arguing, among other things, that the ratio component of the Court's due process jurisprudence "lacks any principled foundation, and does not even have the virtue of being an arbitrary rule chosen by the legislature"); Catherine M. Sharkey, *The* Exxon Valdez *Litigation Marathon: A Window on Punitive Damages*, 7 U. ST. THOMAS L.J. 25, 26 (2009) [hereinafter Sharkey, *The* Exxon Valdez *Litigation*] (arguing that the Court has unduly elevated a retributive understanding of the purposes of punitive damages); Benjamin C. Zipursky, Palsgraf, *Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1772 (2012) [hereinafter Zipursky, Palsgraf] (characterizing the Court's punitive damages due process jurisprudence as "[a]n [a]rc of [i]ncoherence").

2. *See, e.g.*, Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 394 (2008) (seeking to "provide the theoretical defense of the Court's holding [that punitive damages cannot be used to punish wrongdoers for injuries to nonparties] that is missing from its own opinion"); Sebok, *Myth to Theory*, *supra* note 1, at 1032 (providing a framework of punitive damages as personal revenge and noting, for instance, that it offers a justification for the Court's rule prohibiting punishment for harms to nonparties); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 350–52 (2003) [hereinafter Sharkey, *Punitive Damages as Societal Damages*] (arguing that the Court's decision in *State Farm* "[p]erhaps unwittingly" legitimated a non-punitive rationale for punitive damages, which Sharkey articulates as "societal damages"); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 130 (2005) [hereinafter Zipursky, *Theory of Punitive Damages*] (offering the theory that punitive damages have a "double aspect"—one relating to the state's interests and one relating to individual victims' interests—and that, once this dual aspect is disentangled, it suggests that the seminal case *BMW v. Gore* was rightly decided—but noting that "the Court is not explicit" about this theory "and indeed, expressly says it is doing something different").

3. The approaches to punitive damages generally track broader theoretical approaches to tort law. At the risk of dramatically simplifying a rich area, these generally fall into three categories. First, under the law and economics view, damages aim to force actors to internalize the costs of their behavior, and punitive damages are no exception. *See, e.g.*, Calandrillo, *supra* note 1, at 779 ("The ultimate goal of modern tort law jurisprudence should be to make injurers internalize the full costs of all of their actions so that they will take the proper level of care—not too much, not too little, but just right."). Under this view, punitive damages must be imposed "for deterrence purposes" whenever a tortfeasor has escaped liability previously, regardless of whether his conduct was intentional or egregious; on the other hand, imposing punitive damages for conduct that gives rise to little concrete harm simply because it is morally reprehensible risks "overdeterrence," leading to an overall reduction in social welfare. *Id*. Second, along similar lines, Professors A. Mitchell Polinsky and Steven Shavell have argued that punitive damages should be calculated by simply multiplying the harm caused by a tort by the likelihood of its underdetection. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 889 (1998). Others within a law and economics framework have built out more novel economic justifications for punitive damages, generally by broadening the scope of harms that should be incorporated into the calculus. Finally, and perhaps most notably, Professor Catherine Sharkey has argued that punitive damages should be reconceptualized as "societal damages"—essentially, damages meant to compensate society for the harms that the defendant's conduct imposed on those beyond the plaintiff, which might otherwise not be properly accounted for in potential tortfeasors' cost-benefit analyses. Sharkey, *Punitive Damages as Societal Damages*, *supra* note 2, at 2.

meant to "punish and deter,"[4] the questions of what that means and whether those are appropriate aims for private litigation are the subject of an enormous body of literature.[5] While the jurisprudential underpinnings are murky, from ten thousand feet, one defining strand of unity emerges: a move towards centralization.[6] In multiple intertwined doctrinal areas, the Court's punitive

Others view tort law as source of corrective justice, with the aim of creating a system of duties and responsibilities that are incurred when those duties are violated or, more broadly, to promote moral repair. *See* JULES L. COLEMAN, RISKS AND WRONGS 384–85 (1992) ("To understand tort law is to see it in part as a web of substantive and structural rules designed to enforce claims in corrective justice."). Some corrective justice theories of tort law try to incorporate punitive damages by suggesting that they allow for plaintiffs to be compensated for nonmonetary losses that are not otherwise incorporated into compensatory damages. For instance, Jeffrey Berryman has argued that punitive damages compensate plaintiffs for dignitary harms. *See* Jeffrey Berryman, *Reconceptualizing Aggravated Damages: Recognizing the Dignitary Interest and Referential Loss*, 41 SAN DIEGO L. REV. 1521, 1542 (2004).

A third closely related body of scholarship developed over the last few decades asserts that the purpose of tort law generally is to create a system of civil redress that allows victims to pursue justice against those who have harmed them. *See* Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 712–13, 749 (2003) [hereinafter Zipursky, *Civil Recourse*]; Benjamin C. Zipursky, *Rights, Wrongs and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 6 (1998) [hereinafter Zipursky, *Rights, Wrongs and Recourse*]. *See generally* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005) [hereinafter Goldberg, *Constitutional Status*] (arguing that tort law, properly conceived as a system of redress for private wrongs, is a foundational part of the structure of American government with constitutional status). Under this conception, the basic purpose of punitive damages can be understood, roughly, as allowing victims of wrongs recognized by the state to seek a form of private retribution from the person or entity that wronged them that corresponds more to the egregiousness of the wrong than to the plaintiff's actual injury. Professor Markel offered a twist on this basic idea by proposing the "confrontational conception of retributivism," which emphasizes society's interest in retribution while also prioritizing the minimization of different types of error and variation in punishment. Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 257–59 (2009). More recently, in a similar spirit, Professor Hershovitz offered a theory of punitive damages as a substitute for revenge and contends that this substitute can operate as a form of corrective justice. *See* Scott Hershovitz, *Tort as a Substitute for Revenge*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 87–88 (John Oberdiek ed., 2014). For a particularly enjoyable and timely discussion of what wrongs committed by robots might tell us about the role of concepts like "revenge" and "retribution," see generally Christina Mulligan, *Revenge Against Robots*, 69 S.C. L. REV. 579 (2018) (arguing that retribution asks what the wrongdoer deserves but revenge focuses on the personal desire of the wrongdoer's victim).

Finally, and most recently, Professor Tilley has offered a "New Doctrinal" account of tort law as a tool for the creation of communities. *See* Cristina Carmody Tilley, *Tort Law Inside out*, 126 YALE L.J. 1320, 1324 (2017). Under this approach, punitive damages may serve as a mechanism for stigmatization, and the appropriate role and processes for those damages likely depends upon the nature of the community relationships at stake in any given case. *Id.* at 1398.

4. *See, e.g.*, Philip Morris USA v. Williams (*Philip Morris II*), 549 U.S. 346, 352 (2007) ("[P]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); Lake Shore & M.S. Ry. Co. v. Prentice, 147 U.S. 101, 107 (1893) ("The recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized.").

5. *See supra* note 3.

6. *See infra* Part I.

damages decisions have shifted the locus of control over large punitive damages awards away from dispersed, ground-level actors—like juries, trial judges, and even state courts and legislatures—toward a narrower group of appellate judges, including the Court itself.

The question this Article takes up is whether this judicial centralization is for the better. The time for this consideration is ripe. While the Roberts Court has demonstrated a (welcome) reluctance to wade into the morass of punitive damages law, punitive damages awards have not faded from public importance. In December 2018, Johnson & Johnson lost its bid to have a trial judge overturn what will, if affirmed, be one of the largest punitive damages awards in history: a $4.7 billion award imposed by a jury upon finding that Johnson & Johnson knew for decades that its baby powder contained asbestos.[7] An appeal is, undoubtedly, forthcoming.[8] A few years ago, in a case alleging a pharmaceutical company's twelve-year campaign to hide a drug's cancer risks, a federal trial judge felt compelled by the Supreme Court's recent due process jurisprudence to reduce a jury award of $9 billion to $37 million—a swing of $8.6 billion.[9] And the question of punitive damages looms in the background of other major litigations, including the surge of lawsuits seeking to pin responsibility for the opioid crisis on pharmaceutical companies, pharmacies, executives, doctors, and others who allegedly knowingly misled the public or promoted the misuse of opioids.[10] The shift in power over punitive damages up the chain and towards the Supreme Court has enormous practical impact, and the question of whether any benefit from this centralization is worth its costs is urgently important. This Article seeks to address that question and also to consider what the case study of punitive damages indicates about larger trends in the federal courts.

Toward that end, this Article begins in Part I by reconstructing the Court's punitive damages case law in some depth because appreciating this judicial centralization requires a holistic view of the "forest" of the Court's jurisprudence in this area. That forest, in turn, is made up of the rather

7. Tiffany Hsu, *Johnson & Johnson Loses Bid To Overturn a $4.7 Billion Baby Powder Verdict*, N.Y. TIMES (Dec. 19, 2018), https://www.nytimes.com/2018/12/19/business/johnson-johnson-baby-powder-verdict.html [https://perma.cc/C2RV-9VN4 (dark archive)].

8. *See id.*

9. Jessica Dye, *U.S. Judge Slashes $9 Billion Award vs. Takeda, Lilly over Diabetes Drug*, REUTERS (Oct. 27, 2014), https://www.reuters.com/article/us-takeda-pharma-actos-ruling/u-s-judge-slashes-9-billion-award-vs-takeda-lilly-over-diabetes-drug-idUSKBN0IG26N20141028 [https://perma.cc/R2N9-WY99].

10. *See, e.g.*, Commonwealth v. Purdue Pharma, Inc., No. 1883-CV-01808-BLS2, 2019 WL 939120 (Mass. Super. Ct. Jan. 28, 2019) (plaintiff suing Purdue Pharma for its role in contributing to the opioid crisis). There are more than two hundred lawsuits involving more than four hundred plaintiff cities, states, and other entities that have been consolidated into one multi-district litigation. *In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375 (J.P.M.L. 2017). While settlement in some or all of these cases is likely, the settlement negotiations are necessarily conducted against the backdrop risks of punitive damages awards that are, themselves, a product of the Court's jurisprudence.

extraordinary cases in which juries have issued punitive damages awards so extreme as to grab the Court's limited attention. Part II assesses judicial centralization on its merits. On the one hand, centralization lends greater uniformity and predictability to awards. On the other hand, it diminishes variability and particularity, which also have virtues. Because no answer emerges in the abstract, Part III takes a step back and explores how judicial centralization intersects with broader phenomena. In an era of increased consolidation of power and social stratification in a wide range of areas, individuals' and communities' opportunities for "voice" are ever-decreasing, and local participation in the larger forces shaping the world is a diminishing but important value. On this dimension, there should be serious concerns about judicial centralization as a tool historically used to hold the powerful to account for their treatment of the "little guy."

I. A BRIEF HISTORY OF PUNITIVE DAMAGES

A. *The Early Years: Punitive Damage from the Founding to 1978*

Punitive damages in the American tradition[11] have their roots in two eighteenth-century English cases, *Wilkes v. Wood*[12] and *Huckle v. Money*,[13] in which juries issued awards to punish egregious misconduct far in excess of the actual damages suffered by the plaintiffs.[14] Those cases were widely discussed

11. On a grander view of history, punitive damages date back far longer—others have discussed their roots in everything from Hammurabi's Code to the Torah. *See, e.g.*, Elliot Klayman & Seth Klayman, *Punitive Damages: Toward Torah-Based Tort Reform*, 23 CARDOZO L. REV. 221, 226 (2001) (noting that the Torah "has been called 'the harbinger of modern punitive damages'" (quoting Melvin M. Belli, Sr., *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 2 (1980))); *see also, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 491 (2008) (citing the Code of Hammurabi).

12. (1763) 98 Eng. Rep. 489; Lofft 2.

13. (1763) 95 Eng. Rep. 768; 2 Wils. K.B. 206.

14. *Huckle*, 95 Eng. Rep. at 769; *Wilkes*, 98 Eng. Rep. at 498; *see also* Lake Shore & M.S. Ry. Co. v. Prentice, 147 U.S. 101, 106 (1893) (describing *Wilkes* as "[t]he most distinct suggestion of the doctrine of exemplary or punitive damages in England before the American Revolution"). The *Wilkes* case arose in 1762 when British politician John Wilkes published a pamphlet that allegedly slandered the King. *Wilkes*, 98 Eng. Rep. at 493–94. In response, the King's ministers ransacked Wilkes's home pursuant to a general warrant. *Id.* at 489. Although Wilkes's actual compensable damages from the invasion were limited, the court imposed a massive damages award of £4000, justifying this award for "more than the injury received" on the basis that "[d]amages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." *Id.* at 498–99. In *Huckle*, a jury similarly imposed a substantial damage award to punish the abusive use of a general warrant. *Huckle*, 95 Eng. Rep. at 768–69. The English court affirmed that use of "exemplary damages," explaining that the jury had properly issued the larger award given the egregiousness of the defendant's behavior, notwithstanding the "small injury done to the plaintiff, or the inconsiderableness of his station and rank in life." *Id.*

in American political circles at the time of the Founding.[15] By the middle of the nineteenth century, the Court recognized that it was a "well-established principle of the common law" that in "all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant"—damages measured based on "the enormity of [the] offence rather than the measure of compensation to the plaintiff."[16] In practice, punitive damages in early American cases served a number of different purposes, ranging from compensating plaintiffs for intangible injuries to punishing defendants in order to deter similar conduct in the future.[17]

It was taken as a given that the assessment of these damages would generally be up to the jury.[18] As the Supreme Court explained in 1851:

15. In addition to its role in establishing punitive damages in the Anglo-American tradition, the *Wilkes* case is foundational in Fourth Amendment jurisprudence, serving as a paradigmatic example of the abuses that general warrants can give rise to. Many scholars understand the Fourth Amendment to have been drafted with the primary goal of enshrining the principle that such warrants are unlawful. *See* Maryland v. King, 569 U.S. 435, 465–68 (2013) (Scalia, J., dissenting) (documenting many authorities that stand for the proposition that general warrants were the Fourth Amendment's specific target during the Founding Era); Scott Sundby, *Protecting the Citizen "Whilst He Is Quiet": Suspicionless Searches, "Special Needs" and General Warrants*, 74 MISS. L.J. 501, 509 (2004) (suggesting that the "concern over general warrants . . . suppl[ies] a theoretical and historical underpinning" for Fourth Amendment law). This history is suggestive of a prominent feature of current punitive damages jurisprudence, which is that even today, large punitive awards are often awarded in cases involving the abuse of power by large, wealthy entities against individuals. The Supreme Court acknowledged a similar point as far back as 1893, when it explained that "[i]f a public corporation, like an individual, acts oppressively, wantonly, abuses power, and a citizen in that way is injured, the citizen, in addition to strict compensation, may have, the law says, something in the way of smart money; something as punishment for the oppressive use of power." *Prentice*, 147 U.S. at 104.

16. Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851).

17. *See, e.g.*, Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 197 (2003) [hereinafter Sebok, *What Did Punitive Damages Do?*] (reviewing early cases and explaining that the cases "can be placed into six categories: (1) compensation for emotional suffering; (2) compensation for insult; (3) personal vindication; (4) vindication of the state; (5) punishment to set an example; and (6) punishment to deter"); *see also* John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair vs. Full Compensation*, 55 DEPAUL L. REV. 435, 444 (2006) (explaining that broad damage awards were not categorized as "punitive" or "compensatory" but were rather understood as the redress to which a claimant was entitled to by virtue of having been subject to egregious mistreatment); *id.* at 445–47 (explaining that even nominally compensatory awards were understood to depend in part on the nature of the misconduct, not just the plaintiff's harm). Over time, state court judges took steps to render awards more rational and predictable, and tort awards were increasingly bifurcated into compensatory and punitive elements. *Id.* at 453–55 (tracing history). One way to understand the Court's more recent jurisprudence outlined in this Article is as a further dramatic step in this process of rationalizing and containing damage awards.

18. *See, e.g.*, *Day*, 54 U.S. at 371. In *Prentice*, a train conductor allegedly intentionally had a doctor onboard arrested, without cause, in a particularly humiliating manner, and the jury instructions were as follows:

> And, further, after agreeing upon [compensatory damages], you may add something by way of punitive damages against the defendant, which is sometimes called smart money, if you are satisfied that the conductor's conduct was illegal, (and it was illegal), wanton, and oppressive.

> In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called "smart money." This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.[19]

Because punitive damages were issued in the context of common law actions arising under state law, the Court rarely had occasion to opine on them directly during the first two hundred years of the Republic.[20]

In the early twentieth century, *Lochner v. New York*[21] ushered in the era of economic substantive due process jurisprudence, during which the Court struck down numerous laws and regulations on the theory that the Constitution's Due Process Clause enshrines a substantive right to be free of economic restrictions and penalties in a variety of contexts.[22] The longstanding common law tradition of punitive damages, however, remained essentially untouched even during the *Lochner* era.[23] Indeed, in its only due process challenge to punitive damages, the Court concluded that corporations lacked a substantive due process right to be free of respondeat superior liability for punitive damages.[24]

B. *Centralizing Punitive Damages: A Story in Three (or Maybe Four) Parts*

Beginning in the 1980s, there was an increasing groundswell of public criticism over punitive damages awards, which were considered "out of

> How much that shall be the court cannot tell you. You must act as reasonable men, and not indulge vindictive feelings towards the defendant.

Prentice, 147 U.S. at 103–04.

19. *Day*, 54 U.S. at 371. Along the same lines, another nineteenth-century case described the imposition of punitive damages in some cases as "[t]he right of the jury." Denver & Rio Grand Ry. Co. v. Harris, 122 U.S. 597, 609 (1887) ("The right of the jury in some cases to award exemplary or punitive damages is no longer an open question in this court.").

20. The Court has had occasion to address various questions surrounding availability of punitive damages in various federal statutory schemes. *See, e.g.*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981) (holding that municipalities could not be subject to punitive damages under 28 U.S.C. § 1983); Int'l Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 52 (1979) (addressing availability of punitive damages under the Railway Labor Act).

21. 198 U.S. 45 (1905).

22. Victoria F. Nourse, *A Tale of Two* Lochners*: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 758 (2009).

23. *See* Rustad, *supra* note 1, at 504 n.305 (identifying cases in the second half of the nineteenth century and early twentieth century where a few plaintiffs successfully argued that the imposition of punitive damages after a criminal conviction for the same underlying conduct violated the constitutional prohibition against double jeopardy).

24. *See* Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 115 (1927).

control."[25] The empirical accuracy of this characterization was, to say the least, doubtful.[26] But the Supreme Court took note,[27] and in the ensuing decades developed a number of doctrinal threads that enabled it to solve this perceived problem. The overall effect was to vest an unprecedented level of substantive control over punitive damages in the Court itself, and the federal courts of appeals, at the particular expense of juries and trial judges.

1. Centralized Substantive Rules: The Supreme Court's Creation of Rules Limiting the Quantity and Purposes of Punitive Damages

a. *The Lead-Up*

Before 1989, the Supreme Court had never so much as suggested that the Constitution had anything to say about the size of punitive damages awards issued by juries in state courts. Yet by 1996, when the Court for the first time struck down a punitive damages award as substantively excessive in the landmark case *BMW v. Gore*,[28] it was hardly a surprise. In the intervening seven years from 1989 to 1996, the Court repeatedly considered substantive challenges to punitive damages awards, and *Gore* was the logical extension of the Court's reasoning in those decisions.[29] Given the discretionary nature of the Court's

25. *See, e.g.*, Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 10 (1990) (describing the politicization of the punitive damages discussion as the result of "an intense, well-organized, and well-financed political campaign by interest groups seeking fundamental reforms in the civil justice system benefiting themselves"); Sebok, *Myth to Theory*, *supra* note 1, at 962 (noting that the idea that punitive damages are out of control has been a "recurring theme in the literature" since 1985); Catherine M. Sharkey, *Federal Incursions and State Defiance: Punitive Damages in the Wake of* Philip Morris v. Williams, WILLAMETTE L. REV. 449, 453–63 (2010) [hereinafter Sharkey, *Federal Incursions*].

26. A significant body of research suggests that the punitive damages "crisis" was a fiction. *See, e.g.*, Rustad, *supra* note 1, at 462 n.6 ("Despite the diversity in research methods and samples, research studies of the law in action agree that there is no punitive damages crisis."); Sebok, *Myth to Theory*, *supra* note 1, at 962–76 (debunking the "myth" that overall punitive damages awards had recently changed in frequency or amount).

27. Consistent with—and, at times, perhaps driving—this trend, lawyers representing major businesses began filing "scores of amicus briefs in the U.S. Supreme Court" urging the Court to impose new restrictions on punitive damages. Michael L. Rustad, *Happy No More: Federalism Derailed by the Court that Would Be King of Punitive Damages*, 64 MD. L. REV 461, 462 (2005). For a discussion of the role of industry groups' persistent lobbying of the Court in this area, see Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 95–99 (1993).

28. 517 U.S. 559 (1996).

29. *See id.* at 572 (stating that the decision of the Court follows from the principles discussed in previous cases). A devoted group of industry lawyers, led by Ted Olson, brought a number of cases involving punitive damages earlier in the 1980s, some of which also ultimately provided hints that the justices were concerned about the constitutionality of punitive damages. *See* Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 71 (1988) (declining to address arguments that the punitive damages award violated Eighth Amendment or due process principles because those arguments were not properly preserved); *id.* at 86–89 (O'Connor, J., concurring) (expressing concern that lack of standards

docket, the sheer concentration of punitive cases the court considered makes clear that the Court was newly concerned about punitive damages.[30]

The Court's 1989 decision in *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*[31] was the first harbinger.[32] In that case, the Supreme Court rejected the defendant's Eighth Amendment challenge to a punitive damages award and declined to reach any due process question for procedural reasons.[33] In a concurrence, however, Justices Brennan and Marshall essentially invited the defense bar to bring cases raising due process challenges to punitive damages awards, joining the majority "on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties."[34]

Unsurprisingly, the defense bar took Justices Brennan and Marshall's invitation to heart. Two terms later, the Court granted certiorari in *Pacific Mutual Life Insurance Co. v. Haslip*,[35] which properly presented a due process challenge.[36] While the Court ultimately upheld the $1 million punitive damages award in that case, it stated that the award might be "close to the line" of constitutional excessiveness—suggesting, for the first time, that there was a substantive line that might, in some other case, be crossed.[37]

In 1993, the Court made explicit what had been left implicit in *Haslip*: the Due Process Clause was the source of a substantive right to be free from excessive punitive damages awards, regardless of the procedures used to impose them. In *TXO Production Corp. v. Alliance Resources Corp.*,[38] a jury entered an award consisting of $19,000 in compensatory damages and $10 million in punitive damages against an oil company that had brought frivolous lawsuits

to guide juries may violate procedural due process principles and stating that the issue would warrant the Court's attention in an "appropriate case"); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828–29 (1986) (finding it unnecessary to reach arguments that punitive damages awards might violate the Excessive Fines Clause of the Eighth Amendment or procedural due process principles, but noting that those arguments involved "important issues which, in an appropriate setting, must be resolved").

30. For background on the rareness, and corresponding salience, of certiorari grants, see Jeffrey S. Sutton & Brittany Jones, *The Certiorari Process and State Court Decisions*, 131 HARV. L. REV. F. 167, 169 (2018).

31. 492 U.S. 257 (1989).

32. *Id.* at 280.

33. *Id*. at 274–77.

34. *Id.* at 280–82 (Brennan, J., concurring).

35. 499 U.S. 1 (1991).

36. *See id.* at 9–10.

37. *Id*. at 20. The substantive implication of this holding was only underscored by Justice O'Connor's forceful dissent, in which she argued that the trial processes (including vague jury instructions) did not meet the requirements of procedural due process and that there was no need for the Court to invoke substantive due process principles. *Id*. at 46 (O'Connor, J., dissenting). In Justice O'Connor's view, the jury instructions—which gave the jury nearly unfettered discretion to award punitive damages—were so unclear as to be void for vagueness. *See id.* ("The vagueness question is not even close.").

38. 509 U.S. 443 (1993).

and pursued other fraudulent actions in order to reduce the payments the oil company would be required to make under an oil and gas lease and had engaged in "similar nefarious activities" in other business dealings.[39] The Court ultimately affirmed the punitive damages award—but the plurality stressed that a defendant's due process rights could be violated by an excessively large punitive damages award regardless of whether there were any procedural defects underlying the award.[40] The plurality declined, however, to adopt a test or otherwise provide guidance regarding when that threshold might be crossed, instead explaining only that "[a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus."[41] In the case before it, the Court simply accounted for factors, including "the amount of money potentially at stake [with respect to the oil contract], the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth," and concluded that taken together those factors indicated that the award was not "so 'grossly excessive' as to be beyond the power of the State to allow."[42]

b. BMW v. Gore*: A New Substantive Due Process Right*

In 1996, the Supreme Court reached its breaking point in the landmark case of *BMW of North America, Inc., v. Gore*.[43] The Court for the first time invalidated a punitive damages award on substantive due process grounds.[44] At first glance, the facts of the case look tailor-made for an excessiveness challenge: in contrast to the many punitive damages cases brought by sympathetic, often injured, victims, in this case, the plaintiff was a doctor who brought suit against BMW for a poor paint job on a perfectly functional luxury car.[45] The plaintiff, Dr. Ira Gore, purchased a new BMW for roughly $40,000, and upon taking the car in to repaint it, he discovered that the car's paint had been damaged and recoated by BMW prior to purchasing it.[46] Although BMW maintained it was

39. *Id.* at 450–51 (plurality opinion).

40. In reaching that conclusion, the plurality relied primarily on the Court's year-old precedent in *Haslip* and a number of *Lochner*-era precedents invalidating state-imposed fines and penalties. *Id*. at 453–54 (quoting Seaboard Air Line Ry. Co. v. Seegers, 207 U.S. 73, 78 (1907)). The *Lochner*-era cases on which the Court relied involved challenges to state-imposed penalties, rather than to awards of punitive damages in private tort suits. *See, e.g.*, Seaboard Air Line Ry. Co. v. Seegers, 207 U.S. 73, 78 (1907)(concluding that the state law imposing a $50 fine on common carriers who failed to timely pay claims for loss or damages was constitutional, but suggesting that there might be constitutional limitations on states' ability to impose larger fines); St. Louis, I.M. & S.R. Co. v. Williams, 251 U.S. 63, 66–67 (1919) (noting that it has been "fully recognized" that the Due Process Clause limits states' abilities to prescribe penalties for violations of state law).

41. *TXO*, 509 U.S. at 458.

42. *Id.* at 462.

43. 517 U.S. 559 (1996).

44. *Id.* at 559.

45. *Id.* at 563, 576.

46. *Id.* at 563.

unaware that the value of the car had diminished as a result of the repainting, Gore presented expert testimony suggesting that the car's resale value was reduced by as much as ten percent.[47] The jury awarded Gore $4000 in compensatory damages.[48] But, upon finding that BMW's policy (under which it did not disclose presale repairs amounting to less than three percent of a car's value) constituted "gross, oppressive, or malicious" fraud, the jury imposed a punitive damages award of $4 million.[49] The case made its way to the Alabama Supreme Court, which reduced the award to $2 million on the basis that the jury appeared to have improperly sought to punish out-of-state conduct.[50] The Court ultimately granted certiorari on the question of whether the punitive damages award was so large as to violate BMW's right to due process.[51]

In an opinion authored by Justice Stevens, the Court concluded that the size of the Alabama jury's punitive damages award violated BMW's right to due process.[52] In so ruling, the Court established three "guideposts" for ascertaining whether an award is constitutionally excessive. The first guidepost, and "perhaps most important," is the reprehensibility of the underlying conduct.[53] The second guidepost—and, in the subsequent years, most controversial—is the ratio between the punitive damages award and the extent of the harm, or potential harm, it caused.[54] Although the Court purported to "reject[] the notion that the constitutional line is marked by a simple mathematical formula," it explained that, in general, the amount of punitive damages awards should not exceed a "10-to-1 ratio" to the amount of any compensatory damages award.[55] The third guidepost is the relationship between the punitive damages award and the severity of civil or criminal penalties that could be imposed for "comparable misconduct."[56]

2. De Novo Appellate Review of Punitive Damages

In principle, this change need not result in a dramatic shift in power over punitive damages awards. In the ensuing years, however, the approach that the Court adopted to implement *Gore*'s guideposts did just that in a series of subsequent cases.

47. *Id.* at 564.
48. *Id.* at 565.
49. *Id.*
50. At trial, BMW indicated that it had declined to disclose similar presale repairs regarding fourteen cars in Alabama, and 983 others across America. *See id.* at 564.
51. *Id.* at 568.
52. *Id.* at 585–86.
53. *Id*. at 575.
54. *Id*. at 580.
55. *Id*. at 582.
56. *Id.* at 583.

a. Cooper Industries, Inc. v. Leatherman Tool Group, Inc.

First, in 2001, a divided Court held that the review of trial courts' application of the *Gore* excessiveness guideposts should be de novo.[57] In the underlying dispute, a jury concluded that a manufacturer had tried to pass its product off as a competitor's name-brand tool. The jury awarded $50,000 in compensatory damages and $4.5 million in punitive damages. The district court upheld the award under the *Gore* guideposts, and on appeal, the Ninth Circuit applied an abuse-of-discretion standard and affirmed.[58]

The Supreme Court reversed, concluding that the Ninth Circuit should have applied a de novo standard of review for largely prudential reasons.[59] In particular, the majority initially gave three primary reasons for determining which standard of review should govern the reasonable suspicion/probable cause inquiry in the Fourth Amendment context: (1) reasonable suspicion and probable cause "cannot be articulated with precision," but are instead "fluid concepts" that must be defined in context; (2) the legal rules "acquire content only through application," and de novo review is "therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles"; and (3) "de novo review tends to unify precedent" and "stabilize the law."[60] Explaining that these three features also apply to the *Gore* excessiveness standard, the Court concluded with little further analysis that de novo review applied.[61]

Notably missing from the majority's discussion was whether any of these three features—precisely defined standards, appellate control, or unified precedent—are useful or important in the context of punitive damages. In a few stray lines addressing Seventh Amendment concerns, the Court breezily explained that "[d]ifferences in the institutional competence of trial judges and appellate judges are consistent with" de novo review.[62] It recognized that district courts might "have a somewhat superior vantage over courts of appeals" with respect to reprehensibility (the "most important" *Gore* guidepost), that the second guidepost (the ratio between the compensatory damages and punitive damages) could be assessed equally well by trial and appellate courts, and that the third guidepost (a broad comparison of penalties for similar violations) is more suited to appellate review.[63] The Court stopped short of asserting that

57. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 431 (2001) ("[C]ourts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards.").

58. *Id*. at 426.

59. *Id*. at 436.

60. *Id.* (citing Ornelas v. United States, 517 U.S. 690, 696, 697–98 (1996)).

61. *Id*. at 436.

62. *Id.* at 440, 449.

63. *Id*. at 440.

institutional competencies actually support de novo review; instead, it concluded that they "fail to tip the balance in favor of deferential appellate review."[64] Having reached this conclusion, the Court remanded to the Ninth Circuit to apply the proper standard, but not before detailing a number of "questionable conclusions" by the district court judge that "may not survive *de novo* review."[65]

As Justice Ginsburg's forceful dissent makes clear, the application of de novo review to a factually intensive question of tort damages is especially striking in light of the Court's approach to the standard of review regarding purportedly excessive compensatory damages.[66] In *Gasperini v. Center for Humanities, Inc.*[67]—decided the same term as *Gore*—the Court held that "appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive" was reconcilable with the Seventh Amendment if the standard of review was "abuse of discretion," while strongly suggesting that a more robust standard of review would pose a constitutional problem.[68] The Court held that "practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility for application of an excessiveness standard," and that emphasized the importance of trial judges' "unique opportunity to consider the evidence in the living courtroom context."[69] As Justice Ginsburg stressed in her *Cooper* dissent, it is not obvious that *Gasperini*'s logic should not apply equally to allegations that punitive damages are excessive, as both compensatory damages and punitive damages involve intangible and difficult-to-quantify concepts (like the dollar value of "pain and suffering"), and both are fundamentally dependent on determinations that are understood as fact-finding, like the extent of harm or potential harm caused, and the defendant's good faith and mens rea.[70]

In closing, Justice Ginsburg stressed that even the majority agreed that district courts are better positioned to consider the most important *Gore* factor (reprehensibility), and that "in the typical case envisioned by *Gore*," appellate

64. *Id*. at 440.

65. *Id*. at 441, 443.

66. *Id.* at 445–46 (Ginsburg, J., dissenting). Additionally, Justice Thomas concurred in the judgment but wrote separately to stress that, given the opportunity, he would overrule *Gore*'s substantive guideposts. *Id.* at 443 (Thomas, J., concurring). Justice Scalia also concurred, writing separately to indicate that he continued to disagree with *Gore* and generally believed that the Court should apply a deferential standard of review to fact-bound constitutional questions. *Id.* at 443–44 (Scalia, J., concurring). Given the state of the Court's precedents, however, he concurred in the judgment. *See id.* at 444.

67. 518 U.S. 415 (1996).

68. *Id.* at 434, 428–39.

69. *Id*. at 438.

70. *Cooper*, 532 U.S. at 446 (Ginsburg, J., dissenting).

courts thus "should have infrequent occasion to reverse."[71] Thus, she predicted, so long as lower courts carefully separate out fact-findings that qualify for clearly erroneous review, the practical difference between the Court's approach and her own "is not large."[72]

b. State Farm Mutual Auto Insurance Co. v. Campbell*: De Novo Review in Practice*

Time quickly proved Justice Ginsburg's (perhaps hortatory) prediction wrong. In 2003, the Court had an opportunity to demonstrate what its new de novo review would look like in practice. It did so in *State Farm Mutual Auto Insurance Co. v. Campbell* (*Campbell II*)[73] where a major corporation abused its power against elderly, vulnerable customers in a context rather far removed from the car-paint damage at issue in *Gore*.[74]

In the underlying incident, Curtis Campbell, an elderly man suffering from a recent stroke and early-stage Parkinson's disease, attempted to pass a truck on a two-lane road, forcing an oncoming vehicle to swerve onto the shoulder to avoid him.[75] The driver of the oncoming vehicle was killed and another was permanently disabled.[76] Insurance experts and State Farm's investigators agreed early on that Mr. Campbell was at fault.[77] Notwithstanding that clarity, in ensuing tort suits brought by the estate of the deceased driver and by the disabled passenger, State Farm refused offers to settle for a mere $50,000—Mr. Campbell's policy limit—even though it assured Mr. Campbell and his wife that the company was representing their interests, that their assets were not at risk, and that they should not obtain their own counsel.[78] Subsequently, and unsurprisingly, a jury concluded that Mr. Campbell was one-hundred percent responsible for the crash and returned a judgment of $185,849 against him.[79] State Farm refused to cover the $135,849 that exceeded Mr. Campbell's policy limit.[80] Instead, State Farm's counsel told the Campbells to put their house up for sale "to get things moving," and State Farm refused to post a bond to allow Mr. Campbell to appeal the judgment.[81] The "utterly

71. *Id*. at 449.
72. *Id*. at 449–50.
73. 538 U.S. 408 (2003).
74. *See id.* at 412–13.
75. *Id.* at 412, 434.
76. *Id.* at 413.
77. *Id.*
78. *Id*. The settlement offers for the policy limits were made as late as a month before trial. *See* Campbell v. State Farm Mut. Auto. Ins. Co. (*Campbell I*), 65 P.3d 1134, 1141 (Utah 2001).
79. *Campbell II*, 538 U.S. at 413.
80. *Id.*
81. *Id.*

dismayed" Campbells obtained other counsel and quickly "learned that their situation was indeed grave."[82]

In coordination with the plaintiffs in the tort suit against them, the Campbells brought suit against State Farm alleging bad faith.[83] Among other things, discovery revealed that when State Farm's analyst concluded that there was a high risk of liability if the case went to trial, his manager ordered him to change his conclusion, and a second analyst who agreed that liability was likely was removed from the case.[84] The jury concluded that State Farm had acted unreasonably and in bad faith by taking the case to trial.[85]

At the penalty phase, State Farm continued to argue that its decision to take the case to trial was an "honest mistake."[86] In response, the Campbells produced a rather astonishing collection of evidence that State Farm's decision to take the case to trial was part of a national scheme to meet corporate fiscal goals by capping payouts on claims company-wide.[87] That clinical insurance-work language—"capping payouts"—obscures just how colorful and malicious State Farm's efforts to deliberately deceive and cheat its customers were. Agents "changed the contents of files, lied to customers, and committed other dishonest and fraudulent acts"—including, for instance, adding an entirely made-up assertion to the case file that the deceased victim of Campbell's accident had been "speeding to visit his pregnant girlfriend."[88] These fraudulent practices "were consistently directed to persons—poor racial or ethnic minorities, women, and elderly individuals—who State Farm believed would be less likely to object or take legal action."[89] Past employees testified that they were explicitly trained to target "the weakest of the herd," that is, "the elderly, the poor, and . . . consumers who are least knowledgeable about their rights and . . . most vulnerable to trickery or deceit, or who have little money and hence have no real alternative but to accept an inadequate offer to settle a claim at much less than fair market value."[90] And an expert witness testified that the Campbells' case was a "classic example" of the implementation of this policy.[91]

82. *Campbell I*, 65 P.3d at 1142.

83. *Campbell II*, 538 U.S. at 414.

84. *Campbell I*, 65 P.3d at 1141–42.

85. *Id.* at 1142.

86. *Id.* at 1143.

87. The Campbells adduced "extensive expert testimony" regarding State Farm's fraudulent practices, and the trial court made "nearly twenty-eight pages of extensive findings concerning State Farm's reprehensible conduct." *Id.* at 1147–48.

88. *Id.* at 1148. ("[The victim] was not speeding, nor did he have a pregnant girlfriend. The only purpose for the change was to distort the assessment of the value of [the victim's] claims against State Farm's insured.").

89. *Id.*

90. *Campbell II*, 538 U.S. 408, 433 (2003) (Ginsburg, J., dissenting).

91. *Id.* at 433. The trial court's findings regarding the compensatory damage award here provide additional color regarding the Campbells. They were "elderly," Mr. Campbell was experiencing

If that were not enough, State Farm deliberately destroyed all relevant documents about the scheme (even while litigation was ongoing); "systematically harassed and intimidated opposing claimants and witnesses" (by paying a hotel maid, for instance, to disclose whether a witness to the Campbells' case had overnight guests); and expressly instructed its attorneys and claim superintendents to use "mad dog defense tactics—using the company's large resources to 'wear out' opposing attorneys by prolonging litigation, making meritless objections, claiming false privileges, destroying documents, and abusing the law and motion process."[92]

The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages; the trial judge remitted those awards to $1 million and $25 million, respectively.[93] The Utah Supreme Court ultimately reinstated the $145 million punitive damages award.[94] It discussed and applied the *Gore* guideposts, heavily emphasizing the egregious and expansive pattern of misconduct described by the trial court's extensive findings.[95] The court also noted that the trial court had found that corporate headquarters "had never learned of—much less acted upon"—a jury verdict amounting to less than $100 million, and that State Farm's aggressive and unlawful efforts to conceal its wrongdoing, on top of its enormous resources, made it exceedingly unlikely that its similar misconduct would be uncovered.[96]

The Supreme Court reversed.[97] The majority opinion, authored by Justice Kennedy, marched through each *Gore* guidepost. As for "reprehensibility," the Court commented that "State Farm's handling of the claims against the Campbells merits no praise, but a more modest punishment could have satisfied the State's legitimate objectives."[98] The Court further explained that it was impermissible for the state courts to consider "unlawful acts committed outside

residuary effects of a stroke and had Parkinson's disease, had previously suffered financial setbacks, and had modest financial resources and no financial reserves. *Id.* at 434. Mr. Campbell's past traumas included "the murder of his first wife, his second wife's desertion following his stroke, and the death of his third wife from cancer less than two years after their marriage"; additionally, Mrs. Campbell's prior "bitter divorce" and ex-husband's failure to live up to financial obligations had led to the repossession of the Campbells' car and the placement of their home in foreclosure. Order Re Defendant's Motion for a New Trial or Remittur regarding the Compensatory Damages Awards at *2f–g, Campbell v. State Farm Mut. Auto. Ins. Co., No. 890905231, 1998 WL 35159343 (Utah Dist. Ct. Aug. 3, 1998), *aff'd in part*, *rev'd in part* 65 P.3d 1134 (Utah 2001). The trial court elaborated that the Campbells were "quiet, unassuming, and trusting individuals" who had "readily entrusted their financial and emotional wellbeing to State Farm," only to have that trust betrayed. *Id.* at *2h, *2j.

92. *Campbell I*, 65 P.3d. at 1148.

93. *Id.* at 1141.

94. *Id.* at 1155.

95. *Id.* at 1152–55.

96. *Id.* at 1147, 1153 (noting that expert had testified that State Farm's conduct would come to the surface in only one of 50,000 cases as a matter of statistical probability).

97. *Campbell II*, 538 U.S. 408, 429 (2003).

98. *Id.* at 423.

of [its] jurisdiction" and that while a pattern of conduct could be probative of State Farm's culpability, "[d]ue process does not permit courts . . . to adjudicate the merits of other parties' hypothetical claims . . . under the guise of the reprehensibility analysis."[99] The Court concluded that "the Campbells have shown no conduct by State Farm similar to that which harmed them," and "the only conduct relevant to the reprehensibility analysis" is that which did so.[100]

Having effectively thrown out all evidence of the nationwide policy, the Court had little difficulty concluding that reprehensibility could not provide constitutional justification for the jury award. As for the "ratio" between punitive damages and compensatory damages, the Court reiterated its earlier statements that there are "no rigid benchmarks"—but in the next breath, the Court asserted that "[s]ingle digit multipliers are more likely to comport with due process," and that "when compensatory damages are substantial," a ratio "perhaps only equal to compensatory damages" would represent the outer limits for constitutionality.[101] Finally, Justice Kennedy considered the third *Gore* guidepost and noted that the award "dwarf[ed]" Utah's $10,000 maximum civil fine for a single instance of fraud.[102] The Court then remanded the case to the Utah court to set a new award "in the first instance."[103]

In his dissent, Justice Scalia criticized "the punitive damages jurisprudence which has sprung forth from *BMW v. Gore*" as "insusceptible of principled application."[104] Justice Ginsburg, in turn, critiqued "the Court's swift conversion" of the guidelines from *Gore* "into instructions that begin to resemble marching orders."[105]

3. A New Constitutional Prohibition on Jury Control: *Honda Motor Corp. v. Oberg*

In a related development in 1994—after *TXO* and *Haslip* made clear that the Court was concerned with the substantive size of punitive damages awards, but before the contours of the *Gore* guideposts were established—the Court considered the limits of how much control over punitive damages states can permissibly vest in juries. In *Honda Motor Co. v. Oberg*,[106] the Court considered a procedural due process challenge to an amendment to the Oregon Constitution that prohibited judicial review of any "fact tried by a jury"—including, but not limited to, the amount of punitive damages awards—"unless

99. *Id.* at 421, 423.
100. *Id.* at 424.
101. *Id.* at 425.
102. *Id.* at 428.
103. *Id.* at 429.
104. *Id.* (Scalia, J., dissenting).
105. *Id*. at 439 (Ginsburg, J., dissenting).
106. 512 U.S. 415 (1994).

the court [could] affirmatively say there [was] no evidence to support the verdict."[107] The Oregon trial court, appellate court, and state supreme court all held that the state constitutional provision—which had been on the books since 1910—was constitutional.[108] The Oregon Supreme Court explained that while the scope of judicial review was significantly cabined by the award, the substantive instructions that Oregon juries were provided to guide their assessment of punitive damages were significantly more specific than the instructions provided in most states (and in the underlying decisions in *Haslip* and *TXO*).[109]

The Court, however, reversed, holding that the longstanding state constitutional provision deprived defendants of due process.[110] The Court explained that its recent decisions (*Haslip* and *TXO*) "recognized that the Constitution imposes a substantive limit on the size of punitive damages" and suggested that the question for assessing the constitutionality of Oregon's procedures "should focus on Oregon's departure from traditional procedures."[111] The Court then reviewed various early British and American common law cases allowing for judicial review, and noted that while those cases "emphasized the deference ordinarily afforded jury verdict," they also "recognized that juries sometimes awarded damages so high as to require correction."[112] While the plaintiff argued that Oregon used various alternative mechanisms, such as clear jury instructions, to cabin jury discretion, the Court concluded that these mechanisms were insufficient, explaining that "[t]he problem that concern[ed]" the Court was "the possibility that a jury [would] not follow those instructions and may return a lawless, biased, or arbitrary verdict."[113]

Justice Ginsburg's vigorous dissent shines a light on what was at stake in the case. Among other things, the dissent made clear that Oregon's punitive damages procedures, as a whole, provide significantly more procedural protections and detailed guidance to juries than other states' punitive damages schemes under which the Court had declined to reduce awards.[114] In short, the only real difference between Oregon's system and other systems is that, in Oregon, the entity evaluating the facts was the jury:

> In product liability cases, Oregon guides and limits the factfinder's discretion on the availability and amount of punitive damages. The plaintiff must establish entitlement to punitive damages, under specific

107. *Id.* at 427 n.5.

108. *Id.* at 418.

109. *Id.* at 418–19.

110. *Id.* at 432.

111. *Id*. at 420, 421; *see also* TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 453–54 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

112. *Oberg*, 512 at 424.

113. *Id.* at 433.

114. *Id.* at 438, 450–51 (Ginsburg, J., dissenting).

> substantive criteria, by clear and convincing evidence. Where the factfinder is a jury, its decision is subject to judicial review to this extent: The trial court, or an appellate court, may nullify a verdict if reversible error occurred during the trial, if the jury was improperly or inadequately instructed, or if there is no evidence to support the verdict.[115]

Oregon's laws set out "substantive criteria," and jurors were provided with "precise instructions detailing them."[116] Moreover, the specific instructions that Oregon juries were required to follow closely mirrored the *post-verdict* standards judges use in other states where the Court has affirmed jury awards.[117] Justice Ginsburg stressed that the early history on the question of substantive judicial review of punitive damages decisions was far less clear than the majority indicated[118]—the Court has long held that it is a state's prerogative to increase the power of the jury,[119] and the majority invoking its recent substantive due process jurisprudence was irrelevant to the case at hand.[120] Rather, the question apparently presented was whether judicial review of the jury award for compliance with state substantive law was required. The majority position on that point, she concluded, was "extraordinary, for this Court has never held that the Due Process Clause requires a State's courts to police jury fact findings to ensure their conformity with state law."[121]

4. *Coda*: Further Glosses from the Court's Most Recent Cases

Since *State Farm*, the Court has issued two significant decisions on punitive damages, both of which shed light on the Court's broader trajectory towards centralization.

115. *Id*. at 436.

116. Oregon required that punitive damages, if any, be awarded based on seven substantive criteria:

> (a) The likelihood at the time that serious harm would arise from the defendant's misconduct; (b) The degree of the defendant's awareness of that likelihood; (c) The profitability of the defendant's misconduct; (d) The duration of the misconduct and any concealment of it; (e) The attitude and conduct of the defendant upon discovery of the misconduct; (f) The financial condition of the defendant; and (g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

OR. REV. STAT. § 30.925(3) (1991), *amended by* Act of July 19, 1995, ch. 688, § 4, 1995 Or. Laws 2073, 2074.

117. *Oberg*, 512 U.S. at 443 (Ginsburg, J., dissenting).

118. *Id.* at 446.

119. *Id.*

120. *Id.*

121. *Id*. at 449.

First, in *Exxon Shipping Co. v. Baker*,[122] the Court weighed in on the result of decades-long litigation arising out of the Exxon-Valdez oil spill.[123] The evidence presented to the jury indicated that the accident was caused by a drunk captain—the only person licensed to navigate the relevant part of the sound—who left the bridge during a particularly treacherous path, and that Exxon officials were well aware that the captain had a long history of alcohol abuse and had recently relapsed.[124] The result was nearly eleven million gallons of oil pouring into the Prince William Sound, and the incident is considered one of the most environmentally damaging oil spills in history.[125] When the case came to the Court after multiple decades of litigation (including two remands to account for the Supreme Court's evolving jurisprudence), a jury had entered a compensatory award of $507.5 million and a punitive damages award of $4.5 billion, which the Ninth Circuit reduced to $2.5 billion.[126]

Unlike the cases discussed above, in *Exxon Shipping*, the Court was serving as a "common law court of last review" under its maritime jurisprudence.[127] The opinion is thus an especially useful window into the Court's view on punitive damages from a policy perspective—freed from the restriction of deciding only what the outer bounds of constitutionality permit, the Court took the opportunity to opine at length on policy concerns.[128] Justice Souter, writing for an equally divided court, took the opportunity to offer an extensive overview of the history of its punitive damages jurisprudence and the current state of the law across the country and around the world.[129] He then considered the "audible criticism" of punitive damages awards (which had appeared to motivate much of the Court's earlier jurisprudence) but noted that "the most recent studies tend to undercut much of it."[130] "The real problem," he concluded, is "the stark unpredictability of punitive awards."[131] After discussing some available statistical evidence about punitive damages, he set out the premise for the

122. 554 U.S. 471 (2008).

123. *Id.* at 476.

124. *Id.* at 476–78.

125. *12 of the Most Devastating Man-Made Ocean Disasters in History, from Exxon Valdez to Deepwater Horizon*, BUSINESS INSIDER (Mar. 26, 2019), https://www.businessinsider.com/exxon-valdez-spill-other-disasters-contaminated-ocean-2019-3#two-decades-after-the-exxon-valdez-disaster-the-us-saw-another-devastating-oil-spill-7 [https://perma.cc/2A8H-SHZD].

126. *Exxon Shipping*, 554 U.S. at 471.

127. *Id.* at 507.

128. *See, e.g.*, Sharkey, *The* Exxon Valdez *Litigation*, *supra* note 1, at 26–27 (2009) ("Sitting as a common law court of last resort—as opposed to its review posture in the due process trilogy cases, where it was guided and constrained by constitutional considerations—the Court is up front about its preoccupation with the negative side effects of the punitive damages remedy, without much focus on identifying its curative aspirations.").

129. *See Exxon Shipping*, 554 U.S. at 497 (contrasting American practice with that of other countries and noting that some legal systems decline to enforce foreign punitive judgments).

130. *Id.*

131. *Id.* at 499.

discussion that followed: "The common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances."[132] With "that aim [in mind]," the Court considered available approaches to setting limits on punitive damages—one potential "verbal" approach to directing juries properly, and two "numerical" approaches.[133] Ultimately, the Court was "skeptical that verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers."[134] So, the Court turned to the numbers and ultimately concluded that because the median punitive award in the studies at hand bore a 1:1 ratio to compensatory damages, a 1:1 ratio was "a fair upper limit" in maritime cases.[135] Notably, the Court adopted this ratio limitation even though it had not identified a state court that had adopted an analogous limitation.[136] Instead, the Court took its cue from state legislative interventions and concluded that it was empowered to enact an analogous limitation in the maritime context.[137]

Second, in *Philip Morris USA v. Williams* (*Philip Morris II*),[138] the Court created another substantive federal rule for punitive damages.[139] The case was brought by the widow of a heavy cigarette smoker.[140] Without belaboring the point, the record was, once again, egregious.[141] The Oregon jury issued a punitive damages award of $79.5 million.[142] The trial judge reduced the award to $32 million under the Court's excessiveness jurisprudence.[143] The Court of Appeals of Oregon reinstated the jury verdict, and the Oregon Supreme Court affirmed before the Court reversed in a five-to-four decision authored by Justice Breyer.[144] Unlike its earlier excessiveness jurisprudence, the Court focused on what it characterized as procedural, rather than substantive, due process considerations and held that the Due Process Clause prohibits punitive damages awards that punish a defendant for injury to "strangers to the litigation," although injury to others could be used to assess the reprehensibility of the defendant's conduct.[145] The Court emphasized that permitting such punishment

132. *Id.* at 503.
133. *Id.*
134. *Id.* at 504.
135. *Id.* at 513.
136. *See id.* at 520 (Stevens, J., dissenting).
137. *See id.*
138. 594 U.S. 346 (2007).
139. *Id.* at 353–55.
140. Williams v. Philip Morris, Inc. (*Philip Morris I*), 127 P.3d 1165, 1167 (Or. 2006).
141. *See id.* at 1168 (describing a coordinated campaign to convince the public that doubts remained about whether smoking was damaging to health while being fully aware that there was no ambiguity on that question, and finding evidence that the plaintiff specifically relied on the company's published statements in resisting his family's urges to quit).
142. *Id.* at 1167.
143. *Id*. at 1171.
144. *Philip Morris II*, 594 U.S. at 350–52.
145. *Id.* at 353.

"would add a near standardless dimension to the punitive damages equation," thereby exacerbating the "fundamental due process concerns" implicated in the Court's excessiveness jurisprudence.[146]

The four dissenting justices emphasized different concerns but were united in their view that the Court had improperly impeded on the Oregon court's proceedings.[147] The implicit lack of respect for the state court proceedings was apparently not lost on the Oregon Supreme Court, which took the opportunity on remand to unanimously reaffirm its own judgment. As others have recounted, the Court granted certiorari in *Philip Morris* to correct the Oregon court's punitive damages award no fewer than *three times* before finally throwing its hands up and dismissing the final grant of certiorari as improvidently granted (after hearing argument on the case) in 2009.[148] The $79.5 million award remained intact.

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In short, the story of punitive damages through the last thirty years is one of increasing judicial centralization. By creating constitutional limits on punitive damages, the Court has necessarily federalized those issues,[149] and the Court's procedural decisions regarding who gets to decide issues related to punitive damages have shifted upward, towards the Court itself. Another way to think about this phenomenon is in terms of expertise: the Court has increasingly treated punitive damages as an appropriate subject for its own expert judgment, and it has implicitly concluded that appellate judges—and, especially, themselves—are the appropriate experts on the bounds of fairness in this area. This raises an obvious question: Is that a good thing?

146. *Id.* at 354.

147. Justice Stevens noted the "egregious facts disclosed" by the record and critiqued the elusive distinction between the permissible and impermissible uses of third-party injuries. *Id.* at 358 (Stevens, J., dissenting). Justice Thomas viewed the ostensibly procedural holding as "simply a confusing implementation of the substantive due process regime," which he would overrule. *Id.* at 361 (Thomas, J., dissenting). And Justice Ginsburg, joined by Justices Thomas and Scalia, stressed that in vacating the state supreme court's award, the Court had ignored numerous procedural problems with Philip Morris's case and had "reache[d] outside the bounds of the case as postured when the trial court entered its judgment" to enact the new rule. *Id.* at 364 (Ginsburg, J., dissenting). She concluded, "I would accord more respectful treatment to the proceedings and dispositions of state courts that sought diligently to adhere to our changing, less than crystalline precedent." *Id.*

148. Zipursky, Palsgraf, *supra* note 1, at 1759 n.6. For a fuller discussion of the dynamics of state defiance in this area, see Sharkey, *Federal Incursions*, *supra* note 25, at 450.

149. For a fuller discussion of this phenomenon, including a theory that the Court has focused on punitive damages and has made fewer constitutional incursions into other areas of tort law, see Thomas B. Colby, *The Constitutionalization of Torts?*, 65 DEPAUL L. REV. 357, 357–58 (2016).

II. OUTCOMES, MORAL EXPERTISE, AND PUNITIVE DAMAGES

Answering that question requires consideration of the virtues and vices of judicial centralization. Judicial centralization takes multiple forms in this context—it encompasses a shift in power from juries to judges, from trial judges to appellate judges, and from states to the federal judiciary. Each shift reflects a movement from more widely dispersed and closer-to-the-ground actors to a narrower group exerting a form of top-down control. The normative implications of centralization apply to these intertwined strands in different ways. Still, the overarching phenomenon is striking and important—and worth taking into account regardless of whether one agrees with the outcome of each individual decision.

This section begins with a discussion of judicial centralization's predictable effect on the outcomes of punitive damages awards and, in particular, on the outcome effects that seem to especially motivate the Supreme Court: uniformity and predictability. While uniformity and predictability have virtues, they also come with corresponding losses in the values associated with variation and more deeply particularized consideration of cases. Next, the section turns to the question of institutional competence. In most views, the assessment of punitive damages requires not only factual determinations, but also at least some element of moral assessment.[150] The question of which types of actors are best situated to exercise this type of "moral expertise" is complex. On the whole, neither the outcome dimension nor the institutional competence dimension yields a definitive reason to favor or disfavor centralization—although the analysis may place a strong thumb on the scale one way or the other for those with strong priors on jurisprudential questions about tort law or the role of courts.

A. *Centralization's Systemic Outcomes*

1. The Upside of Centralization: Uniformity and Predictability

First, centralization promotes uniformity. Uniformity has been the apparent motivating concern behind much of the Court's jurisprudence in this area. On the few occasions where the justices have directly attempted to explain the shift in authority away from ground-level actors, concerns about uniformity and predictability have been at the forefront. In *Gore*, for instance, Justice Breyer (joined by Justices O'Connor and Souter) wrote separately to explain why the longstanding "presumption of validity" in jury verdicts was overcome

150. Even some law and economics scholars permit consideration of reprehensibility in limited circumstances; Professors Polinski and Shavell, for instance, argue that an assessment of reprehensibility may come into play when an individual (but not a corporate) defendant has acted maliciously. Polinski & Shavell, *supra* note 3, at 905–06.

in the case and explained that creating law, rather than relying on a "decisionmaker's caprice," would help "assure the uniform general treatment of similarly situated persons that is the essence of law itself."[151]

The *Gore* guideposts themselves hint at this rationale. For instance, the third guidepost, the relationship between the punitive damages award and other types of penalties that could be imposed for similar conduct, considers concerns about uniformity across cases, and in practice, lower courts have generally applied the third guidepost by considering the punitive damages awards issued in similar cases within their jurisdiction. The majority in *Cooper* used a similar line of reasoning, offering that "*de novo* review tends to unify precedent" and "stabilize the law."[152] The scholarship has also picked up on this concern, and a number of prominent commentators have argued that a perceived absence of uniformity is the key problem that the Court's jurisprudence does or should seek to solve.[153]

This uniformity operates across different dimensions. At the broadest level, the Court's constitutional limits supersede state legislation or common law developments that allow for different considerations to play different roles across the fifty states. In every jurisdiction in the country, both the *Gore* line of cases' "substantive" rules about what is excessive and *Philip Morris*'s "procedural" rule limiting consideration of third-party harms supplant disparate state law approaches.[154] One level down the chain, the shift from trial judges to appellate judges with presumably broader cross-case perspectives is plainly intended to promote uniformity, although there is some evidence that the success of that effort has been mixed.[155] And there is a widespread belief, obviously at play in the Court's decision in *Oberg* and *Exxon Shipping*, that jury decisions create greater variability than judge-made decisions—and, in particular, that there is a greater tendency for juries to issue "outlier" awards.[156]

151. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 587 (1996) (Breyer, J., concurring).

152. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 436 (2001) (internal quotation marks omitted) (quoting Ornelas v. United States, 517 U.S. 690, 697–98 (1996)).

153. *See* Jeffrey L. Fisher, *The* Exxon Valdez *Case and Regularizing Punishment*, 26 ALASKA L. REV. 1, 1 (2009) (arguing that the reasoning in *Exxon Valdez* reveals that the Court's efforts to rein in punitive damages are motivated "not so much because of the size of the awards . . . but because of such awards' perceived unpredictability"). For a trenchant criticism of the Court's "undue confidence" in its diagnosis of worrisome unpredictable jury awards, see Sharkey, *The* Exxon Valdez *Litigation*, *supra* note 1, at 38–46. Those who view punitive damages as serving a quasi-criminal role tend to express particular concern on this front.

154. A number of scholars have commented on this "constitutionalization" or "federalization" of punitive damages. *See, e.g.*, Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1558–67 (2009); Rustad, *supra* note 1, at 466.

155. *See* Laura J. Hines & N. William Hines, *Constitutional Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma*, 66 HASTINGS L.J. 1257, 1276–315 (discussing inconsistencies in the manner in which courts apply the guideposts).

156. The use of empirical and experimental data has been the subject of a lively debate. For perhaps the most prominent presentation of empirical data on the argument, based on a series of controlled

This last dimension has drawn the most attention, especially from empiricists.[157] As Professors Theodore Eisenburg and Michael Heise summarized, "After decades of dispute, it is now generally understood that the bulk of punitive damages awards have been reasonably sober, modest in size, and relatively stable over time, though some groups continue to question that reality."[158] And notably, in *Exxon Shipping*, the Court expressly disclaimed reliance on some prominent scholarship that had been funded in part by Exxon itself.[159] Although there are grounds for questioning the extent to which jury awards reduce uniformity, for present purposes, we can assume that a shift to judges promotes uniformity as the Court appears to believe.

So the question becomes: why is uniformity important in the context of punitive damages? Uniformity might be good in and of itself—a sense that similar cases will be treated similarly is, after all, deeply rooted in notions of fairness. There is something profoundly disconcerting about the possibility that the consequences of a tort depend on the luck of the draw. The principle that like cases should be treated alike runs deep as a fairness norm. It is worth noting that, even setting aside variation among decisionmakers, the principle is in tension with the heavy dose of variability inherent in the tort system, in which both damages questions—like what value to place on pain and suffering—and

experiments, that juries are likely to issue wildly divergent and irrational punitive damages awards, see CASS SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE, at vii–2, 4–5, 17 (2002). This landmark book, however, has been subject to heavy criticism both for its methodology and its normative conclusions. *See, e.g.*, Neal R. Feigenson, *Can Tort Juries Punish Competently?*, 78 CHI.-KENT L. REV. 239, 246–47 (2003) (book review) (critiquing simulation technique underlying studies); Catherine M. Sharkey, *Punitive Damages: Should Juries Decide?*, 82 TEX. L. REV. 381, 383–84 (2003) (book review) [hereinafter Sharkey, *Should Juries Decide?*]; Neil Vidmar, *Experimental Simulations and Tort Reform: Avoidance, Error, and Overreaching in Sunstein et al.'s* Punitive Damages, 53 EMORY L.J. 1359, 1359–60 (2005) (book review).

157. *See, e.g.*, Brian H. Bornstein & Sean G. McCabe, *Jurors of the Absurd? The Role of Consequentiality in Jury Simulation Research*, 32 FLA. ST. U. L. REV. 443, 444–45 (2005) (discussing cross-cutting problems with the validity of results obtained from experimental jury simulations that lack real-world consequences); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 743 (2002) [hereinafter Eisenberg et al., *Juries*] ("The relation between punitive and compensatory awards in jury trials is strikingly similar to the relation in judge trials. For a given level of compensatory award, there is a greater range of punitive awards in jury trials than in judge trials. The greater spread, however, produces trivially few jury awards that are beyond the range of what judges might award in similar cases."); Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 493–96 (2005) (describing a number of studies, some of which suggest that jury-made punitive damages awards will have greater variation than judicially imposed awards and some of which found no difference).

158. Theodore Eisenberg & Michael Heise, *Judge-Jury Difference in Punitive Damages Awards: Who Listens to the Supreme Court?*, 8 J. EMPIRICAL LEGAL STUD. 325, 325–26 (2011).

159. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 501 n.17 (2007). For a discussion of the impact of this remarkable footnote on academic scholarship, see Lee Epstein & Charles E. Clarke, Jr., *Academic Integrity and Legal Scholarship in the Wake of* Exxon Shipping*, Footnote 17*, 21 STAN. L. & POL'Y REV. 33, 35–36 (2010).

substantive questions—like whether a course of action was negligent—are routinely left to juries and governed by common law.[160]

Ultimately, the Court's focus on uniformity is largely directed towards its more practical counterpart, predictability. "The real problem," Justice Souter concluded in *Exxon Shipping*, "is the stark unpredictability of punitive awards."[161] In *Exxon Shipping*, the Court offered at least a surface-level explanation: "[A] penalty should be reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another."[162] In other words, predictable punishments establish the incentives around which actors can plan their behavior, which is, implicitly, an important role for law.[163]

It is worth stopping to emphasize an important point: in general, punitive damages may only be issued for intentional or reckless torts.[164] Why, one might well ask, do we care if would-be-tortfeasors can plan out their intentional wrongdoing with a clear-eyed view of the consequences? One answer might be that, as a practical matter, we do not care whether tortfeasors behave recklessly or intentionally, or merely negligently; we just want them to behave in the economically optimal way, and punitive damages awards that are predictable could create the right incentives to encourage that optimal behavior.

As a normative matter, whether this response makes sense depends on one's view of the purposes of tort law generally. Law and economics scholars, for instance, have argued that the purpose of punitive damages—if any—is simply to require actors to internalize the costs of their wrongdoing, and punitive damages awards that are predictable may in some sense serve this function.[165] Put differently, under the law and economics approach, punitive damages essentially "perfect the cost-internalization strategy expressed in the Hand Test."[166] The law and economics movement focuses, in particular, on what's known as "optimal deterrence"—the idea is that the sanction for

160. *See* Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407 424–26 (1999).

161. *Exxon Shipping*, 554 U.S. at 499.

162. *Id.* at 502.

163. As Professor Jill Wieber Lens has explained, Justice Holmes's "bad man" is a hypothetical person who is impervious to moral judgment. Jill Wieber Lens, *Justice Holmes's Bad Man and the Depleted Purposes of Punitive Damages*, 101 KY. L.J. 789, 815 (2013) [hereinafter Lens, *Justice Holmes's*]. It thus makes no sense to talk about "punishment" because "punishment" would serve no purpose for such an actor. *Id.*

164. For a discussion of what kinds of cases generally result in punitive damages, see Eisenberg et al., *The Decision To Award Punitive Damage Awards: An Empirical Study*, 2 J. LEGAL ANALYSIS 577, 587–88, 598–600 (2010).

165. *See* Calandrillo, *supra* note 1 at 779 (explaining that the law and economics movement suggests using punitive damages to create socially optimal deterrence, rather than arbitrary penalties so that injurers will internalize the costs of their actions).

166. *See* Sebok, *Normative Theories*, *supra* note 1, at 317.

wrongdoing should be set at a level that will promote the socially desirable level of a particular behavior.[167] Some forms of well-calibrated punitive damages may have a role in doing just that, especially if there is reason to think a tort will be underdeterred without some form of supplemental penalty.[168] And in a well-functioning system, predictability may play an important role in allowing actors to assess whether their actions are worth the costs.

From other perspectives within the tort scholarship, the role for predictability is far less clear. In particular, if tort law is understood to instantiate a system for dealing with *wrongs*,[169] "optimal deterrence" is not the name of the game, and allowing would-be tortfeasors to precisely calibrate the likely costs of a violative course of action could well be counterproductive.[170] If those in charge of a large corporation ran the math and decided that the predictable costs of intentionally or recklessly injuring an individual was economically rational, that would be all the more reason to impose a greater punitive damages award. As Professors Galanter and Luban put it:

> Only by imposing punitive damages of a different order from compensatory damages can a jury convey the message that a norm is categorical, that it demands compliance and not cost-benefit analysis. The point is to make the numbers on the balance sheet so ridiculous that the offender stops looking at the balance sheet.[171]

To put the point somewhat differently, if one thinks that "total deterrence," rather than "optimal deterrence," is the right framework for intentional or reckless torts, then predictability undermines this aim.[172] The

167. *See* Calandrillo, *supra* note 1, at 779 (explaining that punitive damages should be viewed "as a means of creating socially optimal deterrence and levels of care").

168. *See id.* at 779–81; Polinksky & Shavell, *supra* note 3, at 890. For a normative argument that if the purpose of punitive damages is simply deterrence, they fail on their own terms, see Sebok, *Normative Theories*, *supra* note 1, at 316.

169. For more on these schools of thought, see *supra* note 3. The two understandings of tort law are closely related, but their differences tend to be particularly salient in the context of punitive damages. From a corrective justice standpoint, the aim of a tort suit is to return the victim to the position he was in prior to being harmed; it stems from a sense that it is only just for a wrongdoer, rather than an innocent victim, to bear the costs of a tort. *See* Calandrillo, *supra* note 1, at 779. Corrective justice thus promotes a return to the status ex ante. *Id.* By contrast, under redress theory, tort law does not seek to *annul* a misdeed; rather, it seeks to have the misdeed publicly acknowledged, to "assign responsibility to a wrongdoer for having wronged the victim." Goldberg, *Constitutional Status*, *supra* note 3, at 602; *see also* John C. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 925–26 (2010) (explaining that corrective justice theories understand tort law as being fundamentally about "loss," whereas the civil redress theory stresses tort law's role as a law of "wrongs"). Punitive damages are a considerably more natural outgrowth of redress theory.

170. *See* Markel, *supra* note 3, at 243.

171. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1430 (1993).

172. Colby, *supra* note 2, at 471 ("[I]n an optimal deterrence regime, the actor 'is entitled to harm the victim so long as he pays for the harm (with the expectation that this entitlement will induce him

whole point is to prevent people from making cost-benefit analyses that lead them to violate their duties towards others.

As a jurisprudential matter, moreover, the focus on predictability is somewhat baffling, except as a post-hoc justification for reducing large awards. The Court's substantive rules are a grab bag of limitations, drawn from divergent theories of punitive damages,[173] but one thing that does seem clear is that the Court has not fully adopted the type of deterrent approach adopted by the law and economics movement.[174] For instance, the first and "perhaps the most important"[175] *Gore* guidepost—reprehensibility—depends on factors like the defendant's mindset, which has little to do with the overall optimality of a particular course of action. And in *Cooper*, before deciding that appellate courts are better suited than trial judges to assess which awards are too large, the Court engaged in a strikingly direct discussion of the scholarly literature before squarely rejecting the idea that optimal deterrence was the relevant consideration.[176] Indeed, many commentators have argued that the Court has

to take optimal care),' whereas in a complete deterrence regime, the actor 'is not entitled to harm the victim even if [he] is willing to pay for that harm.'" (second alteration in original) (quoting Kenneth W. Simmons, *Deontology, Negligence, Tort, and Crime*, 76 B.U. L. REV. 273, 273 (1996))).

173. For instance, within the *Gore* guideposts, the relationship to other penalties (guidepost three) and the ratio of punitive to compensatory damages (guidepost two) make sense within a framework focused on deterring and regulating conduct in a law and economics sense, whereas the first is basically anathema to that approach. *See* Steven L. Chanenson & John Y. Gotanada, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the* BMW/State Farm *Guideposts*, 37 U. MICH. J.L. REFORM 441, 442 (2004).

174. *See* Rustad, *supra* note 1, at 462 (describing the Court's "microanalysis of punitive damages" as "judicial miniaturism" and observing that the Court's focus on individual retribution is evocative of a "punitive damages puppeteer" akin to the puppeteer in Plato's *Allegory of the Cave*). While I share in some of the spirit of Professor Rustad's work, the thrust of his argument is that the Court is myopically focused on the retributive focus of punitive damages at the expense of other purposes, like public deterrence. I am doubtful that the Court's jurisprudence is sufficiently coherently theorized to even be characterized as myopic—while there can be no doubt that the Court has not adopted a law and economics approach full bore, its focus on predictability and the relationship between actual damages and punitive damages are certainly evocative of that approach, and it seems clear that the Court is attracted to it at a policy matter. *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 438 (2001). Moreover, in my view—which I intend to expound in future work—even a notion of tort law and punitive damages focused on retribution and redress can encompass some level of publicly oriented deterrence. Individual plaintiffs who go through the difficulty of litigation and uncover intentional abuses of power have a real, personal interest in feeling like the outcome of the litigation will not simply be for the wrongdoing to be "costed out," leaving the guilty defendant in a position where from his or her perspective it may make sense to continue with the wrongdoing.

175. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996).

176. *Cooper*, 532 U.S. at 439–40. After expressly engaging with Professors Polinksy and Shavell's article and a Judge Calibresi opinion espousing a similar approach, the Court explained that "deterrence is not the only purpose served by punitive damages." *Id.* at 438–39. Even with respect to deterrence, the Court explained that "it is not at all obvious" that this purpose can be served only by an "optimal deterrence" approach. *Id.* at 439. The Court went on to explain that "[c]itizens and legislators may rightly insist that they are willing to tolerate some loss in economic efficiency in order to deter what they consider morally offensive conduct, albeit cost-beneficial morally offensive conduct; efficiency is just one consideration among many." *Id.*

gone too far in prioritizing the "punitive," revenge-oriented aspect of the Court's jurisprudence at the expense of deterrence interests.[177]

None of this is to say that predictability and uniformity are irrelevant. It seems clear that there is some basic virtue at stake in the idea that like cases should be treated alike, and centralization undoubtedly promotes that to at least some extent—although in this context, it notably does so only by *reducing* large awards. At a broad level, however, the question is whether these values are sufficiently great to overcome the other implications of increased centralization—including the values that are promoted by the *absence* of predictability and uniformity.

2. The Downsides of Centralization: Loss of Variation and Particularity

The flipside of uniformity is variation—and the concomitant value of particularity. Equally obvious, the practical consequence of highly variable punitive damages awards is a decrease in predictability.

This takes at least two forms. First, and more obviously, is the form of variability that arises because different decisionmakers (juries or judges at different levels or jurisdictions) are inclined to treat the same case differently. This is the downside of the standard fairness principle described above. This type of variation may be the result of mere chance—if, for instance, judicial decisions vary based on what the judge had for breakfast.[178] In that sort of circumstance, it is difficult to argue for variation on its own terms (except to the extent that the resultant lack of predictability may serve a deterrent function as discussed above). Two different juries may produce different punitive damages awards—and as noted above, there is some indication that juries ultimately issue punitive damages awards with a higher overall variance.[179]

But an analogous type of variation can also have important, and underrecognized, upsides. In particular, differences across jurisdictions or across decisionmakers are not necessarily bad things. Variation across states, for instance, allows states to serve their long-acknowledged role as "laboratories of democracies."[180] As it currently stands, the Court's excessiveness jurisprudence would seem to prohibit a wide range of possible legislative approaches authorizing especially high punitive damages awards for certain kinds of

177. *See, e.g.*, Rustad, *supra* note 1, at 462; Sharkey, *Punitive Damages as Societal Damages*, *supra* note 2, at 363; *see also* Sharkey, *The* Exxon Valdez *Litigation*, *supra* note 1, at 27 ("By elevating a single punitive damages goal—that of retributive punishment—the Court sets the stage for a clash between state courts and legislatures that might be inspired to define their legitimate state interests in punitive damages differently.").

178. This idea is widely, but probably apocryphally, attributed to Jerome Frank. *See* Brian Leiter, *American Legal Realism*, *in* THE BLACKWELL GUIDE TO PHILOSOPHY AND LEGAL THEORY (M. Golding & W. Edmundson eds., 2005).

179. *See* Eisenberg et al., *Juries*, *supra* note 157, at 617.

180. *See* Klass, *supra* note 154, at 1576.

egregious misconduct, perhaps upon specific findings, and so it would be difficult to tell what type of policy impact such rules have.

More broadly, different localities have different interests they may seek to vindicate with punitive damages. As Professor Rustad put it, "Punitive damages vindicate different interests in a state with a large agricultural sector than in one where software licensing, high technology, or Internet businesses drive the state economy."[181] But the point applies more narrowly: even setting aside differences in state laws, variations in awards by juries in different communities within a state may reflect different practical interests and moral intuitions across those communities. If a defendant has interactions in multiple communities, it is not clear from a normative perspective why they should not be, to at least some extent, accountable to the norms of those communities. And it is even less clear that a centralized decisionmaking body in Washington, D.C., has much to add to that judgment. More straightforwardly, variability at the jurisdictional level gives people more options, to the extent they can choose where to do business or live.

Second, variability may result not from different decisionmakers but from different underlying circumstances in the case. A rich form of particularity requires room for variation. In short, cases that seem similar from ten thousand feet can be, on the ground, quite different. Indeed, the very example that the Supreme Court invoked as "anecdotal evidence" that variation is a problem illustrates the point.[182] In *Exxon Shipping*, the Court relayed the following about *Gore*:

> One of our own leading cases on punitive damages, with a $4 million verdict by an Alabama jury, noted that a second Alabama case with strikingly similar facts produced "a comparable amount of compensatory damages" but "no punitive damages at all." As the Supreme Court of Alabama candidly explained, "the disparity between the two jury verdicts . . . [w]as a reflection of the inherent uncertainty of the trial process."[183]

But even a surface review of the two cases the Court cites reveals a critical difference: in only one of the cases did the plaintiffs adduce evidence that the misconduct was intentional—an absolutely critical question in assessing the appropriateness or amount of punitive damages. The "inherent uncertainty of the trial process" that the Alabama court referred to is not a story about irrational juries—it's a story about the fact that not every civil case will uncover equivalent evidence of wrongdoing.[184] Recall that in *State Farm*, an expert

181. Rustad, *supra* note 1, at 523.

182. Exxon Shipping Co. v. Baker, 554 U.S. 471, 500–01 (2007).

183. *Id.* (alteration in original) (omission in original) (first quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 525 n.8 (1996); and then quoting BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 626 (Al. 1994) (per curiam)).

184. BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 626 (Al. 1994) (per curiam).

testified that evidence of the insurance company's intentional, nationwide scheme would be discovered in approximately one out of fifty thousand cases.[185]

Cases, of course, can be different in ways that are subtler than that. When it comes to evaluating each case in its full richness, the actors closest to the ground—juries and trial judges—have a dramatic advantage. As the dissent in *Cooper* stressed, the Court has itself acknowledged that "[t]rial judges have the unique opportunity to consider the evidence in the living courtroom context, . . . while appellate judges see only the cold paper record."[186]

This is especially so when questions turn on credibility, which tend to be of particular importance in questions of intent or motive—issues that are crucial to the assessment of punitive damages. But even beyond credibility determinations—no matter how strong an appellate judge's grip on the record or how good her clerk—hours spent with a binder of transcripts cannot possibly bring a case alive with the richness of being present at an actual trial.[187] The appellate court "is more removed from the vagaries and sympathies that arise from the trial process."[188] And appellate courts, most especially the Supreme Court, may well be tempted to establish broadly applicable rules even when adjudicating particularized disputes.[189] In its ideal form, the common law system, coupled with appellate review, leads to the emergence of responsive, fact-specific rules that come about from the proper resolution of particularized cases. But on the margins, decisions made with an eye towards establishing the correct rule for future cases to follow may shortchange the particular facts of a case that caused a jury or trial judge to issue a particularly high award. Writing a useful and generalizable opinion, in other words, may come at the expense of particularity, even if only in subtle ways.

More broadly, particularity is a deeply embedded norm in most conceptions of tort law, which is replete with rules like the eggshell skull rule and overwhelmingly fact-sensitive standards that govern everything from proximate cause to reasonableness. Under the relational theory of tort law, where the dignity of the injured is of particular concern, this makes sense. Arguably, punitive damages play a meaningfully different role than these other fact-sensitive tort questions. In *Cooper*, for instance, the Court concluded that

185. *Campbell II*, 538 U.S. 408, 415 (2003).

186. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 445 (2001) (Ginsburg, J., dissenting).

187. *See generally, e.g.*, Douglas A. Kysar, *The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism*, 9 EUR. J. RISK REG. 48, 54 (2018) ("Each individual dispute, in turn, can be addressed with specific care and concern by the judge and jury who evaluate it. Broad principles structure the resolution of the dispute, but the court remains equipped to take account of individual nuances in every case.").

188. Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 952 (2006).

189. *See id.*

de novo appellate review of punitive damages is acceptable under the Seventh Amendment because the appropriate sanction is more of a moral question than a factual one.[190] But particularization seems just as important in evaluating the totality of a defendant's actions as in deciding more obviously factual questions about the sequence of events or the defendant's intention, to the extent that those concepts can be separated at all in practice.[191] In making that evaluation, the advantage in institutional competency surely belongs to the entities closest to the ground.

B. *Institutional Competence and Moral Expertise*

1. Legal Perspective vs. Community Norms

Uniformity, of course, is not the same as "getting it right." And so even if uniformity may have virtue in any legal context, another corresponding drawback is that a uniform approach can be uniformly *wrong*. Centralization promotes the implementation of a single, unified vision. In some sense, what the Supreme Court has done over the last few decades is implement its vision of punitive damages and create a more centralized structure for implementing that vision. And the Court has been largely successful in that effort.[192] Whether that vision is a desirable one as a substantive matter depends upon one's policy preferences and, perhaps, on empirical questions beyond the scope of this paper. From a more systemic perspective, however, the more important question is whether there is reason to think that the Court is so well-suited to addressing the normative issues at stake in punitive damages that its vision should supplant those of other decisionmakers.

In other words, to what extent do judges, and especially the Court, have a claim to "moral expertise" that suggests that their vision of the purposes and limits of punitive damages should win? This is a difficult question, one that goes to the heart of the question of what the role of the judiciary is. There is not a definitive answer to these broad questions, but it is worth taking a serious look at the threads most relevant to the context at hand.

190. *See* Sebok, *What Did Punitive Damages Do?, supra* note 17, at 164–65, 178 (arguing persuasively that the historical understanding on which the Court based this line of argument was entirely incorrect).

191. *See* Jill Wieber Lens, *Punishing for the Injury: Tort Law's Influence on Defining the Constitutional Limitations on Punitive Damage Awards*, 39 HOFSTRA L. REV. 595, 621–22 (2011) [hereinafter Lens, *Punishing for the Injury*] (arguing that the Court's focus on consistency is inconsistent with the private tort law conception that the Court has seemed to adopt in other respects).

192. *See, e.g.*, N. William Hines, *Marching to a Different Drummer: Are Lower Courts Faithfully Implementing the Evolving Due Process Guideposts To Catch and Correct Excessive Punitive Damage Award?*, 62 CATH. U. L. REV. 371, 401–02 (reviewing five hundred cases and concluding that there is some variation in how lower courts interpret the *Gore* guideposts in particular circumstances; on the whole, lower courts carry out the spirit of the guideposts with little resistance).

As an initial matter, as compared to state courts, federal courts have a unique institutional perspective with respect to issues that are national in scope or effect.[193] State courts, by contrast, are closer to the issues that affect their states' populations. The examples adduced by Professor Rustad put the point in sharp focus:

> A jury in Alabama, for example, awarded punitive damages in a case where a large agribusiness firm systematically cheated hundreds of chicken farmers by underweighing their chickens. Arizona, which has a large health-oriented population, imposes punitive damages by statute for willful misconduct in health spa contracts. California places a high value on the confidentiality of medical information, and provides punitive damages for unlawful disclosure by providers. California, as the center of the U.S. entertainment industry, also imposes punitive damages for the unauthorized commercial use of a deceased personality's name, voice, or likeness. California uses the sanction of punitive damages to protect its considerable fine art holdings from being altered or destroyed, and finally, the remedy of punitive damages for rent skimming protects the large numbers of new immigrants to California.[194]

A less-local court system would surely be less likely to appreciate the particular repugnance with which local juries might view these sorts of industry-specific harms. More generally, even setting aside discrete issues along these lines, state courts may be more focused on issues that specifically affect the general public in their states, rather than focusing on a more systemic or abstract view of the law. For better or for worse, this phenomenon may be heightened by the extent to which state judges may be elected or appointed through more politically responsive processes.

As compared to the population at large, federal courts—and the Supreme Court in particular—are different in at least two broad, salient categories.[195]

193. In this Article, I do not take up the quite difficult questions of how to deal with the extraterritorial impact that large punitive damages in one state may have, which has been discussed at length by others. Professor Sharkey, in particular, has argued that a major role the Court should play is in preventing states from attempting to legislate across state lines. *See, e.g.*, Sharkey, *Federal Incursions, supra* note 25, at 455–56. For another nuanced discussion of this phenomenon, see Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1420–28 (2006).

194. Rustad, *supra* note 1, at 523.

195. For a theory of when juries are and should be permitted to make normative judgments, see Gergen, *supra* note 160, at 417. Gergen argues that a key driver of when juries are permitted to make normative decisions is whether the issue implicates economic interests as opposed to physical personal interests. *See id.* at 413 ("While we are willing to let ordinary intuitive morality define obligation in the personal sphere, a different, more instrumental morality reigns in the economic sphere."). Gergen does not take up the question of punitive damages, but it is worth noting that some courts that do consider seemingly economic injuries in punitive damages cases have suggested that economic injuries, and perhaps especially intentional ones, may be more akin to physical injuries in some cases. *See, e.g.*, Campbell v. State Farm Mut. Auto. Ins. Co. (*Campbell III*), 98 P.3d 409, 415 (Utah 2004) ("As the facts of this case make clear, misconduct which occurs in the insurance sector of the economic realm is

First is the professional dimension. It seems fair to assume that legal training and judicial experience make judges better at some forms of moral reasoning.[196] In particular, judges are better at making decisions that are more "prudential" or made with an eye towards how the case at hand fits in with the other cases.[197] Judges may encounter a wide array of different forms of wrongdoing, have a broad perspective on the penalties that are available or ordinarily imposed, and are trained to consider questions like what the precedential value of a decision (in a formal or informal sense) will have on other cases and the public at large.[198] Juries are often said to be more likely to make "emotional" decisions.[199] This arguably cuts in both directions: to the extent that one role of the jury is to serve as the conscience of society, it is unclear why some level of emotion would be categorically inappropriate in assessing the gravity of harms.

Judges are also systematically different from the public in other respects. The Supreme Court, in particular, is whiter, more male, older, and wealthier than the general population as are federal trial and appellate judges.[200] State court judges are also disproportionately white and, especially, male,[201] and it seems reasonable to assume that as lawyers, they also systematically differ from the populations they serve in regard to wealth, class, or educational dimensions. It is at least plausible that such demographic differences affect the way that the

likely to cause injury more closely akin to physical assault or trauma than to mere economic loss. When an insurer callously betrays the insured's expectation of peace of mind, as State Farm did to the Campbells, its conduct is substantially more reprehensible than, for example, the undisclosed repainting of an automobile which spawned the punitive damages award in *Gore*.").

196. For a discussion of the unique moral perspective that lawyers have, see Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 936–48 (2009).

197. *See, e.g.*, Gergen, *supra* note 160, 415–16.

198. For a systematic account of relevant differences between judges and juries, see David A. Logan, *Juries, Judges, and the Politics of Tort Reform*, 83 U. CIN. L. REV. 903, 915–27 (2015).

199. *See, e.g.*, Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179, 183 (1998) ("Judges are less susceptible to emotional factors, less likely to be unduly influenced by a defendant's wealth, more experienced in imposing punishment, and more knowledgeable of the punishment imposed in other cases.").

200. *See* BARRY J. MCMILLION, CONGRESSIONAL RESEARCH SERV., R43426, U.S. CIRCUIT AND DISTRICT COURT JUDGES: PROFILES OF SELECT CHARACTERISTICS 1, 4, 15 (2017), https://fas.org/sgp/crs/misc/R43426.pdf [https://perma.cc/HB8S-PWBL]. As of June 2017, women comprised 37% of circuit court judges and 34% of district court judges (as compared to 33% of the Supreme Court, and 51% of the population). *Id*. Seventy-five percent (75%) of circuit court judges and 71% of district court judges were white (non-Hispanic), as compared to seven-ninths (around 78%) of the Supreme Court and 60% of the population. *Id.* Also, as of 2017, the Center for Public Integrity noted that at least six, and possibly all nine, of the Supreme Court justices were millionaires, with Justice Breyer's net worth in the range of at least $5 million and Chief Justice Roberts' net worth above $2.5 million. *See* David Levinthal, Lateshia Beachum & Carrie Levine, *Supreme Court a Millionaire's Club*, CTR. FOR PUB. INTEGRITY (June 22, 2017), https://publicintegrity.org/federal-politics/supreme-court-a-millionaires-club [https://perma.cc/FZN3-N7ST].

201. *See generally* Tracey E. George & Albert H. Yoon, *The Gavel Gap: Who Sits in Judgment on State Courts?*, GAVEL GAP, https://gavelgap.org/pdf/gavel-gap-report.pdf [https://perma.cc/N5HH-32WC] (finding that 57% of state trial court judges are white men).

judges view punitive damages cases.[202] As noted above, well-entrenched cultural narratives state that juries are predisposed to be biased against wealthy or corporate defendants.[203] But saying that these decisionmakers treat different types of defendants differently tells us little about which approach is right.

The Courts' elite makeup may affect its sympathy for particular parties, and not necessarily always in a negative way. Assume, for instance, that Supreme Court justices—having generally graduated from Harvard or Yale Law Schools—are more likely to personally know executives in major, national corporations. It may well be that this gives them a more realistic understanding of the types of pressures corporate defendants and high-level employees experience at a human level—how easy, for instance, it can be for a perfectly normal person to focus on their own professional goals without taking a broader view of the impact on society, or how frustrating (and easy) it might be to have a corporate cost-cutting measure be construed by underlings as pressure to engage in more egregious misconduct. And they may indeed be less likely to villainize white-collar defendants simply because they work for banks and be sympathetic to the possibility that those in seemingly privileged places can face any number of outside anxieties and pressures. It would not necessarily be an injustice if a decisionmaker had a more realistic understanding of these sorts of issues.

But the downside of this story is clear. If the norms of "elites" running major businesses are out of sync with how the rest of society thinks that business should work, that could just as easily be an argument that there is a greater need for mechanisms by which the less powerful can make that clear.[204] And the flipside of the impulse to interpret a certain type of defendant generously is the tendency to overlook evidence that the defendant at hand was actually pretty

202. *See generally* Max M. Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics*, 34 J. LEGAL STUD. 57 (2005).

203. One possible justification for preferring the judiciary relates to a cultural narrative that juries are especially hostile to the wealthy, the idea being that wealthy or corporate defendants should thus be analogized to other disfavored minorities who receive extra protection from courts. An argument along these lines would have more persuasive force if it turned out that evidence bore this out. But the existing literature suggests that juries by and large make decisions very much like judges. Robbennolt, *supra* note 157, at 493–96. And even assuming that juries systematically issued larger awards against such defendants than did judges, that could simply mean that juries have a more fervent view that even large corporations should be held to account for violating their duties to the public. Because deterrence is one of the stated purposes of punitive damages awards, the fact that juries may issue larger awards against wealthier defendants (whether corporations or individuals) does not by itself suggest bias. *See* Theodore Eisenberg et al., *The Predictability of Punitive Damage Awards*, 26 J. LEGAL STUD. 623, 628–29 (1997) [hereinafter Eisenberg et al., *The Predictability*]. *See generally* Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC'Y REV. 85 (1992) (collecting evidence that juries are not biased against big businesses). And so, we return to the question: Who gets to decide?

204. *See infra* text accompanying notes 244–56.

darn bad—a form of confirmation bias.[205] Notably, judges do *not* seem to be friendlier than juries to defendants across the board. One study, for instance, indicated that judges are more likely to impose the death penalty than are juries.[206]

2. *State Farm*: A Case Study

Take *State Farm* as a case study. The jury entered a punitive award of $145 million; the trial judge felt bound by *Gore* to reduce the award to $25 million, but the Utah Supreme Court, reviewing the rather egregious trial record, concluded that $145 million was indeed an appropriate punishment.[207] Yet a majority of the justices on the Supreme Court indicated that, at most, a punitive award amounting to a "single-digit multiplier" of the compensatory damages award ($1 million) was appropriate.[208] On remand, the Supreme Court of Utah imposed an award at the top end of the permissible range, roughly $9 million,[209] ignoring the Court's suggestion that a one-to-one ratio was "perhaps"[210] the maximum allowable award when compensatory damages are substantial.[211]

What should be made of the Court's radical disagreement with the jury and state court judges about whether $145 million was wildly out of bounds of justice or, instead, entirely reasonable? One answer may lie in prudential concerns: the Court, for instance, was obviously concerned about the downstream effects of such a large award (especially if such awards became common) and its effect on other states, which seems like a concern uniquely within the competence of the federal courts in general and the Court in particular. Along the same lines, the Court may have viewed the lower courts as insufficiently sensitive to the harms that would befall other State Farm insureds if the company were to go out of business.[212] Or perhaps the different

205. *See* Michael D. Cicchini & Lawrence White, *Educating Judges and Lawyers in Behavioral Research: A Case Study*, 53 GONZ. L. REV. 159, 179–81 (2017).

206. *See* AARYN URELL, EQUAL JUSTICE INITIATIVE, THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE 1, 14–16 (2011), https://eji.org/sites/default/files/death-penalty-in-alabama-judge-override.pdf [https://perma.cc/3BKR-A59J].

207. *Campbell III*, 98 P.3d 409, 411 (Utah 2004).

208. *Campbell II*, 538 U.S. 408, 425 (2004).

209. *Campbell III*, 98 P.3d at 420.

210. *Campbell II*, 538 U.S. at 425–26 ("The compensatory award in this case was substantial . . . .").

211. While the state court's approach to the remand after *State Farm* was not quite so bold as the Oregon court's response after *Philip Morris*, it is nevertheless hard to miss a note of frustration. *See Campbell III*, 98 P.3d at 412 ("By assigning to us the duty to resolve the issue of punitive damages by fixing an award, the Supreme Court signaled its intention to vest in us *some* discretion to exercise our independent judgment to reach a reasonable and proportionate award."); *id.* at 413 ("As long as the Supreme Court stands by its view that punitive damages serve a legitimate means to satisfy a state's objectives to punish and deter behavior which it deems unlawful or tortious based on its own values and traditions, it would seemingly be bound to avoid creating and imposing on the states a nationwide code of personal and corporate behavior.").

212. *See Campbell II*, 538 U.S. at 428.

result was driven by a different level of immersion in the facts or different levels of deference towards the actors who were most deeply engaged with the facts. On the other side, perhaps the jury was, as the Court feared, punishing State Farm for being an "unsavory business," rather than for its conduct.[213]

Ultimately, however, it is hard to read the majority opinion without a sense that the Court simply did not view State Farm's conduct as reprehensible to anywhere near the extent of the jury or the state judges. As the Utah Supreme Court put it on remand:

> In this instance, we find the blameworthiness of State Farm's behavior toward the Campbells to be several degrees more offensive than the Supreme Court's less than condemnatory view that State Farm's behavior "merits no praise" . . . . As the facts of this case make clear, misconduct which occurs in the insurance sector of the economic realm is likely to cause injury more closely akin to physical assault or trauma than to mere economic loss. When an insurer callously betrays the insured's expectation of peace of mind, as State Farm did to the Campbells, its conduct is substantially more reprehensible than, for example, the undisclosed repainting of an automobile which spawned the punitive damages award in *Gore*.[214]

It seems that what the Court viewed as routine corporate delinquency, the jury and state courts viewed as a profoundly destructive and a foundational betrayal. And *State Farm* is hardly unique in this respect.[215] Whether this is the

213. *Id.* at 423.

214. *Campbell III*, 98 P.3d at 413, 415.

215. In *Exxon Shipping*, for instance, Justice Breyer's dissent laid out the extent to which the Supreme Court was simply substituting its own judgment for that of many (albeit in the context of reviewing federal, rather than state court, judgments):

> The jury thought that the facts here justified punitive damages of $5 billion. The District Court agreed. It "engaged in an exacting review" of that award "not once or twice, but three times, with a more penetrating inquiry each time," the case having twice been remanded for reconsideration in light of Supreme Court due process cases that the District Court had not previously had a chance to consider. And each time it concluded "that a $5 billion award was justified by the facts of this case," based in large part on the fact that "Exxon's conduct was highly reprehensible," and it reduced the award (slightly) only when the Court of Appeals specifically demanded that it do so.
>
> When the Court of Appeals finally took matters into its own hands, it concluded that the facts justified an award of $2.5 billion. It specifically noted the "egregious" nature of Exxon's conduct. And, apparently for that reason, it believed that the facts of the case "justifie[d] a considerably higher ratio" than the 1:1 ratio we had applied in our most recent due process case and that the Court adopts here.
>
> I can find no reasoned basis to disagree with the Court of Appeals' conclusion that this is a special case, justifying an exception from strict application of the majority's numerical rule.

Exxon Shipping Co. v. Baker, 554 U.S. 471, 526 (2008) (Breyer, J., concurring in part and dissenting in part) (citations omitted).

result of the higher court's broader-minded judicial perspective, the contingencies of the particular personalities on the two courts at hand, or systematic selection criteria that make it likely that the justices on the Supreme Court are likely to have a series of life experiences quite different from most others, it puts in stark relief the extent to which disparate moral impressions can drive the limits placed on punitive awards.[216] And yet it does not answer the question of whose judgment should govern.

✦ ✦ ✦

Taking this all together, we are left in something of an equipoise: juries and judges have different reasonable claims to different relevant institutional competencies, and uniformity and predictability have advantages as well as real costs in this area. The different weight one may place on the different factors will likely turn primarily on one's views of larger tort theory or on broad jurisprudential questions, such as the judiciary's role in protecting wealthy defendants. For instance, to the extent punitive damages are a legitimate opportunity for communities to express moral outrage, either on behalf of society or on behalf of an individual victim, then all in all, centralization seems like the wrong direction—but to the extent that the imposition of damages is more of a technocratic exercise intended to promote an ideal level of behavior, it seems less so. And to the extent one views the judiciary, as opposed to jurors, as the best arbiters of fairness, whether for countermajoritarian or other reasons, centralization might seem like the best approach. But if the purpose of tort law is to allow for the vindication of violations of community norms, then the opposite result is reached.

III. VOICE: DECENTRALIZATION'S INDEPENDENT GOOD

In sum, considering judicial centralization of punitive damages on the dimensions of jurisprudential aims and institutional competence sheds some light on its contours but does not provide an especially clear bottom line regarding whether it is desirable. And so, this Article turns next to a discussion of a third dimension: the relationship between this judicial centralization and democratic values like self-authorship and voice. On this dimension, I argue there is clear reason for concern about judicial centralization.[217]

Understanding the stakes requires taking stock of how judicial centralization in the punitive damages domain connects with broader trends. Consolidation and federalization are increasingly the norm across a wide swath

216. *See* Eisenberg et al., *The Predictability*, *supra* note 203, at 628–29; *see also* Hans & Lofquist, *supra* note 203, at 87 (collecting evidence that juries are not biased against big businesses).

217. I like to think that De Tocqueville would agree. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 90 (Harvey C. Mansfield & Delba Winthrop eds., 2002) (1835) ("What I admire most in America are not the *administrative* effects of decentralization but its *political* effects.").

of the law.[218] Even within the traditionally diffuse realm of tort law, as Professors Golderberg and Zipursky have argued, the Supreme Court has effectively created a federal law of torts in a number of respects beyond punitive damages, controverting the spirit of *Erie* and the hornbook story that there is no federal common law.[219] A parallel phenomenon could be said to describe much of modern life. Amazon—which reportedly controls nearly half of the online retail market in the United States[220]—now also owns Whole Foods. Google (or, rather, Alphabet) is undertaking an array of ambitious healthcare projects.[221] After advocates' intense efforts over years, it has recently come to light that AT&T adds four billion records of consumers' phone calls *per day* to a surveillance program called Hemisphere, which is run in concert with the federal government.[222] Not only is this fusion of power happening, in some instances it can be happening behind the scenes in ways that are extremely difficult for the public to find out about.[223]

At the same time, less powerful individuals—along with the government itself—have been increasingly unable to exert control over the large entities that

218. For a discussion of a phenomenon notably similar to the judicial centralization I discuss here in the context of personal jurisdiction rules, see Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1253 (2018) (demonstrating that a recent Supreme Court decision on personal jurisdiction has led to the consolidation of federal lawsuits on defendant-friendly terms, and that as a result, "even more power over mass-tort litigation will be centralized in the hands of" federal multi-district litigation judges). *See also* JACOB LEVY, RATIONALISM, PLURALISM, FREEDOM 26 (2014) (discussing the "revitalized interest in federalism in a number of constitutional democracies"); Samuel Issacharoff & Florencia Marrotta-Wurgler, *The Hollowed out Common Law*, N.Y.U. PUB. L. & RES. SERIES 1, 1 (Oct. 5, 2018) (demonstrating that the proportion of litigation handled in federal, rather than state, courts has increased dramatically, and the related rise in the relative prevalence of class actions); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007); Alexandra Lahav, The New Privity 53–57 (July 2, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3413349 [https://perma.cc/DDE2-SY9T] (describing Court's jurisdictional "power grab").

219. John C.P. Goldberg & Benjamin C. Zipursky, *The Supreme Court's Stealth Return to the Common Law of Torts*, 65 DEPAUL L. REV. 433, 434–35 (2016).

220. Josh Dzieza, *Prime and Punishment: Dirty Dealing in the $175 Billion Amazon Marketplace*, VERGE (Dec. 19, 2018), https://www.theverge.com/2018/12/19/18140799/amazon-marketplace-scams-seller-court-appeal-reinstatement [https://perma.cc/DQM6-GYTN].

221. *Healthcare and Biosciences*, GOOGLE AI, https://ai.google/healthcare/ [https://perma.cc/4SDW-PYUY].

222. Dave Mass, *Before and After: What We Learned About the Hemisphere Program After Suing the DEA*, ELECTRONIC FRONTIER FOUND. (DEC. 19, 2018), https://www.eff.org/deeplinks/2018/12/and-after-what-we-learned-about-hemisphere-program-after-suing-dea [https://perma.cc/SPU8-5XM7].

223. *See Hemisphere: Law Enforcement's Secret Call Records Deal with AT&T*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/cases/hemisphere [https://perma.cc/MZ8D-CGA6] (explaining that Hemisphere only became public by serendipity—and detailing practices such as "parallel subpoenas" intended to prevent the program from ever being disclosed—and that AT&T's contract with the Drug Enforcement Agency prohibited the government from discussing the program's existence).

seem to run the world.[224] Some part of this phenomenon is surely attributable to broad economic and global trends.[225] But it is also directly traceable to the Supreme Court's recent jurisprudence, which has affirmatively disabled the legislative branch's efforts to protect the political process and made it harder for less affluent or powerful entities to affect corporate interests. By way of example, in *Citizens United v. FEC*,[226] the Court held Congress's efforts to restrain corporate influence in the political process unconstitutional.[227] The predictable result has been a dramatic influx of corporate money into politics.[228] In *Shelby County v. Holder*,[229] the Court held that an overwhelmingly popular provision of the Voting Rights Act, which prevented jurisdictions with particularly poor historical records of discrimination in elections from changing their election laws without going through a preclearance procedure, was likewise unconstitutional.[230] The predictable outcome was that most of the covered jurisdictions have since enacted restrictive laws making it harder for minorities to vote.[231] In the economic realm, the Court has put up significant roadblocks to other mechanisms that allow average individuals to band together in response to corporate power, such as unions[232] and class actions.[233]

We might hope that some combination of corporate responsibility, fear of negative publicity, genuine goodwill, and what legal restrictions remain would prevent egregious behavior—and in most instances, they probably do. But every year brings news of disasters caused by corporations that, it seems, should have done better. The examples in the Court's own jurisprudence are telling: a known alcoholic is permitted to drive an oil supertanker through a fragile ecosystem[234]; tobacco executives engage in a decades-long misinformation campaign[235]; a major insurance company has a corporate-wide scheme to

224. For a powerful discussion of this phenomenon, see Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts' Role in Eroding 'We the People's' Ability To Constrain Our Corporate Creations*, 51 HARV. C.R.-C.L. L. REV. 423, 432 (2016) (arguing that the Roberts Court's jurisprudence across a range of areas has fundamentally shifted the relationship between corporations and society).

225. Amazon's recent headlines-making headquarters selection process put the practical power and influence that such enormously important economic forces can have into high focus. *See, e.g.*, Anand Giridharadas, *The New York Hustle of Amazon's Second Headquarters*, NEW YORKER (Nov. 17, 2018), https://www.newyorker.com/tech/annals-of-technology/the-new-york-hustle-of-amazons-second-headquarters [perma.cc/XXW2-UV95].

226. 558 U.S. 310 (2010).

227. *Id.* at 319.

228. *See* Strine, *supra* note 224, at 426.

229. 570 U.S. 529 (2013).

230. *Id.* at 557.

231. Strine, *supra* note 224, at 446–47.

232. *See, e.g.*, Janus v. Am. Fed'n of State, Cty., and Mun. Emps., 138 S. Ct. 2448, 2459–60 (2018).

233. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 342 (2011).

234. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 476 (2008).

235. *See Philip Morris I*, 127 P.3d 1165, 1168–69 (Or. 2006).

defraud its customers.[236] But those cases do not seem to be isolated. A pharmaceutical company, allegedly, intentionally hides the addictiveness of opioids.[237] Facebook's failure to address the use of its platform by foreign powers may or may not have swung the 2016 presidential election.[238]

Additionally, what to major entities may seem like little more than sloppy business practices may seriously affect individual lives and communities, in both dramatic and subtle ways. Problems with Amazon's bureaucratic "court" for assessing fake user reviews put small companies out of business.[239] Facebook's secret experimentation with users' moods, which intentionally exposed some users to sadder content, affected millions.[240] The extent of damage that genuinely malicious intent at high levels could wreak is enormous, and it is far from clear that such wrongdoing will be predictably uncovered.

None of this is to say that larger or more centralized corporations are better or worse than smaller ones, or that this centralization is not preferable on a macro-level. The point is simply that *even if* this centralization is a good thing for the economy or society at large, a predictable consequence of it is a sense of increasing alienation from forces that govern even the most intimate parts of their lives. This is true even if such entities misbehave less than mom-and-pop shops (although as the above examples indicate, even if that's true, the impact of any such misbehavior could be much greater).

In light of all of this, there is good reason for the proverbial "little guy" to fear that possibilities for meaningful voice are on the decline. This effect is only compounded by heightened levels of socioeconomic stratification.[241] Wealth concentration, in particular, is associated with "sociopolitical malaise" and democratic dysfunction because of the extent to which it gives disproportionate political voice to the affluent.[242] And there is good reason to think that this

236. *See Campbell II*, 538 U.S. 408, 415 (2003).

237. *See, e.g.*, Commonwealth v. Purdue Pharma, Inc., No. 1884-CV-01808-BLS2, 2019 WL 939120, at *1 (Mass. Super. Ct. Jan. 28, 2019); *see also supra* note 10.

238. Jane Mayer, Review, *How Russia Helped Swing the Election for Trump*, NEW YORKER (Sept. 24, 2018), https://www.newyorker.com/magazine/2018/10/01/how-russia-helped-to-swing-the-election-for-trump [perma.cc/73SL-Y455] (discussing KATHLEEN HALL JAMIESON, CYBERWAR: HOW RUSSIAN HACKERS AND TROLLS HELPED ELECT A PRESIDENT—WHAT WE DON'T, CAN'T, AND DO KNOW (2018)).

239. Dzieza, *supra* note 220.

240. Robinson Meyer, *Everything We Know About Facebook's Secret Mood Manipulation Experiment*, ATLANTIC (June 28, 2014), https://www.theatlantic.com/technology/archive/2014/06/everything-we-know-about-facebooks-secret-mood-manipulation-experiment/373648/ [perma.cc/8L3P-GMYL].

241. *See* Martin J. McMahon, Jr., *The Matthew Effect and Federal Taxation*, 45 B.C. L. REV. 993, 998–1012 (2004) (describing the dramatic increase in the stratification of wealth between 1979 and 2000).

242. *See* James R. Repetti, *Democracy, Taxes, and Wealth*, 826 N.Y.U. L. REV. 825, 827, 840–50 (2001).

diminishment of voice is important for the welfare of both individuals and society.[243]

What does this all have to do with punitive damages? In short, regardless of one's take on these macro trends, if we care about individuals' and communities' ability to meaningfully engage with the world, then this is the wrong time to shift control over damage awards towards a narrower class of elite experts. And it is even more concerning for the force behind any such shift to be the least representative branch.

Tort suits are in some sense a means for developing and articulating norms.[244] In practice, punitive damages are a means of giving those norms teeth when violated by the powerful and affluent and, in particular, to push back against the implicit message that the wrongdoer is somehow more valuable than the victim or is entitled to treat the victim poorly.[245] Both punitive awards and settlements negotiated in their shadow tend to target dominant parties.[246] In many parts of the legal system, defendants can deflect blame by casting plaintiffs as overly litigious and the legal system as overly technical. That is much harder in the face of a dramatic punitive damages award, rendering punitive damages "perhaps the most important instrument in the legal repertoire for pronouncing moral disapproval of economically formidable offenders."[247] To be sure, the possibility that corporations get larger and more national in scope might well warrant corresponding national regulation in some domains. Any such shift, however, should be the product of our political process—such lawmaking is emphatically not the province of the courts. To say that *because* corporations have gotten so large that communities have difficulty engaging them, the judiciary should weaken the power of traditional forms of community voice seems to have things precisely backwards.

The downsides of judicial centralization are most stark when it comes at the cost of jury control. In times past, juries were understood as a foundational aspect of democratic participation, and accorded significant control and respect; De Tocqueville, for instance, considered the jury "the most energetic means of making the people reign," and recognized the role that the exercise of jury participation has on the jurors themselves.[248] As others have recounted, the

243. *See generally* DE TOCQUEVILLE, *supra* note 217, at 56–92 (discussing the importance of local participation and control to the "spirit of freedom"); TOM R. TYLER, WHY PEOPLE OBEY THE LAW: PROCEDURAL JUSTICE, LEGITIMACY, AND COMPLIANCE (2006) (explaining that a sense of procedural justice engenders a sense of legitimacy, which generates buy-in and voluntary cooperation).

244. Kysar, *supra* note 187, at 54 (arguing that common law tort actions can be a "decentralized and citizen-empowering means" of bringing to light the concrete harms imposed on private plaintiffs).

245. Galanter & Luban, *supra* note 171, at 1432.

246. *Id.* at 1426.

247. *Id.* at 1428.

248. DE TOCQUEVILLE, *supra* note 217, at 262 ("I do not know if the jury is useful to those who have lawsuits, but I am sure that it is very useful to those who judge them.").

jury's standing—and its practical power—has dramatically diminished over time. But it remains the case that juries are uniquely positioned to deliver a message from the community, if we let them.[249] As Professor Lahav has argued, to the extent that shifting authority away from juries "denies the validity of jurors' rational disagreement with their fellow citizens who are also judges," it infringes on the ideal of self-government.[250]

Just this past term, in *United States v. Haymond*,[251] the Court stressed the political role that juries play in enabling the people to maintain influence on the judicial function. Citing to the eighteenth-century diaries of John Adams and the nineteenth-century commentaries of Justice Story, the Court explained, "[j]ust as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions."[252]

Importantly, the Court stressed that a violation of the right to a jury trial did not only offend "the rights of the accused."[253] It also "divest[s] the 'people at large'—the men and women who make up a jury of a defendant's peers—of their constitutional authority to set the metes and bounds of judicially administered criminal punishments."[254] While that case involved criminal punishment, the broader principle that the tradition of juries protects not only accused defendants but also political power for "the people at large" has deep roots.[255]

Judicial centralization sends a message that contrasts sharply to any such ideal self-government. It telegraphs that the people are not to be trusted to assess the behavior of the corporate forces that shape their lives. When judicial centralization takes the form of the Court substituting its view of defendant's behavior for the jury's, it sends another message, too: while the jury may have thought that the defendant's behavior was egregious, the folks in Washington who understand how the world really works don't agree. What is the lesson we expect those citizens to take about how "business is done" if they rise through

249. For a compelling discussion of how the diminished public perception and role for juries relates to the expansion of the populations who are permitted to participate in them, see Laura Gaston Dooley, Essay, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 335–41 (1995) (describing the "feminization" of the jury in public imagination, and noting, for instance, that the public perception of the jury as "irrational" and overly emotional tracks the history of women's increased participation in juries).

250. Alexandra D. Lahav, *The Jury and Participatory Democracy*, 55 WM. & MARY L. REV. 1029, 1035–41 (2014) [hereinafter Lahav, *The Jury*].

251. No. 17-1672, slip op. at 3 (U.S. 2019).

252. *Haymond*, No. 17-1672, slip op. at 3 (first citing John Adams, Diary Entry (Feb. 12, 1771), *in* 2 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 3 (L. Butterfield ed., 1961); and then citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1779, at 540–41 (4th ed. 1873)).

253. *Id.* (quoting Blakely v. Washington, 542 U.S. 296, 306 (2004)).

254. *Id.*

255. *Id.*

the ranks? Neither of these are messages that seem likely to spark a sense of engagement or social responsibility. In some ways, the messaging effect of judicial decentralization is only compounded by the fact that the Court often purports to be willing to defer to other actors, even while substituting its own judgment. The Court can never say that the jury award was "slightly askew," or "suboptimal." When its impression is that the verdict is wrong, to set the award aside, the Court must declare that it was "irrational and arbitrary,"[256] regardless of how many members of the public and/or state judges decided the award was correct.

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To be clear, to say that judicial centralization is cause for concern is not to say that there is no room for judicial review or for limitations on juries and states in the punitive damages realm. In some circumstances, requiring more detailed jury instructions regarding which factors may appropriately be considered, for instance, and interventions intended to reduce the arbitrary effect of psychological phenomena like "anchoring effects" that may subconsciously affect any decisionmaker may well be sound policy.[257] And the increasingly national or even international nature of powerful actors, coupled with concerns about the extraterritorial effect of punitive damages, may be reasonable grounds for legislative responses, subject to ordinary democratic processes.[258] But the attitude towards such interventions matters. If the animating principle is that citizens and lower-level decisionmakers are irrational or lack the perspective to decide just how bad corporate policies are, then efforts to constrain punitive damages will inevitably have the effect of compounding the alienation and powerlessness that seem so ever-prevalent. On the other hand, interventions that are directed towards properly instructing juries about the relevant considerations and protecting against undue extraterritorial effects seem entirely consistent with participatory norms.[259] Ultimately, the point is

256. *Campbell II*, 538 U.S. 408, 429 (2003).

257. *See generally* Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751 (2003) (reviewing THOMAS GILOVICH, DALE W. GRIFFIN & DANIEL KAHNEMAN, HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGEMENT (2002)) (discussing implications of recent work on the role of heuristics and biases in human decision making on a wide array of legal issues, including jury decisions on punitive damages).

258. As a number of dissenting justices have pointed out, a defining feature of the Court's jurisprudence in this area is that it is strikingly legislative in style. *See, e.g.*, *Campbell*, 538 U.S. at 431 (Ginsburg, J., dissenting); Exxon Shipping Co. v. Baker, 554 U.S. 471, 516 (2008) (Stevens, J., dissenting). *See generally* Rachlinski, *supra* note 188, at 944–48 (describing legislative approaches, as opposed to adjudicatory approaches, as focused on making prospective, categorical rules, and detailing problems that can arise by focusing on particular cases in making such rules).

259. As Professor Lahav has persuasively argued, even if there are problems with jury awards in practice, that does not mean that the appropriate solution is to limit jury power:

simply that there is a real cost—albeit a diffuse and difficult one to measure—to our polity each time the ratchet is cranked, shifting this form of power over the powerful entities that affect modern life farther and farther from the people.

CONCLUSION

Judicial centralization—the defining through-line of modern punitive damages jurisprudence—has benefits and costs. The questions it implicates are fundamental, going to the heart of the relationship between democratic participation and the rule of law. Furthermore, the values on both sides of the ledger are real, and to some extent incommensurable.[260] But the shift toward judicial centralization in the punitive damages realm does not exist in a vacuum: it is part and parcel of a broader trend towards the consolidation of power in the hands of an elite few. At bottom, the centralization of control over punitive damages represents an erosion of traditional checks on power, effected by the powerful themselves, and it diminishes the already-limited power of the little guy to participate in the creation and enforcement of public norms. Given the reduction of citizen voice across so many dimensions, that is a step in exactly the wrong direction.

> If society wants to reaffirm its faith in the rationality and intelligence of its fellow citizens as individuals worthy of equal respect, the correct response to concerns of ignorance, confusion, inconsistency, and bias would be to determine which aspects of our practices within the courts ought to be changed to improve the jury's ability to do its job.

Lahav, *The Jury*, *supra* note 250, at 1051–53. For instance, we could allow juries to receive information about awards issued in other cases and provide them with more, rather than less, information about the circumstances in which appellate courts would be likely to overturn or reduce awards. *See id.* (listing ways that juries are disempowered and kept from learning relevant information).

260. *See generally* LEVY, *supra* note 218, at 25–41, 283–95 (discussing irreconcilability of pluralism and rationalism and arguing that freedom requires maintaining some amount of conceptual disharmony because both are important).