The Republican Model and Punitive Damages

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I. INTRODUCTION

At the center of the ideal model of the republic sits the jury. It expresses an idea of self-governance and an ideal of social justice—an educated populace making law. With its republican roots, it is no wonder that the jury is entrenched as part of the American constitutional order.[1] Yet, in tort law—the most social norm oriented, and hence jury dominated, area of law—two spectacular collapses in the faith of the jury have occurred. The United States Supreme Court has restrained, in two areas, the jury with constitutional shackles. In the 1960s, the state courts of Alabama showed a potential to undermine free speech integral

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1. The most recent articulation of the jury under the U.S. Constitution is *Blakely v. Washington*, 124 S. Ct. 2531, 2536, 2538 (2004) (affirming the Sixth Amendment as reserving jury power).

to the progress of the civil rights movement. Thus was launched the long and uncompleted journey begun in *New York Times Co. v. Sullivan*.[2]

In the last couple of decades, the Supreme Court has detected a distemper that threatened federal principles and national economic interests. The potential of juries in isolated communities to levy heavy punitive damages against large out-of-state corporations—to send a message—was threatening to economic interests and federal coordination.[3] This proposition prompted a judicial conclusion that the civil fine could, by its arbitrary excessiveness, breach the due process arm of the Fourteenth Amendment.[4] It is easy to see how this foray of federal authority was prompted, just as it was in *Sullivan*. The problem now, as after *Sullivan*, is to create a comprehensive stable body of law to work alongside state law. This body of law, though, has failed to materialize. The guideposts articulated in *Gore*[5] and *Campbell*[6] are fragile reeds set upon a blasted foggy moor with treacherous patches of quicksand. The Supreme Court, adept in the high reaches of constitutional law, lacks a common law sense. Thus, one finds the Court's bizarre adventures relating to the defense of comment in defamation[7] and in guiding judicial decisionmaking in awarding punitive damages in concert with the Fourteenth Amendment. In the latter, one finds the unenlightening references to reprehensibility, ratios, and comparative sanctions[8] that have been variously interpreted by the courts, necessitating the Supreme Court to refashion its preferred guidelines.[9]

The Supreme Court's adventures invite a horde of new commentators to parse the Court's opinions. These are often enlightening.[10] Thus, we have a burgeoning jurisprudence of punitives and an anxious blend of state and federal law.[11] All this is occurring in the United States, while

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2. 376 U.S. 254, 264 (1964).
3. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 (1996).
4. *Id*. at 568.
5. *Id.* at 574–85.
6. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418–29 (2003).
7. *See generally* Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) (refusing to establish constitutional protection for statements of opinion in defamation law leaving earlier law in great uncertainty).
8. *Gore*, 517 U.S. at 574–85.
9. *Campbell*, 538 U.S. at 418–29.
10. *See* Colleen P. Murphy, *Comparison to Criminal Sanctions in the Constitutional Review of Punitive Damages*, 41 SAN DIEGO L. REV. 1443 (2004); Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the* BMW/State Farm *Guideposts*, 37 U. MICH. J.L. REFORM 441 (2004).
11. Simon v. San Paolo U.S. Holding Company, Inc., 113 Cal. App. 4th 1137, 1164 (2003) (rejecting any formula flowing from a ratio of compensatory to punitive damages), *review granted*, 86 P.3d 881 (Cal. 2004); *accord* Williams v. Kaufman

punitive damages are receiving close examination in the rest of the common law world. In England, they have arisen from a judicial grave.[12] In Canada and Australia, they are subject to lively debate.[13] In New Zealand—the land of no liability in tort for personal injuries—punitives survive.[14] It would be salutary if these separate developments could be heeded by the courts now wrestling with the law. The law has common roots that would form most useful comparative analysis if rediscovered.[15]

The aim of this Article is to focus the punitive damages debate on a strong theoretical basis. A republican theory firmly establishes the place of the punitive damages award by juries in civil suits.[16] The present struggles by the Supreme Court to engender more predictability are appropriate, but should not lead to the destruction of the role of the jury.[17] Judicial reforms should be directed at the strengthening of the

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County, 352 F.3d 994, 1016 (5th Cir. 2003). On reprehensibility, the courts have found that racial and ethnic employment discrimination justifies significant punitive damages, dominating the other *Campbell* criteria. *See* Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1043–44 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1602 (2004); Bogle v. McClure, 332 F.3d 1347, 1362 (11th Cir. 2003), *cert. dismissed*, 124 S. Ct. 1168 (2004). *But see* Daka, Inc. v. McCrae, 839 A.2d 682, 700 (D.C. 2003) (applying *Campbell* and finding that the punitive damages exceeded the ratio and relationship with other state or legislative sanctions).

12. *See* Kuddus v. Chief Constable of Leicestershire Constabulary, [2002] 2 A.C. 122, 145 (H.L. 2001); Andrew Tettenborn, *Punitive Damages—A View From England*, 41 SAN DIEGO L. REV. 1551 (2004).

13. *See, e.g.*, Harris v. Digital Pulse Pty. Ltd. (2003) 56 N.S.W.L.R. 298. Punitive or exemplary damages in other common law systems have been closely examined in recent jurisprudence and often extended beyond the usual context of tort. Some courts extol the remedy to contract claims, and others to breach of fiduciary obligations. *See* David Morgan, Harris v. Digital Pulse*: The Availability of Exemplary Damages in Equity*, 29 MONASH U. L. REV. 377, 382–84 (2003).

14. *See, e.g.*, Wilding v. Attorney-General [2003] 3 N.Z.L.R. 787, §§ 16–18 (noting the availability of exemplary damages under New Zealand law).

15. The papers in this symposium may be useful in educating Anglo-American courts of the ongoing punitive damage debates and permitting a more informed and principled body of law to emerge. *See, e.g.*, Gary Davis & Michael Tilbury, *The Law of Remedies in the Second Half of the Twentieth Century: An Australian Perspective*, 41 SAN DIEGO L. REV. 1711 (2004); *see also* John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L. L. 391 (2004) (examining the availability of punitive damages in Australia, Canada, England, New Zealand, and the United States). For an example of scholarship that provides enlightening comparative analysis in tort law, see Jane Stapleton, *Comparative Economic Loss: Lessons from Case-Law-Focused "Middle Theory"*, 50 U.C.L.A. L. REV. 531 (2002) (comparing common law approaches outside the United States to recovery of pure economic loss).

16. *See infra* notes 77–111 and accompanying text (analyzing the value of the republican theory to punitive damages).

17. *See infra* notes 126–54 and accompanying text (contending that there is a

jury to bring it into close conformity with its republican rationale as an institution that maximizes the freedom of citizens from domination.[18]

II. CRIMINAL ROOTS

As I wrote several years ago, "punitive damages in the law predate[] verbal identification."[19] Before the writ of trespass, an aggrieved person would utter "words of felony" enabling recovery of the bot, a tariff in accord with the crime and extracted from the goods of the malefactor.[20] In assuaging loss, effective law was brought to the land in the form of the writ of trespass.[21] The modern separation of punishment and trespass had no place at that time.[22] Damages were designed to keep the peace.[23] Honor ran deep.[24] As Pollock and Maitland reported, "before an English local court of the thirteenth century the plaintiff will claim compensation, not only for the damage (*damnum*) but also for the shame (*huntage*, *hontage*, *dedecus*, *pudor*, *vituperium*) that has been done him."[25] The King's Court regarded this element in awarding damages.[26] The purpose of discouraging the dangerous practice of dueling is apparent in the willingness of the courts in the eighteenth century to award damages pitched to punctured honor.[27] The Australian High Court has recognized this purpose as a basis for exemplary damages.[28] It is not a feature, however, that has resonated in other modern courts as a reason for the award of punitive damages.[29]

One of the familiar divides in the law is the separation of crime from

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social value in allowing juries to award punitive damages).

18. *See infra* notes 155–68 and accompanying text (outlining the direction judicial reform should take concerning punitive damages).

19. David F. Partlett, *Punitive Damages: Legal Hot Zones*, 56 LA. L. REV. 781, 784 (1996).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 785.

24. *Id.*

25. 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 537 (2d ed. reissue 1968).

26. Partlett, *supra* note 19, at 785.

27. *Id.*

28. Lamb v. Cotogno (1987) 164 C.L.R. 1, 9 (Austl.) ("[T]hey serve to assuage any urge for revenge felt by victims and to discourage any temptation to engage in self-help likely to endanger the peace.").

29. For the criminal and civil law divide see *Harris v. Digital Pulse Pty. Ltd.* (2003) 56 N.S.W.L.R. 298, 386–91 (Heydon, J.A.) (discussing the criminal and civil law intertwining and holding that equitable breaches could not support punitive damages), and *Kuddus v. Chief Constable of Leicestershire Constabulary* [2002] 2 A.C. 122, 141. *See also* Gotanda, *supra* note 15, at 402 (discussing the recognized bases for punitive damages in England, with no consideration of the honor that has been impugned by the defendant).

tort, of punishment by the state, and of private actions for compensation.[30] The state was a safer prosecutor in the usual event.[31] Manifold protections have been erected to guard against error—protections entrenched in the United States under the Sixth Amendment.[32] Punitive damages with their criminal law aspect lingered in the background of civil law, though, and, with the felt feebleness of state enforcement in the modern day, the private suit of civil vindication has been revivified.[33]

The state is a notoriously poor enforcer of petty crimes. The police force does not have the resources to bring all malefactors to book, nor would the court enforce such a duty if it existed.[34] Moreover, overzealous policing and prosecution carries real social costs.[35] Judge Richard Posner examined the utility of private fines in the recent *bedbug* case—*Mathias v. Accor Economy Lodging, Inc*.[36] In *Mathias*, the court upheld a punitive damages award against the defendant hotel, which had rented out rooms knowing they were ridden with bedbugs.[37] (Bedbugs, as the learned judge notes, are making a comeback in America.[38]) Giving the example of a person spitting in another's face, Judge Posner rightly said that this action would not be addressed through the machinery of state criminal enforcement.[39] Compensatory damages would not be sufficient.[40] They would not reflect the plaintiff's hurt dignity, and would not provide an incentive to sue. Moreover, an incentive to sue touches a third reason—punitives provide a peaceful way to gain satisfaction rather than personal retaliation via breaching the peace.[41] The roots of punitive

30. *See* Partlett, *supra* note 19, at 785–87 (describing the historical division between tort law and criminal law, especially in the area of punitive damages).

31. *Id.* at 785.

32. *See* John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV 139, 149 (1986).

33. See other supercompensatory remedies, reflecting the criminal aspect of the remedy the U.S. Supreme Court calls the proof of the basis of punitive damages according to "clear and convincing" evidence. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 58 (1991).

34. Riss v. City of New York, 240 N.E.2d 860, 860–61 (N.Y. 1968).

35. JOHN BRAITHWAITE, TO PUNISH OR PERSUADE: ENFORCEMENT OF COAL MINE SAFETY (1985).

36. 347 F.3d 672, 675–78 (7th Cir. 2003); *cf.* Allan Beever, *The Structure of Aggravated and Exemplary Damages*, 23 OXFORD J. LEGAL STUD. 87, 95–96 (2003) (discussing the core purpose of punitive and exemplary damages).

37. *Mathias*, 347 F.3d at 678.

38. *Id.* at 673.

39. *Id.* at 676.

40. *Id.* at 676–77.

41. *Id.*; *see also* Lamb v. Cotogno (1987) 164 C.L.R. 1, 9 (Austl.) ("It is an aspect

damages are deep. Justice Windeyer of the Australian High Court, a distinguished legal historian, had it right in *Uren v. John Fairfax*:

> Compensation is the dominant remedy if not the purpose of the law of torts today. But fault still has a place in many forms of wrongdoing. And the roots of tort and crime in the law of England are greatly intermingled. Some things that today are seen as anomalies have roots that go deep, too deep for them to be easily uprooted.[42]

Lord Devlin, as Andrew Tettenborn has nicely articulated,[43] could not live with this messiness.[44] In *Rookes*, the House of Lords cabined punitive damages to a remote corner of the law, basically emasculating the remedy.[45] However, *Rookes* has been savaged badly. It is seen as an unhappy experiment. The English courts are loath to engage in tort reform, and it was a misfortune that the House of Lords chose its moment of law reform so badly. Even in an era in which the Commonwealth courts still showed deference to the House of Lords, the decision was widely repudiated.[46] Punitive damages may be returning elsewhere in the common law world, but the legal hothouse still remains in the United States, where a body of tort doctrine invites strong remedies.[47] Moreover, punitive damages are replete with the language of rights.[48] The damages are given for the arrogant abrogation of a plaintiff's rights.[49] The law sets its face against the economists who theorize that liability was merely a means of efficiently allocating resources, and the compensationists who criticize the moral—fault-based—heart of tort law.[50]

However, modern scholarship has often gleaned an economic and

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of exemplary damages that they serve to assuage any urge for revenge felt by victims and to discourage any temptation to engage in self-help likely to endanger the peace."); XL Petroleum (N.S.W.) Proprietary Ltd. v. Caltex Oil (Austl.) Proprietary Ltd. (1985) 155 C.L.R. 448, 471 (Austl.) ("As an award of exemplary damages is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again . . . ."); Donselaar v. Donselaar [1982] 1 N.Z.L.R. 97, 106–07 (noting the role of punitive damages in preventing breaches of the peace in response to personal harms).

42. Uren v. John Fairfax & Sons Pty. Ltd. (1966) 117 C.L.R. 118, 149–50 (Austl.), *approved in* Gray v. Motor Accident Comm'n (1998) 196 C.L.R. 1, 1, 16 (Austl.).

43. Tettenborn, *supra* note 12, at 1553.

44. *See* Rookes v. Barnard, [1964] A.C. 1129, 1160–61 (H.L.) (examining and circumscribing the proper role for exemplary damages in English law).

45. *Id.* at 1159–60, 1163–64.

46. Cassell & Co. Ltd. v. Broome, [1972] A.C. 1027, 1040–41, 1046–48, 1067 (H.L.).

47. *See* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1404–07 (1993) (noting the vengeance aspects of tort law).

48. Partlett, *supra* note 19, at 791.

49. *Id.*

50. *See generally* PETER CANE, RESPONSIBILITY IN LAW AND MORALITY (2002).

compensationist rationale.[51] The deterrence model is well explored and still finds academic favor in the United States. For example, Cass Sunstein and others, in an important study, insist that the thrust of punitive damages is to optimally deter harm-providing behavior.[52] The compensationist model in the American setting is being newly and effectively analyzed by Professor Catherine Sharkey.[53] Her argument is that punitive damages reflect a concern to compensate third party and social harms not internalized in compensating the plaintiff.[54] Aggravated damages, as a form of compensation for loss of dignity, are at last being recognized in American jurisprudence.[55] They have been acknowledged elsewhere, but not always with clarity.[56] We can capture an old wisdom in the law in recognizing honor as a central value to be protected by the law of torts.[57]

To the extent that the Supreme Court has commenced its analysis with the excessiveness and arbitrariness of punitive damages under the Fourteenth Amendment, the basic rationale of punitive damages is implicated.[58] One would imagine constitutional control should aid in bringing punitive damages back to their appropriate functions.[59]

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51. *See* Catherine M. Sharkey, *Punitive Damages: Should Juries Decide?*, 82 TEX. L. REV. 381, 400 (2003) (reviewing CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2002) [hereinafter PUNITIVE DAMAGES]) (arguing in favor of a social compensationist model of punitive damages) [hereinafter Sharkey, *Should Juries Decide?*].

52. *See generally* PUNITIVE DAMAGES, *supra* note 51.

53. *See* Sharkey, *Should Juries Decide?*, *supra* note 51, at 400–01 (noting her theory of social compensation); *see generally* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003) [hereinafter Sharkey, *Societal Damages*].

54. Sharkey, *Should Juries Decide?*, *supra* note 51, at 400–01; *see also* Michael B. Kelly, *Do Punitive Damages Compensate Society?*, 41 SAN DIEGO L. REV. 1429, 1437 (2004).

55. *See* Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55, 91 (2003) (discussing the role, purpose, and effect of aggravated damages).

56. *See* Jeff Berryman, *Equitable Compensation for Breach by Fact-Based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals*, 37 ALTA. L. REV. 95, 111–13 (1999) (noting the possibility of using aggravated damages where there is a breach of fiduciary duty); Beever, *supra* note 36, at 88–94 (examining the role of aggravated damages in English law).

57. *See* Partlett, *supra* note 19, at 784–85 (describing the centrality of the concept of honor in traditional common law tort actions).

58. *Id.* at 791. This commentary, though, is not meant to challenge the common law controls a court has over punitive damages. *Id.* at 790 (noting the traditional restrictions a court can use to limit or reject an award of punitive damages).

59. *But see* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 607 (1996) (Ginsburg, J., dissenting) (arguing that it is the legislative function to intervene).

III. DETERRENCE AND RETRIBUTION

In an earlier paper, I suggested that deterrence and retribution both had severe shortcomings.[60] The former has attracted the majority of fans, probably because it fits well within the economic analysis of the function of damages.[61] Supercompensatory damages encourage an attorney, as a bounty hunter, to root out harm-producing behavior, bringing malefactors to book.[62] The models are elegant, but most imperfect, as transaction costs plague an efficient allocation of resources.[63] None of this is fatal for economic analysis, but the persistence of punitive damages does not depend upon Coase as much as it does upon viewing tort law as playing an essential role in inculcating responsibility and promoting social cohesion.[64]

There is a long philosophical discourse on retribution and punishment.[65] It is certainly possible to say that much of the discourse supports both publicly and privately initiated punishment.[66] The most satisfactory explanation stems from the idea of punishment as reprobation and denunciation of a wrongful act.[67] Although punishment may be a good in itself, it is the efficacious social consequences of punishment that ground a satisfactory model of punishment, and, therefore, punitive damages.[68] Punitive damages awards serve society in demonstrating correct values and the law's commitment to defending an individual's autonomy.[69] To levy punitive damages is to educate and commit in the coin of commerce.[70] Punitive damages carry a great advantage over state

60. Partlett, *supra* note 19, at 797–806.

61. *Id.* at 795–96; *see also* Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1146 (1988) (explaining the legal academia's consensus that deterrence is the key role for punitive damages).

62. Partlett, *supra* note 19, at 798.

63. For example, the agency costs are currently growing due to disparate incentives faced by attorneys and clients. *See* Ellen Wright Clayton & David F. Partlett, *Lawyer-Client Relationships*, *in* FRANK A. SLOAN ET AL., SUING FOR MEDICAL MALPRACTICE 72, 77–78 (1993).

64. Partlett, *supra* note 19, at 799; *see generally* David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427 (1993).

65. *See, e.g.*, Partlett, *supra* note 19, at 800–06 (describing the retribution principle).

66. *Id.* at 802–06.

67. *Id.* at 803–04.

68. *Id.* at 805.

69. *Id.*; *see also* Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 331–37 (1990) (discussing denunciation theory).

70. *See* C.L. TEN, CRIME, GUILT, AND PUNISHMENT 45 (1987); *cf.* Andrew Burrows, *Reforming Exemplary Damages: Expansion or Abolition?*, *in* WRONGS AND REMEDIES IN THE TWENTY-FIRST CENTURY 153, 160 (Peter Birks ed., 1996) (asking why damages should be the sole form of punishment).

sanctions, since damages can be calibrated to reflect the heinousness of the wrongful act.[71] What is lost in notice is gained in sensitivity. The line is unclear, and the Supreme Court's attempt in *Gore* to provide better notice militates against calibration according to heinousness, or, as the Court would term it, reprehensibility.[72] *Campbell*,[73] however, diminishes the weight of mechanical guideposts—the ratio of punitive to compensatory,[74] the influence of statutory sanctions, and the multiplication of breaches as a guide to reprehensibility.[75] Rather, the one guidepost, sitting as a stronger reed than the others on our blasted moor, is reprehensibility.[76] It is the factor that after *Campbell* has some life to it.

IV. THE REPUBLICAN IDEAL[77]

I have suggested that the goal to be sought in tort law, as in criminal law, is to entrench within the sphere of law a republican ideal in which the citizen enjoys "full dominion."[78] The law provides freedom in terms of "full dominion" when it enables the enjoyment of liberty equal to that of other citizens, when this freedom is notorious, and when the prospect of liberty is maximally compatible with the prospect for all citizens.[79] The law should be uncontroversial, stable, and satiable.[80] The rule on punitive damages uncontroversially punishes consciously wrongful behavior, thus protecting liberty and dominion. Additionally, it promotes stability by avoiding an overreaching by the state, and it is satiable in that it protects dominion by the least intrusive strategy.[81]

The laws in a republic value freedom in the sense that no citizen is

71. Partlett, *supra* note 19, at 811.
72. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575–80 (1996).
73. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).
74. *See* Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 676 (7th Cir. 2003) (insisting that *Campbell* provides no presumptive ratio upon which to base a violation of the Fourteenth Amendment). *But cf.* Chanenson & Gotanda, *supra* note 10, at 463–64 (indicating that the Supreme Court did provide certain target ratios beyond which there is a presumptive violation of the Fourteenth Amendment).
75. *Campbell*, 538 U.S. at 419–24, 428.
76. *Id.* at 419–24.
77. For full explication, see generally JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1990).
78. *See* Partlett, *supra* note 19, at 806–16 (advocating a "full dominion" as the consequential value to understanding tort law).
79. *Id*. at 808.
80. *Id.* at 809.
81. *Id.* at 809–10.

dominated by the state apparatus or by fellow citizens.[82] It is a freedom enjoyed in a society.[83] A person is dominated when subject to arbitrary interference.[84] It is worth noting that the republican ideal is distinguishable from the liberal ideal of freedom. The former—the republican—contemplates that interference may occur at the hands of the state, provided it is nonarbitrary. The latter sets its face against state interference.[85] Yet the liberal ideal of noninterference allows domination, provided it does not amount to interference.[86] The nondomination form of freedom and its noninterference version have waxed and waned in the history of ideas.[87]

A nation of laws is necessary, although not sufficient, to provide nondomination.[88] Without laws, oppression will reign, but, as Grant Gilmore has reminded us, in hell every act would be governed by laws.[89] Law alone is not sufficient, though, because the laws themselves may be tyrannous.[90] But where laws establish mechanisms, situate institutions, and instantiate principles to promote freedom from domination, they are at the base of a republican freedom.[91] The rule of law is particularly important because it establishes a nonarbitrary basis, which governs citizens.[92] It gives citizens the right to make choices that are not arbitrarily dominated by others, choices for which, because of freedom assumptions, the actor will be held responsible.[93] The law necessarily interferes, but does so with a republican ideal of restrained coercion—only in the interest of preserving the citizens' common interests in a manner that "conforms to the opinions received among the citizenry."[94]

Often, punitive damages are seen as illegitimate because they substitute for the criminal law.[95] It is said that the criminal law with its

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82. PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 66–67 (1997).
83. *Id.* at 66.
84. *Id.* at 52.
85. *Id.* at 66–67.
86. *Id.* at 8–10.
87. *Id* at 1–12.
88. *See* Partlett, *supra* note 19, at 807 ("For the liberal, being left alone is freedom; for the republican, freedom is a condition of citizenship to claim equality before the law. Within a community a person may participate in the process of self-rule. Freedom is inseparable from law. Citizenship is woven in the law.").
89. GRANT GILMORE, THE AGES OF AMERICAN LAW 111 (1977).
90. *Id.*
91. *See* Partlett, *supra* note 19, at 806–10 (examining the role of laws in a republican model of government).
92. *Id.* at 808.
93. PHILIP PETTIT, A THEORY OF FREEDOM: FROM THE PSYCHOLOGY TO THE POLITICS OF AGENCY 13 (2001).
94. PETTIT, *supra* note 82, at 36–37.
95. *See, e.g.*, James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1158–64 (1984) (arguing that punitive damages illegitimately serve as a substitute for the criminal law).

protections—both common law and constitutional—would more effectively guard the individual.[96] A republican ideal, however, keeps criminal law gated; it should have a limited scope; it should be parsimonious.[97]

The reason is apparent by reference to criminal law enforcement. In the modern state, the criminal law is enforced by police and other public officials who, if given ambit, will be faced with temptation to abuse power.[98] Any controls must be imperfect.[99] Who will guard the guardians?[100] Freedom from domination is lost in a society where public officials manipulate their position and use their powers to oppress citizenry.[101] The republican sentencing requires adherence to the "three R's."[102] The offender should *recognize* the victim as a free nondominated agent, it should *recompense* the victim by granting restitution, compensation, or reparation from the offender for abuses of power, and it should *reassure* "the victim and the community at large that the offender will not continue to be a threat . . . ."[103]

A republic would be corrupted if all regulation were to be turned over to criminal enforcement.[104] There must be a large reserve where criminal law should have no writ, and, in those areas where the writ runs, careful controls must be applied to officials charged with the public task.[105]

Punitive damages should have a central place. With private decentralized enforcement, the vice of official overreaching is avoided.[106] The form of action in tort complies, moreover, with the "three R's" of republican sentencing.[107] The power of the victim to bring a cause of action

96. *Id.* at 1159 & n.189.
97. BRAITHWAITE & PETTIT, *supra* note 77, at 202–04.
98. *See* PETTIT, *supra* note 82, at 155.
99. *Id.*
100. *See generally* THEODORE CAPLOW, PERVERSE INCENTIVES: THE NEGLECT OF SOCIAL TECHNOLOGY IN THE PUBLIC SECTOR (1994) (thoroughly examining the incentive pitfalls relating to public officials and authorities).
101. *See* PETTIT, *supra* note 82, at 155–56.
102. *Id.* at 156.
103. *Id.* at 156–57.
104. BRAITHWAITE & PETTIT, *supra* note 77, at 203.
105. *See* Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1785–87 (1994) (arguing in favor of a citizen trust model of criminal law as represented by the Fourth Amendment); *see also* PETTIT, *supra* note 82, at 154–55 (advocating a limited role for criminal law in the republican state).
106. Partlett, *supra* note 19, at 810–11.
107. PETTIT, *supra* note 82, at 156–57.

recognizes his power as a free, nondominated actor. Punitive damages are launched against the offender, and the victim receives compensation, restitution, or reparation. The nexus of payment from offender to victim undergirds a corrective justice notion that itself serves to establish nondomination of one citizen over another.

An award designed to be overly public provides the last R— *reassurance*. A court gives the award after careful deliberation and by reference to legal principles in which the matter is given its day in court. The penalty is designed to deter the offender from future similar behavior.[108]

It is important to recognize the central place of punitive damages. Outrageous behavior invading the rights of fellow citizens is anathema to the republican ideal, and is ideally punished and deterred by this tort remedy.[109] The search is to ensure that the remedy does not stray from the "three R's" in its application. It should not become a weapon of oppression and domination.[110] If the application of punitive damages were to become arbitrary, republican ideals would be flouted.[111] Thus the need and the anxious search for principles.

V. CONFORMITY WITH THE REPUBLICAN IDEAL

The fact that the putative offender should be given notice is of particular concern. Certainly, the requirement that the behavior flout clearly recognized norms and be carried out in contumelious disregard for the victims' rights, meets the need of notoriety. However, the possibility of arbitrariness continues to lurk in the wide discretions given to juries in determining the quantum of punitives.[112] It is, therefore, predictable and appropriate that the Supreme Court has attempted to constrain the discretion by principled rules of law and judicial review. It has done so in due process terms—the very essence of the rule of law. Jury instructions, the judges' power of remitter,[113] the enhanced powers of appeal courts to review the jury awards,[114] the burden of proof on clear and convincing evidence,[115] and the guidelines for appellate

108. *See* Weinrib, *supra* note 55, at 84–88 (explaining the corrective justice function of punitive damages).

109. *See* Partlett, *supra* note 19, at 811 (concluding that tort law, and more specifically punitive damages, is best suited to meet the republican ideal of the protection of personal honor).

110. *Cf.* PETTIT, *supra* note 82, at 154 (discussing the potential for misuse of the republican model of sentencing).

111. *Cf. id.* at 157.

112. *See, e.g.*, Partlett, *supra* note 19, at 815–16. *See generally* PUNITIVE DAMAGES, *supra* note 51.

113. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 567, 583 (1996).

114. *In re* Exxon Valdez, 270 F.3d 1215, 1240–41 (9th Cir. 2001).

115. Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104, 111 (Mo. 1996).

courts[116] are designed to reduce the capacity of the punitive jury awards to breach the basic republican ideal of nondomination. Professor Cass Sunstein and others rightly choose the same ground for their analysis.[117] They argue the essential arbitrariness of the jury in determining awards of punitive damages.[118] The critique, however, is radically incomplete. For the essential issue is that if these norms were not enforced via the law of torts, they should fall to the arms of the state and its officials.[119] Two evils may follow: either a failure to enforce obvious and egregious breaches of rights, or the erection of a greater enforcement apparatus with its attendant tendencies to overreach and oppress.[120]

Much can be said in favor of a republican theory, especially in a nation based upon republican ideals. Formative institutions encourage deliberation between citizens, state officials, and the state itself.[121] The stronger those institutions, the more a citizen's dominion is enhanced.[122] As stated earlier, central to our analysis, and the very republican ideal, is the jury.[123] In this ideal, the community is brought into the administration of justice.[124] Service on a jury is a civil obligation, which democratizes the deliberations of the courts.[125] In this sense, if the law operates with

116. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003).

117. *See generally* PUNITIVE DAMAGES, *supra* note 51.

118. *See* Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1, 34–35 (2004).

119. Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 676–77 (7th Cir. 2003).

120. *See supra* notes 95–105 and accompanying text (noting the inability of the criminal law to effectively enforce minor personal crimes, or, in the alternative, the oppression that would result from such enforcement).

121. *See* BRAITHWAITE & PETTIT, *supra* note 77, at 82; ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 42–43 (1993). The role of formative institutions in inculcating *civic virtue* is fully developed in MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 317–51 (1996).

122. Partlett, *supra* note 19, at 810.

123. *See infra* notes 124–54 and accompanying text (positing the role of the jury in the republican theory).

124. Partlett, *supra* note 19, at 810.

125. Maybe this is inefficient, but, as Amar points out, efficiency has very little to do with the constitutional value being expressed here. *See* Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1175 (1995); *cf.* George L. Priest, *Introduction: The Problem and Efforts to Understand It*, *in* PUNITIVE DAMAGES, *supra* note 51, at 1, 1–4 (critiquing the jury for its arbitrariness and lack of rationality). *But see* Neal R. Feigenson, *Can Tort Juries Punish Competently?*, 78 CHI.-KENT L. REV. 239, 284–88 (2003) (reviewing PUNITIVE DAMAGES, *supra* note 51) (criticizing the focus on deterrence to the exclusion of retribution in PUNITIVE DAMAGES, *supra* note 52).

healthy institutions, mediating between the state and the individual, common law relating to punitive damages has a justifiably firm place.

VI. THE JURY AND THE REPUBLICAN IDEAL

Discourse on tort theory has not featured the republican ideal. Tort lawyers are accustomed to economic analysis, corrective justice, compensatory justice, and ideas of responsibility and morality.[126] None of these notions clearly support the structure of punitive damages.[127] However, the structure of privately enforced fines for arrogant and intentional harm of a citizen's rights is consonant with the proportionally and parsimonious rule of punishment.[128] The community's condemnation of such behavior through the jury reinforces this rule.

Now the real rub is whether this is a heroic, unrealistic view of modern American society. I could settle for a theory that would be based on the internal view of the law and not concern itself with consistency to external indicia. But I do want to ground a theory on its real world impact. My argument conforms with Francis Fukuyama's optimistic view of the capacity of society to reconstitute itself.[129] Citizens' involvement in the ordering of a society is vital to a healthy social order.[130] The jury is one such institution. The distemper, about which I wrote earlier, comes from a breakdown in the citizens' role.[131] Citizens avoid service on juries. They are too often badly treated once

126. Partlett, *supra* note 19, at 792–802; *see also* Stapleton, *supra* note 15, at 534–35 (eschewing general, all-encompassing theories of tort law for a blend of pragmatic theory and common law articulation).

127. See the corrective justice discussion of punitive damages by Weinrib, *supra* note 55, at 86 (arguing that punitive damages do not comport with corrective justice, because they do not measure "anything that the plaintiff has been wrongfully deprived of").

128. Partlett, *supra* note 19, at 809–10.

129. *See generally* FRANCIS FUKUYAMA, THE GREAT DISRUPTION: HUMAN NATURE AND THE RECONSTITUTION OF SOCIAL ORDER (1999) (arguing that despite social alienation, social institutions are available to reform social cohesion).

130. There is a large literature on the role of mediating institutions in society. For a sampling, see Meir Dan-Cohen, *Between Selves and Collectivities: Toward a Jurisprudence of Identity*, 61 U. CHI. L. REV. 1213 (1994); Stephen Macedo, *The Constitution, Civic Virtue, and Civil Society: Social Capital as Substantive Morality*, 69 FORDHAM L. REV. 1573 (2001); Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639 (2002); Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988); Robert K. Vischer, *The Good, the Bad and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. (forthcoming 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=499285.

131. *See infra* notes 132–43 and accompanying text (noting the breakdown of the jury in the judicial system). *But see generally* David Millon, *Juries, Judges, and Democracy*, 18 LAW & SOC. INQUIRY 135 (1993) (reviewing SHANNON C. STIMSON, THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL (1990)) (indicting the presumption that the jury is a failing institution and conceptualizing a populist purpose for the jury).

they serve. Education on this fundamental civic duty is lacking. Too often the institution is seen as the one to be manipulated, and as a relic that ought to be dispensed with in a modern legal system.[132]

Legal writers do not typically identify the jury as a mediating institution. The focus is usually placed upon voluntary associations because they promote a civil society, empower the citizens in the face of overweening government, provide identity to individuals, enhance the individual's voice, allow more effective pursuit of common objectives, and build a socially situated individual autonomy that finds comfort from the cold blasts of atomized society.[133]

Modern society, seeking to shore up social capital, often views the voluntary association one-dimensionally as a good.[134] Freedom to form voluntary associations outside governmental interference, however, is not an unalloyed good. The room left for voluntary associations spawns the growth also of undemocratic organizations—at the extreme, mafia and terrorist groupings.[135]

The jury is much more a creation of our constitutional and legal history. Its origins were in communities' interest in peaceful coexistence.[136] It is an institution much celebrated as a guardian of freedom. Unlike voluntary associations, citizens do not band together to promote long-term interests. Rather, the power of the jury acts to constrain overreaching government. Its shifting and impermanent composition restricts the ability of powerful factions and government from suborning the judicial process. Judges, although enjoying independence-producing privileges, are in the end politically appointed and subject to the political exigencies of the day.

Juries have themselves a dark underbelly revealed most starkly in *Sullivan*.[137] They have a capacity to obstruct social change—in that case, the civil rights movement in the South.[138] The jury reflects the

132. *See, e.g.*, Brooke A. Masters, *Culling a Shrunken Jury Pool: Some Go to Lengths to Avoid Service; Others Seek Limelight*, WASH. POST, Apr. 2, 2004, at E1 (discussing the trend of juror misconduct in current high-profile criminal cases and other systemic problems with the jury as an institution).

133. *See generally* Vischer, *supra* note 130.

134. *Id.* at 1.

135. *Id.* at 1–2.

136. For a thorough account on the purpose and development of the modern jury, see generally THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800 (1985).

137. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

138. *Id.* at 294 (Black, J., concurring).

society from which its members are drawn—its high values and its low.[139] The Supreme Court in *Sullivan* found that free expression, necessary to sustain the promotion of the rights of minorities, could not be left to the community values of the jury.[140] Constitutional prescription giving the judges the power to describe the dominion of free speech were essential.[141] Whether the Court made the right choice may be debated,[142] but the train long ago left the station. For punitive damages, the same process is afoot.

This Article cannot begin to analyze the problems besetting the institution of the jury. But its fate is linked with the perceived ill health of punitive damages.[143]

VII. THE JURY AND PUNITIVE DAMAGES

The image of the jury as an out of control institution is widely accepted and has fueled the Supreme Court's intervention.[144] Its flawed decisionmaking has also been grounds for legislative reform prescriptions.[145] It is well established that juries rarely award punitive damages.[146] They award punitives mainly for intentional misconduct,

139. *See, e.g.*, Eric Helland & Alexander Tabarrok, *Race, Poverty, and American Tort Awards: Evidence from Three Data Sets*, 32 J. LEGAL STUD. 27, 51–53 (2003) (inferring the racial and socio-economic composition of juries from county data, the authors find a positive correlation between high proverty rates among minorities and the quantum of damage awards).

140. *Sullivan*, 376 U.S. at 277–80.

141. *Id.* at 283.

142. *See generally* Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782 (1986).

143. *See generally* PUNITIVE DAMAGES, *supra* note 51 (describing the conceptual failures of punitive damage jurisprudence and connecting the concept to the institution of the jury).

144. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42–43 (1991) (O'Connor, J., dissenting).

145. *See* Sharkey, *Societal Damages*, supra note 53, at 414–22 (discussing the realization of the societal damages).

146. *See, e.g.*, 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, 1056 (2000); Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL. STUD. 623, 623–24 (1997); Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida:* In Terrorem *and in Reality*, 38 HARV. J. ON LEGIS. 487, 487–88 (2001); *see also* Carol J. DeFrances & Marika F.X. Litras, *Civil Trial Cases and Verdicts in Large Counties, 1996*, 1999 U.S. DEP'T OF JUSTICE: BUREAU OF JUSTICE STATISTICS BULLETIN 9 ("The median punitive damage amount awarded to plaintiff winners was $40,000. Twenty-one percent of punitive damage awards were over $250,000, and 7% were $1 million or more . . . ."); Thomas H. Cohen & Steven K. Smith, *Civil Trial Cases and Verdicts in Large Counties*, *2001*, 2004 U.S. DEP'T OF JUSTICE: BUREAU OF JUSTICE STATISTICS BULLETIN 6 ("Punitive damages were awarded in 6% of the 6,487 trial cases in which the plaintiff won damages.").

and their quantum is firmly related to the compensatory damages.[147] Judges and juries do not vary with any statistical significance in their predilection to award punitive damages.[148] The debate for those accepting empirical conclusions devolves to the level that some awards remain outrageous, and that they may overdeter potential defendants in decisions, usually corporate decisions relating to safety.[149]

In addition, the unpredictability and variability of juries is marked.[150] The outbreaks of untoward punitive damages tend to be isolated to certain *hot spots* around the country.[151] It must be said that those avid for strong legislative intervention do not go quietly into subtle law reform; the battle cry of outrageous punitive damages awards is seen as important fuel in large scale legislative interventions with the operation of tort law and with juries' traditional freedom.[152] Reform efforts focusing on caps and award limitations have often been blind to empirical research.[153] They have failed to properly focus on identifying problematical aspects of decisionmaking as possible steps to cure flaws.[154]

VIII. JURY IMPROVEMENT

The Supreme Court has decided that reprehensibility should be the lodestar. Empirical research has shown that juries are better in

147. Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 745 (2002). *But see* Hersch & Viscusi, *supra* note 118, at 1 (arguing that jury awards are highly unpredictable and not significantly correlated with compensatory damages).

148. Eisenberg, *supra* note 147, at 750–51.

149. *See, e.g.*, Reid Hastie, *Putting it all Together*, *in* PUNITIVE DAMAGES, *supra* note 51, at 211, 232–33 (discussing the jury's role in forcing corporations to deter against injuries where it is economically inefficient to do so); *id.* at 239–41 (noting that awards for punitive damages are disproportionately high when the facts of a case are considered). Some, it should be noted, insist that the level of punitive damages has systemically mushroomed to impossible, unsustainable levels. *See* Victor E. Schwartz et al., *I'll Take That: Legal and Public Policy Problems Raised by Statutes that Require Punitive Damages Awards to be Shared with the State*, 68 MO. L. REV. 525, 557 (2003).

150. Daniel Kahneman et al., *Shared Outrage, Erratic Awards*, *in* PUNITIVE DAMAGES, *supra* note 51, at 31.

151. Partlett, *supra* note 19, at 817–23; *see also* George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825 (1996) (examining the incidence of punitive damages in Alabama).

152. *See* Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 106–07 (2002).

153. *Id.* at 108.

154. *Id.*

determining retribution than in effecting deterrence.[155] Juries should be given instructions that may be operationalized, and, most importantly, should be given comparative data on punitive damages awards.[156] The greatest variance is perceived when juries have no numerical anchor for an award.[157] Given random numerical anchors, moreover, awards will cluster around them, leading to arbitrary results.[158] Where punitive awards are designed to punish in modern complex societies, they must be broadly notorious, give reasonable guidance to actors, and be consistent across like cases.[159]

It will also be necessary to keep in mind the dynamics in which juries make decisions. The juries are subject to the vicissitudes of group decisionmaking in the context of an adversarial proceeding.[160] Measures to instruct juries, with an eye to informing them of their role and function, would be salutary. However, Cass Sunstein and others argue that instructions will not cure the inherent cognitive dissonance of group decisionmaking by a jury.[161] They are subject to "hindsight bias" that may tend to ready conclusions of wrongful intentional conduct.[162] They are subject to "severity shift," leading to larger awards by a jury than the individual jury members would themselves have awarded.[163] This fact is part of the phenomena of group polarization that, because of the rhetoric of liability, drives awards to the upper side of the pole.[164] An understanding of cognitive dimensions may encourage the disclosure of reasonable anchors drawn from comparative cases, a confining of passion through judicial controls, and refined instructions leading to an improved understanding of the purpose of the award. It may also be advisable to provide instruction on appropriate ways juries should

155. *See* Eisenberg et al., *supra* note 147, at 771–75 (discussing the relationship between punitive and compensatory damages). Sunstein concluded that this favors exclusion of the jury. *See* Cass R. Sunstein, *What Should Be Done?*, *in* PUNITIVE DAMAGES, *supra* note 51, at 242. This is not the case. *See* Sharkey, *Should Juries Decide?*, *supra* note 51, at 411–12 (rejecting the conclusions offered by PUNITIVE DAMAGES, *supra* note 51).

156. Robbennolt, *supra* note 152, at 197–98.

157. Eisenberg et al., *supra* note 147, at 779.

158. *Id.*

159. This is a criticism that could be leveled at common law damages generally and has led to reform suggestions to make damages more consistent.

160. *See, e.g.*, David A. Schkade et al., *Deliberating About Dollars: The Severity Shift*, *in* PUNITIVE DAMAGES, *supra* note 51, at 43, 57–61.

161. W. Kip Viscusi, *Deterrence Instructions: What Jurors Won't Do*, *in* PUNITIVE DAMAGES, *supra* note 51, at 142, 162–64.

162. Reid Hastie et al., *Looking Backward in Punitive Judgments: 20-20 Vision?*, *in* PUNITIVE DAMAGES, *supra* note 51, at 96, 106–08.

163. Schkade et al., *supra* note 160, at 57–61.

164. *See* Sharkey, *Should Juries Decide?*, *supra* note 51, at 388; *see also* Feigenson, *supra* note 125, at 259.

proceed to their decisions by avoiding pitfalls in group decisionmaking.

Lastly, outrageous outliers in punitive damages tend to spring from isolated counties in various states.[165] This indicates a malaise in those counties.[166] The context of sympathetic plaintiffs injured by large out-of-state defendants sets up a tension that may lead to inflation of awards.[167] Juries are filled with less than a cross-section of the community. If the jury comprises those who are unable to avoid jury duty, the mix of opinion is unlikely to produce the most rational or restrained jury award. The movement to make jury service more attractive by removing impediments to devoting the time and paying jurors a fair sum for time lost on the job ought to be taken seriously. Although it has been promoted by prodefendant groups, the initiative should have bipartisan support.[168] It is plain that the problem with punitives is not systemic. Punitive damages are a part of well-grounded Anglo-American jurisprudence that ought to be reinforced by an appreciation that they undergird a republican ideal maximizing citizens' dominion. Our efforts ought to be directed at strengthening this formative institution, rather than performing radical surgery that many reformers favor.

The efforts of the courts ought to be directed to making jury awards more principled and predictable. Jurors lack the knowledge of comparative awards. Judges, as repeat players, may exercise the corrective function by outlying verdicts in accord with the equity notion that like cases should be treated alike. Even if jurors are given more appropriate anchors for their awards, verdicts may be out of balance. Judges, then, in motions for remitter and on appeal, may act as an appropriate corrective. The robustness of the jury in asserting community outrage about the flouting of a right is not a symptom of the illness of the system. Even the outrageous punitive award establishes a healthy dialogue where the wronged citizen is accorded respect and the wrongdoer suffers punishment for his or her misdeeds. In the ebb and flow and in the

165. *See, e.g.*, STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 240–43 (1995).

166. Partlett, *supra* note 19, at 822–23.

167. *Id.* at 822.

168. *See* Victor E. Schwartz et al., *The Jury Patriotism Act: Making Jury Service More Appealing and Rewarding to Citizens*, AM. LEGIS. EXCHANGE COUNCIL (2003) *available at* http://www.alec.org/meswfiles/pdf/0309.pdf (noting that the express steps are flexibility on scheduling, reduction of length of service, protection of employment rights, adequate compensation, repealing of unnecessary exemptions, increasing penalty for no-shows, and limiting excuses).

Supreme Court's occasional forays, a republican perceives strength rather than failure.