

## The Utility of a Nonconsequentialist Rationale for Civil-Jury-Awarded Punitive Damages

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### I. INTRODUCTION

Jury-awarded punitive damages are a controversial political and social issue. To some, high punitive damage awards are a sign that our civil justice system needs reform. To others, these awards are the key to taming international corporate greed. The justification for punitive damages in civil cases has continued to oscillate between a consequentialist<sup>1</sup> and a nonconsequentialist rationale.<sup>2</sup> This fluctuation in the rationale for punitive damages is nothing new. Since the Reformation, shifts between uses of the law have undergirded civil law in its struggle to replace the unified, hierarchical nature of canon law and to justify itself in both the modern and post-modern eras.<sup>3</sup> This same oscillation in rationales has surfaced concerning punishment in the criminal justice system.<sup>4</sup> The debate concerning the uses of law in moral

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1. The consequentialist rationale is sometimes called the utilitarian rationale or the deterrence rationale.

2. The nonconsequentialist rationale is sometimes called the deontological rationale or the retribution rationale.

3. John Witte sees three rationales for, or uses of, law in the Lutheran reformation of canon law:

Each of our three writers, [the Lutheran reformers Melancthon, Eisermann, and Oldendorp,] pressed the uses of doctrine to further specific applications [of law]. Melancthon applied the three uses of the law to differentiate and define the three purposes of criminal law and punishment. In his view, the civil use of the law corresponded to criminal deterrence. The theological use of the law corresponded to criminal retribution. The educational use of the law corresponded to criminal rehabilitation.

JOHN WITTE, JR., *LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION* 171 (2002). As opposed to Melancthon, I will argue that in civil law punitive damages should serve a retributive function.

4. See generally John E. Witte, Jr. & Thomas C. Arthur, *The Three Uses of the Law: A Protestant Source of the Purposes of Criminal Punishment?*, 10 J.L. & RELIGION 433 (1993-94); see also Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 862 (2002) (arguing that punishment of the innocent as a means to deter others is the worst utilitarianism extreme); John Collins Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 419 (1980)

philosophy is important to the discovery of the normative differences between criminal punishment and civil punishment. It highlights the purpose of punishing intentional corporate misconduct in the civil arena. Using moral philosophy and criminal justice literature, this Article critiques the Supreme Court's struggle to define the rationale for punitive damages. In addition, this Article shows the continuing utility of using retribution as a factor in punitive damages and discusses the harm the Court inflicts by minimizing the retributive justification and usurping the discretion of the jury.

Since the late 1970s, the convergence of law and economics has garnered increased popularity in the tort arena.<sup>5</sup> Its proponents claim the consequentialist ethic is superior to the corrective justice norms of traditional negligence analysis.<sup>6</sup> In reality, deterrence models are as subjective and as dependent on individual beliefs and biases as are the corrective justice norms of traditional negligence analysis. Despite this reality, the law and economics ethic continues to dominate the discussion and to serve as the driving force behind tort reform. This ethic is evident in the Supreme Court's recent due process analysis of punitive damages. In a recent holding on the subject, the Court, although claiming a continued role for retribution, restricted the jury's ability to effectuate punishment for egregious behavior by suggesting that appellate courts limit punitive damages to a single-digit multiple of compensatory damages.<sup>7</sup> In so doing, the Court backhandedly endorsed the law and economics, or deterrence, model of punishment and ignored the broader effects on social norms and values that result from taking the retribution analysis out of the hands of a common law jury.

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(arguing that fines are an inefficient means by which to deter organizational crimes); Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 410 (1980) (arguing that a sufficiently large fine is an equally effective deterrent that is cheaper to administer and preferable); Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 561 (2003) (arguing that the philosophy of punishment in the Federal Sentencing Guidelines should be consequentialist); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 456 (1997) (arguing that shared democratic values support a "just desert" rationale of punishment, rather than morality).

5. See e.g., Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 29–52 (1972) [hereinafter Posner, *Theory*] (discussing the negligence system in terms of law and economics); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 106 (1979) [hereinafter Posner, *Utilitarianism*] (explaining that economic analysis was, at the time, a preferred basis of legal theory over utilitarianism).

6. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 890–91 (1998) ("[E]xtra compensatory damages may be needed for deterrence purposes in circumstances in which [a defendant's behavior] would not call for punishment.").

7. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (explaining that although ratios are not binding, "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving . . . deterrence and retribution").

The Court's recent pronouncements regarding jurisdictional evidence restrictions and single-digit ratio caps endorse the consequentialist justification for punitive damages and seriously curtail the function of retribution in civil law punishment. In addition, the Court has called into question the jury's ability to properly apply the factors enumerated in *BMW of North America, Inc. v. Gore*,<sup>8</sup> for determining the proper amount of punitive damages. By establishing de novo review, the Court expanded the discretion of appellate courts, which raises important questions, such as whether appellate courts are better equipped to determine damages, whether judges are more political and, therefore, more influenced by extrinsic forces, and whether these new restrictions ultimately will harm consumers and destroy the integrity of the American market. Only time will tell, but in this struggling economy that relies so heavily on the confidence of consumers, investors, and trade partners (both foreign and domestic), can we afford to wait and see?

Part II of this Article examines the Supreme Court's modern punitive damages jurisprudence and highlights its gradual shift to a consequentialist justification. Part III explores the ethical distinction between consequentialism and nonconsequentialism and argues that a purely consequentialist scheme ultimately will degrade the values and benefits of a more mixed system. This ethical distinction is vital to an understanding of why we need citizens influenced by morality, equity, sympathy, and society to mete out civil punishments in the way of punitive damages, as opposed to so-called "rational" processes using an inflexible formula. This Article argues that a punitive damages award based on the utilitarian, deterrence model, determined by some judicially created cap, is no more rational than a decision by a jury. In Part IV, having established that the jury should be given broad discretion, this Article explores a nonconsequentialist defense of punitive damages. In the process, this Article shows the underlying social norms and beliefs that support the return of jury-made punitive damages decisions.

## II. THE SUPREME COURT'S MOVE TO A CONSEQUENTIALIST/ DETERRENCE ETHIC FOR PUNITIVE DAMAGES

In 1989, the Supreme Court decided, in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, that civil punitive damages were not subject to the Eighth Amendment's cruel and unusual punishment constraints<sup>9</sup>

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8. 517 U.S. 559 (1996). See also *infra* text accompanying notes 18–31.

9. 492 U.S. 257, 262–63 (1989).

and thus implied that punitive damages were not about punishment and retribution. The Court found the case law against applying the Eighth Amendment to punitive damages to be overwhelming.<sup>10</sup> However, the majority opinion did not reject a retributive rationale. The concurring and dissenting Justices (Brennan, Marshall, Stevens, and O'Connor) struggled to describe the meaning of punitive damages in a civil context. The best Justices O'Connor and Stevens offered was a description providing a mixed rationale: deterring future bad actors and also expressing moral outrage at what had been done to the plaintiffs and to society when the defendant chose its course of action.<sup>11</sup>

In *Browning-Ferris*, the Court did not address due process issues because the defendant failed to raise due process arguments at both the trial and appellate levels.<sup>12</sup> In their concurring opinion, Justices Brennan and Marshall signaled their due process concerns.<sup>13</sup> Justices O'Connor and Scalia had earlier expressed due process concerns in *Bankers Life and Casualty Co. v. Crenshaw*.<sup>14</sup> Furthermore, because Chief Justice Rehnquist opposed large punitive damages in an even earlier case, *Smith v. Wade*,<sup>15</sup> it was not a question of whether but rather when and how these due process concerns would appear in the Court's future opinions.

In 1996, the Court decided that due process required limiting punitive damages. In three landmark cases, the Court held that the old common law standard—that punitive awards should be overturned only if “grossly excessive”<sup>16</sup> and “unsupportable by the evidence”<sup>17</sup>—provided appellate courts with insufficient reviewing power. The Court

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10. See *id.* at 262 (“[O]ur cases long have understood [the Eighth Amendment] to apply primarily, and perhaps exclusively, to criminal pro se citations and punishments.”). The Court went on to state as follows:

To decide the instant case, however, we need not go so far as to hold that the Excessive Fines Clause applies just to criminal cases. Whatever the outer confines of the Clause's reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded. To hold otherwise, we believe, would be to ignore the purposes and concerns of the Amendment, as illuminated by its history.

*Id.* at 263–64.

11. See *id.* at 292–93 (O'Connor, J. & Stevens, J., dissenting) (discussing the historical emergence of punitive damages).

12. *Id.* at 276–77 (majority opinion).

13. *Id.* at 281–82 (Brennan, J. & Marshall, J., concurring).

14. 486 U.S. 71, 86 (1988) (O'Connor, J. & Scalia, J., concurring). See generally Forrest Campbell, Comment, *Bankers Life: Justice O'Connor's Solution to the Jury's Standardless Discretion to Award Punitive Damages*, 24 WAKE FOREST L. REV. 719 (1989).

15. 461 U.S. 30, 87–88 (Rehnquist, J., dissenting).

16. See, e.g., *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993).

17. See, e.g., *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 708 (1989).

concluded that due process required trial judges and appellate courts to review and, in some cases, curtail the size of punitive damage awards.

*BMW of North America, Inc. v. Gore*<sup>18</sup> prompted this “new and improved” due process review. The plaintiff in the initial suit, Dr. Ira Gore, Jr., purchased a “new” car from his local BMW dealer.<sup>19</sup> What Gore did not know was that the car had been damaged by acid rain.<sup>20</sup> To save \$4000, the decrease in the resale value resulting from the damage,<sup>21</sup> BMW repainted and sold the car without disclosing the repair.<sup>22</sup> For this infraction, the jury awarded the plaintiffs \$4 million in punitive damages.<sup>23</sup> Noticing the discrepancy between the compensatory and punitive amounts, the Alabama Supreme Court reduced the award to \$2 million.<sup>24</sup>

On appeal, the U.S. Supreme Court ruled that the award was grossly excessive and remanded the case to be decided consistent with its opinion.<sup>25</sup> The Court instructed future courts to consider the following three factors when reviewing punitive damages: (1) the reprehensibility of the defendant’s conduct,<sup>26</sup> (2) the ratio of punitive damages to the actual harm suffered,<sup>27</sup> and (3) the comparison between punitive damages and the civil or criminal penalties that could be imposed for comparable conduct.<sup>28</sup>

The last two factors were new and seemed to favor defendants. The Court compared the punitive damage award in *Gore* with statutory fines for consumer fraud.<sup>29</sup> Not surprisingly, the punitive damage award was far higher.<sup>30</sup> However, the Court ignored any incarceration that might have been imposed if an individual were found guilty of fraud. The Court also reasoned that the Alabama court’s consideration of conduct and injuries outside of Alabama, where other states might not find BMW’s conduct unlawful, was unfair and violated due process.<sup>31</sup>

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18. 517 U.S. 559 (1996).

19. *Id.* at 562.

20. *Id.* at 563.

21. *Id.* at 564.

22. *Id.* at 563–64.

23. *Id.* at 565. The jury heard evidence that 983 purchasers had been defrauded to the tune of \$4000 per car, or approximately \$4 million total. *Id.* at 564.

24. *Id.* at 567.

25. *Id.* at 586.

26. *Id.* at 575.

27. *Id.* at 583.

28. *Id.* at 580–81.

29. *Id.* at 584.

30. *Id.*

31. *Id.* at 572–73. The Court seemed persuaded that BMW’s conduct was not reprehensible

*Gore* was not the Court's last word on punitive damages. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,<sup>32</sup> the Court determined that punitive damages would no longer be a question of fact left to the jury. The jury in *Cooper* found, by clear and convincing evidence, that the defendant, Cooper, acted with malice, recklessness, and outrageous indifference to a highly unreasonable risk of harm when it passed off a Leatherman Tool's product as its own.<sup>33</sup> The jury awarded the plaintiff \$50,000 in compensatory damages and \$4.5 million in punitive damages.<sup>34</sup> On appeal, the Court remanded the punitive damage award.<sup>35</sup> In the face of two centuries of common law to the contrary, the Court declared that punitive damage awards were questions of law, not fact, and should be reviewed de novo, rather than under an abuse-of-discretion standard.<sup>36</sup>

In *Cooper*, the Court upheld a mixed rationale of reprehensibility and deterrence for punitive damages. The Court explained that juries acted irrationally because they were not bound by the optimal deterrence rationale. Justice Stevens wrote for the Court:

However attractive such an approach to punitive damages might be as an abstract policy matter, it is clear that juries do not normally engage in such a finely tuned exercise of deterrence calibration when awarding punitive damages. After all, deterrence is not the only purpose served by punitive damages. And there is no dispute that, in this case, deterrence was but one of four concerns the jury was instructed to consider when setting the amount of punitive damages. Moreover, it is not at all obvious that even the *deterrent* function of punitive damages can be served *only* by economically optimal deterrence. Citizens 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.<sup>37</sup>

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because it had thought it was not required to disclose the damage. BMW pointed to states such as California that had statutes that said damage less than three percent of the value of the car, or \$500, whichever was greater, need not be disclosed during the sale of a car. *Id.* at 578. The jury, in its finding of malice, likely was not persuaded that BMW acted in good faith. The jury was not given the information about fines in California. Even if given the information, the jury may have been persuaded that a \$4000 loss in value of a \$40,000 car would not have given BMW a safe harbor, even in California.

32. 532 U.S. 424 (2001).

33. *Id.* at 429.

34. *Id.*

35. *Id.* at 443.

36. *Id.* at 431.

37. *Id.* at 438–39 (internal citations and quotations omitted).

Although Justice Stevens saw a need for flexibility in determining the underlying purpose of punitive damages, he went on to argue that juries are less able to apply this mix of rationales. He concluded that juries were particularly inept at considering the third *Gore* factor, comparing fines in criminal cases with punitive damages.<sup>38</sup>

Justice Stevens's rationale is unclear and his conclusions may have no obvious explanation.<sup>39</sup> It is unfair to say that juries cannot draw comparisons, if they are not given the necessary information. In addition, one wonders why, if a jury can do complex calculations such as determining the present value of future loss of income and medical expenses, it should not be able to compare fines as one of the factors in awarding punitive damages.<sup>40</sup> Jurors also decide whether to impose a death sentence in capital murder cases. If juries are better than judges at this decision, it seems likely they are better at deciding punitive damages in a civil case when an institution harms others through intentional or reckless conduct.

Not long after *Cooper*, the Supreme Court exercised its own de novo review of a punitive damage award. In April 2003, the Court decided *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>41</sup> In the underlying suit, the Campbells were sued in tort for injuries arising from an automobile accident.<sup>42</sup> They were defended by their insurance company, State Farm.<sup>43</sup> The Campbells' insurance policy required State Farm to defend them and to act in good faith to resolve claims on their behalf.<sup>44</sup> State Farm, however, refused to settle the claims for \$50,000 (the policy limit) and insisted on a trial.<sup>45</sup> State Farm assured the Campbells that their liability would be limited to the policy limit.<sup>46</sup> A Utah jury, however, awarded punitive damages in an amount more than three times the policy limit.<sup>47</sup> After the verdict, State Farm refused to take an appeal and suggested that the Campbells sell their home.<sup>48</sup>

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38. *Id.* at 440.

39. See *infra* Part IV.D (arguing that juries should decide damages).

40. Paul J. Zwier, *The Consequentialist/Nonconsequentialist Ethical Distinction: A Tool for the Formal Appraisal of Traditional Negligence and Economic Tort Analysis*, 26 B.C. L. REV. 905, 941 (1985).

41. 538 U.S. 408 (2003).

42. *Id.* at 412–13.

43. *Id.*

44. *Id.* at 413–14.

45. *Id.* at 413.

46. *Id.*

47. *Id.* (awarding \$185,849).

48. *Id.*

The Campbells sued State Farm for bad faith in refusing to accept the plaintiff's settlement offer.<sup>49</sup> State Farm initially defended, but before trial and after its underlying appeal was denied, it offered to pay the Campbells' judgment.<sup>50</sup> The Campbells sued nonetheless and at trial exposed the reason State Farm refused settlement in the underlying law suit—settlement would not have allowed State Farm to meet certain nationwide profitability goals.<sup>51</sup> The Campbells proved that State Farm routinely denied justified claims to meet profitability targets.<sup>52</sup>

In her dissent, Justice Ginsburg explained that State Farm's Performance Planning and Review (PP&R) scheme (1) "functioned . . . as an unlawful scheme to deny benefits owed consumers by paying out less than fair value in order to meet preset, arbitrary payout targets;" (2) "adversely affected Utah residents" when State Farm "falsif[ied] or with[eld] evidence in claim files;" (3) subjected claimants to unjustified attacks on their "character, reputation, and credibility," which further prejudiced claimants against the jury if their cases went to trial; (4) exposed its claims agents to "intolerable and recurrent pressure to reduce payouts below fair value;" (5) instructed its agents to "pad files with self-serving documents" and omit critical information; (6) destroyed documents in the Campbells' file; and (7) "deliberately crafted" its business plan to "prey on consumers who were unlikely to defend themselves"—the elderly, the poor, and other consumers who were infirm.<sup>53</sup>

The jury awarded the Campbells \$2.6 million in compensatory damages and \$145 million in punitive damages.<sup>54</sup> The trial court subsequently reduced the damages to \$1 million and \$25 million, respectively.<sup>55</sup> When the Utah Supreme Court reinstated the jury verdict, State Farm appealed to the U.S. Supreme Court.<sup>56</sup>

The Supreme Court reversed and remanded (Justices Scalia, Thomas, and Ginsburg dissented).<sup>57</sup> The Court used the three *Gore* factors to justify its decision. In applying the reprehensibility factor, the Court

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49. *Id.* at 414.

50. *Id.* at 413.

51. *Id.* at 414–15.

52. *Id.*

53. *Id.* at 431–35 (Ginsburg, J., dissenting) (internal citations and quotations omitted) (noting that Mr. Campbell was himself infirm at the time of settlement, suffering from a recent stroke and Parkinson's disease).

54. *Id.* at 415 (majority opinion).

55. *Id.*

56. *Id.* at 416.

57. *Id.* at 429–38.

held that a state does not have a legitimate interest in imposing punitive damages to punish a defendant for *unlawful* acts committed outside the state's jurisdiction, unless those unlawful acts have a specific nexus to the defendant's acts against the plaintiffs.<sup>58</sup> This was significantly different from the holding in *Gore*, where the Court ruled that Alabama had no jurisdiction to punish for acts *lawful* in other jurisdictions when determining the degree of reprehensibility.<sup>59</sup>

The Court found that State Farm's denials of other claims outside Utah, pursuant to its PP&R policy, were dissimilar acts, independent from the acts giving rise to the claim, and, therefore, could not serve as the basis for punitive damages.<sup>60</sup> The Court, instead, focused on the acts

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58. *Id.* at 421–22.

59. *BMW of N. Am., Inc., v. Gore*, 517 U.S. 559, 572–73 (1996).

60. The Court took advantage of the ambiguity in the meanings of the words “act” and “intent.” The Court defined State Farm's action and intent very narrowly. In her dissent, Justice Ginsburg described the act quite differently than Justice Kennedy in the majority opinion. Focusing on State Farm's firm-wide PP&R program that was designed to use the claims-adjustment process as a profit center, Justice Ginsburg described State Farm's act as a deliberate decision to put profit over the policy holders' rights to fair treatment. *State Farm*, 538 U.S. at 431–35 (Ginsburg, J., dissenting). Meanwhile, Justice Kennedy described State Farm's act more narrowly and as being unrelated to its bad faith regarding fire claims. *Id.* at 424 (majority opinion). These different ways of defining the offending act account for the different outcomes at the end.

Philosophers, for example, define “act” in a number of ways. They can define an act empirically as “what someone does.” This definition avoids the Cartesian duality between mind and body and considers an act only as behavior. The reason for the popularity of behaviorism is that it avoids what “can't be got at” or what goes on in the mind. On the other hand, most of us agree that “twitches, blinks, coughs, and sneezes” are not acts. Norman S. Care & Charles Landesman, *Preface* to READINGS IN THE THEORY OF ACTION, at xv (Norman S. Care & Charles Landesman eds., 1968). To get the label “act,” the act must include some analysis of the mental process behind the act, usually thought of as volition. However, many acts are done under duress, which gives rise to a distinction between volitions and intentions. Defining acts as behavior and intentions leads not only to the problem of never knowing what one truly intends but also to the problem of dual intent. As a result, some describe acts, or explain them, by referring to the intentions, purposes, desires, and motives of agents.

Others argue that acts need to be evaluated in terms of ethics, or rules, that surround the agent's actions. John Rawls argues that for an act to be evaluated as right or wrong, it must be analyzed beyond its immediate consequences to determine whether there are any ethical, moral, or teleological bases for evaluating the action. *Id.* at xxxi. Rawls might say that ethics help determine whether an institution's denial of a car-insurance claim is similar to the denial of a fire-insurance claim, assuming it was done simply to meet profit quotas set by the company.

The Supreme Court did not engage in this latter form of Rawlsian analysis. Moral damages are damages of the Rawlsian sort and correlate with an understanding of an act in the context of the rules that surround its doing. Using a football analogy, dropping a pass in the end zone is either of no consequence or of ultimate consequence. It depends if the pass is dropped in the last seconds of the fourth quarter when a score would have altered the outcome. Similarly, denying a claim in an auto accident is dissimilar to denying a claim for fire damage, unless a company has rules against treating its insured in bad faith and if, in each instance, the claim is denied simply to meet profit quotas.

Punitive damages provide punishment in light of the nature of the conduct and in the nature of the rules the conduct violates. That is why our system struggles to award punitive damages because

of the individual agent who (1) instructed the Campbells to reject the settlement, (2) counseled them not to get a separate attorney, (3) told them that State Farm would not appeal, and (4) informed them that they had no rights to redress against State Farm.<sup>61</sup> The Court found the Campbells' allegations against State Farm to be dissimilar to the claims of other policy holders under homeowner, fire, and other insurance, even though there was proof that other agents had engaged in similar devious behavior.<sup>62</sup>

Justice Kennedy explained that retribution remains a major factor in awarding punitive damages.<sup>63</sup> However, he stated that punitive damages should not exceed a single-digit multiple of the compensatory damages suffered by the plaintiffs.<sup>64</sup> In combination with the limitation that state courts should only consider acts occurring in their respective states, the outside multiplier serves as a significant cap on jury verdicts. It demonstrates that the Supreme Court follows an economic efficiency, or deterrence-based, rationale for punitive damages that assumes individual compensation as its prime reference point.

As Professor Galligan argues, a deterrence-based rationale for punitive damages, especially one that has an augmented damages component, seems to be a critical rationale supporting punitive damages.<sup>65</sup> *Campbell* severely cramps the ability of a court to provide

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our market encourages rational conduct—conduct that would weigh injury to an individual against expected profits.

61. *State Farm*, 538 U.S. at 413–14.

62. *Id.* at 423. Justice Stevens's opinion may have been influenced by his attempt to be consistent with his earlier opinions involving jury discretion in capital punishment cases. Similarly, Justices Scalia and Thomas may have been for fewer due process limitations in civil punitive damages cases because of the opinions they held in capital punishment cases involving limits on jury discretion.

63. *Id.* at 416.

64. Justice Kennedy stated,

With regard to the second *Gore* guidepost, the Court has been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award; but, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. . . . Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards . . . with 145-to-1 [ratios]. . . . [B]ecause there are no rigid benchmarks, . . . ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages. . . . [But when] compensatory damages are substantial, then a lesser ratio . . . can reach the outermost limit of the due process guarantee.

*Id.* at 424–25 (internal citations and quotations omitted).

65. Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 7–14 (1990).

augmented damages. In addition, it eviscerates the ability of the jury to exact retribution.<sup>66</sup>

One might argue that the holdings of *Gore*, *Cooper*, and *Campbell* are inapposite to the retribution rationale described above. After all, *Gore* and *Campbell* continue to give lip service to the role of retribution in determining punitive damages. *Cooper* holds that the judge and appellate court should become involved but only after the jury has had its say. Still, *Gore*, *Cooper*, and *Campbell* point the reviewing court in a new direction requiring de novo review, a specific nexus between the plaintiff's injury and the defendant's acts in the respective state, and the application of a single-digit multiplier cap. Recent decisions by state courts show the power of Justice Stevens's statement in *Campbell* creating a cap (or a de facto safe harbor for those who want to calculate the extent of their exposure) for jury-awarded punitive damages.<sup>67</sup>

Ultimately, the Court sends a message to state courts when it is cautious regarding jurisdiction and when it encourages ratios that severely restrict a jury's power to award punitive damages.<sup>68</sup> The Court

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66. Justice Kennedy's analysis ignores the intentional tort roots of punitive damages. Dean Galligan suggests that tort law is concerned about deterrence, while intentional torts remind us that retribution can be used to protect against violence. Galligan, *supra* note 65, at 9 n.7.

67. See *Henley v. Phillip Morris, Inc.*, 9 Cal. Rptr. 3d 29, 73 (Cal. Ct. App. 2004) (stating that "[i]n light of *Campbell*, we do not believe the 17-to-1 ratio reflected in the present judgment can withstand scrutiny"); *Benham v. Wallingford Auto Park, Inc.*, No. CV0204594185, 2003 WL 22905163, at \*5 (Conn. Super. Ct. Nov. 26, 2003) (stating that "[a]lthough the conduct of the defendant in this case was egregious, the court is not of the opinion that it requires ten times the compensatory damage" and reducing the award to "a 7:1 ratio"); *Daka, Inc. v. McCrae*, 839 A.2d 682, 697 (D.C. 2003) (noting that "[a]lthough the facts established by the jury's verdict justified a significant award of punitive damages, the sum awarded—reflecting a ratio of 26:1 to the compensatory damages award—lacked the reasonableness and proportionality required of a punitive damages award"); *Bocci v. Key Pharm., Inc.*, 79 P.3d 908, 910 (Or. Ct. App. 2003) (reducing punitive damages to a seven-to-one ratio); *Waddil v. Anchor Hocking, Inc.*, 78 P.3d 570, 576 (Or. Ct. App. 2003) (reducing damages to a four-to-one ratio); *Viener v. Jacobs*, 834 A.2d 546, 562 (Pa. Super. Ct. 2003) (acknowledging that, on remand, the court should consider *Campbell*'s ratio rule and stating that "the trial court may recalculate the amount of the punitive damage award, if necessary, to comport with Mr. Justice Kennedy's admonition").

68. For example, the *Gore* Court stated as follows:

Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of the noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach. Once again, we return to what we said in . . . *Haslip*: We need not and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and constitutionally unacceptable that would fit every case.

*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582–83 (1996) (internal citations and quotations

seems to espouse a consequentialist justification of punitive damages that unduly restricts and hinders their maximum moral effect.<sup>69</sup> In addition, because punitive damages have large value and policy implications and constitutional analysis is required, the question is who should determine punitive damages—judge, jury, or formula? In deciding that an appellate court should make the decision *de novo* and that it should do so with a particular ratio in mind, Justice Stevens seems to follow the Polinsky and Shavell schools of thought—optimal deterrence is too sophisticated for jurors.<sup>70</sup>

Are appellate judges truly better or more expert at awarding punitive damages? Of course the answer to this question hinges on the purpose of punitive damages. Certainly, a judge is more, or at least as, adept at keeping awards within “rational” limits, as those limits are defined by the Court. But what about expressing moral outrage or protecting the integrity of the market? If these are valid uses of punitive damage awards, then we must determine whether a judge is really better than a jury in these arenas. Are not judges more political and, therefore, more susceptible to the influence of corporate America? Is one individual truly more equipped to determine the beliefs of society concerning the morality of a given action than twelve individuals working collectively? Is a well-educated lawyer, hardened by years on the bench, more in touch with what is considered a fair punishment for a corporation’s willful disregard of consumer safety?

### III. METAETHICS AND PUNITIVE DAMAGES

#### A. *Defining Consequentialism and Nonconsequentialism*

A metaethical understanding of the punitive damages debate illustrates why it is necessary for the Court to continue to allow for a moral or nonconsequentialist rationale for punitive damages. Metaethics also provides the impetus for uncovering and articulating the underlying norms that support a broad, pluralist retribution analysis. Furthermore, metaethics shows the harm in assigning the responsibilities of the jury to

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omitted). The Supreme Court has sent two conflicting messages and the lower courts seem to have picked up the last one.

69. This same question has been asked concerning the underlying rationale of criminal punishment. See Robinson & Darley, *supra* note 4, at 478 (arguing a utilitarian reason to continue to focus on moral blameworthiness in criminal punishment).

70. See Polinsky & Shavell, *supra* note 6, at 891 (stating “judges and juries often will be able to apply the formula without difficulty because the formula transparently (if trivially) implies that no punitive damages are needed”).

an appellate judge. To focus and simplify the comparison of an economic-efficiency-based deterrence model and traditional punitive damages on formal grounds, this Article uses ethical categorization as a starting point.

Historically, philosophers have categorized ethical systems according to their consequentialist and nonconsequentialist characteristics.<sup>71</sup> In short, nonconsequentialists are unconcerned with the outcomes of their decisions and appeal to morality, God's law, or to virtues that are "ends in themselves."<sup>72</sup> Consequentialists, on the other hand, are concerned with the ultimate result of their decisions.<sup>73</sup> Consequentialists are ultimately utilitarians who base their faith in what will produce optimal efficiency.<sup>74</sup>

The categorization process examines an ethical system's justification. A system is consequentialist if it appeals to the effects on society when measured against some standard or principle.<sup>75</sup> It is nonconsequentialist when the justifications are found in rules or absolutes that the system provides.<sup>76</sup> Consequentialism involves predicting consequences.<sup>77</sup> Nonconsequentialism involves weighing and ranking competing values or virtues.<sup>78</sup> Philosophers have found this

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71. JACQUES P. THIROUX, *ETHICS: THEORY AND PRACTICE* 21 (1977). While philosophers have long recognized two schools of thought in ethics, Thiroux is the first to call them consequentialist and nonconsequentialist. Traditionally, ethical theories have been divided by the labels teleological and deontological. See WILLIAM K. FRANKENA, *ETHICS* 13–20 (1963) (explaining the views of teleological and deontological theorists).

72. THIROUX, *supra* note 71, at 40.

73. *Id.* at 21.

74. Professor MacCormick, who studies these categories, defines this division of decision-making ethics as follows:

One can conceive of two extreme positions. On the one extreme, the only justification of a decision would be in terms of all its consequences, however remote—in terms, that is, of its productivity of the greatest net benefit, taking together all consequences and judging them by some suitable criterion of benefit and detriment. On the other extreme, the nature and quality of the decision, regardless of any of its consequences however proximate, would alone be allowed as relevant to its justification or its rightness.

Neil MacCormick, *On Legal Decisions and Their Consequences: From Dewey to Dworkin*, 58 N.Y.U. L. REV. 239, 239 (1983).

75. See THIROUX, *supra* note 71, at 21 (describing the decision-making process from a consequentialist's point of view). The various schools of egoism (universal, individual, and personal) as well as act and rule utilitarianism are categorized as consequentialist systems. *Id.* at 21–33.

76. *Id.* at 40. Thiroux categorizes divine command theories and Kant's categorical imperative as nonconsequentialist ethics. *Id.* at 40, 44.

77. *Id.* at 21.

78. See *id.* at 48–49 (discussing the resolution of conflicting moral rules).

simple categorization helpful to the analysis and comparison of various philosophical ethical systems.<sup>79</sup>

There inevitably will be deficiencies and inconsistencies in ethical systems where the systems are overly consequentialist or nonconsequentialist.<sup>80</sup> The extreme consequentialist excludes any possibility of rationally justifying a decision because the ramifications of any ethical decision are infinite.<sup>81</sup> If actors had to “know” all the consequences of a given act before acting, they would be paralyzed. They might favor no action, but inaction has consequences as well. Extreme consequentialism, therefore, necessarily accepts the proposition that all acts are irrational. The moderate consequentialist compensates for this problem by trusting some unstated set of values such as the theory that the unregulated market will sort out normative behaviors or that a policy of inaction over action will maintain the status quo.

On the other hand, the extreme nonconsequentialist ignores that the “nature and quality of decisions and acts are . . . [themselves] constituted by the consequences the decider intends, foresees, or hopes to bring about.”<sup>82</sup> In addition, the extreme nonconsequentialist ignores the extent to which “care for one’s neighbor” requires that one seriously consider the “foreseeable outcomes of one’s acts and decisions before finally acting or deciding.”<sup>83</sup> Obviously, the more momentous the act or decision under consideration, the more important this consideration becomes.<sup>84</sup>

These metaethical models provide a key to the comparison of a punitive damages model defined by deterrence in relationship to compensation with traditional retribution-based punishment. A system that strictly follows consequentialism falls prey to the indefiniteness of the ultimate standard that results from the uncertainty of future consequences.<sup>85</sup> A purely nonconsequentialist system, which relies on rules and absolutes, is vulnerable to criticism because it lacks a rational

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79. See *id.* at 21–50 (defining and comparing the categorical theories of morality); see also Posner, *Utilitarianism*, *supra* note 5, at 104 n.9 (equating utilitarianism to consequentialism); see generally DONALD REGAN, *UTILITARIANISM AND CO-OPERATION* (1980) (creating a theory of co-operative utilitarianism to help resolve the conflict between the two major camps of utilitarianism).

80. THIROUX, *supra* note 71, at 49–50.

81. MacCormick, *supra* note 74, at 239.

82. *Id.* at 240.

83. *Id.*

84. *Id.*

85. See THIROUX, *supra* note 71, at 49–50 (discussing the pitfalls of ultimate rules and absolutes).

justification and results in incompleteness.<sup>86</sup> In response to these criticisms, nonconsequentialists inevitably smuggle consequentialist arguments into their system.<sup>87</sup> This subjects the nonconsequentialist system to attacks not only for incompleteness but also for inconsistency.<sup>88</sup> Yet some degree of logical inconsistency is necessary to any ethical system that tries to deal fairly with disputes and also produce rules governing behavior.<sup>89</sup>

### *B. Applying Ethical Categories to the Deterrence-Versus-Punishment Debate*

In judging and comparing rationales for punitive damage awards, this comparison between consequentialism and nonconsequentialism is

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86. See *id.* at 46 (giving examples of the negative impact certain absolute rules would have). Posner is a prime proponent of consequentialism in negligence law. He writes,

Perhaps, then, the dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient—cost-justified—level of accidents and safety. Under this view, damages are assessed against the defendant as a way of measuring the costs of accidents, and the damages so assessed are paid over to the plaintiff (to be divided with his lawyer) as the price of enlisting their participation in the operation of the system. Because we do not like to see resources squandered, a judgment of negligence has inescapable overtones of moral disapproval, for it implies that there was a cheaper alternative to the accident. Conversely, there is no moral indignation in the case in which the cost of prevention would have exceeded the cost of the accident. Where the measures necessary to avert the accident would have consumed excessive resources, there is no occasion to condemn the defendant for not having taken them.

If indignation has its roots in inefficiency, we do not have to decide whether regulation, or compensation, or retribution, or some mixture of these best describes the dominant purpose of negligence law. In any case, the judgment of liability depends ultimately on a weighing of costs and benefits.

Posner, *Theory*, *supra* note 5, at 33–34. Even Posner notes that when the actor acts with choice or intent moral retribution may trump a cost-benefit analysis directed at deterrence.

John Witte sees, in the Reformation, an understanding of various uses of the law different from simple deterrence and efficiency. WITTE, *supra* note 3, at 170–71.

Consequentialists ignore other important uses in the law, including society's expression through the jury of moral outrage and its expressive or educative function concerning what is and is not fair market behavior.

87. See Posner, *Theory*, *supra* note 5, at 47 (stating that some would think it unfair for a man to be found negligent for an act resulting in unforeseen consequences). Thiroux poses the following question: "Even without this doctrine, when you push any ethical system back far enough, asking why one should do these things, won't your answers have to bring in consequences for yourself, others, or all concerned?" THIROUX, *supra* note 71, at 47.

88. See THIROUX, *supra* note 71, at 49 (discussing the inapplicability of justification to absolve moral rules).

89. Posner argues that proponents of other ethical systems are generally incapable of deriving specific policies or guidelines for human behavior. Posner, *Utilitarianism*, *supra* note 5, at 114. He recognizes the inherent inconsistencies in Rawls's work, in the Kantian theorists, in Epstein, and in Dworkin's theories. *Id.* at 114–15.

extremely helpful. It exposes the weaknesses in a system based solely on deterrence. It should prompt nonconsequentialists to reexamine their underlying beliefs and consequentialists to look beyond economic effects. To answer the growing consequentialist school, the nonconsequentialist must uncover the “natural laws” in the fabric of a free democracy that lead to the development of punitive damages allowing for retribution.<sup>90</sup>

### 1. Optimal Deterrence and Consequentialism

Optimal deterrence focuses on just the right amount of deterrence to efficiently prevent certain harmful behavior. It does not seek to over deter because its proponents believe that action and risk-taking need to be encouraged for the overall improvement of society. Optimal deterrence is consequentialist because it is concerned with establishing rules that best balance the consequences of punishment against the utility of a market place of vigorous and creative risk-taking.<sup>91</sup>

In *Cooper*, Justice Stevens stated that the most *rational* way to decide punitive damages was with reference to optimal deterrence.<sup>92</sup> The Court cited<sup>93</sup> professors Polinsky and Shavell and their leading article, *Punitive Damages: An Economic Analysis*, where they describe the delicate balancing act involved in determining optimal deterrence:

to achieve appropriate deterrence, injurers should be made to pay for the harm their conduct generates, not less, not more. If injurers pay less than for the harm they cause, under deterrence may result—that is, precautions may be inadequate, product prices may be too low, and risk-producing activities may be excessive. Conversely, if injurers are made to pay more than for the harm they cause, wasteful precautions may be taken, product prices may be inappropriately high, and risky but socially beneficial activities may be undesirably curtailed.

It follows from these observations that a crucial question for consideration is whether injurers sometimes escape liability for harms for which they are responsible. If they do, the level of liability imposed on them when they *are* found liable needs to exceed compensatory damages so that, on average, they will pay for the harm that they cause.

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90. See Robinson & Darley, *supra* note 4, at 478 (urging courts to “adopt rules that distribute liability and punishment according to desert, even if a nondesert distribution appears in the short-run to alter the possibility of reducing crime”).

91. Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 505–06 (1980).

92. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 438–39 (2001).

93. *Id.*

## 2006] THE UTILITY OF A NONCONSEQUENTIALIST RATIONALE 419

This excess liability can be labeled “punitive damages,” and failure to impose it would result in inadequate deterrence.<sup>94</sup>

Polinsky and Shavell also state, in reference to deterrence, that “[w]hen an injurer has a chance of escaping liability, the proper level of total damage to impose on him, if he is found liable, is the harm caused multiplied by the reciprocal of the probability of being found liable.”<sup>95</sup> By way of example, if *A* tortiously injures four people, but the odds of *A*’s being held liable are one in ten, and one of the four, *B* (but no others), files suit and establishes damages of \$100,000, then the proper total recovery for *B* is the harm caused multiplied by the reciprocal of the probability of *A* being found liable. Here, the harm caused is \$100,000 and the probability of liability was 1/10, the reciprocal of which is ten. Consequently, according to Polinsky and Shavell, the proper award for *B* is \$100,000 x 10, or \$1,000,000.

The apparent appeal of the Polinsky and Shavell rule is that it is mathematical and certain. In addition, it seems to depend on probability theory, which suggests rationality. In this way, it has the same attractiveness as does the Hand formula in tort law.<sup>96</sup> Yet, as we will see, it is subject to the same criticisms of any formulaic attempt at balancing utilities.

## 2. The Problems with Optimal Deterrence

Consequentialists want juries to apply mathematical calculations based on assumptions about the components of market efficiency and optimal deterrence. They argue that it is more rational, more predictable, and, therefore, more fair to use a mathematical formula. Evidence for the assertion that ethical systems inevitably rest on beliefs and intuitions about the future can be found in the specific workings of the elements of this deterrence-based punitive damages system. Such evidence further supports the observation that an unbalanced, overly nonconsequentialist system invariably will include many consequentialist features.

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94. Polinsky & Shavell, *supra* note 6, at 873–74.

95. *Id.* at 891.

96. The Hand formula is a widely cited method for determining duty in negligence actions. It was described by Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). Judge Hand argued that duty is defined by considering the probability of some harm, multiplied by the gravity of any injury, weighed against the cost of adequate precautions. *Id.* at 173.

a. *Uncertainty and Incompleteness*

Law and economics theory has long argued that the common law should be judged according to its certainty and completeness.<sup>97</sup> The problem is that no human decision-making system is ever certain or complete. Professors Sunstein, Kahneman, and Schkade discuss the uncertainties inherent in jury punitive damage awards concerning pain and suffering, wrongful death, and a myriad of other calculations.<sup>98</sup> These uncertainties are applicable to any legal or factual determination, whether made by a judge or a jury. Uncertainty is no reason to take punitive damage awards out of the hands of the jury.

In addition, where the economist is overly consequentialist in his directives concerning the ability of the market to project future values, one must question the likelihood of ever having adequate information about the consequences of certain decisions or the future values of certain commodities.<sup>99</sup> Without such information, predicting consequences or values is an uncertain process. The economist can guarantee no more certainty about the consequences he projects than can the jury, a mathematician, or anyone else.<sup>100</sup>

Moreover, as previously discussed, a crucial component of the deterrence-based model (the Polinsky and Shavell formula) is the assignment of a probability. Assigning probabilities also has both consequentialist and nonconsequentialist features. Though assigning probabilities seems only to involve a determination of the likelihood of some future event from evidence of past events,<sup>101</sup> whether this process can ever actually be done, without skewing the probabilities in favor of a preferred outcome, is highly questionable.<sup>102</sup> In fact, some argue that

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97. See generally Posner, *Utilitarianism*, *supra* note 5.

98. Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 *YALE L.J.* 2071, 2074 (1998).

99. WESLEY C. SALMON, *THE FOUNDATIONS OF SCIENTIFIC INFERENCE* 76 (1967); THIROUX, *supra* note 71, at 34–38.

100. SALMON, *supra* note 99, at 76.

101. *Id.* at 68. Salmon refers to this description of probability as the logical interpretation of probability. *Id.* He writes that such a description involves inductive reasoning. *Id.* at 68–69.

102. Salmon calls this description of probability the “subjective interpretation.” *Id.* at 68. Salmon writes about Rudolf Carnap’s theory of inductive logic, which relates to Posner’s attempts at defining an economic ethic:

Carnap’s earlier systems of inductive logic have been criticized—especially by those who are more interested in questions of practical statistical inference than in foundational questions—on the ground that [Carnap’s] confirmation functions were defined only for extremely simple languages. These languages embody only qualitative predicates . . .

decision makers inevitably will assign the probability with reference to their own beliefs about the best outcomes for the analysis.<sup>103</sup> Thus, the process of assigning probabilities is much like argument by analogy, anecdote, or from individual experience: the assigning of a probability has both consequentialist and nonconsequentialist overtones. It arguably is tied to past events but also requires the decision maker to predict the future in light of new, changing circumstances.

Even if the psychology of the process would allow for the assignment of an objective probability figure, such a process is uncertain where there is little or no experience with, or empirical data to support, assigning the probability.<sup>104</sup> As such, it is primarily a consequentialist process. Where society changes so rapidly that the decision maker can trust only his intuition, he will most likely assign a high probability if his intuition tells him that the conduct in question is likely to affect society badly. In contrast, he will probably assign a low probability if his intuition tells him that the conduct in question will not. Thus, when the decision maker has no experience, the assignment of probabilities is very consequentialist and becomes more nonconsequentialist only where the decision maker or society has had experience with the accident.<sup>105</sup> Therefore, the process of assigning probabilities is not necessarily a nonconsequentialist process, and it does not provide the same degree of ethical certainty in all situations.<sup>106</sup>

Assuming that an economist can overcome these problems, he has one remaining obstacle: an ethical processing problem. As to who is to make the decision about wealth maximization, the economist can disclose little, only asserting that this valuation process and application of the Hand formula (or the Polinsky and Shavell formula) will be, and can be, done by a court. For example, Judge Richard Posner, a major proponent of law and economics, states simply that “a court can make a

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that are patently inadequate as languages for science. In his more recent work, Carnap has been developing systems that are able to treat physical magnitudes quantitatively.

*Id.* at 74–75.

103. *Id.* at 79. Salmon calls this view the “personalistic” view. *Id.* See Daniel Kahneman & Amos Tversky, *The Psychology of Preferences*, SCI. AM., Jan. 1982, at 160 (describing how mathematical patterns can describe how people regularly depart from objective reasoning when faced with risky choices).

104. This is the most likely explanation for the variability of dollar figures assigned by juries.

105. See SALMON, *supra* note 99, at 76 (discussing the addressing of “unobserved matters of fact on the basis of evidence concerning observed matters of fact”).

106. Salmon notes that determining the probabilities with any certainty depends on the requirement of “total evidence.” *Id.* In this way, economic analysis parallels negligence analysis. Where society has had wide experience with a certain type of accident, the rules are more easily and consistently applied.

reasonably accurate guess as to the allocation of resources that would maximize wealth.”<sup>107</sup> Yet it is obvious that if assigning a probability is based on the decision maker’s knowledge—in particular, his knowledge of both the harm that intentional behavior causes society and the chances that someone will discover the wrongdoing—then the experience of more members of society ought to balance out the bias that any one decision maker might have.

*b. Deterrence Calculated on Compensation or Related to Profit Motive?*

As every first-year torts teacher knows, the Pinto example raises from students strong reactions to the immorality of Ford’s decision to forgo the installation of rubber sleeves around the car’s gas tank.<sup>108</sup> Even if we could determine how much is needed to deter certain conduct, some students feel that human life is priceless and that violators should have to pay more than this fixed amount. The students’ intuitions are backed by moral philosophy. There is considerable debate as to why anyone would assume that a system based on optimal, efficient deterrence will produce “good.”<sup>109</sup> If wealth maximization means nothing more than a process by which good is maximized, then the formula of optimal deterrence is no improvement over the existing utilitarian formulation.<sup>110</sup> This is similar to the kind of reasoning attempted by Posner when he defines wealth as the value in dollars, or dollar equivalents, of everything in society.<sup>111</sup> Some values should not be converted to dollars because such a decision-making process encourages the treatment of individuals as though they are money.<sup>112</sup>

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107. Posner, *Utilitarianism*, *supra* note 5, at 120. It is interesting to speculate as to whom Posner refers when he says that the decision will be made by the court. Because he does not specify whether judge, jury, a combination of judge and jury, or an economic expert under cover of the court, will make the decision, it is unclear whether the decision will be made by a fact-finding or by a law-making person. Because we are not told the nature of the decision maker, the usual ethical indications given by this information are lacking.

108. See generally George Priest, *Economics of Civil Justice Reform Proposals*, 9 KAN. J. L. & PUB. POL’Y 401, 402–05 (2000) (discussing the Pinto disaster).

109. See THIROUX, *supra* note 71, at 20–38 (discussing consequentialist (teleological) theories of morality).

110. See *id.* at 28–34 (discussing the basic tenets of utilitarian moral philosophy).

111. Posner, *Utilitarianism*, *supra* note 5, at 119.

112. See Richard L. Abel, *A Critique of Torts*, 2 TORT L. REV. 99, 104 (1994) (discussing problems raised by monetary compensation for tort victims). Consider the classic Ford Pinto example. If Ford could save eleven dollars per car by not installing a gas tank sleeve and it expected to sell eleven million cars, then its expected profit by not installing the sleeve would be \$121 million. Factoring in the resulting 200 deaths and injuries at roughly \$200,000 in damages per case

Focusing solely on deterrence is also undesirable because it does nothing to take away the market actor's profit motive. The consequentialist should ask how the Polinsky and Shavell formula—which does not cap damages but still provides for a calculation based on compensation to the plaintiff multiplied by the reciprocal of the actor's chance of getting caught—really serves society by producing wealth maximization. Why, for instance, are the plaintiff's damages used rather than an estimation of the defendant's expected total profit or the average harm to each person likely to be harmed?<sup>113</sup> Benthamite beliefs in limited government interference are imbedded in narrow definitions of “act,” (which exclude the extended consequences of the act) and the Benthamite market sense of justice is unstated support for optimal deterrence. As such, economics is ultimately supported by a part of the same utilitarian belief system that supports all of torts, especially negligence. Similarly, it also fails where its cost-benefit-analysis support does not improve upon predictability or certainty.

The deterrence model assumes that market actors will act rationally. This is a leap of faith akin to the leap of faith any deontological system makes. Accepting the nonconsequentialist aspects of market theory depends upon one's acceptance of the assumptions that the economist makes. These assumptions are the economist's articles of faith. Moreover, these assumptions are certainly not without criticism.<sup>114</sup> For instance, one may question why it is that a hypothetical market is useful, reliable, or even useable.<sup>115</sup> Use of hypothetical markets has proved, in certain cases, to be a subjective and arbitrary system of decision making.<sup>116</sup> Additionally, one might criticize the lack of empirical

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(\$40 million total), Ford would still gain more than \$100 million by not installing the sleeve. Although immoral, Ford's decision not to install the sleeve was indeed rational. The purpose of punitive damages is to cause morality and rationality to align. If protecting consumers is moral (and we all know it is), then punitive damages (from a purely deterrent rationale) should be high enough to make protecting consumers the economically efficient decision. The amount of actual damage suffered by each individual killed or injured is irrelevant in this respect, as is the ratio of punitive damages to actual damages. Punitive damage caps and ratios do not further the deterrent goal, let alone the purpose of retribution. See generally David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982).

113. See Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1058–59 (1972) (discussing allocation of accident-avoidance costs).

114. See, e.g., Izhak England, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 51–56 (1980) (criticizing Posner's theory of negligence).

115. See *id.* at 39 (considering the hypothetical and actual role of market deterrence).

116. See WILLIAM A. KLEIN & JOHN C. COFFEE, JR., *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 279 (1990). Klein and Coffee write, “valuation by reference to the market prices of comparable assets involves an obvious problem of circularity; it is a method that tells us that similar assets have similar values without telling us anything about how that value is determined.” *Id.*

evidence validating the decisions produced by hypothetical markets.<sup>117</sup> This subjectivity, at such a crucial level, produces many of the inconsistencies from which Posner claims his system is free.<sup>118</sup> In this way, Posner's system is subject to the same leap-of-faith, subjectivity, and lack-of-empirical-verification criticisms to which all nonconsequentialist systems are subject.<sup>119</sup>

It is important to consider the various alternatives available to either model and to any deterrence-based economic analysis under existing judicial constraints. Each alternative affects not only the ethics used but also the decision maker's power. Does the economist mean for the decision maker to be a witness who is an expert economist; a judge; a particular type of judge, such as one versed in law and economics; or the jury? Whether the decision maker is determining negligence or assessing the appropriateness of deterrence-based punitive damages, the decision takes the appearance of a mathematic formula. Each formula appears to have an answer that is proved or found by the decision maker himself.

With respect to either decision, the process can be controlled by economic experts giving opinions as to the value of certain activities and the probabilities associated with their occurrence, with reference only to the hypothetical market. These opinions can be given and justified by reference to what experts usually rely on in giving similar opinions.<sup>120</sup> The fact-finding process can be under cover if the courts use this approach. If the court uses the Polinsky and Shavell model, the economic expert can provide his opinion as to the value of harm done to the injured parties and the chance of the defendant getting caught. Next, the expert will use the reciprocal of the probability of the defendant's getting caught to determine the proper figure for optimal deterrence. Or, if the court uses the Supreme Court's formula, the expert will try to place a value on the harm done to the plaintiffs within its jurisdiction, determine what other acts done to potential plaintiffs in the jurisdiction are similar enough to count in the harm calculation, and then give the jury an outside cap for determining retribution at ten times the amount of the harm. The jury will end up deciding little more than the economic expert's credibility, or, if there is more than one expert, which one offers the most credible figure within the cap.

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117. See SALMON, *supra* note 99, at 75 (considering the problems inherent in hypothetical reasoning).

118. See Posner, *Utilitarianism*, *supra* note 5, at 111 (arguing that the "economic approach, is less 'rejectable' than Utilitarianism or Kantianism").

119. See THIROUX, *supra* note 71, at 50 (discussing criticisms general to nonconsequentialist systems).

120. See FED. R. EVID. 703 (addressing the use of expert witnesses).

Under the Polinsky and Shavell formula, the jury will only plug the expert value of the harm into the equation and multiply it by the probability, given by the expert, of the defendant's getting caught. But is the economic expert any better than a jury at judging the value of the harm done, the relevance of other harmful actions in the jurisdiction, or the probability of the defendant getting caught? Perhaps the jury can be given the task of assigning these values and probabilities. It is easy to see, however, that even with the jury included, where the appellate court has the power of *de novo* review, such a decision-making process supplants the decision of the jury with that of the judge. Hence, the overall process appears to be nonconsequentialist because the jurors' roles in making findings is more openly consequentialist and less defensible. Its uncertainty and nonrationality is exposed in the opinion of the appellate court when the court shows why wealth maximization demands lowering the award. Under this alternative, the process is rule oriented, absolutist, and, therefore, nonconsequentialist in appearance. The consequentialist nature of the process is carried out by the cap and by the appellate court on review.

This ethical analysis helps us to better understand how deontological/moral reasoning leads to an examination of fundamental beliefs about human nature and the underlying assumptions that guide common law rules. In other words, consequentialism and nonconsequentialism meet when the future is unknowable and the consequences cannot be determined. At this point, different belief systems supporting deterrence-based analysis and augmented awards are revealed. In the context of punitive damages, this place of meeting is in determining whether market efficiency ought to govern decisions or whether economic pluralism ought to play as important a role in areas of quasi-criminal behavior.

Others note that there is a certain frustration that arises when a decision-making criterion is defended on the basis of beliefs as being more moral or ethical than another. This frustration arises in any struggle between rationales or justifications based on different ethical theories. Paul Robinson and John Darley make the point that retribution needs to be defended as producing good consequences.<sup>121</sup> They argue

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121. Robinson & Darley, *supra* note 4, at 457. What the authors say about criminal law applies directly to punitive damages:

The law is not irrelevant to these social and personal forces. Criminal law, in particular, plays a central role in creating and maintaining the social consensus necessary for sustaining moral norms. In fact, in a society as diverse as ours, the criminal law may be the only society-wide mechanism that transcends cultural and ethnic differences. Thus, the criminal law's most important real-world effect may be its ability to assist in

that punishment based on moral outrage, corrective justice, and retribution serves a useful purpose in criminal law.<sup>122</sup> They conclude that retribution based on morality is useful.<sup>123</sup> The frustration comes when Robinson and Darley try to describe exactly why this is the case. It is simply hard to prove. They are betting, like the utilitarians, on their beliefs about human nature and the future effects of certain legal processes.<sup>124</sup> Yet, the ability to articulate those social values and beliefs is essential. If, by unpacking and describing those beliefs, Robinson and Darley help us see and reaffirm our connected values, then this process serves a vital purpose. Yet, permanently disaggregating those social values and beliefs and removing them by restricting the jury to a value-laden deterrence model threatens other important values imbedded in the jury system and risks undermining the authority of the common law.

Prominent torts scholar and judge Guido Calabresi missed this point in a recent opinion on punitive damages.<sup>125</sup> He acknowledged that a

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the building, shaping, and maintaining of these norms and moral principles. It can contribute to and harness the compliance-producing power of interpersonal relationships and personal morality.

The criminal law can have a second effect in gaining compliance with its commands. If it earns a reputation as a reliable statement of what the community, given sufficient information and time to reflect, would perceive as condemnable, people are more likely to defer to its commands as morally authoritative and as appropriate to follow in those borderline cases in which the propriety of certain conduct is unsettled or ambiguous in the mind of the actor. The importance of this role should not be underestimated; in a society with the complex interdependencies characteristic of ours, an apparently harmless action can have destructive consequences. When the action is criminalized by the legal system, one would want the citizen to “respect the law” in such an instance even though he or she does not immediately intuit why that action is banned. Such deference will be facilitated if citizens are disposed to believe that the law is an accurate guide to appropriate prudential and moral behavior.

The extent of the criminal law’s effectiveness in both these respects—in facilitating and communicating societal consensus on what is and is not condemnable, and in gaining compliance in borderline cases through deference to its moral authority—we argue is to a great extent dependent on the degree of moral credibility that the criminal law has achieved in the minds of the citizens governed by it. Thus, we assert, the criminal law’s moral credibility is essential to effective crime control, and is enhanced if the distribution of criminal liability is perceived as “doing justice,” that is, if it assigns liability and punishment in ways that the community perceives as consistent with the community’s principles of appropriate liability and punishment. Conversely, the system’s moral credibility, and therefore its crime control effectiveness, is undermined by a distribution of liability that deviates from community perceptions of just desert.

*Id.* at 456–57.

122. *Id.* at 497–98.

123. *See id.* at 498 (“[U]tility theorists ought to support liabilities assigned according to such a desert-based system.”).

124. *See id.* (“[W]e do not know with any certainty the degree of importance of the criminal law’s moral credibility.”).

125. *See generally* *Ciraolo v. City of New York*, 216 F.3d 236, 250 (2d Cir. 2000) (Calabresi, J., concurring).

punitive damage award may serve general and specific deterrence functions.<sup>126</sup> In addition, he argued that the current analysis of punitive damages was clouded by the merging of these functions.<sup>127</sup> Moreover, he wrote that disaggregation of the general deterrence function from other truly punitive functions would have a clarifying effect and make appellate review simpler, clearer, and more focused.<sup>128</sup>

The contrary is true. What I have attempted to show is that limiting lower courts and juries to a certain kind of harm done, to a narrower class of plaintiffs, and to a cap on the amount of punitive damages has a two-fold effect. The first effect is that the law of punitive damages, while giving more predictability within the cap, is at least as uncertain and subjective as the previous system. Second, and more importantly, the next part of this Article demonstrates that this shift in the decision-making ethic undercuts two of the common law's principal uses: protecting the inestimable worth of the individual and expressing moral outrage against the outrageous acts of outliers. I argue that appellate courts, as ultimate decision makers, are forced to accept a decision-making ethic that is monolithic in its values, "commoditizes" human suffering, and limits the ability of society to sufficiently deter intentional wrongdoing and to express moral outrage against vicious acts.

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126. *Id.* at 245.

127. *Id.*

128. Judge Calabresi noted,

Although widely accepted by economists and acknowledged by some courts, the multiplier function of punitive damages has nonetheless been applied haphazardly at best. One reason this is so is that the twin goals of deterrence and retribution are often conflated, rather than recognized as analytically distinct objectives. The term "punitive damages" itself contributes greatly to the confusion. For *punitive* damages, the term traditionally used for damages beyond what is needed to compensate the individual plaintiff, improperly emphasizes the retributive function of such compensatory damages at the expense of their multiplier-deterrent function. It also fails totally to explain the not unusual use of such damages in situations in which the injurer, though liable, was not intentionally or wantonly wrongful. A more appropriate name for extracompensatory damages assessed in order to avoid underdeterrence might be "socially compensatory damages." For, while traditional compensatory damages are assessed to make the individual victim whole, socially compensatory damages are, in a sense, designed to make society whole by seeking to insure that all of the costs of harmful acts are placed on the liable actor.

Indeed, it would not be inappropriate to disaggregate the retributive and deterrence functions of extracompensatory damages altogether and allow separate awards to further the two separate goals.

*Id.* at 245-46 (internal citations omitted).

Professor Catherine Sharkey picks up on this same idea and conceives of punitive damages as social compensatory damages. See generally Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003).

IV. THE NONCONSEQUENTIALIST/MORAL DEFENSE OF PUNITIVE DAMAGES AWARDED BY COMMON LAW JURIES

To determine a rationale for punitive damages, one should at least consider social values, human nature, and the corrupting influence of market capitalism. An ethical decision-making system that focuses on optimal efficiency ignores the moral implications of a traditional jury-awarded punitive damages system. The nonconsequentialist/deontological position contends that punitive damages are expressions of the community's moral outrage, that they provide the defendant with "just deserts," that retribution is a proper purpose for punitive damages, and that corrective justice is best served when community decision makers focus on the return of ill-gotten profits and the wealth of the actor.<sup>129</sup> This position considers the proper uses of law, human nature, the value of freedom, the corrupting effect of market capitalism, and studies in criminal justice and the punishment of corporate criminals. In addition, international perspectives on the integrity of American markets and the metaethical nature of any punitive damage award help us understand why the jury rather than the judge is a superior decision maker.

*A. Human Nature, Societal Values, and the Free Market*

The first step in defending jury-awarded punitive damages from a nonconsequentialist/deontological perspective is to rediscover the beliefs and values that undergird U.S. law, both criminal and civil. Our law has "Reformed Protestant" roots—civil (as opposed to religious) law is used to restrain persons from sinful conduct.<sup>130</sup> To induce compliance, the law should accord with the public's moral ideals.<sup>131</sup> Witte and Arthur argue "that criminal law and punishment must induce respect for formal law and social norms, confirm moral inhibitions and habits of citizens, and shape the framework of moral education."<sup>132</sup> Similarly, when contemporary jurists abandon the moral base of the law, they lose a

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129. See generally Edward L. Rubin, *The Incidence, Scope, and Purpose of Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law*, 1998 WIS. L. REV. 131.

130. Witte & Arthur, *supra* note 4, at 436. John Calvin wrote, "to check the raging and otherwise limitlessly ranging lusts of the flesh. . . . Hindered by fright or shame, [persons] dare neither execute what they have conceived in their minds, nor openly breathe forth the rage of their lust." *Id.* at 437.

131. See *id.* ("Threatened by divine sanctions, persons obey the basic commandments of the moral law.").

132. *Id.* at 459–60 (internal quotations omitted).

“vital source of unity and integration.”<sup>133</sup> Failure to punish wrongdoers according to social values demoralizes the public and weakens its faith in the law.<sup>134</sup>

Contemporary tort law retains moral focus by including a “corrective justice,” function.<sup>135</sup> The corrective justice, nonconsequentialist/deontological argument is based, in part, on definitions of “just desert,” or the common understanding of the phrase “retribution for the reprehensible.”<sup>136</sup> It holds that jury-awarded punitive damages are justified because they are essential in counteracting the inherently survivalist component of human nature—that part of our nature that values one’s own life (or one’s own pocketbook) over the life (or pocketbook) of another. The goal is to eliminate the ill-gotten profit derived from harming others. Free society requires strict rules—rules that are publicized and consistently upheld—to curtail the excesses of market capitalism that result from human nature.<sup>137</sup> Punitive damages are part of this system.

Punitive damages are also necessary to defeat a creeping “corporatism” that continually threatens to corrupt any governmental body charged with making ethical decisions. Corporatism, or “statism,” is the word for the system of government most common in Europe: a parliamentary or unitary government.<sup>138</sup> This system is far more efficient than our own. It is less individualized, cumbersome, and emotional.<sup>139</sup> Under this form of government there is regularized public law participation in which a stable, elite cadre of technically qualified interest group representatives consults regularly with government officials and

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133. *Id.* at 461.

134. *Id.* at 464.

135. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 554–60 (1972). See generally JULES L. COLEMAN, RISKS AND WRONGS 361 (1992) (arguing generally that tort law serves a rectification function in repairing wrongful losses and annulling wrongful gains); Ernest Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992) (supporting a formalist theory of corrective justice by drawing on Aristotle, Kant, and Hegel to establish a system of interpersonal rights and duties); Ernest Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987) (same).

136. Robinson & Darley, *supra* note 4, at 478. The authors explain that people follow the law for a variety of reasons. They argue that, most of all, people obey the law because they fear disapproval by their social groups and because they generally see themselves as moral beings. *Id.* at 468. See also BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 130 (1985) (warning that distinctions in definition are often driven by deeply held differences in value).

137. Robinson & Darley, *supra* note 4, at 478.

138. Frank B. Cross, *America the Adversarial*, 89 VA. L. REV. 189, 214 (2003) (reviewing ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001)).

139. *Id.* at 212–17.

serves on influential policy-recommending committees.<sup>140</sup> Creeping corporatism stands opposed to our “adversarial legalism,” where individuals argue issues in courts and are subject to the radical democracy of the common law jury.<sup>141</sup>

The U.S. adversarial system embodies a number of values and beliefs that challenge the European need for order and decorum. It places less value on efficiency and more on individual justice. In the United States, individual justice is tied to history and a number of shared, fundamental, and interconnected beliefs about the nature of humankind.<sup>142</sup> Instead of starting from the position that individuals are rational, our jurisprudence assumes that, while governments and established religions tend toward oppression and corruption, human nature also is flawed, sinful, and prone to greed and avarice.<sup>143</sup> The United States, as a whole, fears centralized power, both from governments and institutions.<sup>144</sup> We prefer power to be separated and the public to have a say in the formation and application of the law. We distrust the so-called experts. We would rather sacrifice money and efficiency to ensure justice and fairness for the individual.

The U.S. view of human nature and human freedom corresponds with a desire to hold individuals and groups accountable when they break rules. Citizens realize that market capitalism can produce temptation and greed. The modern market says, “Greed is good.”<sup>145</sup> “Greed in all its forms . . . has marked the upward surge of mankind.”<sup>146</sup> Our adversarial legalism would rather rely on punishment after the fact than a large regulatory state designed to prevent harm in the first place.<sup>147</sup> Beliefs in the penultimate nature of human freedom and the inevitability of human failing lead to a system in constant tension.<sup>148</sup> The primary values of the United States are inherently conflicted—freedom to pursue happiness

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140. *Id.*

141. *Id.*

142. Bernard Bailyn, *The Central Themes of the American Revolution*, in *ESSAYS ON THE AMERICAN REVOLUTION* 9–10 (Stephen G. Kurtz & James H. Hutson eds., 1973).

143. These are values derived from a mix of four views: Puritan, Evangelical, Enlightened, and Republican. JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 23–35 (2d ed. 2005).

144. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3 (2001); WITTE, *supra* note 143, at 23–35.

145. *WALL STREET* (20th Century Fox 1987).

146. *Id.*

147. See KAGAN, *supra* note 144, at 3 (noting that policymaking is principally implemented by “lawyer-dominated litigation”).

148. Cross, *supra* note 138, at 190, 206–30.

and freedom from harm, especially in an environment of scarce resources.<sup>149</sup>

Corporate law pours gasoline on the fire of human nature. It divorces the individual from liability for his actions by allowing limited liability.<sup>150</sup> By creating a board or a committee, individuals can take risks with other people's money and protect themselves through the invention of shared ownership.<sup>151</sup> The market rewards risk takers. Limited liability makes it easier to take risks—committees shield the risk taker from responsibility for any decision that recklessly endangers another. In this environment, risks can be taken with virtual impunity.

Corporatism does not contain any inherent protection against the abuse of power.<sup>152</sup> Unchecked, powerful corporate actors can persuade legislators and judges to protect corporate interests.<sup>153</sup> Unchecked, corporatism will eviscerate the rule of law, destroy the integrity of the markets, and make impossible a free and just society.

Sociological studies provide support for the proposition that corporate actors are largely undeterred by government fines.<sup>154</sup> The market's emphasis on material gain causes many of its actors to see their decisions in terms of the risks, rewards, and probabilities of getting caught, instead of in terms of right and wrong. At some point, the law must send a clear message about what is right and wrong to counteract the immorality of the market. The nonconsequentialist argues that punitive damages express social norms—that punitive damages “are perhaps the most important instrument in the legal repertoire for pronouncing moral disapproval of economically formidable offenders.”<sup>155</sup> They discipline the market actor who fails to adequately respect an individual's freedom from harm. They demand compliance,

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149. GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* 74–76 (1978).

150. See LEWIS D. SOLOMON ET AL., *CORPORATIONS LAW AND POLICY, MATERIALS AND PROBLEMS* 326–29 (4th ed. 1998) (discussing limited liability generally).

151. See *id.* (discussing the scope of the corporate veil).

152. Cross, *supra* note 138, at 226 (arguing against European corporatism and arguing that the United States should continue to bear less than optimal efficiency in its civil justice system—lengthy discovery, juries, punitive damages—because these mechanisms prevent government officials and corporations from forming alliances that harm society).

153. See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974) (describing how large, powerful interests tend to succeed in court); Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals*, 36 *AM. J. POL. SCI.* 235 (1992) (reporting that large enterprises are much more successful in appellate court than individuals).

154. Coffee, *supra* note 4, at 426–31. See also Robinson & Darley, *supra* note 4, at 480 (discussing the ineffectiveness of such sanctions).

155. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 *AM. U. L. REV.* 1393, 1428 (1993).

regardless of their effect on the defendant or their relationship to the plaintiff's injury.<sup>156</sup>

*B. Criminal Justice Scholarship*

Jury-awarded punitive damages often seek to punish the intentional and malicious wrongdoer wrapped in institutional garb. Criminal law does the same. Does this mean that giving juries a free hand to punish such institutions really produces more compliance with the law than judge-made decisions that are economically efficient or utility based? Criminal scholars have asked this question to discern the best way to prevent corporate crime. John Collins Coffee, Jr., reviewed the data available in 1980 and found support for his deontological belief that there is a need for retribution-based, rather than economically driven, fines.<sup>157</sup> He concluded that,

The threat counts more than the penalty. In order to determine the deterrent effect of a legal sanction in a world of uncertainty, one must consider the entire range of outcomes with which the offender was *threatened*, not simply the penalty *imposed*. . . .

. . . [F]ines will generally lack the deterrent value of incarceration because the range of the threatened sanction in the case of imprisonment typically exceeds that of fines. . . .

. . . Criminal justice reforms must take into account the problem of demoralization costs. A system that fines the rich and jails the poor risks the appearance of institutionalizing bias, and its asserted efficiency may depend on myopic social cost accounting. . . .

. . . Even if the neo-classic assumption that a firm will always profit maximize is accepted, the prospects are not encouraging for achieving adequate corporate deterrence through reliance on penalties aimed solely at the firm. Under such a theory the penalty must be increased to a point which, after discounting it by the likelihood of apprehension, it still exceeds the expected gain. Corporate crime tends to be uniquely concealable and hence apprehension rates may often fall well below 10%. If this occurs, the penalty would have to be tenfold greater than the gain in order to be effective.<sup>158</sup>

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156. See Rubin, *supra* note 129, at 132 (arguing that punitive damages "have nothing to do with punishment, but represent an ordinary and essential mechanism for the private enforcement of commercial law").

157. See generally Coffee, *supra* note 4.

158. *Id.* at 468-71.

Moreover, the data suggest that, to be effective, the potential penalty is dependent on its indeterminate range; a range that needs to be *at least tenfold* the expected gain for a penalty to be effective.<sup>159</sup>

In the civil context, as part of the “criminal process as a whole,” jury-awarded punitive damages provide a clear message of moral condemnation, especially if the jury can truly “hurt” the defendant by judging reprehensibility in relation to wealth. We need full moral condemnation because our political and market structures send mixed messages about what is right and wrong. To combat this tendency to favor profit over people, tort law provides counter-incentives. It punishes by requiring the disgorgement of profits in proportion to the wealth of the actor.<sup>160</sup> Criminal justice scholars contend that punishment must take into account the wealth of the actor.<sup>161</sup> Even if one uses an economic analysis of punishment in the criminal context, high punitive damages that vary with the wealth of the corporate actor are the bedrock of deterrence.

Efforts to develop an economic understanding of criminal sanctions and penalties are not new. Since the 1970s, the Chicago School of Economics<sup>162</sup> has attempted to define the costs for efficient punishment as “the sum of damages, costs of apprehension and conviction, and costs of carrying out the punishments imposed.”<sup>163</sup> Proponents of the Chicago School believe it is cheaper to apprehend a few criminals, and subject them to severe punishment, than to achieve a higher rate of apprehension and punish moderately.<sup>164</sup> Proponents also find that “the harmful effects of some crimes may be less than the enforcement costs necessary to deter

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159. See *id.* at 466 (suggesting that the offenders’ attitudes toward risk are important for judging the effectiveness of potential penalty).

160. See Galanter & Luban, *supra* note 155, at 1428 (noting that punitive damages are “the most important instrument . . . for pronouncing moral disapproval of economically formidable offenders”); see also Jennifer K. Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1140 (2003) (reviewing arguments based on equity theories). While large punitive damages can put a company out of business and, therefore, lead to lay-offs, this is not a justification for allowing a company to interfere with an individual’s freedom from harm. Furthermore, innocent employees with valuable skills can find new jobs. Former Arthur Andersen accountants who lost their jobs as a result of the Enron scandal are prime examples.

161. See GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 65 (1976) (noting that determining optimal fines based on harm to society rather than an offender’s income has been criticized).

162. The Chicago School describes the rise of economic analysis as a tool for limiting the government to proven cost-benefit supported tasks that are optimally efficient. See Coffee, *supra* note 4, at 420–21 (discussing the economic model developed by Gary Becker).

163. BECKER, *supra* note 161, at 77.

164. Coffee, *supra* note 4, at 421.

them.”<sup>165</sup> These conclusions are based on the following assumptions: “(1) the threat of incarceration typically will have a greater deterrent value than the threat of a fine; (2) more deterrence is generated by penalties focused on an individual than on an organization; and, (3) the *certainty* of a sanction is . . . more important than its *severity*.”<sup>166</sup>

Some theorists believe that economic sanctions are ineffective in preventing white collar crime unless the judicial system considers the wealth of the offending individual or entity. Recognizing that the most effective deterrent is incarceration, these theorists propose a system that converts incarceration time into a monetary equivalent, according to the wealth of the offending individual or entity.<sup>167</sup> The benefit of using economic sanctions in the civil context is clear—fines have been proven to be as effective a deterrent as incarceration, and fines are cheaper to administer.<sup>168</sup> Unless the wealth of the offender is considered, however, the deterrent effect is hindered.<sup>169</sup>

Furthermore, if the penalty is capped, the deterrent effect is lessened. Fines are most effective when they are high and unpredictable. If fines are set at a certain level, a company will decide whether the benefits of the unlawful behavior outweigh the chances of being fined. This is precisely the type of calculus that the law should prevent. To encourage compliance with the law and to promote ethical business decisions, fines must be high and *also* uncertain.

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165. *Id.*

166. *Id.* at 422–23.

167. Posner agrees, with qualifications:

But this is not to say that a system of fines discriminates against the poor. It is rather that a *uniform* prison term discriminates against the rich compared with a *uniform* fine. If we want to discriminate against the rich through a fine system, that is easily done by progressively varying the fine with the offender's income. If we want not to discriminate against the rich through an imprisonment system, we can make the length of the sentence inverse to the offender's income. In either case the choice to discriminate is independent of the form of the punishment.

Posner, *supra* note 4, at 415.

Posner notes that Jeremy Bentham was the first to make this point: “Pecuniary punishments should always be regulated by the fortune of the offender. The relative amount of the fine should be fixed, not its absolute amount.” *Id.* at 415 n.17 (quoting J. BENTHAM, *THE THEORY OF LITIGATION* 217 (1975)).

168. *See id.* at 410 (“[F]ining the affluent offender is preferable to imprisoning him from society's standpoint because it is less costly and no less efficacious.”). Criminal punishment scholars are quick to point out that an objective utility analysis will do little to deter a criminal actor. In this regard, attitudes concerning morality play a strong role and social sanctions or the fulfillment of moral obligations are actually a better deterrent of crime than a utility analysis. Robinson & Darley, *supra* note 4, at 468–71.

169. *See* Posner, *supra* note 4, at 415 (suggesting a progressive scale for fines based on income).

In the end, even without caps, criminal justice scholars contend there is little deterrence from economic sanctions.<sup>170</sup> Corporations as entities cannot be deterred—punishment only deters the individuals who run corporations. Yet prosecutors struggle to prove who in an organization is responsible for wrongdoing. Further, corporate assets can be sent abroad or hidden in off-shore bank accounts.<sup>171</sup> Collection is low compared to the individual actor's ability to pay.<sup>172</sup> Generally, the expected gains to the company and the individual are greater than the risk of punishment to any one individual.<sup>173</sup> In addition, the costs of punishment are absorbed by passing them on to future consumers.<sup>174</sup> In other words, corporations have an economic incentive to maximize profits by breaking the law. As it stands, punitive damages are the only force capable of constraining corporate greed and the only manifestation of the law capable of expressing moral condemnation. The educative use of punitive damages may be its most important; it teaches that greed at the expense of harming others is wrong and immoral.

### *C. International Comparative Law Provides Support for Punitive Damages*

In addition, international law perspectives demonstrate the need and role for punitive damages on a national and international scale. Some countries have laws limiting judgments against their citizens to compensatory damages.<sup>175</sup> There is little to prevent such countries from exporting defective products to the United States. Without the threat of punitive damages, these countries are free to balance expected profits against the amount of damage their products will cause.

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170. See Coffee, *supra* note 4, at 436 (“The threat of incarceration would have a greater deterrent value than the threat of fines even if the authorized ceilings on fines were infinitely high.”). Where institutions act to defraud the public, Congress gives the whistle-blower the right to recover, not based on their harm but on the amount of ill-gotten gains. See 31 U.S.C. § 3730 (2000) (basing the award in a false claims qui tam action on the amount of recovery).

171. See Coffee, *supra* note 4, at 437 (suggesting that individuals “can hide assets . . . [or] shelter [them]”).

172. See *id.* (discussing the “collectability boundary”).

173. See *id.* at 456 (“A distinctive feature of organizational crime is that it is committed by agents for the primary benefit of a principal.”).

174. See *id.* at 443 (stating that Section 5 of the Model Business Corporation Act permits fines to be indemnified in some cases).

175. See *e.g.*, Lucien J. Dhooge, *The Lowen Group v. United States: Punitive Damages and the Foreign Investment Provisions of the North America Free Trade Agreement*, 19 CONN. J. INT’L L. 495, 566 (2004) (describing limits imposed by Middle East nations).

A timely example that illustrates the need for punitive damages in the international arena involves lawsuits brought by families of victims of terrorism.<sup>176</sup> In these cases, judges award large compensatory and punitive damages.<sup>177</sup> Some of the awards are even based on the size of the responsible government's defense budget.<sup>178</sup> These punitive damage awards are expressions of moral outrage—they say to the world, “this is what an individual's life is worth in the United States.” We must not allow foreign governments to engage in their own calculus, weighing the value of human life against a desire to expand their territory, spread their religious views, or fulfill their gods' wills.

Some commentators note that punitive damages in international law are necessary for the effective enforcement of human rights.<sup>179</sup> These punitive damages give governments legitimacy by empowering their courts to protect individuals from the collective power of the state and powerful international corporate actors. In any event, the perspective of international market actors highlights the values underlying jury-awarded punitive damages. Punitive damage awards express the values of the U.S. citizenry—freedom from harm above freedom to thrive. Allowing uncapped punitive damages in international law is an important way for countries such as the United States to uphold their values in the international market and to protect their citizens according to their ethical standards. Proponents of unrestrained punitive damage awards acknowledge that, given proper circumstances (work pressure and a lack of accountability), there are powerful forces leading individuals to value their own needs over the safety of others. These forces are universal. Proponents understand that punitive damages are currently the only line of defense against the forces of human nature.

#### *D. The Jury*

Implicit in Justice Stevens's opinion in *Cooper*<sup>180</sup> and Justice Kennedy's opinion in *State Farm*<sup>181</sup> is a diminution in the role of the

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176. See W. Michael Reisman & Monica Hakimi, *Illusion and Reality in the Compensation of Victims of International Terrorism*, 54 ALA. L. REV. 561, 568–74 (2003) (discussing cases against Cuba and Iran).

177. See *id.* at 568–73 (detailing several judgments that exceeded \$100 million).

178. See *id.* at 574 (discussing the Secretary of the Treasury's power to distribute funds “not to exceed the total amount in the Iran Foreign Military Sales Program account”).

179. See Reisman & Hakimi, *supra* note 176, at 569 (citing *Alejandro v. Republic of Cuba*, 966 F. Supp. 1239, 1251 (1997)).

180. See *supra* notes 32–40 and accompanying text.

181. See *supra* notes 41–66 and accompanying text.

jury.<sup>182</sup> These decisions suggest that judges make better, more rational decisions than juries. In reality, juries are separate, radical, and moral discipliners of the market.

Lost in the Court's discussion of the rationality of optimal deterrence and retribution is an explanation of why a judge is any better at determining the level of punishment deserved by a corporate defendant than a jury. Judges themselves must recognize the irrational features of fact finding. Both the making of law by judges and the finding of facts by juries require that consequentialist directives be processed within nonconsequentialist decision-making constraints. As such, both processes are subject to inconsistent methods and uses. Where their directives are consequentialist, these processes are open to criticism for lack of definiteness, as each tries to define the good that their principles will produce. They are also unable to prove or guarantee their future good from the use of their principles. Where each has processing constraints that are dogmatic and nonconsequentialist, the systems are open to criticism for producing inconsistent and unpredictable results that do not further society's widely held beliefs concerning what is in people's best interests. The criticisms illustrate the lack of rational justification for the assumptions that undergird these systems processing directives.

As philosophers have long pointed out, these criticisms are not unique to the tort system but exist in any normative, ethical, decision-making system.<sup>183</sup> Perhaps, however, the tort system, which must try to operate within the adjudicatory constraints imposed by the real world, is driven, for the sake of appearances, to pretend that the criticisms are invalid. It is interesting to note that what the economic system tries to do is what modern philosophers argue is the best way to solve the inconsistencies of consequentialist and nonconsequentialist systems.<sup>184</sup> These philosophers argue that the key to a unified and consistent system is wide acceptance of the underlying faith in the tenets and assumptions

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182. See cases cited *supra* note 67, and accompanying text. These cases evidence a gradual eroding of the role of the jury in civil law decision making. A number of states have recently placed limits on punitive damages. See, e.g., ALA. CODE § 6-11-21 (Supp. 1990) (capping punitive damages at \$250,000); VA. CODE ANN. § 8.01-38.1 (1987) (capping punitive damages at \$350,000). Some of the caps place flat dollar limits on the amount of the award, while others restrict punitive damages to some multiple (e.g., two or three times) of compensatory damages. See, e.g., ALA. CODE § 6-11-21 (flat cap); FLA. STAT. ANN. § 768.72 (West Supp. 1990) (capping damages at a three-to-one ratio).

183. See generally CALABRESI & BOBBITT, *supra* note 149 (discussing choices that members of society must make in the allocation of scarce goods).

184. See REGAN, *supra* note 79, ch. 8 (introducing the theory of "co-operative utilitarianism").

of an ethical system.<sup>185</sup> Once an agreement is reached among all the participants in such systems, and a process for consistent decision making is found, those who agree with both the principles of the system and with its process will be satisfied with the consistency, definiteness, and completeness of their system.<sup>186</sup> Yet, there is no more agreement among judges than among individual jurors in a jury.<sup>187</sup> All things being equal, the jury is a better judge of the changing values and morals of society.

The genius of the jury system is that it provides for decision making that is at once democratic and uniquely private. In deliberation, jurors must listen to one another and strive for consensus. Nowhere else in our democratic system can one individual prevent the majority from taking action. During this process, jurors are untouchable—no influence beyond their own values and beliefs may persuade this group to reach a particular conclusion. Once jurors emerge from deliberation, their job is complete. No one can ask for their reasons or force them to change their decision. Judges are entirely different. They are undemocratic. They do not *have* to listen to anyone else in making a decision. However, they *are* subject to outside forces because their decisions must be explained, and such explanations are often questioned and occasionally overturned.

Where a decision's rationale is mixed and uncertain, the decision is ideal for a jury. Punitive damages are said to be about deterrence, corrective justice, and compliance. More than just deterrence, punitive damages are about punishment—about judging the reprehensibility of an action and expressing the moral outrage of society. Jury decisions are still restrained by the Constitution. They must be proportional to some combination of compensation, wealth of the individual, and

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185. *See id.* at 130 (“[T]he more relevant correct beliefs the parties have, the more sophisticated is their co-operation.”).

186. *See Cross, supra* note 138, at 230 (noting that adversarial legalism can serve as a moderating check on all branches of government).

187. To decide which is a better decision maker, judge or jury, one may ask whether, in light of *State Farm*, a principled basis has developed governing when federal and state courts permit punitive damages that exceed the ten-to-one ratio. Of course, *State Farm* itself held that there is no rigid benchmark on ratios and that ratios that are greater than four to one or ten to one may comport with due process. *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). This is possible where a “particularly egregious act has resulted in only a small amount of economic damages.” *Id.* (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996)). Furthermore, a higher ratio might be necessary where the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. *Id.* On the contrary, when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. *Id.* For a discussion of case law applying *State Farm*, consult Part VI.

blameworthiness of the actor. They cannot be clearly excessive.<sup>188</sup> They must be based on the defendant's conduct as it relates to individuals within the court's jurisdiction.<sup>189</sup>

Who better than a group of twelve diverse Americans to determine what value society places on freedom from harm? A jury is a preferred decision maker precisely because the moral and religious values that go into the decision are shielded by the process. In this unanimous, unquestionable decision, the community, through these jurors, is given the ability to fight back, the ability to speak directly to corporate actors in a language they understand—dollars and cents.

## V. CONCLUSION

While optimal, efficient deterrence provides a powerful justification for awarding damages, punitive damages, as developed in common law torts cases, have a moral foundation or purpose that is broader than the utilitarian roots of deterrence.<sup>190</sup> Punitive damages must be understood in connection with their corrective-justice roots. Such roots are not only concerned with compensating the individual but also with compensating society for the threat to all people's freedom. These concerns are ignored by imposing a cap, either a maximum amount or a single-digit multiplier. Under the existing system, market forces encourage corporate actors to make illegal and unethical decisions if the expected profit is ten times larger than the harm to those who will be injured and obtain a judgment. When expected profits exceed these expected costs, the decision to engage in undesirable conduct is a smart economic move. Analysis of the moral and philosophical uses of U.S. common law demonstrates why a narrowly focused deterrence model that centers on harm to a particular plaintiff, rather than on reprehensibility and moral outrage, will undermine democratic values.

The Supreme Court has moved significantly the rationale of punitive damages away from its moral basis in retribution and corrective justice to an apparently consequentialist rationale. This shift is contrary to the values and beliefs imbedded in American culture: that freedom from harm is primary, that institutions are corruptible, that power should be separated, and that humans are sometimes irrational. Punishing and

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188. Paul J. Zwier, *Due Process and Punitive Damages*, 1991 UTAH L. REV. 407, 441–42.

189. *Gore*, 517 U.S. at 610.

190. See Gary T. Schwartz, Comment, *Deterrence and Punishment in the Common Law of Punitive Damages*, 56 S. CAL. L. REV. 133, 140–43 (1982) (arguing that deterrence cannot explain punitive damages).

preventing bad corporate behavior is a difficult task. Effective punishment depends on sending a message of moral condemnation and economic pain, especially where the market blurs the lines of morality and values profit above all else. Where the institutional conduct is particularly egregious, the most effective way to punish in civil law is to simulate incarceration. In some ways, bankruptcy, which limits a company's freedom and taints its reputation, serves this purpose.

An international perspective adds force to the nonconsequentialist argument that the importance of individual freedom and liberty supports jury-awarded punitive damages. Each society values the individual according to its own beliefs. Some believe that a cause, or a religion, is more important than the value of human life. Some believe that the collective good takes precedence over an individual's happiness. Upholding punitive damages in international law is a way for each society to maintain its values in the global arena.

In the United States, the jury system provides the best mechanism for determining fair punishment. The nature of the punitive damages award is complex, requiring value judgments and speculation about future consequences. Local jurors are in a position to express the values of their community through a unanimous, independent decision. Placing this decision in the hands of judges threatens the corrective justice system and the integrity of the market.

## VI. APPENDIX

Many courts read *State Farm Mutual Automobile Insurance Co. v. Campbell*<sup>191</sup> as imposing a ten-to-one ceiling on constitutionally permissible punitive damage awards. These courts reduce punitive damage awards that exceed the single-digit ratio margin. For example, in *Valu Gas, Inc. v. Equilon Enterprises*,<sup>192</sup> the California Court of Appeals held a ratio of twelve to one was excessive. The court found the defendant's fraudulent conduct reprehensible, but the punitive-to-compensatory ratio was above that permitted by *State Farm*.<sup>193</sup>

Other courts construing *State Farm* are more cautious. For example, the Eighth Circuit explains that a ratio greater than ten to one does not

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191. 538 U.S. 408 (2003).

192. No. B169365, 2005 WL 950133, at \*11 (Cal. Ct. App. Apr. 26, 2005).

193. *Id.*

violate the Constitution but rather alerts the court that such an award needs special justifications.<sup>194</sup>

Following this cautionary view, some lower courts have upheld punitive damages that are well above the single-digit margin. For example, in *Mathias v. Accor Economy Lodging, Inc.*,<sup>195</sup> the court upheld punitive damages in a ratio of approximately thirty-seven to one against a motel that subjected its guests to an infestation of bedbugs. The court stated that the motel management willfully ignored the insect infestation and showed wanton conduct deserving of punitive damages.<sup>196</sup> The jury's verdict of \$186,000 in punitive damages and \$5000 in compensatory damages was upheld by the court.<sup>197</sup>

In a notable state court case, *Craig v. Holsey*,<sup>198</sup> the Georgia Court of Appeals let stand a punitive damage ratio of twenty-two to one. In that case, the plaintiff was injured in an automobile accident caused by the defendant, who was driving under the influence of alcohol and marijuana.<sup>199</sup> The court noted that the defendant was on probation for another offense at the time of the accident and that he continued to drive under the influence of alcohol and drugs even after the accident giving rise to the case.<sup>200</sup>

Some courts have upheld even higher ratios in nonphysical injury cases. For example, in *Kemp v. American Telephone & Telegraph Co.*,<sup>201</sup> a RICO class action by telephone customers who were billed illegally for fees they incurred using a telephone gambling service, the court allowed compensatory damages of \$115 and remitted punitive damages to \$250,000, a ratio of 2173 to 1. In *Planned Parenthood v. American Coalition of Life Activists*,<sup>202</sup> the district court upheld a ratio of thirty-two to one. In that case, abortion providers sued anti-abortion activists under the Freedom of Access to Clinic Entrances Act.<sup>203</sup> The district court found that the defendants who placed the plaintiffs'

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194. See *Williams v. Conagra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) ("In the absence of extremely reprehensible conduct against a plaintiff or some special circumstance such as an extraordinary small compensatory award, awards in excess of 10-to-1 cannot stand.").

195. 347 F.3d 672, 674 (7th Cir. 2003).

196. *Id.* at 675.

197. *Id.* at 678.

198. 590 S.E.2d 742, 748 (Ga. Ct. App. 2003).

199. *Id.* at 744.

200. *Id.* at 747.

201. 393 F.3d 1354, 1365 (11th Cir. 2004).

202. 300 F. Supp. 2d 1055, 1060 (D. Or. 2004).

203. *Id.* at 1057.

identities on a Web site placed the plaintiffs in danger of physical violence.<sup>204</sup>

In *Stack v. Jaffee*,<sup>205</sup> the district court held that the intentional failure to investigate charges of police misconduct warranted punitive damages of \$27,000 even though compensatory damages were only \$2000.

In *Jones v. Rent-A-Center Inc.*,<sup>206</sup> the district court permitted \$290,000 in punitive damages and \$10,000 in compensatory damages. The case involved a sexual harassment action under Title VII.<sup>207</sup> The jury had originally given a verdict of \$10,000 in compensatory damages and \$1.2 million in punitive damages, but the award was reduced after a statutory cap was applied.<sup>208</sup> Nevertheless, the ratio in *Jones* was twenty-nine to one.<sup>209</sup>

In addition, courts have not hesitated to permit ratios that are well above the single-digit ratio margin in cases where the jury has awarded only nominal compensatory damages. Many of these cases involve infringement of civil rights or are cases where the plaintiff does not seek compensatory damages. These courts tend to view the conduct of a defendant who violates the plaintiff's constitutional rights as reprehensible and the invasion of the plaintiff's rights as substantial. In such cases, where the harm cannot be reduced to a compensable dollar amount, juries often award one dollar as nominal damages. Punitive damages have been awarded as the only practical remedy to the plaintiff and as the only means of punishing and deterring the defendant. For this reason, lower courts have permitted high punitive damages to serve the purposes of punishment and deterrence.

For example, in *Lincoln v. Case*,<sup>210</sup> the district court allowed a punitive damage award of \$55,000, a 110-to-1 ratio to the compensatory damages, where a prospective tenant sued a landlord under the Fair Housing Act for race discrimination. In *Sherman v. Kasotakis*,<sup>211</sup> the district court upheld a punitive damage award of \$12,500 where the African-American defendants were racially discriminated against in a restaurant and called derogatory names. The district court stated that the ratio limitation did not apply to cases where nominal damages were

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204. *Id.* at 1058–59.

205. 306 F. Supp. 2d 137, 142 (D. Conn. 2003).

206. 281 F. Supp. 2d 1277, 1290 (D. Kan. 2003).

207. *Id.* at 1280.

208. *Id.* at 1279.

209. *Id.* at 1289.

210. 340 F.3d 283, 285 (5th Cir. 2003).

211. 314 F. Supp. 2d 843, 873 (N.D. Iowa 2004).

available instead of compensatory damages because a proportional punitive damage award did not punish or deter the defendant in any way.<sup>212</sup> The court stated that a 12,500-to-1 ratio was reasonable and permissible in consideration of the facts of the case.<sup>213</sup>

Courts also have allowed a high ratio of punitive-to-nominal damages where a plaintiff does not seek compensatory damages or where the compensatory damages are insignificant in comparison with the reprehensibility of the defendant's conduct. For example, in *Tyco International, Inc. v. John Does, 1-3*,<sup>214</sup> the district court upheld a 10,000-to-1, punitive-to-nominal damage ratio. In that case, individuals launched an unsuccessful spam attack on Tyco's computers with the intention of making the computers crash.<sup>215</sup> The district court affirmed the magistrate's recommendation of \$1 in nominal damages and \$10,000 in punitive damages as being necessary to punish the defendant because Tyco did not ask for compensable damages in its complaint.<sup>216</sup>

*Tate v. Dragovich*,<sup>217</sup> involved a suit by a state prisoner against prison employees for harassment. In that case, the Prison Litigation Reform Act prohibited recovery of compensatory damages, so the jury awarded the plaintiff \$1 in nominal damages and \$10,000 in punitive damages.<sup>218</sup> The Court held that the punitive damage award was reasonable and permissible.<sup>219</sup> Furthermore, nominal damages are not necessarily one-dollar awards. For example, in *Williams v. Kaufman County*,<sup>220</sup> the court stated that nominal damages did not fit the ratio limitation and that nominal damages ranging between \$500 and \$5000 were permitted.

Finally, other courts have upheld high punitive damages when they believed that the punitive damages were only a fraction of the potential damages. For example, in *Craig v. Holsey*,<sup>221</sup> where a drunk driver was liable for injuries caused in an auto accident, the court upheld a punitive damage award of \$200,000, even though the compensatory damage award was \$8801. The court stated that "Holsey could have died as a result of Craig's driving under the influence" and that "awards for

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212. *Id.* at 875.

213. *Id.* at 876.

214. No. 01 Civ. 3856(RCC)(DF), 2003 WL 23374767, at \*7 (S.D.N.Y. Aug. 29, 2003).

215. *Id.* at \*3-4.

216. *Id.*

217. No. CIV.A.96-4495, 2003 WL 21978141, at \*1 (E.D. Pa. Aug. 14, 2003).

218. *Id.* at \*9.

219. *Id.* at \*10.

220. 352 F.3d 994, 1015 n.70 (5th Cir. 2003).

221. 590 S.E.2d 742, 742 (Ga. Ct. App. 2003).

wrongful death can easily approach or exceed the amount of punitive damages awarded in the present case.”<sup>222</sup>

In the last two years, courts have looked to *State Farm* for direction on when punitive damages are grossly excessive and in violation of due process. Outcomes indicate that unusually large punitive damages are likely to be reduced. However, some lower courts distinguish their cases from *State Farm* and permit high punitive damage awards. These cases involve claims where the egregious conduct of a defendant results in nominal, as opposed to compensatory damages, and where the potential harm to the plaintiff is difficult to quantify. In these cases, lower courts permit punitive damage awards that result in ratios well outside the single-digit margin. Nevertheless, a principal basis governing when lower federal courts will permit high punitive damages is not apparent because some courts also allow high punitive damages in cases that do involve compensatory damages.

Lower courts vary significantly in their application of the *State Farm* factors for determining reprehensibility. Some courts apply the factors broadly and others apply them narrowly. As a result, there does not appear to be any uniform treatment of the reprehensibility issue. What appears to be happening is a mere substitution of the jury-decided verdict with a judge-decided order of what conduct is reprehensible and how reprehensible it is. The wide variation in the application of the factors makes it very difficult to determine when an action is sufficiently egregious to warrant a high punitive damage award.

Does retribution provide a principled basis for large punitive damages? It is important to remember that punitive damages are aimed at deterrence and retribution.<sup>223</sup> However, due process prohibits the imposition of grossly excessive punitive damages because excessive amounts do not further any legitimate purpose and constitute an arbitrary deprivation of property.<sup>224</sup>

Courts must consider the following guideposts when reviewing the reasonableness of a punitive damage award:

- (1) the degree of reprehensibility of the defendant’s misconduct;
- (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and
- (3) the difference between the punitive damages awarded by the jury

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222. *Id.* at 748.

223. *See* *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (“Punitive damages may properly be . . . imposed . . . in punishing unlawful conduct and deterring its repetition.”).

224. *Id.* at 586.

and the civil penalties authorized or imposed in comparable cases.<sup>225</sup>

The most important of the guideposts is the degree of reprehensibility of the defendant's conduct.<sup>226</sup> Because there is a presumption that compensatory damages make a plaintiff whole for injuries suffered, punitive damages should be awarded only when the defendant's conduct is so reprehensible that such an award is necessary for deterrence and punishment.<sup>227</sup> The degree of reprehensibility is determined by considering whether:

- (a) "the harm caused was physical as opposed to economic";
- (b) the "conduct [shows] an indifference to or a reckless disregard of the health and safety of others";
- (c) the victim of the conduct is financially vulnerable;
- (d) "the conduct involved repeated actions or was an isolated incident"; and
- (e) "the harm was the result of intentional malice, trickery, or deceit, or mere accident."<sup>228</sup>

Even though any one of the factors may weigh in favor of a plaintiff, it does not necessarily sustain a punitive damage award. The absence of all factors, on the other hand, makes any award suspect.<sup>229</sup> In determining the reprehensibility of the defendant's action, a court should only consider conduct that has a nexus to the specific harm suffered by the plaintiff.<sup>230</sup> That is, a defendant should be punished for the conduct that harmed the plaintiff and not for acts that are independent from those upon which liability was premised.<sup>231</sup> Therefore, as long as there is a nexus between that conduct and the specific harm suffered, lawful out-of-state conduct may be probative when determining reprehensibility.<sup>232</sup> In sum, the "reprehensibility guidepost does not permit courts to expand

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225. *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418 (citing *Gore*, 517 U.S. at 575).

226. *Id.* at 419.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 422–23.

232. *Id.* at 422.

the scope of the case so that a defendant may be punished for any malfeasance.<sup>233</sup>

Repeated instances of misconduct are more indicative of reprehensible conduct than an individual instance of malfeasance.<sup>234</sup> Therefore, recidivists may be punished more severely than first-time offenders and might warrant a higher punitive damage award. However, courts must ensure that the conduct in question replicates the prior transgression when considering repeated instances of misconduct.<sup>235</sup>

The goal of *State Farm* was to create an exacting review of the reasonableness of punitive damages. However, it has not achieved this goal. Lower courts vary significantly in their application of the factors. For example, some lower courts have immediately treated conduct that results in primarily economic injuries as being less reprehensible than conduct that results in physical injuries, even if the physical harm is minimal. In one case, the Alabama Supreme Court upheld a punitive damage award of \$500,000 against the owner of a recently purchased motel.<sup>236</sup> In *McCaleb*, a guest struck her ankle against a piece of metal on the bottom of the bed frame that caused “a speck of blood,” but the court found the defendant’s negligence so reprehensible as to warrant the punitive damage award.<sup>237</sup> On the other hand, in *Eden Electrical, LTD. v. Amana Co.*,<sup>238</sup> the defendant intentionally and illegally ruined a small business through fraudulent business practices. The district court held that the damages suffered by the plaintiff were purely economic and did not warrant the high punitive damages awarded by the jury.<sup>239</sup>

*State Farm* therefore is vague enough that lower federal courts apply its factors broadly or narrowly. The result is a disparate treatment of the issues regarding reprehensibility. The lack of a uniform treatment shows that *State Farm* has failed in establishing some precise or predictable manner of reviewing the reasonableness of punitive damage awards. Instead, it appears that courts simply substitute the jury verdict with the judge’s opinion of what is reprehensible and to what degree.

The above cases indicate that lower courts have distinguished *State Farm* in cases involving nominal damages and where the quantification of potential damages is difficult. However, these cases do not provide

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233. *Id.* at 424.

234. *Id.* at 423 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 577 (1996)).

235. *Id.* (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 (1993)).

236. *Shiv-Rom, Inc. v. McCaleb*, 892 So. 2d 299, 319 (Ala. 2004).

237. *Id.*

238. 258 F. Supp. 2d 958, 959–60 (N.D. Iowa 2003).

239. *Id.* at 974.

2006] THE UTILITY OF A NONCONSEQUENTIALIST RATIONALE 447

proof that a principled basis has been established to guide lower state and federal courts in permitting high punitive damages. The wide variation in the application of factors by the lower courts in determining reprehensibility makes deciphering a principled basis difficult because there is no uniform treatment of the issue. Courts turn out to be no better than juries at measuring retribution and its effect on punitive damages.