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## PUNITIVE COMPENSATION

Cortney E. Lollar\*

*Criminal restitution is a core component of punishment. In its current form, this remedy rarely serves restitution's traditional aim of disgorging a defendant's ill-gotten gains. Instead, courts use this monetary award not only to compensate crime victims for intangible losses, but also to punish the defendant for the moral blameworthiness of her criminal action. Because the remedy does not fit into the definition of what most consider "restitution," this Article advocates for the adoption of a new, additional designation for this prototypically punitive remedy: punitive compensation. Unlike with restitution, courts measure punitive compensation by a victim's losses, not a defendant's unlawful gains. Punitive compensation acknowledges the critical element of moral blameworthiness present in the current remedy. Given this component of moral blameworthiness, this Article concludes the jury should determine how much compensation to impose on a particular criminal defendant. The jury is the preferable fact-finder both because jurors represent the conscience of the community, and because the Sixth Amendment jury trial right compels this result. Nevertheless, many scholars and legislators remain reluctant to permit juries to determine the financial award in a particular criminal case. Courts and lawmakers share a common misperception that juries make arbitrary, erratic, and irrational decisions, especially in the context of deciding criminal punishments and punitive damages, both of which overlap conceptually with punitive compensation. In debunking this narrative, this Article relies on empirical studies comparing judge and jury decision-making and concludes that juries are the more fitting fact-finder to determine the amount of punitive compensation to impose in a given case. Although anchoring biases, difficulties in predicting the duration and degree of a crime victim's future emotional response, and poorly written jury instructions challenge juries, each of these impediments can be counteracted through thoughtful and conscientious systemic responses.*

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## I. INTRODUCTION

Criminal courts impose “restitution” as punishment. Both the manner in which courts impose criminal “restitution” and the implications of failing to pay it illustrate the remedy’s increasingly punitive character.<sup>1</sup> Unlike restitution proper, what is called “restitution” in criminal proceedings usually is compensation to victims, not the disgorgement of unlawful gains or unjust enrichment. In fact, criminal “restitution” rarely involves disgorgement or even tangible gain to the defendant; it often contemplates only compensation for victim losses. Through “restitution,” courts order criminal defendants to compensate a victim’s tangible and intangible, current and future losses, without any clear instruction as to how to calculate those losses. The broadly conceived “restitution” in the criminal context now requires criminal defendants to make monetary amends to crime victims by paying for any losses those victims attribute to the commission of the crime. Rather than preventing defendants from obtaining an unjust enrichment, criminal “restitution” primarily aims to make the victim “whole.”

The consequences of failing to pay criminal “restitution” mirror those of other criminal punishments. Once a court imposes “restitution” as part of a criminal sentence, a defendant’s failure to pay it results in the same collateral consequences that attach to other criminal sentences, including continued disenfranchisement, preclusion from running for office, disqualification from jury service, suspension of one’s driver’s license, and even further incarceration. In fact, criminal defendants often end up incarcerated for a longer period of time due to a failure to pay a restitution obligation than for their original sentence.<sup>2</sup> Although criminal “restitution” certainly has restorative aims, increasingly, the punitive nature of the remedy eclipses those equitable purposes.

Consequently, the term “restitution” no longer fits the remedy regularly being imposed in criminal cases; it is a misnomer. This Article advocates recognizing the distinction between restitution and this markedly different remedy by dividing what is currently termed criminal “restitution” into two distinct remedies: (1) restitution, a remedy whose aim remains restorative, and (2) “punitive compensation,” a separate remedy with dual aims of compensating the victim and punishing the defendant. Restitution remains a primarily civil remedy that corrects an unjust enrichment by requiring the disgorgement of a defendant’s unlawful gains, whereas the newly minted “punitive compensation” covers the majority of “restitution” awards judges currently issue in criminal cases. Unlike restitution, “punitive compensation” acknowledges the moral blameworthiness at the core of the regularly utilized criminal remedy. “Punitive compensation” recognizes that courts impose this remedy largely in an attempt to address the moral harm caused by a criminal defendant’s action, while also compensating a victim’s intangible losses.

In identifying this distinct remedy as punitive compensation, this Article acknowledges that the remedy is, in fact, a punishment, thereby raising the question of the appropriate fact-finder to determine a punitive compensation amount. This Article concludes that juries should determine the appropriate amount of punitive compensation a defendant

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1. See Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93 (2014).

2. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 291 (2014).

must pay.

As an initial matter, the Constitution compels this result. The Supreme Court's Sixth Amendment jurisprudence recognizes that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."<sup>3</sup> In *Southern Union Co. v. United States*, one of the most recent cases to elucidate the contours of the jury trial right, the Court found Sixth Amendment protections applicable to criminal fines.<sup>4</sup> As such, any fact that increases the maximum amount of a criminal fine must be proven to a jury beyond a reasonable doubt. Applying the same logic results in the undeniable conclusion that the Sixth Amendment also should apply to punitive compensation, a monetary penalty paid to victims instead of the government. Although practitioners and scholars have reached this conclusion, the Supreme Court has yet to address the issue.<sup>5</sup>

Not only does the Constitution compel this result, jurors, as community representatives, are in the best position to determine the proper monetary sanction for a violation of our community mores. The focus of criminal trials and guilty pleas is legal and moral guilt; the focus of criminal sentencing hearings is the appropriate manner and degree of expressing condemnation of a person who has engaged in behavior that we, as a society, deem to be morally wrong. When we consider the punitive element present in punitive compensation decisions, the jury's role as moral compass becomes compelling.

Despite the undeniable rationale for allowing juries to determine punitive compensation, many have questioned whether submitting this decision to a jury is a good idea. They share a common perception that jurors are prone to arbitrary and excessive judgments in both civil damage and criminal felony decisions. Many lawyers and laypeople believe that allowing juries to make this type of determination will only decrease the fairness and reliability of the punitive compensation judgment. Additionally, even if juries are fair and reliable in their decision-making, the question of cost always lingers. Courts may be less inclined to accept a jury's role in deciding the amount of the remedy if the costs of doing so outweigh the benefits of having community members make this decision.

This Article begins in Part II by exploring the transformation of criminal restitution into a primarily punitive, rather than restorative, device. Part II proposes adopting the more apt denomination, "punitive compensation," to describe this particular remedy, in lieu of the ill-fitting term "restitution." Part II closes with a discussion of why punitive compensation is the appropriate terminology for the remedy courts employ regularly in criminal cases.

Part III turns to the question of how the proposed change in terminology translates

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3. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

4. *S. Union Co. v. United States*, 132 S. Ct. 2344, 2348 (2012). Distinct from "restitution," criminal fines are court-ordered payments imposed at sentencing and made to the government solely for the purposes of punishment.

5. In recent months, the Supreme Court has denied certiorari in several cases aimed at solidifying that criminal restitution is indeed a criminal punishment, and therefore subject to the Sixth Amendment of the U.S. Constitution. *See, e.g.*, Brief of Petitioner at \*2-3, *Holmich v. United States*, 2014 WL 4727762 (2014) (No. 14-337), *cert. denied*, 2015 WL 231975 (2015); Brief of Petitioner at \*i, *Rosbottom v. United States*, 2014 WL 6468917 (2014) (No. 14-570), *cert. denied*, 2015 WL 133043 (2015). *See also, e.g.*, Lollar, *supra* note 1; James Barta, *Note, Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution under the Sixth Amendment*, 51 AM. CRIM. L. REV. 463 (2014).

into a conclusion that the jury is the preferable entity to determine the amount of punitive compensation. This Part begins with a discussion of why the Constitution compels the jury to take the role of fact-finder, and then addresses other normative reasons behind this conclusion. After examining why juries theoretically may be better suited to determine the amount of punitive compensation, Part III also considers the question of whether, on a practical level, juries can be rational, considered, and consistent in taking on this difficult task. Part III explores whether submitting highly charged emotional decisions to a jury in a criminal case—such as how much restitution to impose on a possessor of child pornography or on a doctor who has sold pain medications to addicts in the community—is likely to decrease the accuracy, fairness, and overall legitimacy of the imposition of monetary punishments.

A review of the current literature on decision-making by juries and judges in similar areas of law—specifically, decision-making in the context of state-level felony sentencing hearings and civil punitive damages cases—shows that, contrary to common perception and intuition, juries are likely to be as even-handed as judges in determining emotionally charged financial decisions. In light of the jury's favorable status as community representatives, debunking the myth of jury incompetence adds a further reason to value the jury as fact-finder in this context.

Drawing on extensive social science literature, Part IV acknowledges and explores three significant factors challenging effective jury decision-making: anchoring, affective forecasting, and jury instructions. This social science literature looks at how juries determine damages and other monetary awards, and what subconscious factors enter into their decision-making when calculating the amount of a financial award to impose. The anchoring literature reveals that jurors, like judges, are prone to rely on a number they have been given, even an entirely unrelated number, and unconsciously anchor any numerical decision to that number. The affective forecasting literature shows jurors are poor predictors of the duration and degree of a crime victim's future emotional response to the crime, meaning they are not able to accurately predict the amount of compensation that will appropriately address both the victim's needs and the defendant's punishment.

Finally, literature on jury instructions illuminates another weakness specific to jury decision-making. Many jury instructions are dense and opaque, leaving jurors confused as to what the applicable laws and standards are. Jurors often seek to fill in gaps in their understanding with their own interpretations. Although this rarely ends up affecting the outcome, studies show poorly-worded jury instructions affect the outcome of civil damages determinations.

After evaluating the strengths and weaknesses of juries as decision-makers, Part V turns to the critical question of whether, and how, courts and legislators can address these weaknesses to place jurors in the best position to determine the appropriate amount of punitive compensation. Part V proposes several strategies for encouraging and enabling juries to make thoughtful, reliable, and accurate punitive compensation decisions. This Article concludes that not only are juries constitutionally empowered to decide punitive compensation awards, juries are the more appropriate decision-making body to determine this aspect of criminal sentencing, especially from the perspective of determining how best to punish violations of our moral norms.

## II. THE TRANSFORMATION OF CRIMINAL “RESTITUTION” INTO PUNITIVE COMPENSATION

Courts impose criminal restitution as punishment.<sup>6</sup> Although restitution has long been an available criminal remedy in the United States,<sup>7</sup> until the last forty years, courts rarely utilized restitution in the criminal context. In the instances when courts did employ it, restitution operated primarily, if not solely, as a mechanism to prevent unjust enrichment. Restitution required the defendant to disgorge her ill-gotten gains, thereby preventing her unjust enrichment at the victim’s expense.<sup>8</sup>

Propelled forward by the victims’ rights movement, legislatures in the 1980’s and 90’s adopted restitution as one of several criminal justice reforms aimed at responding to criticisms regarding the system’s treatment of victims.<sup>9</sup> Over the course of forty years, “restitution” went from being a rare occurrence in criminal cases to a common element in criminal sentencing, ultimately becoming a mandatory requirement for federal judges in any criminal case involving an “identifiable” victim who “suffered a physical injury or pecuniary loss” as a result of a convicted defendant’s crimes.<sup>10</sup> Reflecting society’s progressively vengeful approach to criminal defendants and punishment,<sup>11</sup> courts moved away from imposing criminal restitution as a mechanism to force a defendant to disgorge her unlawful gains<sup>12</sup> and began to impose “restitution” as compensation to a victim for

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6. This Article relies on the definition of punishment previously articulated by Cortney E. Lollar in *What Is Criminal Restitution?*. See Lollar, *supra* note 1, at 105-22 (defining punishment as a state action subsequent to a criminal allegation, resulting in a substantial deprivation and/or obligation, and impose pursuant to: a statute that reveals morally condemnatory intent, a statute with unclear intent but applied in a consistently condemnatory manner, or with the effect of substantially diminishing a person’s well-being as a result of moral condemnation communicated by a state action).

7. Starting in 1925, federal judges were authorized to order restitution only as a condition of probation. Woody R. Clermont, *It’s Never Too Late to Make Amends: Two Wrongs Don’t Protect a Victim’s Right to Restitution*, 35 NOVA L. REV. 363, 373 (2011). See also, e.g., *United States v. Boswell*, 605 F.2d 171, 175 (5th Cir. 1979); *United States v. Wilson*, 469 F.2d 368, 370 (2d Cir. 1972); *United States v. Taylor*, 321 F.2d 339, 341-42 (4th Cir. 1963); cf. *Tate v. Short*, 401 U.S. 395, 397-99 (1971) (citing *Williams v. Illinois*, 399 U.S. 235, 240-42 (1970)) (explaining that it is a violation of the Equal Protection Clause to convert the statutory ceiling of a punishment from payment of a fine to imprisonment based solely on an indigent defendant’s inability to pay the fine).

8. See, e.g., Elmar Weitekamp, *Can Restitution Serve as a Reasonable Alternative to Imprisonment? An Assessment of the Situation in the USA*, in RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 81, 82 (Heinz Messmer & Hans-Uwe Otto eds., 1992).

9. In 1982, at the height of the victims’ rights movement, Congress passed the federal Victim and Witness Protection Act (“VWPA”), introducing a new era for restitution. Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CALIF. L. REV. 1687, 1688 (2009).

10. 18 U.S.C.A. § 3663A(c)(1)(B) (West 2006). See generally 18 U.S.C.A. §§ 2248, 2259, 2264, 2327, 3556, 3663.

11. See, e.g., DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWES: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* (2004); Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259 (2011).

12. Under the VWPA, criminal restitution was no longer limited to repaying the victim the value of money,

economic, emotional, and psychological losses.<sup>13</sup>

As the scope of “restitution” broadened to require a criminal defendant to compensate a victim’s losses, the method of calculating what was actually victim compensation inevitably changed. In most cases, criminal “restitution” became unmoored from the specific, tangible, economic gains a defendant unlawfully earned at the victim’s expense, and evolved into a guessing game of how much harm a victim experienced, and would continue to experience throughout her lifetime, as a result of a defendant’s criminal action. Whereas disgorgement rights an economic imbalance, the compensation of evolving, amorphous emotional and psychological losses aims to right a moral imbalance, requiring payment to a victim as a consequence for committing a moral wrong.

As a result, reimbursement of a victim’s economic losses is only a part of what now constitutes criminal “restitution.” In fact, courts no longer require precise calculations for many types of “restitution.” Rather, in difficult cases, the Supreme Court has urged district courts to “do their best”<sup>14</sup> to determine the appropriate amount of compensation, while discouraging them from using too much precision: “it is neither necessary nor appropriate to prescribe a precise algorithm” for calculating particular types of criminal “restitution.”<sup>15</sup>

The shift in criminal “restitution’s” focus illustrates the remedy’s subtle transformation from a primarily remedial device to a primarily punitive one.<sup>16</sup> Through criminal “restitution” statutes, courts and legislatures now can require defendants to provide victims with a financial benefit they did not previously possess.<sup>17</sup> The statutes’ legislative histories confirm their goal of “punish[ing] the bad guy” and “ensur[ing] that the offender realizes the damage caused by the offense.”<sup>18</sup> Criminal “restitution” has become “compensation loosely tied to a criminal act and imposed as a consequence of committing a moral wrong.”<sup>19</sup> Because of its now punitive character, the term restitution no longer fits the remedy courts utilize daily in criminal cases.

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goods, or services taken from them; restitution could now be ordered as compensation for physical injuries, and as time went on, for mental injuries and emotional losses. For the first time, under the VWPA, if the victim suffered bodily injury, the court could order a defendant to pay for medical, psychiatric or psychological treatment, as well as reimburse the victim for wages lost prior to sentencing. 18 U.S.C. § 3579(b)(2), (3) (1982) (current version at 18 U.S.C. § 3664 (2012)). In 1994, the Violence Against Women Act (“VAWA”) became the first federal statute to mandate criminal restitution. This was a change from the VWPA, which allowed a court to decline ordering restitution based on a defendant’s indigency. 18 U.S.C. § 3579(a)(2) (current version at 18 U.S.C. § 3664 (2012)). VAWA required convicted defendants to compensate victims for physical and psychological injuries inflicted as a result of sex-related and domestic violence crimes, regardless of the defendant’s financial means. Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, 108 Stat. 1904 (codified as amended at 18 U.S.C. § 2248 (2012)).

13. Indeed, some statutes actually *require* judges to impose restitution for economic and psychological losses. *See, e.g.*, 18 U.S.C. §§ 2259(b)(3)(A), (F), 3663(b)(2)(A) (2012). Federal judges consistently have interpreted federal restitution statutes as measuring restitution by a victim’s losses rather than a defendant’s unlawful gains. *See infra* Part II(A).

14. *Paroline v. United States*, 134 S. Ct. 1710, 1715 (2014).

15. *Id.* at 1728.

16. *See* Lollar, *supra* note 1, at 101-22.

17. *Id.* at 102, 130-48.

18. *Id.* at 114-15.

19. *Id.* at 97.

A. *A New Designation*

As already indicated, the disgorgement approach to restitution is a rarity in the criminal context,<sup>20</sup> calling into question the accuracy of the term “restitution” to describe the remedy criminal courts utilize as a regular part of sentencing proceedings. By its very definition, restitution, a legal remedy that remains in regular use in the civil context, is concerned with unjust enrichment and the disgorgement of unlawful gains. Unjust enrichment is rarely the issue in criminal cases.<sup>21</sup> Rather, courts impose what is called “restitution” on criminal defendants to compensate victims based on the moral wrong committed, in an effort to make the victim “whole.” Courts impose this financial penalty partially out of a desire to compensate victims, but principally to hold the defendant accountable for her crimes and make her suffer yet another form of criminal punishment.

Because the designation “restitution” inaccurately describes this remedy, its continued usage causes doctrinal confusion. Restitution in the civil law context remains focused on disgorgement and unjust enrichment, whereas in the criminal system, “restitution” usually refers to the compensation of a broad range of tangible and intangible losses. The tension between the very disparate uses of the term has caused heated debate among restitution scholars in the United States.<sup>22</sup> These different terminologies, and the inaccuracy of the word “restitution” to describe what courts impose in criminal sentencing hearings, has created confusion and led some scholars, including this author, to believe that “restitution” simply is not the correct word to describe the remedy criminal courts employ regularly in sentencing hearings.

This Article proposes dividing the remedy courts and legislators currently call criminal “restitution” into two distinct designations: restitution and punitive compensation. Restitution will remain the denomination for the long-used civil and criminal remedy requiring a defendant to disgorge the amount of her unjust enrichment. “Punitive compensation” describes the remedy that compensates the crime victim for her losses and sends a message of punishment and accountability to a criminal defendant. Punitive compensation exists alongside restitution, a term still applicable when a court orders a civil or criminal defendant to disgorge a tangible, unlawfully obtained economic gain. This Article urges legislators and courts to adopt this new term to describe the previously undelineated remedy used often in criminal sentencing hearings.

Some have argued that “victim compensation” is the more accurate and easier designation to describe what this Article labels “punitive compensation.” Courts often require criminal defendants to pay a determined amount of money into a general fund—a crime

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20. In the criminal context, forfeiture is now the remedy used to force a defendant to disgorge her unlawful gains. However, as with criminal fines, the criminal forfeitures go to the government, rather than the crime victim.

21. Criminal forfeiture has become the mechanism courts use to require a criminal defendant to disgorge her unlawful gains. However, those unlawful gains then go to the government, not the victim.

22. Recent proposed, and then rejected, changes to the Model Penal Code acknowledged the confusion created by the use of the word “restitution” to describe two very different sets of compensatory mechanisms. *See* MODEL PENAL CODE: SENTENCING § 6.04A cmt. a (Preliminary Draft No. 10, Sept. 3, 2014). The American Law Institute initially proposed adoption of the more accurate term “victim compensation” to describe what practitioners and legislators refer to as “restitution.” Although this terminology was adopted at the 2014 Annual Meeting, in the next Preliminary Draft, the Reporter recommended maintaining the term “restitution,” as “victim compensation” created too much confusion with state and federal Victim of Crime Compensation Funds. *See* MODEL PENAL CODE: SENTENCING § 6.04A cmt. b.

victim compensation fund—that court employees then disburse to crime victims (not necessarily the victim of that particular crime). Victims fill out paperwork and apply for reimbursement of various out-of-pocket losses attributable to the actions of some criminal defendant. If the court administrators of the fund approve the compensation request, those victims receive reimbursement from the fund.

Because of the prevalence of state and federal Crime Victim Compensation Funds, many scholars reject the use of “victim compensation.” At first blush, the only substantive difference between criminal “restitution” and payments from the Crime Victim Compensation Fund is the process. The defendant pays “restitution” directly to a particular victim, whereas a defendant pays into a general fund, and then court clerks disburse the money to victims from that fund. As a result, one might presume that “victim compensation” actually is an accurate term for both types of payments, and that criminal “restitution” and crime victim compensation funds are, at their essence, the same thing.

Yet the rejection of the term “victim compensation” actually reflects a much more significant distinction between the two processes. Victim compensation funds reimburse incurred losses. These state-run funds generally require the victim to provide documentation of the specific losses claimed, and in return, the fund reimburses the victim for the loss. By contrast, the “restitution” orders judges impose as part of criminal sentencing hearings rarely require extant, documented losses. Rather, because criminal “restitution” usually aims to compensate a crime victim for a wider range of losses, including intangible future emotional and hedonic losses, which judges cannot always pin down to a pre-calculated, mathematical amount, reimbursement is only a small part of “restitution.” Although the term “victim compensation” might still be descriptively accurate for both remedies, what victim compensation funds do and what criminal “restitution” does are fundamentally different on both a practical and theoretical level. One reimburses, the other compensates.

“Punitive compensation” identifies the previously undifferentiated form of punishment that sits alongside restitution, compensates a broader range of losses than victim compensation, and whose fundamental concern is addressing a defendant’s moral blameworthiness.<sup>23</sup> The term punitive compensation recognizes that the remedy courts currently employ in criminal courts is not restitution as common legal parlance understands the term. It acknowledges that compensation of victims is not limited to easily quantifiable economic losses. Punitive compensation appreciates that judges impose this sentencing obligation on criminal defendants as a consequence of committing a moral wrong in an effort to make the victim “whole.”

Distinct from restitution proper, punitive compensation serves twin goals: victim compensation and condemnation of moral blameworthiness. Legislators and judges aim to punish those convicted of a crime to the full extent possible by “making them pay,” both figuratively and literally, for committing a crime, and they want to “make victims whole” by compensating them for the experience of being a crime victim.<sup>24</sup> The term “punitive

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23. Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 799-806 (1997).

24. *See, e.g.,* United States v. Brock-Davis, 504 F.3d 991, 998 (9th Cir. 2007); Lollar, *supra* note 1, at 132.

compensation” articulates and acknowledges these twin goals, and makes explicit the punitive aspect of this criminal punishment.

### B. *Punitive Compensation As Punishment*

A close look at how courts impose punitive compensation in criminal cases illustrates plainly its corrective character. On the most basic level, the practical effects of failing to pay punitive compensation, or criminal “restitution” under the current parlance, are no different from the effects of failing to abide by any other unmistakable form of criminal punishment, including the failure to pay a criminal fine.<sup>25</sup> Failure to pay punitive compensation results in a defendant’s continued disenfranchisement, suspension of her driver’s license, continued court supervision, and constant threat of re-incarceration.<sup>26</sup> Each of these is a consequence that typically results from a criminal conviction, and the effects are no different with punitive compensation.

Courts also regularly order defendants to compensate a victim for conduct the prosecution has not proved beyond a reasonable doubt in a criminal proceeding. For example, courts require defendants to compensate third parties for acquitted, unproven, and “relevant” conduct, for harms only indirectly attributable to them, and when there is no actual loss to a victim.<sup>27</sup> Federal courts have required defendants to pay “restitution” to victims not named in the indictment,<sup>28</sup> for acts occurring during the same course of conduct as the counts of conviction—even if not close in time and not charged<sup>29</sup>—and for events occurring outside of the statute of limitations.<sup>30</sup> Criminal defendants have paid “restitution” even when the victim has not claimed a loss.<sup>31</sup> Courts even order defendants to pay for the costs of their own prosecution under the guise of criminal “restitution.”<sup>32</sup>

As with other criminal punishments, the failure to pay punitive compensation can

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25. To the extent there was any doubt that criminal fines are punishment, *Southern Union Co. v. United States* clarified those doubts. 132 S. Ct. 2344, 2349–50 (2012). The distinction between restitution and criminal fines largely comes down to the recipient: fines are paid to the state/government/court system, and restitution is paid to crime victims.

26. *See, e.g.*, *Johnson v. Bredesen*, 624 F.3d 742, 747 (6th Cir. 2010). *Cf. Harvey v. Brewer*, 605 F.3d 1067, 1079-80 (9th Cir. 2010). Additionally, many states do not permit a convicted defendant to seek to seal or expunge her criminal record unless restitution has been paid. *See* COLO. REV. STAT. § 24-72-308.9(2)(a)(V) (2013); IND. CODE § 35-38-9-8(b)(11) (West 2014); IOWA CODE § 907.9(4)(b) (2014); MO. ANN. STAT. § 610.140(5)(3) (West 2012); N.C. GEN. STAT. § 15A-145.5(c) (2013); OKLA. STAT. tit. 22, § 991c(C) (2013); UTAH CODE ANN. § 77-40-105(3)(b) (LexisNexis 2013); VT. STAT. ANN. tit. 13, § 7602(b)(1)(C) (2012). Waiting periods for expungement or record sealing often do not begin to run until a person has paid their restitution in full. For example, in Wyoming, a person cannot petition for expungement of their record unless at least ten years have passed since restitution was paid in full. *See* WYO. STAT. ANN. § 7-13-1502(a)(i)(C) (West 2011).

27. Lollar, *supra* note 1, at 130-33.

28. *See, e.g.*, *United States v. Henoud*, 81 F.3d 484, 489 (4th Cir. 1996); *United States v. Pepper*, 51 F.3d 469, 473 (5th Cir. 1995). *Cf. United States v. Kones*, 77 F.3d 66, 70 (3d Cir. 1996); *United States v. Reed*, 80 F.3d 1419, 1423 (9th Cir. 1996).

29. *United States v. Wright*, 496 F.3d 371, 380 (5th Cir. 2007) (determining that because one scheme was “practically identical” to scheme of conviction, other than identity of the victims, events were part of common scheme or plan and restitution to those victims appropriate).

30. *United States v. Dickerson*, 370 F.3d 1330, 1342-43 (11th Cir. 2004).

31. *See, e.g.*, *United States v. Cliatt*, 338 F.3d 1089, 1090 (9th Cir. 2003); *United States v. Hackett*, 311 F.3d 989, 993 (9th Cir. 2002).

32. *See* Lollar, *supra* note 1, at 142-48.

result in significant, long-term consequences.<sup>33</sup> Criminal defendants often lose their jobs subsequent to conviction and sentencing, even if they do not receive a sentence of jail time.<sup>34</sup> As a result of unemployment, many convicted defendants have trouble paying off a “restitution” obligation, which is often all that remains for them to have completed their sentence. Fulfilling this monetary obligation can become an insurmountable hurdle. “Restitution” obligations show up on a credit report for seven years, and any difficulties in keeping up with such payments can add another obstacle to securing employment, while also creating the potential for disqualification from food stamps, low-income housing, housing assistance, federal Temporary Assistance to Needy Families (TANF) funds, and other benefits.<sup>35</sup>

Punitive compensation recognizes that courts regularly impose this remedy as a punishment, in an attempt to address the moral harm a criminal defendant’s action caused, not simply as a mechanism for reimbursement of a victim’s concrete losses. By placing a concrete dollar amount on intangible harms, courts attempt to quantify the appropriate amount of monetary compensation for a defendant’s moral transgression, sometimes without proof beyond a reasonable doubt that such a transgression occurred.

### III. WHY JURIES SHOULD DECIDE THE AMOUNT OF PUNITIVE COMPENSATION

Punitive compensation is the apt term to describe the remedy regularly imposed in criminal cases. This designation reflects the remedy’s undisputable shift from reimbursement to compensation, and reminds us that punitive compensation is, at its essence, a criminal punishment. Recognizing punitive compensation’s character as punishment raises two parallel issues worth exploring: first, does acknowledging punitive compensation’s corrective character carry constitutional implications, and second, separate and apart from the constitutional considerations, are judges the best fact-finders to be calculating the appropriate amount of punitive compensation in a given case? Part III considers these questions in turn.

#### A. *Constitutional Considerations*

Supreme Court precedent requires “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum [to] be submitted to a jury, and proved beyond a reasonable doubt.”<sup>36</sup> In 2012, the Court applied

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33. *Id.* at 124.

34. R. Boshier & Derek Johnson, *Does Conviction Affect Employment Opportunities?*, 14 BRIT. J. CRIMINOLOGY 264 (1974); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 942-43, 955-57, 959 (2003); Richard Schwartz & Jerome Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133 (1962); Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526, 528 (2002) (noting men in trusted or high-income positions prior to conviction experience large earnings losses after release from prison, and that felony conviction can disqualify someone from employment in certain fields).

35. Lollar, *supra* note 1, at 125; ALICIA BANNON ET AL., BRENNAN CENTER FOR JUSTICE: CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 28 (2010).

36. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

this rule to criminal fines in *Southern Union Co. v. United States*.<sup>37</sup> As a result, the prosecution must prove to a jury beyond a reasonable doubt any fact that increases the maximum amount of a criminal fine.<sup>38</sup> This logic would seem to apply equally to punitive compensation—the prosecution should have to prove any fact that increases the amount of punitive compensation to a jury beyond a reasonable doubt.

Although punitive compensation operates as a punishment, under the auspices of criminal “restitution,” courts have not afforded it the constitutional protections reserved for other criminal punishments.<sup>39</sup> Instead, every circuit court to consider whether the Sixth Amendment jury trial right applies to criminal “restitution” has declined to grant it this constitutional protection.<sup>40</sup> The Supreme Court’s recent Sixth Amendment jurisprudence has not changed that result.<sup>41</sup>

Most courts have declined to extend the rule to criminal “restitution” by asserting that the federal restitution statutes do not contain a maximum sentence. According to most federal courts, “the single restitution amount triggered by the conviction. . . is the full amount of [each victim’s] loss.”<sup>42</sup> In other words, according to this view, criminal “restitution” has no statutory minimum or maximum; it is measured solely by the “full amount

37. *S. Union. Co. v. United States*, 132 S. Ct. 2344 (2012).

38. *Id.* at 2348.

39. *See* Lollar, *supra* note 1, at 148-54.

40. *Id.* at 150 & n.217. Prior to *Southern Union*, the case in which the Supreme Court found Sixth Amendment protections applicable to criminal fines, ten circuits rejected the Sixth Amendment’s application to criminal restitution on the ground that it contains no statutory maximum sentence. *See* *United States v. Leahy*, 438 F.3d 328, 337-38 (3d Cir. 2006) (en banc); *United States v. Milkiewicz*, 470 F.3d 390 (1st Cir. 2006); *United States v. Reifler*, 446 F.3d 65, 118-20 (2d Cir. 2006); *United States v. Williams*, 445 F.3d 1302, 1310-11 (11th Cir. 2006); *United States v. Bussell*, 414 F.3d 1048, 1060 (9th Cir. 2005); *United States v. Garza*, 429 F.3d 165, 170 (5th Cir. 2005) (per curiam); *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005); *United States v. Miller*, 419 F.3d 791, 792-93 (8th Cir. 2005); *United States v. Sosebee*, 419 F.3d 451, 454, 461 (6th Cir. 2005); *United States v. Wooten*, 377 F.3d 1134, 1144-45 (10th Cir. 2004). The Seventh Circuit rejects *Apprendi*’s application to criminal restitution based on its longstanding precedent rejecting criminal restitution as punishment. *United States v. Wolfe*, 701 F.3d 1206, 1216-18 (7th Cir. 2012) (citing “well-established” and “long-standing” precedent that “restitution is not a criminal penalty”).

41. Lollar, *supra* note 1, at 150 n.218. After *Southern Union*, four of the five circuits to address this question have continued to reject the Sixth Amendment’s application to criminal restitution on the grounds that “there is no prescribed statutory maximum in the restitution context.” *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2012); *see also* *United States v. Roemmele*, No. 13-14255, 2014 WL 6952961, at \*1-2 (11th Cir. Dec. 10, 2014); *United States v. Jarjis*, No. 13-1430, 2014 WL 260321, at \*1 (6th Cir. Jan. 24, 2014) (per curiam); *United States v. Green*, 722 F.3d 1146, 1150 (9th Cir. 2013) (acknowledging, additionally, the Ninth Circuit’s own conflicting precedent as to whether restitution is punishment). Courts have been more willing to apply the protections of the Eighth Amendment’s Excessive Fines Clause to criminal “restitution.” Lollar, *supra* note 1, at 152-54. In its recent *Paroline* decision, the Supreme Court acknowledged that criminal restitution may be subject to the constitutional protections of the Excessive Fines Clause. *Paroline v. United States*, 134 S. Ct. 1719, 1726 (2014). Pre-*Southern Union*, four circuits recognized that criminal restitution fell under the Eighth Amendment’s Excessive Fines Clause protections: the Fourth, Fifth, Ninth and Eleventh Circuits. *See* *United States v. Dighlawi*, 452 F. App’x 758, 760 (9th Cir. 2011) (finding restitution subject to Excessive Fines Clause of Eighth Amendment); *United States v. Arledge*, 553 F.3d 881, 899 (5th Cir. 2008); *United States v. Newsome*, 322 F.3d 328, 342 (4th Cir. 2003) (finding restitution subject to Excessive Fines Clause of the Eighth Amendment); *United States v. Suarez*, 215 F. App’x 872, 879 (11th Cir. 2007) (applying Excessive Fines analysis in determining whether restitution order violated Eighth Amendment); *United States v. Bollin*, 264 F.3d 391, 419-20 (4th Cir. 2001); *United States v. Dubose*, 146 F.3d 1141, 1144-46 (9th Cir. 1998) (holding criminal restitution subject to Eighth Amendment Excessive Fines Clause). The Third Circuit did not appear to challenge this conclusion. *Cf.* *United States v. Lessner*, 498 F.3d 185, 205-06 (3d Cir. 2007) (assuming, *arguendo*, that Excessive Fines Clause applies to restitution, court rejects conclusion that the Eighth Amendment was violated in this case).

42. *United States v. Leahy*, 438 F.3d 328, 337-38 (3d Cir. 2006).

of [each victim's] loss." As a result, courts conclude the Sixth Amendment is inapplicable to punitive compensation.<sup>43</sup>

As some judges and scholars have acknowledged, this reasoning fails to recognize "[r]estitution in any amount greater than zero clearly increases the punishment that could otherwise be imposed."<sup>44</sup> Although they may not acknowledge their role in the process, judges currently make the factual determination as to what the "full amount" of a victim's loss is, a determination that almost always requires some factual inquiry, often a rather challenging and involved inquiry.<sup>45</sup> As one judge noted, "no restitution can be imposed absent a judicial determination of the amount of loss."<sup>46</sup> As a result, courts' rejection of the Sixth Amendment's application to punitive compensation is unconvincing and unavailing.

If judges were imposing only restitution—the disgorgement of a defendant's unlawful gains—this argument might carry more weight. Ascertaining concrete economic gains a defendant receives is often a much more straightforward inquiry. As already discussed, however, judges impose punitive compensation measured by a victim's losses—past and future, tangible and intangible—during the criminal sentencing process. On a daily basis, judges determine both what monetary amount will "make a victim whole," and what amount will signal to the defendant the wrongfulness of her action, deter her from committing future crimes, and punish her for her transgression. This inquiry is quite distinct from a restitution measurement.

Punitive compensation is a punishment, and as a result, the Sixth Amendment jury trial right should be afforded to defendants faced with paying punitive compensation.

#### *B. Juries as Community Representatives Should Determine Punitive Compensation Amounts*

Given punitive compensation's use as a criminal penalty, courts should recognize the same constitutional protections as other criminal penalties seems fairly straightforward. As compelling as this reasoning may be, courts continue to reject the application of Sixth Amendment constitutional protections to criminal "restitution." The imposition of punitive compensation carries normative, practical considerations, however, in addition to constitutional ones. The practical case for a jury determination of punitive compensation is equally, if not more, compelling than the constitutional one.

Juries are "the embodiment of the ideal of a decentralized democracy."<sup>47</sup> Juries, as democratic institutions, have the moral authority to make difficult judgments in criminal cases. As scholar Jenia Iontcheva noted, "[c]ertain features of juries are particularly conducive to democratic deliberation. Random sampling, together with a robust jurisprudence prohibiting racial, ethnic, or gender-based discrimination in jury selection, promotes the

43. Lollar, *supra* note 1, at 151 n.222.

44. *Leahy*, 438 F.3d at 342-43 (McKee, J., concurring in part and dissenting in part). *See also* Lollar, *supra* note 1, at 151.

45. Lollar, *supra* note 1, at 151-52.

46. *Leahy*, 438 F.3d at 342 (McKee, J., concurring in part and dissenting in part).

47. Jenia Iontcheva, *Jury Sentencing as Democratic Principle*, 89 VA. L. REV. 311, 323 (2003).

inclusivity of the jury.”<sup>48</sup> Determining what punishment to impose is an indication of a community’s values and priorities, placing juries in the prime position to make this key judgment.<sup>49</sup> As one judge commented,

There is nothing I do as a trial court judge that makes me more uncomfortable than when I impose criminal sentences. It is not just a matter of emotional and policy tensions inherent in the act of sentencing. It is an institutional discomfort—a nagging feeling that this is a moral act and not a legal one, and that one person should no more have the power to select an arbitrary sentencing within a wide legislatively prescribed range than to declare certain acts to be crimes in the first instance. The demise of rehabilitation, and the reemergence of retribution, has made it clear that the act of sentencing is indeed a moral act.<sup>50</sup>

Jurors, as a group of community representatives, make moral assessments regarding the quality of a person’s actions and the best manner for appraising and addressing the blameworthiness of those actions. In the context of criminal sentencing decisions, this approach is preferable to leaving those decisions in the hands of one individual.<sup>51</sup> As one

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48. *Id.* at 346-37.

49. Although this Article is focused specifically on moral compensation, this argument could well be extended to address the jury’s role in all types of sentencing decisions.

50. Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 994-95 (2003).

51. See, e.g., Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 363-64, 367-69 (1996); Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U. L. REV. COLLOQUY 355, 358 (2008), [http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1115&context=nulr\\_online](http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1115&context=nulr_online). Iontcheva, *supra* note 47, at 346-47.

A historical, originalist argument strongly supports juries playing a key role in criminal sentencing decisions. Several scholars have written about juries’ central role in determining criminal sentences for most of our nation’s history. Hoffman, *supra* note 50, at 957-58; Iontcheva, *supra* note 47, at 316. In the late eighteenth and early nineteenth century, as the newly formed states of the United States began to consider how best to enforce and punish their criminal laws, a few states chose to delegate the power to determine a defendant’s punishment to juries. Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings about Apprendi*, 82 N.C. L. REV. 621, 641-44 (2004). Initially, only two of the thirteen states adopted this approach, but by the second half of the nineteenth century, eleven states placed the non-capital sentencing decision in the hands of jurors. *Id.* at 644-45 n.107; Iontcheva, *supra* note 47, at 317 n.28. Still today, six states continue to use juries as decision-makers in felony sentencing hearings. See, e.g., Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885 (2004). Juries decided both questions of law and fact, and in many states, the authority of the criminal jury to determine questions of law was assumed to be self-evident. Iontcheva, *supra* note 47, at 319-20. Jurors stepped comfortably into their role as the voice of community within the confines of the courthouse.

Over much of the last century, the rise of the legal class and the professionalization of punishment led to an emphasis on expertise rather than community wisdom, and many states moved away from having juries determine felony sentences. Iontcheva, *supra* note 47, at 324-26. Although most states and the federal system now place the felony sentencing decision squarely in the hands of the judge, six states retain a sentencing scheme that allows juries to decide a defendant’s felony sentence. Lillquist, *supra*, at 646; King & Noble, *supra*, at 886. Those six states are: Arkansas, Kentucky, Missouri, Oklahoma, Texas and Virginia. Even within jury felony sentencing states, many defendants are sentenced by judges because defendants often waive jury sentencing, particularly in cases where the defendant has pled guilty rather than proceeded to trial. Lillquist, *supra*, at 647. Recent estimates suggest that juries determine approximately 4,000 felony sentences per year. King & Noble, *supra*, at 887 n.4. This data is approximately ten years old, however; it has been difficult to obtain more up-to-date information.

commentator observed, “[t]he value of jury sentencing lies in mediating, through a conversation across rival discourses, among different aims and models of punishment.”<sup>52</sup> Judges do not have the benefit of such a dialogue or the moral legitimacy of the group decision that ultimately results.

Despite both the increasing recognition of juries’ constitutionally compelled responsibility for determining punitive compensation, and the appeal of utilizing juries to determine the appropriate award, many have concerns about jurors and their ability to make accurate and thoughtful decisions in the criminal sentencing context.

An examination of two areas of scholarship—studies of criminal felony sentencing and civil punitive damages—reveals that judge and jury decision-making is not so different from one another. Thus, the fear that juries are less reliable and more biased in their decision-making turns out to have little empirical support. In reviewing the literature on felony jury sentencing, the emerging consensus is that juries make markedly similar decisions to judges in determining the appropriate criminal sanction to impose. In light of this similarity in the results juries and judges reach, and the advantage juries have of better representing the composition and experiences of the community as a whole, on balance, jurors become the preferable fact-finder for determining the degree of moral blameworthiness a defendant’s action caused and how best to punish someone for that violation of our community’s mores. In the context of punitive compensation, juries emerge as the desirable entity to calculate how much monetary compensation is likely to both adequately compensate a victim of crime for her losses and appropriately punish the defendant for her morally blameworthy actions. The following subsections take a closer look at these findings.

#### 1. The Importance of a Racially and Gender-Diverse Jury

A review of felony sentencing literature reveals that race, gender, class, and disability status play significant roles in both judge and jury decision-making. Although many juries remain more homogenous than the community at large, on average, they are more likely to represent the views of a broader and more diverse community than judges. Jurors are not only likely to be a more diverse group when it comes to race, gender, and disability, especially in jurisdictions that draw from a jury pool selected by something other than voter registration records, they are much more likely to be economically diverse. Because of their range of backgrounds, jurors bring a wider array of perspectives to the decision about what monetary award would sufficiently compensate a crime victim for the moral transgression the defendant committed. As a result, assuming the jury reflects the community, the monetary award they elect has a greater probability of adequately reflecting the consensus of the community. Thus, jurors are the preferable entity to determine the appropriate punishment for a violation of community mores, especially the appropriate amount of punitive compensation to impose.

Judges, as a group, are not representative of the larger society.<sup>53</sup> Although federal

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52. Iontcheva, *supra* note 47, at 344.

53. Meghan J. Ryan, *The Missing Jury: The Neglected Role of Juries in Eighth Amendment Punishments*

judges as a whole are increasingly diverse, both racially and by gender, both the absolute numbers and the percentages are still small. As of February 2015, only approximately 29% of the entire federal judiciary was female, in contrast with a population that was almost 51% female.<sup>54</sup> Although about 16% of Americans are Latino, only 9% of federal judges are Latino, and only 2% of federal judges are Asian-American, although almost 5% of Americans are of Asian descent.<sup>55</sup> On average, judges tend to be older than the average American, and much more educated.<sup>56</sup> Most judges have law degrees, whereas fewer than a third of Americans have completed college.<sup>57</sup>

At the state level, where most judges sit and most criminal cases are litigated, judges are even less reflective of society. The percentage of state judges who are racial minorities ranges from 0% in Maine, Montana, New Hampshire, Vermont, and Wyoming to 65.1% in Hawaii.<sup>58</sup> Nationwide, an average of 9.3% of state court judges are racial minorities, compared with a population rate of 37.4%.<sup>59</sup> Of those, approximately 54% are African-American, approximately 11% are of Asian descent, and approximately 28% are of Hispanic descent.<sup>60</sup> Hawaii is the only state with a higher percentage of state court judges who are racial minorities than the national population average.<sup>61</sup> As indicated previously, women constitute almost 51% of the overall national population. At the state level, Hawaii has the highest percentage of female judges, at 34.9%, closely followed by Massachusetts, at 34.2%.<sup>62</sup> West Virginia comes in last, with 5.6% female judges.<sup>63</sup> Like federal judges, almost all state judges are required to have a law degree,<sup>64</sup> which again distinguishes them from the average population. In short, no state comes close to having a bench that mirrors

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*Clause Determinations*, 64 FLA. L. REV. 549, 560 n.66 (2012).

54. Federal Judiciary Center, Biographical Directory of Sitting Judges, Fed. Judiciary Center, at <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Feb. 4, 2015). I have calculated these percentages based on the numbers of sitting judges, not limiting that number to active judges, as many senior judges maintain significant case loads. See also Nat'l Women's Law Center, *Women in the Federal Judiciary: Still a Long Way to Go*, <http://www.nwlc.org/resource/women-federal-judiciary-still-long-way-go-1> (Jan. 9, 2015); Ryan, *supra* note 53, at 560.

55. Federal Judiciary Center, Biographical Directory of Sitting Judges, Fed. Judiciary Center, at <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Feb. 4, 2015); Ryan, *supra* note 53, at 560 n.67. Notably, the percentage of African-American judges mirrors the percentage of African-Americans in the country at large.

56. Ryan, *supra* note 53, at 560.

57. *Id.*

58. ABA STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, JUDICIAL DIVERSITY IN STATE COURTS, at <http://apps.americanbar.org/abanet/jd/display/national.cfm> (June 2010) (last viewed Feb. 4, 2015); Malia Reddick et al., *Racial and Gender Diversity on State Courts: An AJS Study*, 48 ABA JUDGES' J. 1, 3 tbl. 1 (2009), available at [http://www.judicialselection.us/uploads/documents/Racial\\_and\\_Gender\\_Diversity\\_on\\_State\\_8F60B84D96CC2.pdf](http://www.judicialselection.us/uploads/documents/Racial_and_Gender_Diversity_on_State_8F60B84D96CC2.pdf).

59. Reddick et al., *supra* note 58, at 3, tbl. 1; U.S. Census Bureau, at <http://www.census.gov/quickfacts/table/PST045214/00> (last viewed Feb. 4, 2015) (62.6% of Americans are white "alone, not Hispanic or Latino"). Obviously this average does not account for the differences in the population of racial minorities, either as a whole or by group, from state to state. For a closer look at the state-by-state breakdown, see Reddick et al., *supra* note 58, at 3, tbl. 1; U.S. Census Bureau, available at <http://www.census.gov/quickfacts/table/PST045214/00>.

60. ABA STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, JUDICIAL DIVERSITY IN STATE COURTS, available at <http://apps.americanbar.org/abanet/jd/display/national.cfm> (June 2010) (last viewed Feb. 4, 2015).

61. *Id.*

62. Reddick et al., *supra* note 58, at 3, tbl. 1.

63. *Id.*

64. *Id.* at 2.

the general population.

By contrast, juries, as Justice Stevens famously noted, “reflect more accurately the composition and experiences of the community as a whole.”<sup>65</sup> As a result, they are “more attuned to the community’s moral sensibility.”<sup>66</sup> In fact, studies show that diverse juries tend to deliberate longer and more thoroughly than all-white juries.<sup>67</sup> The jury deliberation process encourages dialogue among people from different backgrounds, increasing the odds that the judgments reached will be both more informed and more reflective of the whole community’s view.<sup>68</sup> As one scholar noted, “[j]urors learn from each other in the process of deliberation and perhaps reach solutions that would not have occurred to them individually.”<sup>69</sup>

This collaborative, deliberative process is especially important when determining a criminal punishment such as punitive compensation. After all, punishments reflect society’s view of the best method for communicating punitive condemnation for an offender’s actions. Substantial evidence exists that, in general, whites and people of color have different life experiences based on race, which leads them to different conclusions about to what degree certain behaviors violate our moral, as well as legal, codes and what the appropriate sanction, monetary or otherwise, should be.<sup>70</sup>

Many people of color also have different perspectives on crime, police, and the criminal justice system than many whites.<sup>71</sup> A fairly recent study of criminal juries in Florida revealed that having at least one black juror in a jury pool plays a significant role in conviction rates. Strikingly, the presence of one or two black jurors in the jury pool results in a 10% drop in the conviction rates of black defendants, and a 7% increase in the conviction rates of white defendants.<sup>72</sup> This effect impacts trial outcomes even when black jurors are not seated on the final jury.<sup>73</sup> The scientists conducting the study concluded “even small

65. *Ring v. Arizona*, 535 U.S. 584, 616 (2002) (Stevens, J., concurring in part and dissenting in part).

66. *Id.*

67. NAZGOL GHANDNOOSH, *THE SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES* 39 (2014), available at [http://sentencingproject.org/doc/publications/rd\\_Race\\_and\\_Punishment.pdf](http://sentencingproject.org/doc/publications/rd_Race_and_Punishment.pdf). Many scholars seem to presume that the greater the jury’s diversity, the more likely the jury will be unable to reach a result. Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 238 (2005). At least one study failed to find evidence of such a correlation. Kenneth S. Klein & Theodore D. Klastorin, *Do Diverse Juries Aid or Impede Justice?*, 1999 WIS. L. REV. 553, 565 (1999). Rather, most studies indicate that hung juries primarily result from disputes over the evidence. See Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT L. REV. 1249, 1276-77 (2003); Kate Marquess, *Juries Hung Up on Close Calls, Study Says*, 1 NO. 40 ABA J. E-REP. 3 (Oct. 18, 2002).

68. Iontcheva, *supra* note 47, at 341.

69. *Id.*

70. Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141, 185 (2012); Amy Farrell et al., *Juror Perceptions of the Legitimacy of Legal Authorities and Decision Making in Criminal Cases*, 38 LAW & SOC. INQUIRY 773, 777, 793-96 (2013); GHANDNOOSH, *supra* note 67, at 19.

71. Chernoff, *supra* note 70, at 185; Farrell et al., *supra* note 70, at 774; Nour Kteily & Sarah Cotterill, *Is the Defendant White or Not?*, N.Y. TIMES OPED SR9 (Jan. 25, 2015). See also Ana Swanson, *Whites greatly overestimate the share of crimes committed by black people*, WASH. POST WONKBLOG, available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/12/01/whites-greatly-overestimate-the-share-of-crimes-committed-by-black-people/> (Dec. 1, 2014).

72. Shamera Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1019 (2012).

73. *Id.* at 1020.

changes in the composition of a jury pool have a large impact on average conviction rates for black versus white defendants.”<sup>74</sup> Troublingly, they also determined that “defendants of each race do relatively better when the jury pool contains more members of their own race.”<sup>75</sup>

Other studies show that white Americans consistently overestimate the proportion of crime committed by people of color.<sup>76</sup> White people also experience less crime than do people of color, resulting in white individuals having less frequent, and more positive, experiences with the criminal justice system.<sup>77</sup> White individuals who more strongly associate crime with people of color, are more likely to be punitive in their approach to crime as well.<sup>78</sup> They have more of a tendency to desire retaliation, less of a tendency to contextualize a defendant’s behavior, and less willingness to forgive.<sup>79</sup>

Thus a juror’s racial background can play a significant role in how she approaches a criminal sentencing decision, and what she thinks the fair amount of punitive compensation may be. Given that no single theory of punishment prevails in either public opinion polls or legislative policy,<sup>80</sup> one of the values of jury sentencing is that it allows for a “conversation across rival discourses, among different aims and models of punishment.”<sup>81</sup> Those who might be inclined to take a more punitive approach in a particular case have to negotiate and mediate a sentence with those who contextualize a defendant’s behavior and take a more rehabilitative approach. What one juror might view as an award that appropriately compensates the victim and punishes the defendant might be far too little or far too much according to another juror’s views.

Despite those different perspectives, jurors have to decide, collectively, on an assessment of the harm caused by the offender and the blameworthiness attributable to her. As a group, jurors must work through and reach a consensus about what amount of compensation is appropriate in a given case. They must decide what amount of money adequately compensates a victim for her losses and punishes a defendant for her actions. Once all jurors agree on the appropriate moral condemnation to be communicated and how best to translate that into a punishment, including a monetary punishment, that decision holds more legitimacy than that reached by an individual judge, whose decision may or may not reflect the community’s views as a whole.<sup>82</sup> Collective decision-making increases the likelihood that the amount awarded reflects the views of the larger community on the defendant’s crime and the harm to the victim.

Of course, the condition that a jury sufficiently represent the full range of perspectives and views of all of the community is critical to the legitimacy of this approach. Unfortunately, jurisdictions regularly prevent minority jurors from serving on juries because

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74. *Id.* at 1021.

75. *Id.*

76. GHANDNOOSH, *supra* note 67, at 5-6.

77. *Id.* at 6, 10-12.

78. *Id.* at 18-19.

79. *Id.* at 19.

80. Iontcheva, *supra* note 47, at 343.

81. *Id.* at 344.

82. *Id.*

of how they select jury pools. Most jurisdictions select jury pools from voter registration records. By and large, state laws prohibit individuals who are not registered to vote from serving on juries because jurors are selected from voter registration lists. As of 2014, felony convictions prohibited 5.85 million voters in the United States from voting.<sup>83</sup> The impact of disenfranchisement laws is particularly significant for African-Americans, who are four times more likely to lose their voting rights than the rest of the population.<sup>84</sup> Nationwide, one in every thirteen black adults cannot vote as a result of felon disenfranchisement laws.<sup>85</sup> Many states permit disenfranchisement for life, even after a person has finished serving her sentence and completed all other court-ordered obligations.<sup>86</sup> In fact, state laws prohibit approximately 2.6 million people from voting, despite these individuals having completed their sentences.<sup>87</sup> The numbers of potential jurors, particularly black jurors, who are excluded from service because they are not on the voting registration lists parallels the disenfranchisement numbers. Because of reliance on voter registration lists, those at the lowest end of the socio-economic spectrum, as well as many racial minorities, are systematically underrepresented in the jury venire.<sup>88</sup>

The result is “minority underrepresentation in jury composition, most notably in the makeup of the jury pool from which the jury ultimately is selected.”<sup>89</sup> Given the importance of a juror’s racial background to the process and ultimate outcome of a case, the consistent and pervasive underrepresentation of African-American and Latino jurors in the jury pool is particularly troubling.<sup>90</sup> As one scholar has noted, this underrepresentation “diminishes the quality of deliberation about issues frequently relevant in criminal trials.”<sup>91</sup> These issues include the degree of moral blameworthiness of a defendant’s actions, and the appropriate punishment, monetary or otherwise, for the moral transgression. Ensuring jury pools represent a fair cross-section of the community is therefore critical to ensuring that jurors adequately represent the views of the community at large.

Another common issue linked to race and class, and important in the context of punitive compensation, arises during jury deliberations. Those in what some sociologists term “low-status” groups—for example, those who are less-educated, sometimes women, sometimes those of a minority race—often participate less in jury deliberations, and are less willing to “correct” the majority view when a consensus emerges contrary to their own

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83. The Sentencing Project, *Felony Disenfranchisement: A Primer* 1 (Apr. 2014), available at [http://www.sentencingproject.org/doc/publications/fd\\_Felony%20Disenfranchisement%20Primer.pdf](http://www.sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf).

84. *Id.* at 2.

85. *Id.* at 5.

86. *Id.* at 1.

87. *Id.* at 1.

88. VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 53-57 (1986); RITA J. SIMON, *THE JURY: ITS ROLE IN AMERICAN SOCIETY* 30-33 (1980); David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CALIF. L. REV. 776, 803-11 (1977). Another issue that arises with some jurors, particularly in the Latino community, is language. Less than fluent English speakers are regularly excluded from jury panels, often lessening the percentage of the panel who are Latino.

89. See Chernoff, *supra* note 70, at 145.

90. *Id.* at 145-46.

91. *Id.* at 185.

view.<sup>92</sup> This remains true even when that juror has unique and important information to contribute to the discussion.<sup>93</sup> When these jurors do contribute their perspective, with information that would be beneficial in ensuring the group reaches the most accurate decision, other jurors are often judgmental and disapproving, especially if such information is not offered early in the decision-making process.<sup>94</sup> The inevitable result is that after waiting to contribute and then being shot down by her peers, that juror is less likely to contribute her perspective as the discussions proceed.<sup>95</sup> This dynamic is unlikely to change when one is determining the appropriate amount of money to require a criminal defendant to pay to a crime victim.

A jury pool drawn from various backgrounds has the best chance of evaluating the appropriate financial punishment for the violation of community mores committed by the defendant. An action that might seem to be a significant moral transgression to one juror might be viewed as less morally blameworthy to someone with a different relationship to the law, different interpretations of a defendant's actions, and different views on the effectiveness of a particular type of punishment in lieu of the goals they see criminal punishment as serving. Having to mediate the various goals of punishment and the differing views of how to attain those goals requires people from different backgrounds to reach some type of resolution that satisfies them both, thereby enhancing the legitimacy of the ultimate punitive compensation award imposed.

## 2. The Importance of a Socio-Economically Diverse Jury

In the context of punitive compensation, the importance of having decision-makers with diverse socio-economic backgrounds also cannot be overemphasized. Traditionally, judges have come from the upper classes, raising concerns about judicial bias toward wealthy interests.<sup>96</sup> Our nation's founders envisioned juries as protecting parties from a presumed judicial bias toward wealthy and powerful citizens.<sup>97</sup> Indeed, as noted already, almost all judges we have attained a particular status as a result of their education that distinguishes them from the average American. By contrast, the jury selection process tends to exclude the most powerful and well-off jurors from service.<sup>98</sup> Yet the method of selecting the jury pool also eliminates those who are poorer and lacking in economic and social power.<sup>99</sup> The result is a jury pool decidedly of the middle class.

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92. J.J. Prescott & Sonja Starr, *Improving Criminal Jury Decision Making After the Blakely Revolution*, 2006 U. ILL. L. REV. 301, 349 (2006); Cass Sunstein, *Group Judgments: Statistical Means, Deliberation and Information Markets*, 80 N.Y.U. L. REV. 962, 987, 998-99 (2005); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1281-1308 (2000).

93. Prescott & Starr, *supra* note 92, at 349; Sunstein, *supra* note 92 at 994, 996-97, 998-99.

94. Prescott & Starr, *supra* note 92, at 349; Sunstein, *supra* note 92, at 998-1000.

95. Prescott & Starr, *supra* note 92, at 349; Sunstein, *supra* note 92, at 998-1000.

96. Darryl K. Brown, *Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrine*, 47 HASTINGS L. J. 1255, 1282 (1996).

97. *Id.*; Alan Howard Scheiner, *Note: Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 153 (1991).

98. SIMON, *supra* note 88, at 30-31.

99. Scheiner, *supra* note 97, at 168.

A person's socio-economic background will likely be a significant factor in establishing her view of the appropriate amount of punitive compensation to award. Evidence has shown that jury trials held in counties with higher poverty rates often result in higher damage awards, suggesting a sort of rough attempt to level the economic playing field.<sup>100</sup> Other studies have shown that in most other places, juries award white plaintiffs and plaintiffs with higher socio-economic status more in damages.<sup>101</sup> Although the results may differ depending on the location, in each instance, the socio-economic background of the community members plays a role in determining what the jurors see as the appropriate amount of monetary compensation. As a result, ensuring that a jury pool comes from an economic background that mirrors the community where the jury was selected is vital. Although the voir dire process may eliminate individuals at either extreme of the socio-economic spectrum, the jury's role as community representative requires a more diverse economic background than a single judge can provide.

A jury pool drawn from the spectrum of socio-economic backgrounds has the best chance of evaluating the appropriate amount of a financial award, such as an award of punitive compensation, for the same reasons that a jury drawn from varying racial backgrounds will result in a fairer result. An award that might seem only mildly punitive to a judge or juror who comes from a wealthier background might be viewed as a crippling sanction to a juror who cannot imagine ever having access to that amount of money. Having to mediate both the goals of punishment and the differing views of how to attain those goals requires people from different economic circumstances to reach some type of resolution that satisfies them both.

### C. *Juries Are As Fair and Consistent As Judges*

Many people believe that, even if our system has compelling reasons for including jurors in the trial process, certain weaknesses in the jury process prevent jurors from being fair and impartial in the most challenging decisions, such as punitive damages or felony sentencing decisions. Surprisingly, the literature evaluating jury decision-making illuminates a significant finding in the context of determining punitive compensation: when it comes to deciding the appropriate sentence, in the main, judges and juries make comparable decisions. We see this in the literature examining jury sentencing in felony cases, as well as in the punitive damages literature from civil cases.<sup>102</sup>

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100. Eric Helland & Alexander Tabarrok, *Runaway Judges? Selection Effects and the Jury*, 16 J.L. ECON. & ORG. 306, 309-10 (2000); Jennifer K. Robbenolt, *Evaluating Juries By Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 485 (2005).

101. MARK A. PETERSON, COMPENSATION FOR INJURIES: CIVIL JURY VERDICTS IN COOK COUNTY 34-37 (1984); Francis Dane & Lawrence Wrightsman, *Effects of Defendants' and Victims' Characteristics on Jurors' Verdicts*, in THE PSYCHOLOGY OF THE COURTROOM (Robert Bray & Norbert Kerr eds., 1982).

102. Ideally, in examining how juries determine the appropriate amount of monetary punishment to impose, we also would have literature from the criminal fine context to evaluate. *Southern Union v. United States*, the Supreme Court case applying the Sixth Amendment jury trial right to criminal fines, came down in 2012. Yet, very few written opinions have been issued discussing any aspect of how the jury trial right is playing out in that context. From what this author has seen, only one opinion has begun to grapple with the best structure to allow a jury to evaluate the evidence regarding what fine to impose. See *United States v. AU Optronics Corp.*, No. 09-CR-110, 2012 WL 2120452 (N.D. Cal. June 11, 2012). As a result, we have very little information from the criminal area regarding how juries make determinations regarding financial penalties.

Although few are aware that some states permit juries to determine a criminal sentence, allowing juries to determine the amount of punitive compensation to award in a particular criminal sentencing hearing is not novel. Through the early twentieth century, juries determined the amount of financial punishment and restitution to impose in a given criminal case. The quiet presence of felony sentencing juries in six states still today provides us with important information to consider in determining how juries make sentencing decisions, and whether a jury is sufficiently impartial to be trusted to calculate the appropriate amount of punitive compensation in a particular case. Several scholars have examined judge and jury sentencing in the criminal context, and this Section discusses that scholarship.

Punitive compensation decisions are surprisingly similar to judgments about punitive damages in several key ways. At their essence, they are both decisions about how much compensation to give a victim based on both the amount of her documented losses and her anticipated emotional and hedonic losses. In the criminal context, punitive compensation determinations come with a moral overlay and implicate the direct and collateral consequences that attach to all criminal punishments, a fundamental difference from punitive damages.<sup>103</sup> This distinction does not prevent the punitive damages literature from revealing several important issues equally relevant in the criminal punitive compensation context.

The punitive damages literature confirms judges and jurors reach similar decisions when determining monetary compensation, just as they do in criminal sentencings. This result may be surprising in light of the common misperception that juries are arbitrary and disproportionately punishing in their punitive damage awards. Evidence shows, however, we should not be concerned about allowing juries to step into their role, arguably their constitutionally required role, of determining the appropriate amount of punitive compensation in a particular case. These next Sections examine this research in more detail.

### 1. Judges and Juries Reach Similar Conclusions in Criminal Sentencing

On average, juries make the same decisions as judges in felony cases. In the bulk of criminal trials, judges and juries agree on the outcome of the case—on the finding of guilt or innocence,<sup>104</sup> and on the general degree of wrongfulness of the defendant's behavior.<sup>105</sup> Thus, at first blush, we should have little concern that juries will make any markedly different determination of a defendant's moral blameworthiness than judges will.

When it comes to the amount of punishment to impose, however, judge and jury decision-making diverges somewhat. Despite agreeing on the degree of a defendant's

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103. Lollar, *supra* note 1, at 123-30; Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634-39 (2006).

104. Theodor Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171 (2005) (indicating that judges and juries agreed on the outcome about seventy-five percent of the time).

105. Prescott & Starr, *supra* note 92, at 325-26. In cases where the judges and juries disagreed, judges were more likely to convict. *Id.* See also Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 WASH. U. L. REV. 151, 151 (2005).

wrongfulness, in particular types of cases, juries and judges differ on what punishment adequately addresses that wrongful conduct. Initially, the existing empirical evidence appears to conflict: Some evidence suggests that judges impose less severe sentences than juries;<sup>106</sup> other studies trend in the opposite direction, indicating that judges are harsher than jurors in sentencing.<sup>107</sup> More nuanced reviews of felony jury sentencing explain the seeming discrepancy in these findings. These studies reveal that juries *overall* are more lenient than judges,<sup>108</sup> but in particular types of cases, they impose harsher sentences. Specifically, juries tend to impose harsher sentences in theft, sex abuse, and drug cases.<sup>109</sup>

In some cases, juries also impose more disparate sentences than judges.<sup>110</sup> In many states, juries imposed a more severe average sentence after a jury trial than after a bench trial or guilty plea.<sup>111</sup> In some states, however, post-jury trial sentences were more consistent than those imposed by a judge after a guilty plea.<sup>112</sup> One notable exception involved sentences of incarceration: when comparing only sentences of incarceration, juries still imposed less consistent sentences than those judges imposed for the same offense.<sup>113</sup>

The inconsistency in juror sentences may cause some initial hesitation or concern as to whether jurors should determine punitive compensation amounts. But the discrepancy has a legitimate explanation: the difference in information jurors and judges receive prior to sentencing.<sup>114</sup> Juries often have less information on which to reach a realistic conclusion about the harms caused by these crimes. Judges are privy to much more information about the harms stemming from these offenses and, having seen many of these cases, may have reached the conclusion that the harms are less significant than jurors believe.

Juries also tend to lack information about alternatives to incarceration.<sup>115</sup> For example, jurors often do not understand how parole works; they assume if they impose a sentence with parole, the person will get parole.<sup>116</sup> Juries do not receive information about probation, suspended sentences, or treatment options.<sup>117</sup> As a result, jurors believe that

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106. Brian H. Bornstein, *Judges vs. Juries*, 43 COURT REV. 56, 58 (2006).

107. Shari S. Diamond & Loretta J. Stalans, *The Myth of Judicial Leniency in Sentencing*, 7 BEHAV. SCI. & L. 73 (1989).

108. See, e.g., Robbennolt, *supra* note 100, at 499-500.

109. See, e.g., King & Noble, *supra* note 51, at 898; Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 WASH. U. J. URB. & CONTEMP. L. 3, 9-10, 33 (1994). See also King & Noble, *supra* note 51, at 927-28, 934 (observing that juries tend to impose higher sentences in drug cases than judges). Additionally, as with trial judges, jury sentences imposed after trial often are greater than those imposed following a plea. King & Noble, *supra* note 51, at 895, 926. In other words, just as judges do, juries impose a “trial penalty” on criminal defendants.

110. Weninger, *supra* note 109, at 9, 29.

111. King & Noble, *supra* note 51, at 923-24. Sentences for rape were the exception to that general trend. Evidence seemed to suggest that the choice of fact-finder or whether the conviction was obtained by trial or plea had no bearing on sentencing decisions for that crime. *But see* Weninger, *supra* note 109, at 36 (noting that in trial cases in El Paso County, Texas, juries sentence less severely than judges).

112. King & Noble, *supra* note 51, at 907.

113. *Id.*

114. *Id.* at 899, 931.

115. *Id.* at 931.

116. *Id.* at 899, 914.

117. King & Noble, *supra* note 51, at 911 (“Juries do not receive information about probation or suspension of sentence or about rehabilitative services.”).

prisons and jails offer more treatment and programs than those institutions generally do.<sup>118</sup> Depending on whether jail seems like a viable option, a juror might make a different, and more extreme, sentencing choice than she might if she knew the full range of sentencing options.

Linked to the information disparity between judges and jurors is the reality that jurors do not have a sense of the normal range of sentences imposed when a defendant is convicted of a particular offense.<sup>119</sup> As one attorney explained, jurors “have no concept about what sentences for [a particular] offense are.”<sup>120</sup>

Some evidence indicates that providing jurors with more information may alter their verdicts, especially in cases involving lesser included offenses: “Giving jurors multiple options is an indirect way of giving them information about sentences; by telling jurors that they have more than one option to find a defendant guilty, the jurors can conclude that the likely sentence under one verdict is lower than the sentence under another verdict.”<sup>121</sup> Jurors use this information not only to make a decision about guilt, but also as a way of deciding what sentence to impose. Rather than considering these decisions independent of one another, they become linked in most jurors’ minds. As a result, if the guilt and sentencing phases of a defendant’s jury trial are held together, in a unified proceeding (rather than two proceedings, where the guilt and sentencing phases are bifurcated), significant danger exists that juries will misuse evidence in determining guilt or innocence that should be used only in sentencing.<sup>122</sup>

In the context of punitive compensation, these concerns remain relevant. As with other types of criminal punishments, punitive compensation determinations will be more accurate if jurors are given more information. Jurors typically do not have information about the range of possible compensatory sentences a defendant should pay to “make whole” a community ravaged by addiction and overdoses as a result of her distributing oxycodone and methadone there.<sup>123</sup> Likewise, most jurors do not have a realistic sense of the quantity of harm attributable to an individual viewer of a widely circulated image of child pornography.

In both the punitive compensation context and the felony sentencing context more broadly, a relatively straightforward solution exists: give jurors more information. Although calculating the quantity of punitive compensation intended to reimburse a concrete economic loss is a relatively straightforward inquiry, calculating more abstract losses, such as psychological and emotional losses, or the amount of intangible harm to a community from one drug dealer’s sales, is much more challenging. Juries need information about how to calculate losses that are less clear. They need information about whether the com-

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118. *Id.* at 899-900.

119. *Id.* at 900, 911; Weninger, *supra* note 109, at 29.

120. King & Noble, *supra* note 51, at 915-16.

121. Lillquist, *supra* note 51, at 670.

122. *Id.* at 623-24.

123. See Transcript of Sentencing Hearing, at 87, 89, 101, United States v. Leman, No. 7:10-CR-00010 (GFVT) (E.D. Ky. 2012) (ordering \$1 million in community restitution for the “hurt,” “pain,” and “devestat[ion]” to the community as a result of defendant’s distribution of oxycodone and methadone).

pensation claimed is comparable to other similar claims, or based in realistic value assessments. Jurors also may need to be able to consider the innocence/guilt decision separate from the decision about the appropriate amount of compensation to require if the defendant is convicted.

The best solution to these problems is equality of information: “the jury needs both the same information that judges receive and the power to impose the full range of sentencing options authorized by the legislature.”<sup>124</sup> Bifurcating the proceedings and never allowing the jury to know in advance that it will decide punishment is another possible solution.<sup>125</sup> Both of these proposals will be discussed in more detail later in this Article. For now, the existence of concrete reliable methods that can help juries address this information disparity should prevent us from concluding that because juries can be harsher and more disparate in their felony sentencing decisions, inviting them to determine punitive compensation amounts is a dangerous idea.

In the end, regardless of the discrepancy in the sentencing result, the underlying message remains that jurors and judges approach determinations of moral blameworthiness in a similar way. The conclusions they reach, based on differences in knowledge and perception about the implications of a particular sentence, may differ, but both entities largely agree on whether a defendant has committed a crime and the wrongfulness of the defendant’s behavior in committing that crime. Providing jurors with equivalent information may make the sentencing results substantially similar as well, especially in the context of punitive compensation.

## 2. Judges and Juries Reach Similar Conclusions in Punitive Damages Cases

A recent headline in the *New York Times* read, “Jury Awards \$23.6 Billion in Florida Smoking Case.”<sup>126</sup> The family of a chain smoker who died of lung cancer at the age of 36 sued R.J. Reynolds Tobacco Company, resulting in the jury finding the company liable for \$17 million in compensatory damages, and \$23.6 billion in punitive damages.<sup>127</sup> Similarly, in 2002, a Los Angeles jury awarded \$28 billion in punitive damages against Philip Morris USA.<sup>128</sup>

Stories like these have led many to conclude that jurors are arbitrary, erratic, unpredictable, and unreliable in evaluating punitive damages cases and, by extension, in any case involving a monetary award. Rarely does one hear of a judge imposing such a staggering punitive damages award. Yet, on closer analysis, the empirical evidence is more nuanced. Punitive damages are only imposed in a very small percentage of civil cases,<sup>129</sup>

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124. King & Noble, *supra* note 51, at 888.

125. Lillquist, *supra* note 51, at 671.

126. Frances Robles, *Jury Awards \$23.6 Billion in Florida Smoking Case*, N.Y. TIMES, Jul. 20, 2014, at A17, available at [http://www.nytimes.com/2014/07/20/business/jury-awards-23-6-billion-in-florida-smoking-case.html?\\_r=0](http://www.nytimes.com/2014/07/20/business/jury-awards-23-6-billion-in-florida-smoking-case.html?_r=0).

127. *Id.*

128. *Id.*

129. For example, civil complaints do not often result in trials, and of those cases that do end up with a trial verdict, less than one percent result in the awarding of punitive damages. Theodore Eisenberg & Michael Heise, *Judge-Jury Difference in Punitive Damages Awards: Who Listens to the Supreme Court?*, 8 J. EMPIRICAL LEGAL

and the instances of a seemingly extreme result, such as the ones mentioned in the previous paragraph, are almost anomalous.

When they do award punitive damages, judges and juries do not differ significantly in their rates of awarding punitive damages.<sup>130</sup> In fact, “the bulk of punitive damages awards have been reasonably sober, modest in size, and relatively stable over time.”<sup>131</sup> In trial cases where the plaintiff prevails, judges award punitive damages approximately 4.8% of the time, and juries award them approximately 3.4% of the time.<sup>132</sup> In the unusual occurrence when a jury awards punitive damages, the awards are generally not in jaw-dropping amounts. More than half of punitive damages cases involve awards of less than \$100,000; 86.6% involve awards of less than \$1 million.<sup>133</sup> In other words, juries who impose significant punitive damages are the relatively rare exception.

Another factor in the perception that juries award outrageous punitive damages is the difference in the type of cases judges and juries hear.<sup>134</sup> Juries hear most tort disputes, whereas judges hear most contract disputes.<sup>135</sup> Punitive damages are generally not available in contract disputes, meaning juries decide most punitive damage awards.<sup>136</sup> However, despite this finding, several studies show judges awarded a “surprisingly high fraction”—31.3%, according to one study—of the total number of punitive damages awards given.<sup>137</sup> In fact, more than juries, judges tend to award punitive damages in cases with higher financial stakes, whether the defendant is an individual or a corporation.<sup>138</sup>

Thus, despite the popular perception, the literature suggests juries as a whole are no more likely to make arbitrary, erratic, unpredictable, and unreliable financial awards than judges. In fact, judges, too, have run the gamut in their approaches to calculating “restitution,” awarding punitive compensation in widely varying amounts from case to case, even with similar facts and identical losses alleged.<sup>139</sup> Although some of the punitive compensation awards require a straightforward calculation of losses, other calculations are less

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STUD. 325, 330 (2011).

130. See, e.g., Theodore Eisenberg et al., *Juries, Judges and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of Civil Courts 1992, 1996, and 2001*, 3 J. EMPIRICAL LEGAL STUD. 263, 268 (2006); Theodore Eisenberg et al., *Juries, Judges and Punitive Damages: An Empirical Study*, 89 CORNELL L. REV. 743, 746 (2002).

131. Eisenberg & Heise, *supra* note 129, at 325-26. See also *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497 (2008).

132. Eisenberg & Heise, *supra* note 129, at 330. See also Eisenberg et al., *supra* note 130, at 750 (finding judges awarded punitive damages in 5.3% of trials won by plaintiffs, whereas juries awarded them in only 3.5% of cases). In fact, “plaintiffs only sought punitive damages in approximately 10 percent of the trials they won.” Eisenberg & Heise, *supra* note 129, at 332.

133. Eisenberg & Heise, *supra* note 129, at 334.

134. See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1162-63 (1992).

135. *Id.* at 332-34. Eisenberg et al., *supra* note 130, at 749-50.

136. Eisenberg & Heise, *supra* note 129, at 332-33.

137. Eisenberg et al., *supra* note 130, at 752. See also Thomas A. Eaton et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 GA. L. REV. 1049, 1094 (2000) (finding that judges awarded punitive damages more frequently than juries).

138. Eisenberg et al., *supra* note 130, at 762-63.

139. See Cortney E. Lollar, *Child Pornography and the Restitution Revolution*, 103 J. CRIM. L. & CRIMINOLOGY 343, 365 (2013); Tim McGlone, *Victim of Child Porn Wants Viewers to Pay*, VIRGINIAN-PILOT, Oct. 25, 2009, at A6.

clear-cut. For example, in a case where a defendant is convicted of distributing oxycodone to a community ravaged by drug addiction and poverty, determining the appropriate amount of compensation to give to the victim community involves a significant amount of discretion and personal judgment. Likewise, in the context of a defendant convicted of possessing child pornography, determining the amount of losses attributable to a person who has downloaded and viewed images featuring a particular victim is far from simple. Nothing from the punitive damages context suggests that jurors would be any poorer at conducting this analysis than judges, a finding that would seem to bode well for allowing jurors to determine the punitive compensation awards in criminal cases.

That said, the public perception that jurors make arbitrary and massive monetary awards in punitive damages cases did not arise out of nowhere. Although sizable punitive damage awards likely make headlines in large part because they are such an anomaly, the headlines alone do not explain the public perception. When large punitive damages awards are imposed, juries tend to be the fact-finder determining them, usually in high-stakes tort trials.<sup>140</sup> These occasional, strikingly high punitive damages awards have led courts to continually engage in the task of determining whether those damages are constitutionally excessive. Courts conduct this analysis by comparing the punitive award to the amount of compensatory damages awarded.<sup>141</sup> In recent years, the ratio of punitive to compensatory awards has been greater when a jury issued the award than when a judge issued it.<sup>142</sup> Additionally, the ratio of punitive to compensatory damages is more disparate in jury trials than in judge trials.<sup>143</sup>

Some scholars attribute the discrepancy to litigants' strategic decisions about whether to pursue bench or jury trials.<sup>144</sup> Litigants tend to try cases with more money at stake before juries instead of judges, thereby raising the possibility that juries do not actually award greater punitive damages than judges do.<sup>145</sup> Rather, juries may simply decide the bulk of cases with large money awards at stake.<sup>146</sup> Other factors suggest a selection bias when it comes to parties electing to proceed before a particular fact-finder.<sup>147</sup>

Regardless of the cause, the surprising effect of having a jury decide a case in which a plaintiff is pursuing punitive damages is a 1.4% *decrease* in the likelihood that the plaintiff will receive a punitive damages award.<sup>148</sup> As a whole, in only .49% of cases<sup>149</sup> will a jury return an award that empiricists would consider disproportionate, such as the ones that tend to appear in the headlines. Thus the research on punitive damages does not bear

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140. Eisenberg & Heise, *supra* note 129, at 334; *see also* Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1, 4-10, tbl. 1 (2004).

141. *See, e.g.*, *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("few awards exceeding a single-digit ratio between punitive and compensatory . . . will satisfy due process"); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

142. Eisenberg & Heise, *supra* note 129, at 328.

143. Eisenberg et al., *supra* note 130, at 756.

144. Eisenberg & Heise, *supra* note 129, at 345-46, 353.

145. *Id.* at 345.

146. *Id.*

147. *Id.* at 345-46.

148. *Id.* at 330.

149. This figure comes from the 3.4% of cases in which juries award punitive damages and fewer than 14% of cases where punitive damages awards are greater than \$1 million. *See* Eisenberg & Heise, *supra* note 129, at 330, 334.

out the common perception that juries will not be as fair or careful in determining the monetary award to impose in a given case, such as in a punitive compensation case.

The import of this social science research for punitive compensation is both obvious and significant. The punitive damages scholarship strengthens the conclusion that juries are able to be as fair and considered in their evaluation of difficult and emotionally-charged criminal and civil sanctions as judges. Whether one endorses the view that the Constitution requires juries to take on the punitive compensation decision, the undisputable conclusion is that juries certainly are as competent to make this determination as judges. Juries may have a more diffuse range of awards, resulting in the occasional outlier, but statistically, they are less likely than judges to award punitive damages in a given case. Extrapolating this general trend to the punitive compensation context suggests that in situations where jurors are deciding high stakes, emotionally charged cases involving the potential award of significant amounts of money, jurors are as likely to award fair, considered compensation as judges.

#### IV. LEGITIMATE CONCERNS ABOUT JURY DECISION-MAKING

When looking at the criminal sentencing literature and the punitive damages literature combined, the conclusion is unmistakable: jurors can be as impartial and thoughtful as judges. But jurors have the critical advantage of being drawn from, and better representative of, the community at large, making them the preferable arbiter of any punitive judgment, particularly one involving compensation.

Although a straightforward evaluation of the similarities in the results judges and juries reach is compelling, research reveals some areas of weakness in the jury decision-making process. The literature shows that jurors are prone to “anchoring,” a phenomenon that leads people to make numerical decisions subconsciously relying on other, often entirely irrelevant and unrelated numbers. Studies on affective forecasting show that jurors, more than judges, struggle with accurately predicting a person’s future emotional response to a traumatic event, and studies on jury instructions expose the difficulty they have deciphering many of the jury instructions courts ask them to apply.

Anchoring is a psychological term referring to our natural tendency to use numeric reference points to influence numeric judgments, even when the reference points are “arbitrary, ludicrous, or irrelevant.”<sup>150</sup> Jurors, as well as judges, are prone to this particular weakness in mental processing.

Social scientists have looked closely at “affective forecasting”—the act of predicting a person’s future emotional response to a traumatic event—and found that jurors are particularly poor at predicting the degree and duration of emotional distress a crime victim will experience in the future. More often than not, jurors anticipate that victims will continue to experience the intensity of the suffering they currently experience for a much longer time than they do, which affects the amount of compensation jurors are willing to provide. These insights are particularly relevant to the punitive compensation context as jurors are being asked to decide how to compensate a victim’s future emotional losses. If

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150. Jeffrey J. Rachlinski, et al., *Arbitrary Adjudication: How Anchoring and Scaling Distort Awards and Sentences*, at 6 (Preliminary Draft, 2013, on file with author).

jurors are not accurately predicting the emotional effect of a crime on a victim, they will have difficulty imposing a punitive compensation award that is fair and consistent with the evidence presented.

How jurors ultimately decide on an issue is also heavily dependent on the instructions judges give them, and the comprehensibility of those instructions. Some of the issues with which jurors struggle occur because jurors are not reading closely enough. However, a significant number of misunderstandings come from a lack of clear instructions—about legal terminology, how a particular instruction relates (or does not relate) to another, and what standard of proof to apply. Juror error in interpreting instructions has particular bearing on jurors trying to figure out complex financial and monetary determinations, whether or not they have expert testimony to assist them. Because jurors rely on jury instructions to figure out how to calculate and establish the amount of punitive compensation, their difficulty in understanding instructions could be quite problematic here.

This Section focuses on the three primary issues with juror decision-making likely to arise in determinations of punitive compensation.

#### A. *Juries Are Susceptible to Anchoring*

Juries are susceptible to a phenomenon called anchoring. As indicated, anchoring refers to our use of numeric reference points to influence numeric judgments, even when those reference points are so irrelevant as to be absurd. Numerous studies show how easily most people rely on these “mental shortcuts,” which can be useful, but which also can lead to significant errors.<sup>151</sup> People are most prone to errors when they rely on “ludicrous” anchors, yet fail to recognize how obviously irrelevant and useless the anchoring number is to the question they are being asked to answer.<sup>152</sup> According to some experts, “[i]t is not simple cognitive laziness . . . in which people simply cannot dial down the appropriate number enough to avoid any influence of the initial [anchoring number]. Rather, in rejecting the ludicrous anchor, people call to mind the most extreme example that they can identify.”<sup>153</sup> In other words, although they do not rely on the “absurd anchor,” when they estimate the number they have been asked to determine, having this absurdly high (or low) number in mind, they produce higher (or lower) results.<sup>154</sup>

One commonly cited study involves asking subjects to estimate the average weight of an adult male raccoon and then an adult male giraffe. When asked to estimate the raccoon’s weight first, subjects estimated the giraffe’s weight at a lower number than when questioned in the reverse order.<sup>155</sup> When asked to estimate the weight of the giraffe first, subjects similarly estimated the raccoon’s weight as greater than when the subjects were asked about the raccoon’s weight first.<sup>156</sup> Perhaps obviously, nothing about the experiment

151. *Id.* at 7; see also DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

152. Rachlinski et al., *supra* note 150, at 7.

153. *Id.* at 8.

154. *Id.*

155. Shane W. Frederick & Daniel Mochon, *A Scale Distortion Theory of Anchoring*, 141 J. EXPERIMENTAL PSYCHOL.: GEN. 124, 130 (2011).

156. *Id.*

indicated that the subjects making the estimates should use the estimate for one animal as the starting point for estimating the weight of the other animal. The researchers in the study concluded, in results that are consistently replicated,<sup>157</sup> that anchoring “consists of a temporary distortion in . . . how to translate a quantitative sense of some physical property into a qualitative assessment.”<sup>158</sup> One’s sense of the size of a giraffe does not change, just one’s ability to translate this sense into numbers.<sup>159</sup>

Social scientists and legal scholars have long believed anchors affect juries, especially in their determination of financial penalties. As a result, many scholars have studied the effect of anchoring on juries, particularly in the context of punitive damages awards. One common anchor subject to regular analysis is a damages cap.<sup>160</sup> Legislatures implemented damages caps intending to tap down on “runaway juries.” They thought damage caps would lower the exorbitant punitive damage awards frequently cited by the media. Few anticipated the actual result of instituting such caps: instead of anchoring awards lower, damage caps appeared to increase damages awards in “low value” cases.<sup>161</sup> Scholars later speculated that perhaps the cap provided jurors with a sense of scale, a reference point from which to start considering the appropriate award.<sup>162</sup> Regardless of how jurors use the cap or why the caps increase damages awards, the indisputable conclusion is that the caps remain an anchor on which juries consciously or subconsciously base their awards. The results are consistent and the anchoring effect is clear.

Social scientists and those involved with the justice system traditionally believed that anchors influence judges, decision-makers with more experience, much less than juries.<sup>163</sup> To the extent that judges might be inclined to consider or be influenced by reference points, the law presumes judges can and will consciously put aside those tendencies. Psychological and social science literature reveals that, contrary to this assumption, judges are as susceptible to “anchoring” as the rest of us. The anchoring effect illustrated in the animal weight study turns out to occur in the context of judges setting damages awards and criminal sentences as well.<sup>164</sup>

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157. Rachlinski et al., *supra* note 150, at 9 (citing Gregory B. Northcraft & Margaret Neale, *Experts, Amateurs, and Real Estate: An Anchoring-and-Adjustment Perspective on Property Pricing Decisions*, 39 *ORG. BEHAV. AND HUM. DECISION PROCESSES* 84, 89 (1987)).

158. *Id.* at 8.

159. *Id.* at 9.

160. *Id.* at 21. *See also* Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 *OHIO ST. J. ON DISP. RESOL.* 597, 605-08 (2005-06); Jennifer K. Robbennolt & Christina A. Stuebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 *LAW & HUM. BEHAV.* 353, 361 (1999); Verlin B. Hinsz & Kristin E. Indahl, *Assimilation to Anchors for Damage Awards in a Mock Civil Trial*, 25 *J. APPLIED SOC. PSYCHOL.* 991, 1006 (1995). *Cf.* Michael S. Kang, Comment, *Don’t Tell Juries About Statutory Damages Caps: The Merits of Nondisclosure*, 66 *U. CHI. L. REV.* 481-86 (1999).

161. Rachlinski et al., *supra* note 150, at 22.

162. *Id.*

163. *See, e.g., id.* at 23.

164. *See, e.g.,* KAHNEMAN, *supra* note 151, at 125-26; Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: a Modest Solution for Reforming a Fundamental Flaw*, 104 *J. CRIM. L. & CRIMINOLOGY* 489, 503-10 (2014); Chris Guthrie, et al., *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 *DUKE L.J.* 1477, 1502-06 (2009); Chris Guthrie, et al., *Blinking on the Bench: How Judges Decide Cases*, 93 *CORNELL L. REV.* 1 (2007); Jeffrey J. Rachlinski, *Inside the Bankruptcy Judge’s Mind*, 86 *B.U. L. REV.* 1227, 1233-37 (2006); Andrew J. Wistrich, et al., *Can Judges Ignore*

For example, in the context of damage awards, one study asked federal magistrate judges to determine the appropriate damages award in a hypothetical personal injury lawsuit where liability had been admitted and the only issue was damages.<sup>165</sup> Study organizers asked half the judges to determine an appropriate damage award; the other half were first asked to rule on a motion to dismiss for failing to satisfy the minimum amount in controversy of \$75,000 to allow federal jurisdiction to be proper in federal court.<sup>166</sup> The motion was patently frivolous, and almost all the judges asked to decide the motion denied it.<sup>167</sup> But the judges who ruled on the motion awarded the plaintiff less money than the judges who just determined the appropriate damages award.<sup>168</sup> The judges who had not ruled on the motion awarded an average of \$1.2 million, whereas the judges who first denied the motion to dismiss awarded an average of \$882,000.<sup>169</sup>

Anchors can be found throughout our legal rules and statutes. Predictably, damage caps provide an anchor for judges as well as juries. Presented with a hypothetical case where the judge had to determine pain and suffering damages as a result of a car accident, and was told the defendant's injuries "are not serious, and do not warrant a significant damage award," some judges were given an anchor and others were not.<sup>170</sup> Scholars designed the study to produce a compensatory award of \$30,000-\$50,000.<sup>171</sup> The materials asked half the judges to determine the amount of pain and suffering. The other judges were told that the damages could not exceed a \$332,236 cap.<sup>172</sup> Judges who had not been informed of the cap imposed pain and suffering damages in the average amount of \$58,600, whereas judges who had been told of the cap imposed an average of \$87,000 in damages.<sup>173</sup>

Anchors not only affect the financial award a judge may impose, they also distort the time scale, affecting quantitative judicial judgment as to the appropriate sentence to impose in a case. One hundred and thirty-five judges were given a one-page description of a criminal case in which a hypothetical man pled guilty to voluntary manslaughter.<sup>174</sup> Study organizers also gave the judges a few other facts about the defendant. They asked judges to decide the appropriate sentence for the man "without regard to the sentence maximum in your own jurisdiction."<sup>175</sup> Half of the judges were instructed to determine the sentence in years, the other half were asked to do so in months.<sup>176</sup> Those who authorized a sentence in years imposed an average sentence of 9.7 years, or 115 months, whereas

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*Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1286 (2005); Chris Guthrie, et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 790-94 (2001); Thomas Mussweiler & Fritz Strack, *Numeric Judgments under Uncertainty: The Role of Knowledge in Anchoring*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 495, 495 (2000).

165. Guthrie et al., *Inside the Judicial Mind*, *supra* note 164, at 784-87.

166. *Id.* at 790-91.

167. *Id.* at 791-92.

168. *Id.*

169. *Id.* at 791.

170. Rachlinski et al., *supra* note 150, at 24.

171. *Id.*

172. *Id.* at 25.

173. *Id.*

174. *Id.* at 17.

175. Rachlinski et al., *supra* note 150, at 17.

176. *Id.*

those who sentenced in months provide an average sentence of months authorized a sentence of 66.4 months, or 5.5 years.<sup>177</sup> In other words, judges sentencing in months assigned much lower sentences than did judges sentencing in years. Nothing in the judges' backgrounds or political affiliations could explain the disparity in the results.<sup>178</sup> Anchoring was the only logical conclusion.

Anchoring is not always unexpected. Some judicial anchoring is based on anchors that most in the justice system see as acceptable and even desirable. For example, judicial sentences tend to be influenced by the recommendations of probation officers.<sup>179</sup> In the federal system, judges are expected to use the presentence reports probation officers prepare as an initial jumping off point for calculating a defendant's sentencing guideline range and ultimate sentence.<sup>180</sup> Judges also tend to rely on previous decisions and recommendations made by police officers, prosecutors, and other judges who have examined the case during earlier proceedings.<sup>181</sup> Sentencing recommendation forms influence judicial decision-making as well.<sup>182</sup> In other words, judges rely on people and forms tasked with making a preliminary determination of the appropriate sentence to anchor the sentences they impose. Most scholars and judges would view some of these anchors as desirable; others might appear somewhat more problematic. Unmistakably, the criminal justice system expects and almost requires judges to use some of these anchors in calculating the appropriate sentence to impose on a defendant.

Although we accept and even encourage a judge's use of these anchors, those anchors can be erroneous. Probation officers, police officers, prosecutors, and even other judges can make mistakes. Information may be inaccurate, calculations may be incorrect, and recommendations may reflect a bias. Yet judges often rely on these anchors whether the data supporting the anchor is reliable or accurate.<sup>183</sup> Studies show that judges are no more adept at recognizing or taking into account the weaknesses of using these mistaken or erroneous numbers as anchors than they are the wildly arbitrary and "ludicrous" anchors mentioned in previous examples.<sup>184</sup>

In the context of punitive compensation, both judges and juries likely remain subject to subconscious and arbitrary psychological influences that need to be addressed. Both fact-finders search for reference points from which to translate their sense of wrongdoing into a concrete and tangible number that accurately reflects the blame. Given that both judges and jurors anchor, two possible solutions emerge, each of which likely precludes the other.

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177. *Id.* at 18.

178. *Id.* at 18-19.

179. Ebbe B. Ebbesen & Vladimir J. Konecni, *The Process of Sentencing Adult Felons: A Casual Analysis of Judicial Decision*, in *THE TRIAL PROCESS* 413, 434 (Bruce Dennis Sales ed., 1981).

180. *See, e.g.*, Bennett, *supra* note 164, at 523-29.

181. Mandeep K. Dhami, *Psychological Models of Professional Decision Making*, 14 *PSYCHOL. SCI.* 175, 177 (2003).

182. Shawn Bushway et al., *Sentencing Guidelines and Judicial Discretion: Quasi-Experimental Evidence from Human Calculation Errors*, 9 *J. EMPIRICAL LEGAL STUD.* 291 (2012).

183. *See, e.g., id.* at 291. *Cf.* Dhami, *supra* note 181, at 177.

184. Bushway et al., *supra* note 182, at 314-15; *see also* Rachlinski et al., *supra* note 150, at 12.

One possible solution, given our criminal justice system's acceptance of some anchors as "legitimate," would be for courts to provide whoever is making the punitive compensation determination with anchors that are accurate and reliable, and also, ensure the fact-finder remains as sheltered as possible from any irrelevant anchors. The consequence of allowing unreliable anchors to affect a punitive compensation decision is apparent in light of what scholars have learned about how judges make sentencing decisions.

Another potential solution is to find some method of reducing any fact-finder's reliance on these anchors. Mistakes and errors happen, and in many ways, may be inevitable. Asking a fact-finder to make a determination about punitive compensation from their intuition, without any anchoring numbers, might get us to a more fair and equitable result than relying on even the most carefully placed anchors. Part V will address each of these possible approaches in more depth.

### B. Jurors' Cognitive Biases In Affective Forecasting

Although judges and juries are both prone to anchoring, juries are somewhat more prone toward inaccurate forecasting of a victim's emotional response to a traumatic situation. Across the board, jurors tend to over-predict the degree of emotional distress a victim will suffer in response to a traumatic event, such as being a crime victim, experiencing a debilitating accident, or suffering the loss of a loved one.<sup>185</sup> Inaccurate emotional forecasting can lead to inflated damage awards and overcompensation of victims.<sup>186</sup>

As a whole, people tend to accurately predict whether they will experience positive or negative emotions in response to a particular event and what specific emotions they will experience.<sup>187</sup> But accuracy of prediction goes down when they are asked to anticipate their response to a complex event, and when trying to predict events that are far in the future.<sup>188</sup> Many people have the most trouble accurately anticipating the intensity and duration of their emotions.<sup>189</sup>

Psychological biases arise particularly in the context of pain and suffering and hedonic damages, both of which are relevant to determinations of punitive compensation. Under the prevailing federal criminal "restitution" statute, courts must order criminal defendants to compensate victims for the "full amount" of their losses, including "the cost of necessary . . . professional services . . . relating to physical, psychiatric, and psychological care."<sup>190</sup> Because juries notoriously have a difficult time accurately predicting future emotional states, applying this statute in practice is likely to significantly impact a jury's ability to assess the appropriate compensation for future psychiatric and psychological losses.<sup>191</sup>

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185. Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 166, 183 (2005).

186. *Id.* at 183.

187. *Id.* at 188.

188. *Id.* at 167.

189. *Id.*

190. 18 U.S.C.A. § 3663A(b)(2)(A) (West 2012). *See also* HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* (1966).

191. *See, e.g.*, Blumenthal, *supra* note 185, at 182.

Empirical studies show that a person's emotional responses to difficult, even traumatic events often last for less time than most of us might expect. In other words, people return to their "emotional baselines sooner rather than later."<sup>192</sup> Scholars call this process "hedonic adaptation." Not only do people adapt more quickly to painful events than we might imagine, but many of us also fail to anticipate that our emotional states will return to normal in the relatively rapid time that they do.<sup>193</sup> We consistently fail to realize that the intensity and duration of a difficult emotional experience will be less than our intuition or belief tells us.<sup>194</sup>

Social scientists have studied this phenomenon in the context of civil damages awards "designed to compensate the victim of a tortious injury for the harm experienced, with the goal of placing her in a position equivalent to that before the tort occurred."<sup>195</sup> The compensatory damages decision mirrors the decision about punitive compensation that juries would make in a criminal case, as the previously quoted federal statute indicates. Damage awards are likewise aimed at compensating a victim's losses and returning her to the financial position she was in prior to the crime.<sup>196</sup>

In the context of damages awards, juries pervasively and consistently engage in inaccurate emotional forecasting, resulting in their over-prediction of the degree of emotional distress a victim will experience. Jurors rely on the amount and duration of a victim's current suffering to predict that person's future suffering. They presume the victim will continue to experience the level of emotional harm she is now experiencing for a much longer period than most victims do experience.<sup>197</sup> As a result of these forecasting errors, jurors regularly impose excessive damages awards.<sup>198</sup> Jurors likely would do the same when determining a punitive compensation award, as the inquiry they would be undertaking is much the same.<sup>199</sup>

Expert testimony may appear to be the panacea for this problem of emotional forecasting.<sup>200</sup> Typically, attorneys for victims seeking punitive compensation hire experts to calculate the amount of future therapy and mental health treatment the victim will need. Undoubtedly, experts are better equipped than juries to anticipate how much psychiatric and psychological treatment a victim may need in the future. However, as many commentators have discussed at length, experts regularly battle it out during fact-finding hearings,

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192. Daniel T. Gilbert et al., *The Trouble with Vronsky: Impact Bias in the Forecasting of Future Affective States*, in *THE WISDOM IN FEELING: PSYCHOLOGICAL PROCESSES IN EMOTIONAL INTELLIGENCE* 114, 116-17 (Lies Feldman Barrett & Peter Salovey eds., 2002); Blumenthal, *supra* note 185, at 168-69. *See also* Camille B. Wortman & Roxanne Cohen Silver, *The Myths of Coping with Loss*, 57 *J. CONSULTING & CLINICAL PSYCHOL.* 349, 352 (1989).

193. Blumenthal, *supra* note 185, at 169-72; Cass R. Sunstein, *Illusory Losses*, 37 *J. LEGAL STUD.* S157, S161-62, S164-66 (2008); Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 *VAND. L. REV.* 745 (2007).

194. Blumenthal, *supra* note 185, at 172; KAHNEMAN, *supra* note 151, at 405-07.

195. Blumenthal, *supra* note 185, at 182.

196. *Id.* (citing RESTATEMENT (SECOND) OF TORTS: DAMAGES §§ 901 cmt. A, 903 (1979)).

197. *Id.* at 183-84.

198. *Id.*

199. *Cf.* Sunstein, *supra* note 193, at S168-69, S173-74.

200. *See, e.g.*, Blumenthal, *supra* note 185, at 187-88.

presenting differing calculations and analyses. With emotional trauma and loss, the average person may feel more able to discern the accuracy and credibility of an expert witness's testimony than they might in, say, a complex mortgage fraud case. But the result still may be an over-reliance on the juror's own ability to anticipate how much emotional distress a victim will experience.<sup>201</sup>

The experts who testify in these cases usually are not affective forecasting experts.<sup>202</sup> Rather, they are psychologists who are testifying on behalf of either one of the parties in the criminal case or the victim herself. The testimony usually centers on the expert's prediction of the need for future therapy, mental health treatment, and other future psychological and psychiatric treatment. Thus, the experts from whom juries hear generally are not well-versed in the literature of affective forecasting.

Rather, the experts from whom juries normally hear simply offer competing versions of how much treatment a victim will need in the future, usually based on how that victim seems to be responding to treatment at the time of the expert's testimony. Sometimes experts hired by victims even appear to engage in the same flawed emotional forecasting as the average juror.<sup>203</sup> Often, defense experts do not have access to the victim in order to make an independent determination of the accuracy of the prosecution's expert evaluation. This can lead jurors to credit the expert who has actually examined the victim, but who is relying on the same flawed methodology as the jurors in predicting the future emotional harm.

Several studies have shown that jurors also are not particularly adept at evaluating expert evidence.<sup>204</sup> In the event more than one expert testifies, jurors often have trouble discerning whose testimony is more reliable.<sup>205</sup> Rather than highlighting the difference between "high-quality" and "low-quality" experts, competing expert testimony seems to cause jurors to become skeptical of both.<sup>206</sup> Jurors appear to judge experts based on how much they are paid and whether they use "concrete examples" or summaries of their findings.<sup>207</sup> In part, jurors' inability to evaluate the credibility and reliability of expert testimony might stem from their own lack of familiarity regarding the area over which the expert claims expertise.<sup>208</sup> As a result, expert testimony does not necessarily resolve the

201. See, e.g., *id.* at 183.

202. *Id.* at 187.

203. For example, one expert testifying on behalf of a child pornography victim anticipated that the victim, now in her early twenties, would need therapy until the age of eighty-one. *United States v. Staples*, No. 09-14017, 2009 WL 2827204, at \*3 (S.D. Fl. Sept. 2, 2009); *United States v. Hardy*, 707 F. Supp. 2d 597, 600 (W.D. Pa. 2010). However, most mental health experts acknowledge that if mental health treatment has not been effective in the first ten years—and that is a generous amount of time—another fifty years of therapy is not going to change that. See Lollar, *supra* note 139, at 358 n.39.

204. See, e.g., Ilya Somin, *Jury Ignorance and Political Ignorance*, 55 WM. & MARY L. REV. 1167, 1181 (2013); Bradley D. McAuliff et al., *Can Jurors Recognize Missing Control Groups, Confounds, and Experimenter Bias in Psychological Science?*, 33 LAW & HUM. BEHAV. 247 (2009); Bradley D. McAuliff & Margaret Bull Kovera, *Juror Need for Cognition and Sensitivity to Methodological Flaws in Expert Evidence*, 38 J. APPLIED SOC. PSYCHOL. 385 (2008); Lora M. Levett & Margaret Bull Kovera, *The Effectiveness of Opposing Expert Witnesses for Educating Jurors About Unreliable Expert Evidence*, 32 LAW & HUM. BEHAV. 363 (2008).

205. Levett & Kovera, *supra* note 204, at 370-71.

206. Somin, *supra* note 204, at 1181.

207. *Id.* at 1182.

208. *Id.*; Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, in VERDICT:

dilemma of how to get jurors to accurately evaluate future emotional losses.

Were jurors tasked with deciding the appropriate amount of punitive compensation to impose in a given case, this emotional forecasting problem would need to be addressed. Part V discusses some of the possible ways to go about limiting the impact of this phenomenon.

### C. Jury Instructions Challenges

Not only are jurors deficient at predicting the degree and duration of a crime victim's future emotional responses, they often have trouble wading through the opaque language of jury instructions. Substantial evidence from both the civil and criminal contexts suggests that juries regularly fail to understand jury instructions.<sup>209</sup> Although jurors pay close attention to the law, often even reading jury instructions aloud in the jury room,<sup>210</sup> they still regularly misunderstand the instructions they are given.<sup>211</sup> Because the task of determining a victim's losses—past and future, tangible and intangible—is difficult in any circumstance, the lack of clear guidance and information about how to undertake the process of determining the appropriate amount of punitive compensation can be particularly problematic. In fact, empirical evidence shows the determination of damages awards is the sole area in which confusing jury instructions affect the outcome.

States have long recognized the need to increase legal accuracy in jury instructions.<sup>212</sup> One attempt to simplify the law for jurors came in the form of pattern jury instructions.<sup>213</sup> However, even the introduction of pattern instructions was not a cure-all in addressing the issue of juror comprehension. Pattern instructions generally do a good job of assisting lawyers and judges during trial, but they often do little to increase a juror's understanding of the law.<sup>214</sup> The comprehensibility of pattern instructions for non-lawyers remains a significant issue.<sup>215</sup> The American Bar Association recognized as much in 2005, remarking that “jury instructions remain syntactically convoluted, overly formal and abstract, and full of legalese.”<sup>216</sup> A few states have consulted with communications experts

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ASSESSING THE CIVIL JURY SYSTEM 181, 192 (Robert E. Litan ed. 1993); cf. Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1552-53 (1998).

209. William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1093-94 (1995); Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1207 (1995); Shari Seidman Diamond, *The “Kettleful of Law” in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537 (2012); Somin, *supra* note 204, at 1182.

210. Diamond, *supra* note 209, at 1553.

211. *Id.* at 1555-85.

212. Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153, 155 (1982).

213. *Id.*

214. *See, e.g.*, Diamond, *supra* note 209, at 1544; Severance & Loftus, *supra* note 212, at 156.

215. Severance & Loftus, *supra* note 212, at 156.

216. AM. BAR. ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS, princ. 14A cmt. subdiv. A, at 108 (2005), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/american\\_jury/final\\_commentary\\_july\\_1205.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/american_jury/final_commentary_july_1205.authcheckdam.pdf).

in developing pattern instructions, eliminating some of the substantial issues in those jurisdictions, but most states have not addressed the issue.<sup>217</sup> As a result, laypersons regularly fail to comprehend the relevant, and sometimes critical, legal concepts.<sup>218</sup>

A recent study of fifty civil jury deliberations provides some insight into the source and pervasiveness of juror confusion. The study revealed that 19.3% of juror comments referencing instructions they received were inaccurate.<sup>219</sup> Eighty-three percent of the errors were due to miscomprehension, and those errors occurred in forty-eight of the fifty cases.<sup>220</sup> The longer the written instruction and the more difficult the instruction was to understand, the greater likelihood of juror error.<sup>221</sup> A judge or another juror often tries to correct mistakes in jury instruction comprehension, but they only manage to catch 47% of the mistakes.<sup>222</sup>

Although jurors' unfamiliarity with legal language or simple misreadings led to some errors, poorly structured and worded jury instructions led to others.<sup>223</sup> In fact, the dense language of jury instructions accounted for most of the jury errors that arose.<sup>224</sup> Instructions requiring a straightforward reading of words with plain meanings confused jurors as often as technical legal language.<sup>225</sup> Nineteen percent of the references to burdens of proof were incorrect.<sup>226</sup> Trying to piece together how difference instructions relate to one another also confused jurors.<sup>227</sup> Sometimes this confusion resulted in jurors thinking there were connections that were not present, and other times, jurors missed connections that were present.<sup>228</sup>

Studies of criminal juries found similar patterns. Although having jury instructions is more helpful than having none, instructions fail to increase overall comprehension.<sup>229</sup> In one study, investigators concluded that before deliberating on a defendant's guilt or innocence, the average juror only understood half of the instructions presented to them by

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217. Diamond, *supra* note 209, at 1545 n.34 (confirming California consulted a linguist in drafting its instructions); Severance & Loftus, *supra* note 212, at 156 n.5 (noting that in the 1970s, Arizona, Florida and Pennsylvania "made some efforts toward making pattern jury instructions understandable for laypersons"). See also Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081 (2001).

218. Diamond, *supra* note 209, at 1542. See also Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension and Discrimination*, 33 LAW & HUM. BEHAV. 481, 486-87 (2009); Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias and the Death Penalty*, 24 LAW & HUM. BEHAV. 337, 347 (2000); Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59, 88 (1988); Walter W. Steele, Jr. & Elizabeth Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 78 (1988); Richard L. Weiner, et al., *Comprehensibility of Approved Jury Instructions in Capital Murder Cases*, 80 J. APPLIED PSYCHOL. 455, 462 (1995).

219. Diamond, *supra* note 209, at 1556.

220. *Id.* at 1557-58.

221. *Id.* at 1556.

222. *Id.* at 1558.

223. *Id.* at 1557-58.

224. Diamond, *supra* note 209, at 1559.

225. *Id.* at 1559-60.

226. *Id.* at 1562.

227. *Id.* at 1564.

228. *Id.*

229. Severance & Loftus, *supra* note 212, at 157.

the judge.<sup>230</sup>

The degree of juror confusion over instructions is striking, especially given that judges and juries reach similar results in most cases. Despite evidence that instructions confuse jurors, in a study out of Arizona, these errors only affected damages awards in seven of the fifty cases, and they did not affect the verdict in any of them.<sup>231</sup> Thus, to the degree that jurors are misunderstanding the instructions, the misunderstanding generally does not affect the outcome, except in the context of monetary awards.

The consistency of jurors reaching a similar decision to judges does not suggest that we should ignore the issue of jury instruction comprehension. Jurors clearly struggle to understand the instructions with some regularity, and reach a similar conclusion to judges in spite of, not because of, the instructions.<sup>232</sup>

#### V. WHAT WOULD ALLOW JURIES TO MAKE BETTER DECISIONS

Remedies exist to help make jury decision-making stronger, more reliable, and more accurate. Jurors engage in subconscious and inaccurate predictions about the harm a victim will continue to experience in the future. They silence some voices in the deliberation process. They sometimes fail to understand the instructions they are given. Part V proposes remedies to ameliorate the issues raised in Parts III and IV, offering solutions that will ensure jurors are as fair and impartial in their punitive compensation decision-making as possible, and certainly as reliable as judges in reaching a result.

##### A. *Effective Jury Composition*

When functioning properly, a jury represents the voice of the community. Yet, as we know from Part III, juries often do not resemble the communities around them.<sup>233</sup> Even when disadvantaged groups are present in the jury pool and on the jury, they often are hesitant to express their views. Ensuring diverse jury pools and encouraging jurors to give voice to their views is particularly important in any criminal sentencing decision, including a punitive compensation decision.

We need jury pools that constitute a fair cross-section of the community, in all senses of that term. As indicated previously,<sup>234</sup> we know that race and socio-economic status continue to play significant roles in criminal sentencing and undoubtedly would play a role in determining the appropriate amount of punitive compensation as well. Undoubtedly, gender, disability status, and other salient discernible factors influence an individual juror's approach to compensation, too.

In criminal proceedings, the differences in racial, gender, and economic backgrounds seem most likely to become manifest. Specific to the punitive compensation determination, the undertaking requires a decision about the proper amount of money to both

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230. *Id.* at 160 (citing Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163 (1977)).

231. Diamond, *supra* note 209, at 1539, 1546, 1593.

232. *Id.* at 1596.

233. *See supra* Part III(B).

234. *See supra* Part III(B)(1).

compensate a victim and punish a defendant. For jurors of all backgrounds, these determinations may invoke a wide, and divergent, range of responses and considerations. For example, the amount needed to compensate a victim and the amount needed to punish a defendant may differ significantly from one another. Similarly, ordering an indigent defendant to pay a significant amount of punitive compensation may be unrealistic. Many other factors may play in to an individual juror's judgments about compensation. For this reason, having jurors of various racial, gender, ethnic, disability status, and socio-economic backgrounds is essential to a determination of how much compensation satisfies the twin aims of punitive compensation.

Evidence indicates several ways to minimize or even eliminate the disparities in the jury pool. Most jurisdictions draw their jury pools from voter registration records. Voter registration rolls simply do not mirror the composition of the community at-large. Whites in this country register to vote at significantly greater rates than Hispanics, and somewhat greater rates than African-Americans.<sup>235</sup> Pulling jury panels from utility company databases instead of, or in addition to, voter registration rolls would be one step toward changing the composition of the pool. Most everyone has to pay utilities, regardless of race or socio-economic background, so utility information would reach a broader swath of the population than voter registration rolls. Others have suggested supplementing the source of potential jurors with records of those receiving disability or social security benefits.<sup>236</sup> These records also would likely lead to the inclusion of many individuals who are not currently present in jury pools.

Eliminating, or narrowing the scope of, felon disenfranchisement laws would have a significant effect on jury composition as well. Approximately half of those who are prohibited from serving on a jury due to felon disenfranchisement laws have already completed their sentence and court-ordered obligations.<sup>237</sup> Public opinion surveys overwhelmingly support returning voting rights, and the complementary jury service rights, to individuals who have completed their criminal sentence.<sup>238</sup> A slightly smaller, but still significant number—nearly two-thirds of those surveyed—support returning that right to those who are on probation or parole as well.<sup>239</sup> This support has led to several changes in the law over the past fifteen years. Approximately half of U.S. states amended their felon disenfranchisement laws to expand voting rights to those previously prohibited from both voting and serving on a jury.<sup>240</sup> The trend in this direction should continue.

Jury size is another essential factor in ensuring the diversity of juries. Larger juries are more likely than smaller juries to contain members of minority groups, more accurately

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235. U.S. CENSUS BUREAU, THE DIVERSIFYING ELECTORATE—VOTING RATES BY RACE AND HISPANIC ORIGIN IN 2012 (AND OTHER RECENT ELECTIONS) 2 (2013), available at <http://www.census.gov/prod/2013pubs/p20-568.pdf>.

236. Martha Neil, *Judge Dismisses Entire 112-Member Jury Pool Over Lack of Racial Diversity*, ABA JOURNAL, May 13, 2015, [http://www.abajournal.com/news/article/judge\\_dismisses\\_jury\\_pool\\_due\\_to\\_lack\\_of\\_diversity](http://www.abajournal.com/news/article/judge_dismisses_jury_pool_due_to_lack_of_diversity).

237. The Sentencing Project, *supra* note 83, at 1.

238. *Id.* at 4.

239. *Id.*

240. *Id.*

recall testimony, and give more time to deliberation.<sup>241</sup> Twelve person juries also yield more reliable, less variable punitive damages awards than six person juries.<sup>242</sup> Conversely, reducing the size of a jury tends to increase the variance in the jury's decisions.<sup>243</sup> As a result, social scientists conclude with virtual unanimity that larger juries are preferable to smaller ones for determinations of liability, guilt, and damages.<sup>244</sup> Requiring twelve people to decide punitive compensation awards would help ensure that determination is sound and fair.

Finally, courts must address the concern about indirectly censoring the voices of jurors from underrepresented groups. As indicated in Part III, jurors who are minorities or from a lower socio-economic class are regularly reluctant to speak up during jury deliberations, and, when they wait until late in the process, other jurors regularly disregard their voices.<sup>245</sup> This indirect silencing of minority voices can undermine the positive gains in how the jury pool is selected.

If courts required jurors to record their thoughts and beliefs anonymously prior to deliberations and then share those perspectives with one another at the beginning of deliberations, the opportunity for all voices to be heard would increase tremendously.<sup>246</sup> The group as a whole can then consider everyone's viewpoints early in the deliberation process without any view being linked to any particular individual, and therefore, without any subconscious biases creeping in. As prominent psychologist Daniel Kahneman noted, "[t]his procedure makes good use of the value of the diversity of knowledge and opinion in the group. The standard practice of open discussion gives too much weight to the opinions of those who speak early and assertively, causing others to line up behind them."<sup>247</sup> Although courts are reluctant to get involved in jury deliberations, even this small change would increase the accuracy of the deliberation process and should be worth considering.

Notable scholars have suggested variations on this approach. For example, Cass Sunstein proposes encouraging "leaders" to "refrain from expressing any opinion at all until other people have said what they think," to "indicate sympathy for a wide range of views, encouraging diverse opinions to arise," and to "suggest in particular that they welcome information and perspectives that diverge from their own."<sup>248</sup> As Sunstein observed, "if norms favor disclosure of privately held information, then self-silencing will be reduced significantly."<sup>249</sup> With punitive compensation, those leaders could be whoever is selected as the jury foreperson, perhaps.

Providing jurors with timely instructions urging them to follow this approach, and

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241. Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CALIF. INTERDISC. L.J. 1, 14 (1997).

242. Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 884 (1998).

243. Saks, *supra* note 241, at 14.

244. Vidmar, *supra* note 242, at 897.

245. *See supra* Part III(B)(1).

246. KAHNEMAN, *supra* note 151, at 84-85; Prescott & Starr, *supra* note 92, at 351-52; Sunstein, *supra* note 92, at 1018.

247. KAHNEMAN, *supra* note 151, at 84.

248. *See* Sunstein, *supra* note 92, at 1020.

249. *Id.* at 1014.

explaining to them the motivations behind it, will likely get jurors to comply. For example, a judge could instruct jurors to be aware of this troubling social dynamic in jury deliberations and encourage them to counteract it.<sup>250</sup> Evidence suggests that when jurors are informed of this dynamic, they are much more conscientious about listening to their peers during their deliberations.<sup>251</sup> “[J]urors respond to specific information they can understand and appreciate.”<sup>252</sup> In other words, juries will follow instructions when a judge gives the jury a reason to follow them.<sup>253</sup> The timing of these instructions is also important. When judges give instructions at the end of trial, juries are much more likely to follow them.<sup>254</sup>

Because of the importance of the deliberative process to determinations of punitive compensation, ensuring the jury pool is representative of a truly fair cross-section of the community and ensuring all voices are heard during deliberation is of the utmost importance. Although the Court has not addressed the role of economic background in the context of the fair cross-section cases, and has rejected a constitutional requirement that juries have twelve members, these factors are crucial to a fair and unbiased jury, whether that jury is determining a verdict or the appropriate amount of compensation to impose. In the context of any decision involving the jury’s judgment as to punitive compensation, encouraging consideration of the range of viewpoints shared by the community is critical.

#### B. *The Importance of Unity*

For at least a century, bifurcation of the trial and sentencing portions of a criminal proceeding has been the norm.<sup>255</sup> In the felony context, juries typically decide a defendant’s guilt or innocence, and the trial judge decides the sentence of those found guilty. In the capital context, juries decide both verdict and sentence, but in separate and purportedly independent proceedings. As a result, most scholars and judges have developed an inclination toward bifurcation, believing that such a system allows fact-finders the ability to consider issues of liability and punishment separately.<sup>256</sup>

Using a bifurcated trial to determine another facet of punishment, namely the required amount of punitive compensation, is therefore not a particularly bold or innovative idea. Yet both the theoretical underpinnings and the empirical evidence to support bifurcation are mixed. A review of both the criminal and civil literature leads to the conclusion that a unitary presentation of the facts is likely a better approach for punitive compensation.

As indicated, historically, courts bifurcated capital trials from capital sentencing hearings. Courts embraced bifurcation as a way of keeping juries from contemplating, and confusing, the evidence of a defendant’s guilt with evidence related to the punishment

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250. *Id.* at 1019-20.

251. *Id.*; see also David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 416-17, 432-33 (2013) (discussing effects of debiasing on juries).

252. Sklansky, *supra* note 251, at 438.

253. *Id.* at 439.

254. *Id.*

255. Shaakirrah R. Sanders, *Unbranding Confrontation as Only a Trial Right*, 65 HASTINGS L.J. 1257, 1268-69 (2014).

256. See, e.g., Prescott & Starr, *supra* note 92, at 304, 353-54.

decision—whether she should live or die. Despite the accepted belief that bifurcation minimizes “cognitive overload,”<sup>257</sup> studies from the capital sentencing context indicate that the guilt phase of the trial tends to predispose juries toward a penalty preference before even hearing evidence at the sentencing phase of the trial.<sup>258</sup> One study found that seventy percent of jurors were “absolutely convinced” of their punishment decision before hearing any evidence as to the appropriate sentence.<sup>259</sup> In that same study, almost half of jurors acknowledged that conversations about the possible penalty arose during the jury’s guilt deliberations.<sup>260</sup> As a result, whether bifurcation eliminates any of the concerns of a unitary trial seems highly questionable.

Other criminal courts have only begun to consider bifurcation in recent years. Bifurcation first came to prominence in the non-capital criminal context when the Supreme Court announced its 2000 decision in *Apprendi v. New Jersey*.<sup>261</sup> *Apprendi* held any fact that increases the maximum penalty of a crime must be submitted to the jury for determination.<sup>262</sup> The decision blurred the line courts had drawn between facts that were “elements” of a crime, which had to be submitted to a jury, and “sentencing factors,” which were submitted to a judge.<sup>263</sup> As a result of *Apprendi*’s mandate, numerous courts had to make a practical determination about the best way to present the constitutionally required facts to a jury, especially “sentencing facts” that most judges considered to be within their sole purview.

Subsequent to *Apprendi*, courts, particularly federal courts, began to figure out how that rule would work in practice. For example, if a defendant pled guilty to possessing an unquantified amount of methamphetamine, but the prosecution sought a sentence presuming the possession of 75 grams, would a jury need to be sworn to determine the exact amount of methamphetamine the defendant possessed? If the defendant had gone to trial instead of pleading guilty, would a separate jury need to be sworn to answer that question? Would the trial and sentencing need to be bifurcated?

Courts landed on bifurcation as the most workable approach. Hanging on to an increasingly diminishing distinction between facts required to prove the existence of a crime and facts solely relevant to sentencing, most courts concluded that bifurcated jury trials and/or a separate sentencing hearing in front of a jury following a guilty plea was the best, if not the only, answer.<sup>264</sup> Relying on the capital context, at least one circuit noted, “[t]here

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257. *Id.* at 353.

258. Sandys, *supra* note 209, at 1194.

259. *Id.* Of those who decided the penalty before hearing any evidence, forty-three percent believed the defendant should receive a death, rather than a life, sentence. *Id.* at 1192.

260. *Id.* at 1191.

261. 530 U.S. 466 (2000).

262. *Id.* at 490.

263. *Id.* at 478-88, 494-96.

264. *See, e.g.*, *Figueroa v. United States*, 463 F. App’x 99, 100 (3d Cir. 2012) (sentencing jury empaneled to determine quantity of drugs defendant conspired to possess); *United States v. Montiel-Sanchez*, 171 F. App’x 599, 600 (9th Cir. 2006) (using bifurcated jury for “sentencing” phase of trial); *United States v. Booker*, 375 F.3d 508, 514 (7th Cir. 2004) (authorizing jury determination of drug quantity at bifurcated trial); *United States v. Henry*, 282 F.3d 242, 253 (3d Cir. 2002) (approving bifurcated jury trial to determine identity and quantity of the drugs possessed); *United States v. Cooney*, 26 F. App’x 513 (6th Cir. 2002) (remanding case for jury to determine amount of drugs involved).

is no novelty in a separate jury trial with regard to sentence, just as there is no novelty in a bifurcated jury trial, in which the jury first determines liability and then, if and only if it finds liability, determines damages.”<sup>265</sup> As a result, most courts began to accept the idea of juries determining constitutionally important facts that a judge will then use to determine the appropriate sentence.

Recently, courts have begun to grapple with whether to bifurcate financial penalty decisions from the guilt phase of a trial in the context of criminal fines. In 2012, the Supreme Court held in *Southern Union v. United States*<sup>266</sup> that any fact exposing a criminal defendant to a higher potential maximum sentence, including a higher criminal fine, must be submitted to a jury pursuant to *Apprendi v. New Jersey*.<sup>267</sup> *United States v. AU Optronics Corporation*,<sup>268</sup> an antitrust case where the corporate defendant was charged with price-fixing over the course of a decade, was one of the first cases after *Southern Union* to address the practicalities of this decision-making process.<sup>269</sup> For the first time, the government had to prove to a jury beyond a reasonable doubt either the amount of gain the corporate defendant unlawfully acquired or the amount of loss the victim(s) experienced. The government requested a bifurcated trial, which the court denied, “[seeing] little benefit.”<sup>270</sup> Some experts believe most courts will continue to deny such requests because, unlike in a capital case, they would require “duplicative presentations of evidence” and take up more of the court’s time.<sup>271</sup>

The punitive compensation decision is more akin to determinations about criminal fines, and thus, somewhat different than other criminal decisions. Unlike capital cases, where entirely different evidence is presented to a jury at the penalty phase than at the trial phase, here, much of the evidence between the trial and penalty phases would likely overlap. Especially in light of the capital sentencing studies showing that evidence of guilt bleeds into the decision about punishment, it is hard to discern a benefit in the punitive compensation context to keeping the proceedings separate. In presenting the evidence of guilt, prosecutors can easily present evidence of the amount of loss.

Evidence from the civil damages context confirms this conclusion. As indicated previously, because punitive compensation has come to resemble the awarding of civil punitive damages, evidence from the civil context is uniquely relevant to the punitive compensation context. Early studies of bifurcated civil proceedings suggest defendants were more likely to prevail on the question of liability, whereas in unitary trials, plaintiffs were more likely to win.<sup>272</sup> However, liability results did not resemble the damages decision. Compensatory damages awards were significantly larger in bifurcated trials than in unitary trials, largely because jurors weighed all the evidence before them in reaching the liability

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265. *Booker*, 375 F.3d at 514.

266. 132 S. Ct. 2344 (2012).

267. 530 U.S. 466 (2000).

268. No. 09-CR-110, 2012 WL 2120452 (N.D. Cal. June 11, 2012) (Illston, J.).

269. Deirdre A. McEvoy & Melissa R. Ginsberg, *The Use of Expert Witnesses for Penalty Determinations in Criminal Antitrust Cases: A Study of United States v. AU Optronics*, 28 ANTITRUST ABA 95, 95 (2014).

270. *Id.* at 98.

271. *Id.*

272. Vidmar, *supra* note 242, at 872-73.

decision when they were tasked with deciding both liability and damages.<sup>273</sup> If the damages context is any indication of what might occur in the punitive compensation context, bifurcating trials and punitive compensation hearings would lead to lower conviction rates and higher compensation amounts.

In the context of punitive compensation, unitary trials seem to make the most practical and empirical sense. The evidence is largely overlapping, and the fact-finder's decision usually relies on information provided during trial. The primary concern with a unitary approach is that jurors would not have access to information about a defendant's or victim's financial resources in determining the appropriate amount of punitive compensation to impose. Although the law currently prohibits courts from considering the resources of either when determining the amount of criminal "restitution" to impose, this remedy would be more effective if the fact-finder were permitted to consider a defendant's financial resources when determining the appropriate amount of punitive compensation to impose, an issue discussed at length in the next Section.<sup>274</sup>

### C. *Telling Juries Possible Sentencing Outcomes*

In contrast with judges, juries are exposed to only a single case at a time—the one case they are deciding. Judges have the benefit of regular exposure to similar (and different) cases, giving them a baseline from which to make a decision in any given case. Many states employ a solution for ensuring the jury's lack of knowledge is not a concern: they provide judges with the ability to review jury decisions. However, this solution undermines jurors' sense of responsibility for the decision they are making and leads them to be less careful in reaching a decision, if they deliberate at all.<sup>275</sup>

Other, more empowering strategies might allow jurors to come in with more robust background information, giving them close to equivalent information as judges when they make decisions. By providing the jury with the full range of information, the jury is in the best position to determine whether a defendant's moral culpability is proportional to the punishment being sought.<sup>276</sup> This, in turn, would help to eliminate disparities in the punitive compensation awards juries return.

273. *Id.*

274. *See, e.g.,* Lollar, *supra* note 139, at 397-99.

275. This occurs regularly in the capital sentencing context. *See, e.g.,* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1095, 1097 (1995); William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 74-75 (2003); Ross Kleinstuber, "Only A Recommendation": How Delaware Capital Sentencing Law Subverts Meaningful Deliberations and Jurors' Feelings of Responsibility, 19 WIDENER L. REV. 321, 331-32 (2013); Michael A. Mello, *Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes that Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C. L. REV. 283 (1989); Austin Sarat, *Violence, Representation and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103, 1130 (1995). The problem is particularly acute in jurisdictions that allow judges to override a jury's sentencing decision in a capital case. *See, e.g.,* Joseph L. Hoffmann, *Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1138 (1995).

276. Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury's Historical Role as Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 132 (2006). Ninth Circuit Court of Appeals Judge Alex Kozinski recently made a similar recommendation: "Jurors should be told the gravity of the decision they are making so they can take it into account in deciding whether to convict or acquit. As representatives of the community where the defendant committed his crime, the jury should be allowed to make the judgment of whether the punishment is too severe

Historically, courts have been reluctant to provide jurors with sentencing information. Their reasoning is fairly circular. Courts adopted a strict dichotomy between trial and sentencing, and justified preventing jurors from hearing sentencing information by asserting that jurors did not need to know about punishment because jurors do not play a role in sentencing. According to this view, informing jurors of potential punishments introduces extraneous information into fact-finding decisions at trial.<sup>277</sup>

Precedent no longer supports this distinction in a juror's role. Since *Apprendi* and *Southern Union*, jurors have played a constitutionally-mandated role in determining a defendant's sentence. Even if Supreme Court precedent did not reject the strict line between the jury's role at trial and its role at sentencing, a belief in the soundness of our jury system requires this result. As Ninth Circuit Judge Alex Kozinski recently noted:

[We should g]ive jurors a say in sentencing. . . . [W]e studiously ignore the views of the very people who heard the evidence and are given the responsibility to determine guilt or innocence while reflecting the values of the community in which the offense occurred. . . . Jurors should be instructed on the range of punishments authorized by law and, if they find the defendant guilty, entrusted to weigh in on the appropriate sentence.<sup>278</sup>

Providing jurors with information previously kept off limits is critical. Jurors need to be aware of the moral consequences of their decisions, particularly decisions intended to convey, at least in part, a message of moral condemnation.<sup>279</sup> After all, “[i]n a democratic society, jurors’ views of appropriate criminal sentences should track those of the legislators who enact the sentencing statutes.”<sup>280</sup> As one scholar explained, “[j]ury trials force the people—in the form of community representatives—to look at crime not as a general matter, the way they do as voters, but instead to focus on the particular individual being charged.”<sup>281</sup> If we expect jurors to be the voice of our community, they need to be given the tools to be able to do that job to the best of their ability.

The need for jurors to have additional knowledge and guidance is especially acute in the punitive compensation area. The Supreme Court recently ruled where “it is impossible to trace a particular amount” of a victim’s losses to a defendant “by recourse to a more traditional causal inquiry,” a court “should order restitution in an amount that comports with the defendant’s relative role in the causal process that underlies the victim’s

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to permit a conviction.” See Kozinski, *infra* note 332, at xxi.

277. Lance Cassak & Milton Heumann, *Old Wine in New Bottles: A Reconsideration of Informing Jurors About Punishment in Determinate- and Mandatory-Sentencing Cases*, 4 RUTGERS J.L. & PUB. POL’Y 411, 416-17 (2007).

278. Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xxi (2015).

279. Cassak & Heumann, *supra* note 277, at 427.

280. Jeffrey Bellin, *Is Punishment Relevant After All? A Prescription for Informing Juries of the Consequences of Conviction*, 90 B.U. L. REV. 2223, 2233 (2010).

281. Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 62 (2003).

general losses.”<sup>282</sup> The sentencing fact-finder “must assess as best it can from available evidence the significance of the individual defendant’s conduct in light of the broader causal process that produced the victim’s losses” using “discretion and sound judgment.”<sup>283</sup> A precise mathematical inquiry is “neither necessary nor appropriate.”<sup>284</sup> In other words, because fact-finders are no longer engaged in ascertaining actual concrete unlawful gains, as restitution historically required, nor even actual concrete losses, as criminal “restitution” of thirty years ago began to necessitate, very few guideposts remain to assist any fact-finder in making the punitive compensation determination.

Several proposals appear to provide viable methods of addressing this issue. Providing juries with the full range of sentencing options authorized by the legislature (and Sentencing Commission, to the extent sentencing guidelines are applicable in a given jurisdiction) and making sure jurors understand what those sentencing options entail would give juries a baseline from which to begin their deliberative process. Additionally, judges could provide juries with a slightly modified version of the reports pretrial services or probation agencies prepare for judges in anticipation of sentencing. Usually, juries are not privy to this information when asked to sentence a criminal defendant. Although issues of confidentiality may prevent disclosure of some information in a presentence report, the report may contain enough useful information that allowing jurors to access even part of it can be helpful.<sup>285</sup> Of course, courts would need to set clear parameters on the use of the information. Judges would need to instruct juries on how to use a presentence report – what information to rely on, what information contained therein may or may not be relevant, and how to use sentencing guidelines.

Another possibility is to have some type of punitive compensation guideline, similar in theory to the sentencing guidelines that give a framework for determining the applicable amount of incarceration and fine to impose in a given case. A punitive compensation guideline could provide a floor and ceiling on punitive compensation awards based on particular factors or experts or issues.<sup>286</sup> A framework that provides jurors a consistent method for translating the harm and moral message into a dollar amount would help ensure uniformity and predictability in the jury’s decisions.<sup>287</sup> Such guidelines could “place heavy reliance on existing knowledge about hedonic harms” and consider “the extent that the short-term hedonic losses are present even when long-term adaptation occurs. . . .”<sup>288</sup> Likewise, they could “attempt to make sensible translations into monetary equivalents.”<sup>289</sup>

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282. *Paroline v. United States*, 134 S. Ct. 1710, 1727 (2014).

283. *Id.* at 1728-29.

284. *Id.* at 1728.

285. Presuming, of course, that the redacted portions do not end up slanting the evidence available to the juries one way or the other.

286. Cass Sunstein and others have put forth a similar proposal in the context of punitive damages awards. See Sunstein, *supra* note 193, at S185-86; Cass Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1183 (2002).

287. Iontcheva, *supra* note 47, at 358.

288. Sunstein, *supra* note 193, at S184.

289. *Id.* at S185.

Courts could keep a database and generate statistics that would inform jurors of the average amount of punitive compensation for individuals convicted of a similar offense who caused a similar type and degree of harm to a victim.<sup>290</sup> This system would give jurors an idea of the “heartland” range of punitive compensation amounts in a particular type of case.

The potential downside of such a guideline system is that it raises anchoring concerns.<sup>291</sup> However, guidelines could provide juries with the “right” kind of anchors for making their determination rather than allowing them access to anchors that would be less reliable. This proposal will be discussed in more detail in the next Section.

Because of jurors’ increased role in making sentencing determinations, courts should provide jurors making punitive compensation decisions with as close to equivalent information as judges so that the disparity between the two is not so great. “The jury needs both the same information that judges receive and the power to impose the full range of sentencing options authorized by the legislature” whenever the jury is making a sentencing determination rather than the judge.<sup>292</sup> If we fail to provide them this information, we can only expect juries to produce arbitrary sentences, including arbitrary punitive compensation awards.<sup>293</sup>

#### D. *Unmooring Juries from Their Anchors*

Both judges and juries are susceptible to anchoring.<sup>294</sup> Although studies have suggested that anchors may affect judges less than juries,<sup>295</sup> ample evidence reveals that both fact-finders are subject to this subtle bias.<sup>296</sup> In the context of punitive compensation determinations, this anchoring bias has the potential to significantly skew the calculations and conclusions a fact-finder reaches. There are several ways to minimize anchors’ effects on juries.

Social science indicates that accountability can reduce anchoring.<sup>297</sup> In one particular study, the authors asked participants to explain their decision-making process in reaching a particular judgment.<sup>298</sup> Knowing they had to articulate how they reached their judgment led participants to be less swayed by the normal effects of anchoring.<sup>299</sup> As we know, judges often have to explain their decision-making processes, which may be one reason judges are slightly less subject to the anchoring effect. Asking juries to similarly explain

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290. See, e.g., Iontcheva, *supra* note 47, at 369.

291. See discussion *supra* Part IV(A).

292. King & Noble, *supra* note 51, at 888.

293. Iontcheva, *supra* note 47, at 359.

294. See *supra* Part IV(A).

295. Rachlinski et al., *supra* note 150, at 22-23.

296. See *supra* Part IV(A).

297. Philip E. Tetlock & Richard Boettger, *Accountability: A Social Magnifier of the Dilution Effect*, 57 J. PERSONALITY & SOC. PSYCHOL. 388 (1989).

298. *Id.* at 388.

299. *Id.*

how they arrived at a particular punitive compensation amount should have the same effect.<sup>300</sup>

Although courts are incredibly reluctant to look into the “black box” of jury decision-making, significant benefits inure from requiring juries to articulate the reasons for imposing a particular amount of punitive compensation. If the jury has to give reasons for its moral assessments in a public way, its members must think more carefully and critically about their assessments, because they know those moral assessments will be subject to critical examination, and possibly repudiation.<sup>301</sup> In making the jury’s reasoning public, each juror must accept responsibility for the moral judgments and conclusions she is reaching. If each juror engages in this thoughtfulness, the likelihood of a jury imposing an arbitrary punitive compensation award will decrease. Each juror need not articulate her own specific thought process, although she should be encouraged to do so in her own mind. Rather, after the jury deliberates and reaches a consensus, courts should require the jury as a whole to make a statement declaring the jury’s collective reasoning and determination.

Several scholars have proposed another possible approach: prohibit the parties from mentioning numbers that might operate as anchors.<sup>302</sup> This proposal would be quite difficult to implement in the context of punitive compensation since the very act of determining the appropriate monetary award is rooted in particular losses claimed by a crime victim. To ask jurors to determine losses with no numbers provided would be a Herculean task.

Other scholars propose instructing participants to look for and focus their attention on arguments against using a particular anchor.<sup>303</sup> In the context of negotiations, for example, forcing the conscious mind to engage in the task of thinking the opposite, of pushing against the anchor, has been shown to reduce and even eliminate the effect of anchoring.<sup>304</sup> If jurors are presented with a particular set of numbers on which they will rely in calculating a punitive compensation award, perhaps instructing them about the effects of anchoring and encouraging them to consciously try to counteract the anchoring effect might help to eliminate the phenomenon.

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300. See, e.g., KAHNEMAN, *supra* note 151; Mark Spottswood, *The Hidden Structure of Fact-Finding*, 64 CASE W. RES. L. REV. 131, 147 (2013).

301. See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 363-64 (1996).

302. Rachlinski et al., *supra* note 150, at 37; Michael S. Kang, Comment, *Don’t Tell Juries About Statutory Damages Caps: The Merits of Nondisclosure*, 66 U. CHI. L. REV. 468, 481-86 (1999). Iowa District Court Judge Mark Bennett has proposed a similar approach for federal judges in criminal cases, urging them to consider the sentencing factors laid out in 18 U.S.C. § 3553 before turning to the United States Sentencing Guidelines. See Bennett, *supra* note 164, at 530-33.

303. KAHNEMAN, *supra* note 151, at 126-27 (citing Adam D. Galinsky & Thomas Mussweiler, *First Offers as Anchors: The Role of Perspective-Taking and Negotiator Focus*, 82 J. PERSONALITY & SOC. PSYCHOL. 657 (2001)).

304. *Id.* This approach is more problematic here, as it presumes that the people trying to reach a consensus are advocating or negotiating for a particular position at the beginning of the negotiation. Ideally, jurors are not coming into deliberations with pre-set conclusions about their position. Presuming jurors do approach deliberations about punitive compensation with an open mind, they would likely have an incredibly challenging time attempting to ascertain what monetary award would compensate the full amount of a victim’s losses. By trying to do the opposite of whatever a party or victim is advocating, jurors will not necessarily reach a fairer or more appropriate conclusion. Rather, they will only be trying to play “devil’s advocate” against the only anchors they have.

As suggested previously,<sup>305</sup> a better approach for diminishing the effects of anchoring is to create a composite akin to the sentencing guidelines, but for punitive compensation awards.<sup>306</sup> Rather than dissuading jurors from relying on anchors, providing them with relevant and useful numbers would allow jurors to anchor their punitive compensation decision within the context of similar decisions made by other fact-finders.

In a study of judges attempting to determine the appropriate amount of damages to award in a hypothetical case without anchors, many expressed frustration at the lack of reliable numerical anchors on which to draw.<sup>307</sup> Jurors inevitably would feel the same way, and rightfully so. As Cass Sunstein observed, “juries and judges are likely to have difficulty in generating monetary figures to reflect pain, suffering, and loss of enjoyment of life.”<sup>308</sup> “Because it is difficult to scale without a modulus, and because anchors will have a significant effect,” without some kind of anchor, “unjustified inequality and excessive and insufficient awards are inevitable.”<sup>309</sup> Providing juries with relevant and useful anchors allows them to rely on information in a manner equivalent to how judges use sentencing guidelines, mandatory maximum and minimum sentences, and criminal fines to determine a sentence now.

Creating a punitive compensation guideline akin to the United States Sentencing Guideline system could assist juries in using helpful, and hopefully fair, anchors to calculate the appropriate amount of punitive compensation to impose. Likewise, requiring juries to explain why they reached a particular punitive compensation decision would similarly reduce or eliminate the effects of anchoring. A composite, explanatory approach appears easier to implement and more fitting for the punitive compensation context than removing anchors altogether or encouraging juries to push against the anchors provided.

#### *E. Increasing Accuracy in Affective Forecasting*

Although both judges and jurors are prone to anchoring, affective forecasting impacts jurors more often than judges. As previously discussed, jurors tend to exaggerate the degree and duration of a victim’s emotional reaction to a criminal event. Judges experience a greatly diminished degree of affective forecasting due to having been exposed to many more criminal cases and victims.

One common proposal is to ask juries to behave like judges. Common wisdom expects judges to try and “set aside” their emotional response—a concept termed “behavioral suppression”—in an attempt to more accurately predict a victim’s long-term response.<sup>310</sup> The presumption is if the judge can respond in an emotionally “neutral” manner, she will be more accurate in her affective forecasting,<sup>311</sup> and, consequently, determine a monetary

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305. See discussion *supra* Part V(C).

306. Rachlinski et al., *supra* note 150, at 37; Chris Guthrie et al., *Inside the Judicial Mind*, *supra* note 164, at 823.

307. Chris Guthrie et al., *Inside the Judicial Mind*, *supra* note 164, at 823.

308. Sunstein, *supra* note 193, at S184.

309. *Id.*

310. See, e.g., Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485, 1543-45 (2011).

311. *Id.*

award that adequately compensates the victim's losses. Assuming this approach is effective, encouraging juries to do the same might be a simple and relatively straightforward counter to the problem of affective forecasting.

Unfortunately, however, studies show behavioral suppression to be counter-productive. By attempting to suppress her natural emotional response and prediction, a person ends up "draw[ing] heavily" against her cognitive capacity, "leaving fewer resources available for problem-solving."<sup>312</sup> As a result, one is "temporarily 'stupider,'" opening herself up instead to the "pitfalls" of an "unrealistic and inflexible approach."<sup>313</sup> Rather than eliminating the emotional pitfalls, behavioral suppression may "magnify" the emotion instead.<sup>314</sup>

As with anchoring, reasoned reflection can minimize affective forecasting errors.<sup>315</sup> By "reconstructing aspects of a situation, shifting attention, reappraising reactions to a situation,"<sup>316</sup> jurors can more effectively regulate and manage their intuitive emotional responses to a victim's long-term emotional and hedonic harm, and they can approach the punitive compensation task with reasoned consideration.

In order to encourage the jury to reasoned reflection, ideally, a party would present an expert on emotional forecasting to the jury, allowing them to learn about the phenomenon and counter their own implicit and unknown impulses. Expert witnesses may have the ability to temper the effects of emotional forecasting by helping jurors better understand how to approach the task of determining a fitting punitive compensation award.

As we already know, juries rarely hear from experts on emotional forecasting in large part because judges rarely allow them to testify.<sup>317</sup> Given that many punitive compensation decisions are likely to turn on expert evaluations of a victim's psychological, emotional, and economic state, these criticisms might be cause for concern. Judicial training on this issue might encourage judges to permit emotional forecasting experts to testify when one of the parties proffers such an expert.

Judicial training on affective forecasting could have other benefits as well, as judges actually are no better at evaluating complex empirical and statistical evidence than juries.<sup>318</sup> Numerous studies have analyzed judges' ability to evaluate expert and scientific evidence. Many judges do not feel prepared to deal with the range of scientific and expert issues that arise regularly in their courtrooms.<sup>319</sup> Nor are their assessments of the evidence necessarily accurate.<sup>320</sup>

Evidence suggests that jurors could benefit from hearing the testimony of an affective forecasting expert. Jurors struggle with two primary categories of expert testimony:

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312. *Id.* at 1538.

313. *Id.* at 1539, 1545.

314. *Id.* at 1547.

315. Maroney, *supra* note 310, at 1550.

316. Susan A. Bandes & Jeremy A. Blumenthal, *Emotion and the Law*, 8 ANN. REV. L. & SOC. SCI. 161, 171 (2012) (citing Maroney, *supra* note 310).

317. *See supra* Part IV(B); Blumenthal, *supra* note 185, at 187.

318. Robbennolt, *supra* note 100, at 488-92.

319. *Id.* at 488-89.

320. *Id.* at 489-90.

empirical and statistical evidence.<sup>321</sup> Social science studies have concluded that “when [expert testimony] is presented in a form that they can use,” jurors are able to “make reasonable use of complex material.”<sup>322</sup> Additionally, short, targeted training sessions can help individuals—both jurors and judges—improve their understanding of statistical and methodological reasoning.<sup>323</sup> Providing juries with some type of instruction prior to trial could help alleviate this issue. The obvious difficulty would be in determining how to fit such training into the trial process.

Akin to a training, courts also might consider a jury instruction that informs juries about the literature on emotional forecasting and encourages them to regulate or manage their emotional responses by thinking logically and rationally about the harms alleged. Evidence shows jurors can be educated to make their subconscious thought processes conscious and to confront and think through their possible biases.<sup>324</sup>

If judges inform jurors of the tendency to over-predict the long-term harm and pain a person will experience, they may be able to thoughtfully curb some of the tendencies when determining the appropriate punitive compensation award.<sup>325</sup> The result will be a punitive compensation decision that more accurately reflects the losses caused by a defendant in addition to being more reflective of the jury’s determination of moral blameworthiness. Reminding jurors to review the evidence and discuss it with fellow jurors may also help reduce affective forecasting to some degree and result in a more thoughtful and considered compensatory award.

#### F. *The Need for Comprehensible Jury Instructions*

Finally, jury instructions play a critical role in ensuring that juries have the tools they need to determine the most appropriate punitive compensation award. As indicated in Part IV, criminal jurors often are confused by the way courts word and present jury instructions.<sup>326</sup> Likewise, in the context of non-economic civil damages, how judges present an instruction can make a significant difference in how juries award damages.<sup>327</sup> The instructions are critical as “they give juries a common starting place, a shared set of issues, factors, or guidelines on which to initiate deliberations.”<sup>328</sup> Ensuring that juries have reliable and understandable instructions to guide them in making a determination about punitive compensation remains vital.

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321. *Id.* at 487-88 n.101.

322. *Id.* at 487-88.

323. Robbenolt, *supra* note 100, at 505-06.

324. Bandes & Blumenthal, *supra* note 316, at 171.

325. *See, e.g.*, Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207, 1277 (2012).

326. *See, e.g.*, Severance & Loftus, *supra* note 212, at 153.

327. *See, e.g.*, David A. Hoffman & Alexander S. Radus, *Instructing Juries on Noneconomic Contract Damages*, 81 FORDHAM L. REV. 1221 (2012).

328. Brown, *supra* note 96, at 1319.

Numerous studies illustrate jurors' lack of comprehension of pattern jury instructions,<sup>329</sup> especially in the context of determining damages. Evidence from juror observations suggests two primary reasons indecipherable instructions do not affect the outcome in a more significant way. First, jurors talk to one another and often help each other understand the instructions.<sup>330</sup> Throughout the deliberation process, jurors consistently correct one another when they assert an inaccurate view of the law.

Jury instructions themselves are the other indisputable aid. The presence of a printed out copy of the jury instructions in the deliberation room has a tremendous impact on a jury's comprehension of the instructions.<sup>331</sup> Jurors repeatedly refer back to the instructions as they try to work through the issues in the case. Although some courts permit jurors to take a copy of the instructions back to the deliberation room with them, many courts prohibit it. Written jury instructions are a critical resource.<sup>332</sup>

Notably for the context of punitive compensation, these two resources do not always improve damages award determinations. Although it is a relatively small percentage, fourteen percent of civil juries studied misapplied the jury instructions when determining the amount of damages to award.<sup>333</sup> This finding is significant for the punitive compensation context, as the process of determining damages is not so different from the process of determining punitive compensation. The degree of misunderstanding also highlights the importance of making jury instructions, particularly those related to making a financial determination comprehensible.

Many studies show that revising instructions according to psycholinguistic principles can significantly increase juror comprehension. When linguistic experts write instructions in a manner that takes into account empirical information regarding what factors affect memory, perception, and comprehension of language, jurors understand more.<sup>334</sup> Basic changes, such as using active instead of passive voice, rearranging the order of words so that the instruction reads more logically, and replacing legalese with more commonly used words, can make a tremendous difference.<sup>335</sup> This better understanding means not only that jurors have an enhanced command of crucial legal concepts, they also have an

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329. Severance & Loftus, *supra* note 212, at 157-60, 162-96. Analyzing Kentucky's jury instructions for readability, Professor Marla Sandys found that most of the jury instructions relevant to death sentencing require more than a college education to understand. See Marla Sandys, Assoc. Prof., Dep't of Crim. Just., Indiana Univ., Remarks at The Second Annual Forum on Criminal Law Reform in the Commonwealth of Kentucky: What Kentucky Capital Jurors Misunderstand (Nov. 15, 2013) (on file with the author). Similarly, Sandys found that ease of reading was revealingly low, usually ranging between 30 and 40, but going as low as 15 on a scale of 1-100, with 60-70 being the ideal. *Id.*

330. *Id.* at 1558, 1594-95.

331. *Id.* at 1552-53, 1595.

332. See, e.g., Kozinski, *supra* note 278, at xx.

333. Sandys, *supra* note 329, at 1593 (a general misunderstanding of jury instructions affected jury damages awards in seven out of fifty cases).

334. Severance & Loftus, *supra* note 212, at 159.

335. *Id.* at 159-60. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979).

enhanced ability to accurately apply those concepts to the facts in a case.<sup>336</sup> Jurors' confidence levels reflect this increased understanding as well.<sup>337</sup>

Everyday language and careful wording on jury instructions increases juror comprehension. Likewise, providing the jurors a written copy of the instructions assists in the accuracy of their decision-making. If courts employ both of these methods of making instructions more accessible, jurors will be better able to focus the bulk of their energy and time on reaching the most accurate result rather than wasting both the court's and their own time and resources trying to discern what the instructions mean and how to interpret them.<sup>338</sup>

In the context of punitive compensation, accurate and understandable jury instructions remain as important, if not more so, than in other areas of criminal trials. Ascertaining what constitutes the "full amount" of a victim's losses under the federal restitution statute requires directed instructions, as courts across the country have struggled with what this term means.<sup>339</sup> Courts have consistently held that criminal "restitution" should be measured by the victim's losses rather than the defendant's gains; juries will need clear instructions on how to go about determining that amount.<sup>340</sup> Likewise, in complicated fraud cases, courts spend extensive energy determining on what date the loss should be calculated and according to what standard. In numerous situations, juries will need to be informed in explicit detail how to apply the rules in existence in a given jurisdiction.

Further insight as to the substantive information helpful to juries comes from the punitive damages context. Drafters of damage jury instructions have had a particularly difficult time providing useful guidance on how to determine the amount to be awarded.<sup>341</sup> Damages instructions "usually tell the jury nothing more than to place the plaintiff in the position it would have occupied if the breach had not occurred. What that means in operation is left to the jury."<sup>342</sup> As a result, it is unclear that juries receive enough information, or the "right" information, to make a considered and fair assessment of the appropriate amount of damages to impose in a given case.<sup>343</sup>

A series of Supreme Court cases in the early 1990s began to change what juries were told in considering punitive damages.<sup>344</sup> Prior to that, almost all state and federal courts adopted the common law approach of allowing juries to "inflict" damages on a defendant "in view [of] the enormity of his offence rather than the measure of compensation to the plaintiff."<sup>345</sup> In an attempt to limit the effects of "unlimited jury discretion" that "may

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336. Severance & Loftus, *supra* note 212, at 194.

337. *Id.*

338. *See, e.g.*, Diamond, *supra* note 209, at 1596 (discussing how, in both the Rod Blagojevich trial and the fifty civil trials observed, jurors spent substantial time just trying to figure out the jury instructions).

339. *See, e.g.*, Paroline v. United States, 134 S. Ct. 1710 (2014).

340. *See* discussion *supra* Part II.

341. *Cf.* Sunstein, *supra* note 193.

342. ROBERT E. KEHOE, JURY INSTRUCTIONS FOR CONTRACT CASES 1023 (1995).

343. Hoffman & Ratus, *supra* note 327, at 1235.

344. *See* BMW of N. Am. Inc. v. Gore, 517 U.S. 559 (1995); Honda Motor Co. Ltd. v. Oberg, 512 U.S. 415 (1994); TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443 (1993); Pac. Mut. Ins. Co. v. Haslip, 499 U.S. 1 (1991).

345. *Haslip*, 499 U.S. at 16 (citing *Day v. Woodworth*, 13 How. 363, 371 (1852)).

invite extreme results that jar one's constitutional sensibilities," the Supreme Court encouraged the drafting of jury instructions that require the jury to engage in reasonable decision-making with "adequate guidance" from the court.<sup>346</sup> The Court approved instructions that gave the jury information about the punitive and deterrent goals of punitive damages, informed the jury of the need to take into consideration the "character and the degree of the wrong as shown by the evidence," and explained that the imposition of punitive damages was not required.<sup>347</sup> As with other juror decision-making, when provided with the reasons for the legal rules one had to apply, the results were more reliable and accurate.<sup>348</sup> As a result, according to the Court, these decisions provided the jury constitutionally sufficient guidance in "rational decisionmaking" and "meaningful individualized assessment of appropriate deterrence and retribution."<sup>349</sup>

If courts provided juries with information about the goals of imposing punitive compensation in their instructions, this information undoubtedly would greatly assist jurors in understanding the instruction.<sup>350</sup> Allowing jurors to understand the purpose(s) courts and legislators intend for punitive compensation to serve is likely to increase the odds that jurors will reach a constitutional and fair result. Additionally, to the extent that judges accept and utilize a basic formula to ascertain the full amount of a victim's losses, giving juries instructions to guide them through the process of employing that formula can help them make a defensible punitive compensation determination.<sup>351</sup> In conjunction with information regarding the aim of imposing punitive compensation, these instructions could make a significant difference for jurors.

## VI. CONCLUSION

This Article endorses the designation "punitive compensation" because it describes the remedy already being employed on a daily basis in courts across the country. Recognizing this reality, this Article proposes that we grapple with the full consequences of what it means to be imposing punitive compensation as part of a criminal sentence. Because punitive compensation is operating as a punishment, courts should treat it as a punishment and grant it the full range of constitutional protections provided for other criminal punishments. This means not only that punitive compensation should be protected by the Sixth Amendment jury trial right, but from a practical perspective, jurors should be the entity we, as a community, desire to have as fact-finders in determining punitive compensation. Jurors, as the conscience of the community, should decide the degree of moral blameworthiness of a defendant's actions and what amount of compensation is sufficient

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346. *Id.* at 18.

347. *Id.* at 19-20.

348. Robbenolt, *supra* note 100, at 505.

349. *Haslip*, 499 U.S. at 20.

350. Identifying the goal can be a somewhat challenging proposition, however, as state and federal courts are split on whether criminal "restitution" is aimed at compensation or punishment. Increasingly, courts are acknowledging "restitution's" dual purpose—compensation *and* punishment. *See, e.g.*, *Paroline v. United States*, 134 S. Ct. 1710, 1726 (2014) (recognizing twin goals of restitution as compensatory and punitive). Some courts and legislatures also have identified deterrence and rehabilitation as criminal "restitution" goals. Lollar, *supra* note 1, at 135-36.

351. *Hoffman & Radus*, *supra* note 327, at 1251.

to “make a victim whole.”