NOTE

PUNITIVE DAMAGES CAPS: A PROPOSED MIDDLE GROUND AFTER *EXXON SHIPPING CO. V. BAKER*

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In 2008, the U.S. Supreme Court expounded upon its punitive damages and substantive due process jurisprudence in Exxon Shipping Co. v. Baker. *In a 6-3 decision, the Court held that substantive due process demands a 1:1 punitive-to-compensatory damages ratio cap in federal maritime cases. The majority in* Exxon *was concerned about outlier verdicts like the astronomical $5 billion punitive damages that the* Exxon *jury returned. Meanwhile, the minority was concerned that the cap stripped the jury of its function as spokesman of the community and that the cap left no room for juries to punish truly heinous crimes more harshly than less egregious acts. Could a middle ground possibly exist between these two views? Borrowing from Colorado statutory law and Arizona state court precedent, this Note argues that a 1:1 ratio cap should apply to all federal cases in order to reduce the number of outlier verdicts, but juries should have the power to overcome that cap if a plaintiff can prove (1) beyond a reasonable doubt that (2) a defendant acted with "an evil mind." Through the combined use of these two heightened standards—each of which are already used individually by some states, the* Exxon *minority's concerns about keeping the jury empowered would be alleviated, while still allowing the use of a ratio cap to reign in outlier verdicts. In this way, there exists a middle ground after* Exxon.

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What is needed for punitive damages reform is a prudential judgment of the appropriate cap or limit to punitive damages that will allow some room for punishing egregious behavior but constrain the deleterious effects of unlimited punitive damages judgments on consumers.

– George L. Priest[1]

INTRODUCTION

Having just guzzled ten shots of liquor, Joseph Hazelwood, a lifetime alcoholic, boarded a ship as its captain at 9:12 p.m.[2] Shortly after leaving port, Hazelwood realized that the boat was on course to collide with an underwater coral reef.[3] Despite becoming aware of this potential hazard, Hazelwood sped up the boat and then abandoned his outdoor post to do paperwork in his cabin down below, leaving two unlicensed crew members to navigate around the reef.[4] The crew members failed to properly make a turn, and, as a result, the ship ran aground on the reef, tearing open the hull.[5] Eleven million gallons of crude oil gushed into Prince William Sound off the Alaskan Coast.[6] During the follow-up investigation, authorities determined that at the time of the accident, Hazelwood had a blood-alcohol content of approximately .241, an amount triple the legal limit at which a person can operate a motor vehicle in most states today.[7] These are the facts of the Exxon *Valdez* oil spill that occurred on March 23, 1989.[8]

The aftermath resulted in a significant financial loss for Exxon.[9] In all, the company spent more than $3.4 billion between cleanup efforts,

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1 George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 839 (1996).
2 Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2612 (2008).
3 *Id.*
4 *Id.*
5 *Id.* at 2613.
6 *Id.*
7 *Id.*
8 *Id.* at 2612.
9 *See id.*

fines, restitution, and voluntary settlements with various injured parties.[10] The unsettled claims in the Exxon *Valdez* incident merged into a single, massive case.[11] At trial the jury returned a verdict finding both Hazelwood and the corporation to have acted recklessly and awarded $287 million in compensatory damages to the class of plaintiffs—commercial fisherman whose industry had been wiped out by the oil spill.[12] In the subsequent phase of the trial, the court investigated the actions and omissions of Exxon officials leading up to the spill.[13] After reviewing the evidence, the jury found Exxon liable for punitive damages in the amount of $5 billion.[14]

A figure as massive as $5 billion in punitive damages naturally raises some eyebrows.[15] Because the U.S. Supreme Court had begun the process of reforming the law of punitive damages while the *Exxon* litigation was playing out in the lower courts, the verdict had to repeatedly be reviewed to ensure that it remained constitutional.[16] The Ninth Circuit twice remanded the case back to the trial court for an award adjustment.[17] Eventually, the Ninth Circuit took it upon itself to remit the award to $2.5 billion.[18] The constant bouncing back and forth between the district court and the Ninth Circuit kept the multi-billion dollar verdict in the news for almost two decades.[19]

Exxon was one of several cases that fueled the "tort reform" fire, which became a hot-button political issue during the 1990s and 2000s.[20] Awarding punitive damages has not always been commonplace in the American civil justice system.[21] In fact, prior to and during the first half of the twentieth century, cases rarely resulted in an award of punitive damages, which were reserved for exceptional cases.[22] This principle no

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10 *Id.*

11 *Id.*

12 *Id.* at 2615.

13 *Id.* at 2614. The case was so complicated that the district court divided the litigation into four phases. *Id.* at 2618 n.6.

14 *Id.*

15 *See* Jennifer Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 126 (2002).

16 *See In re* Exxon Valdez, 472 F.3d 600 (9th Cir. 2006); *In re* Exxon Valdez, 239 F.3d 985 (9th Cir. 2001).

17 *See In re* Exxon Valdez, 472 F.3d 600 (9th Cir. 2006); *In re* Exxon Valdez, 239 F.3d 985 (9th Cir. 2001).

18 *In re* Exxon Valdez, 400 F.3d 1066 (9th Cir. 2007).

19 *See* Robbennolt, *supra* note 15, at 126 (explaining that the media overrepresents cases involving products liability or medical malpractice, large damage awards, plaintiffs winning, and awards that include a punitive component).

20 *See, e.g.*, *Bush Outlines Medical Liability Reform*, CNN.COM, Jan. 16, 2003, http://www.cnn.com/2003/ALLPOLITICS/01/16/bush.malpractice [hereinafter *Medical Liability Reform*] (last visited Apr. 25, 2009).

21 *See* Priest, *supra* note 1, at 826–27.

22 *See id.*

longer constitutes the general rule today.[23] As a result, many want to revert to the days when a claim for punitive damages was the exception, not the expectation.[24] These tort reformers have proposed many possible reforms, including the following: (1) eliminating punitive damages altogether, (2) taking the issue out of the hands of the jury and leaving it in the hands of the judge, or (3) controlling the amount of punitive damages awarded through a legislatively-devised statutory scheme.[25]

The media's tendency to disproportionately report on verdicts that arguably involve excessive punitive damage awards distorts the public's perception of the way in which juries award punitive damages[26] and, to some extent, catalyzes the tort reform movement. The movement places much of the blame on the institution of the jury, and candidates for public office seize the opportunity to make political headway by promising institutional reform measures.[27] Detractors of punitive damages point to the award in *Exxon* as proof that juries cannot control their anger in many cases, and, that as a result, they award excessively large punitive damages.[28]

Such criticism is not altogether unwarranted. Cases like *Exxon* do indeed present a very real problem, because defendants face the prospect of having an "outlier jury" that will award damages grossly in excess of the amount that anyone might have predicted them to award. When this happens, defendants face the possibility of incurring insufferable punitive damage awards that can completely bankrupt the entity. Fixing this problem by having a judge determine punitive damages does not guarantee better results.[29] Moreover, eliminating punitive damages altogether is an overly drastic measure, given the unique ability of punitive damages to advance the important goals of retribution and deterrence in the American civil justice system. Relying solely on an appellate court's use of remittitur—the reduction of a jury damages award by a judge—to reduce outlier verdicts is also problematic.[30] The remedy, then, seems to

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23 *See id.*

24 *See, e.g.*, The American Tort Reform Association Homepage, http://www.atra.org (last visited Apr. 25, 2009).

25 *See, e.g.*, Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179, 210 (1998) ("Judges are better suited than juries to give appropriate weight to a defendant's finances.").

26 *See* Robbennolt, *supra* note 15, at 126 ("The information available in the media about civil jury decision-making is not a representative sample of all civil litigation.").

27 *See, e.g.*, *Medical Liability Reform*, *supra* note 20.

28 *See* John C. MacQueen & George Woodworth, *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1120 (1995).

29 David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139, 1170 (2000) ("The most radical reform would be to dispense with the jury entirely and to move toward judicial judgments . . . .").

30 *See* MacQueen & Woodworth, *supra* note 28, at 1123; *See also infra* Part III.C.

lie in exercising greater control over jury discretion, as it relates to awarding damages. This Note will propose several reforms to craft such a remedy.

Part I will present several factors that may lead a jury to render an outlier verdict. Part II will consider the reasons that the U.S. Supreme Court in *Exxon* chose to implement a 1:1 punitive-to-compensatory damage ratio-cap in federal maritime claims as a means to rein in outlier verdicts. Part III proposes that jurisdictions apply the 1:1 ratio-cap to all claims for punitive damages as well but allow awards to exceed the cap if a given plaintiff can prove beyond a reasonable doubt that the defendant acted with an "evil mind." These heightened standards present a compromise between decreasing the number of outlier verdicts through a ratio-cap and allowing the jury to maintain its power as a body representative of the community's sentiments.

I. FACTORS THAT MAY CAUSE JURIES TO RETURN OUTLIER VERDICTS

Multiple commentators have called for replacing juries with trial judges as the arbiters on questions of whether to award punitive damages.[31] Problems undoubtedly exist with allowing juries to award punitive damages, but despite these problems, those commentators who call for substituting judges for jurors in punitive damages matters go too far. The problems with the current system may explain what triggers a jury to return an apparently excessive verdict, but these problems do not —individually or in the aggregate—demand taking away this function from the jury altogether. Instead, the problems with the current system counsel in favor of reforms that will rein in some of the unbridled discretion that jurors currently possess in the area of returning damage awards.

Juries are inherently deliberative bodies.[32] While deliberations may strengthen a jury's ability to reach accurate decisions on questions of fact, they may also increase the risk of unpredictable and erratic dollar verdicts.[33] Professor David Schkade and his colleagues argue that jurors are quite competent when it comes to placing a defendant's conduct on a "punishment rating scale."[34] Problems with awards arise because jurors have difficulty understanding how the severity ratings they assess translate into dollar figures.[35] Even experts have difficulty agreeing on what punitive damage dollar figure will adequately punish a reprehensible defendant.[36] This inability to easily decide on punitive damage amounts

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31 *See, e.g.*, Mogin, *supra* note 25, at 221.
32 Schkade et al., *supra* note 29, at 1173.
33 *See, e.g.*, *id.*
34 *See id.* at 1169.
35 *See* PATRICK ATIYAH, THE DAMAGES LOTTERY 143–50 (1997).
36 *See* Schkade et al., *supra* note 29, at 1145.

can lead to juries arbitrarily choosing a figure, which occasionally results in a shockingly large award.[37] These awards then become dubiously characterized as outlier verdicts.[38] Deliberations may also cause problems because jurors lack the ability to adequately differentiate between compensatory damages and punitive damages. This inability to differentiate between the two types of damages can cause "leakage" between the two awards.[39]

A second factor that may lead to the occasional outlier verdict involves jury confusion about how to assess a dollar figure to effectuate optimal deterrence.[40] Optimal deterrence theory posits that punitive damages close the gap between the compensatory damages awarded and the amount of damages needed to deter future repetition of harmful behavior.[41] Jury instructions explain the different purposes served by awarding compensatory damages and punitive damages, but they often fail to provide guidance on how jurors should approach the different types of awards.[42] Even if courts did provide adequate instructions on how to address optimal deterrence, the risk would remain that jurors would not follow the instructions because ordinary people do not think in terms of optimal deterrence.[43] In addition, the large punitive damage awards reported in the media influence jurors' decisions.[44]

Another factor that deleteriously impacts the ability of juries to consistently award appropriate punitive damages involves the jury's penchant for presuming that defendants had more ex ante knowledge than they actually did.[45] Because of poor jury instructions, a poor explanation by defense counsel, or a decision to disregard the jury instructions received, jurors sometimes use a post-event reference point to assess the defendant's pre-event knowledge.[46] This use of hindsight often makes a juror believe that a much higher degree of care was warranted than "one based on the actual imperfect pre-[event] state of knowledge."[47] Although defendants may have reasonably arrived at their ultimate decision

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37 *See id.* at 1144–45.

38 *See id.*

39 *See* Michelle Chernikoff Anderson & Robert J. MacCoun, *Goal Conflict in Juror Assessments of Compensatory and Punitive Damages*, 23 LAW & HUM. BEHAV. 313, 315–16 (1999).

40 Robbennolt, *supra* note 15, at 108.

41 *Id.* at 130.

42 *See, e.g.*, Edith Greene et al., *The Effects of Limiting Punitive Damage Awards*, 25 LAW & HUM. BEHAV. 217, 223 (2001).

43 *See* Cass R. Sunstein et al., *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237, 250 (2000).

44 Robbennolt, *supra* note 15, at 108.

45 *E.g.*, Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance As a Risk Manager*, 40 ARIZ. L. REV. 901, 914 (1998).

46 *See id.*

47 *See id.*

prior to the event, jurors who review a defendant's decision years later—when the case actually comes to trial—may see the defendant as having acted on nothing more than a "wild hunch."[48] Presuming more knowledge than the defendant's actual pre-event knowledge tends to sway juries toward increasing their culpability ratings for the defendant's action.[49] This tendency exists because jurors assign greater culpability to defendants who acted with more pre-event knowledge than they do to defendants who acted with less pre-event knowledge.[50]

A fourth factor that may exert an upward influence on juries' punitive damage verdicts involves the media's coverage of the American civil justice system. Litigation that results in very large punitive damages often garners significant media attention, and verdicts like the $2.7 million McDonald's hot coffee award and the $5 billion Exxon *Valdez* oil spill award have become a part of popular culture.[51] Professor Jennifer Robbennolt explains:

> [I]t is likely that cases that result in large punitive damage awards are more available in memory and are called to mind more easily because they are reported more frequently in the media than are other cases. Media reports of plaintiffs winning large punitive damages awards may inform jurors' judgments of the appropriate range of recovery in subsequent cases. If jurors use the cases that are available in memory as benchmarks, larger damages awards might result.[52]

Each of these factors may help explain the reasons that juries return an occasional outlier verdict. Sometimes an individual factor may cause the result, and other times the result may stem from a combination of factors. While outliers may not be as prevalent as many think,[53] occasionally a jury verdict deviates so substantially from the typical punitive-to-compensatory ratio in similar cases that one cannot characterize the punitive damages award as anything other than excessive. Typically, the system has relied upon trial and appellate courts to exercise their powers of remittitur to adjust the award downward, but those courts do not always opt to exercise such powers. It is for this reason that the U. S. Supreme Court stepped in.

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48 Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 621 (1998).

49 *E.g.*, Hastie & Viscusi, *supra* note 45, at 914.

50 *See id.*

51 Robbennolt, *supra* note 15, at 104.

52 *Id.* at 127.

53 *See* Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 3 J. EMPIRICAL LEGAL STUD. 263, 293 (2006).

II. THE DEVELOPMENT OF U.S. SUPREME COURT PUNITIVE DAMAGES CAP JURISPRUDENCE

Beginning in the early 1990s, the U.S. Supreme Court started to provide some general guidance as to the constitutionality of enormous and seemingly excessive punitive damage awards that survived appellate remittitur review. In determining whether to strike down an award as grossly excessive, the Court applied a reasonableness test to two separate cases.[54] The Court chose to uphold the awards in both cases, despite one of the cases presenting an award in which the punitive-to-compensatory ratio was 526:1.[55]

In 1996, the Court actually invoked a new strain of substantive due process analysis to strike down a punitive damage award as grossly excessive in *BMW of North America, Inc. v. Gore*.[56] In striking down the $4 million punitive damages verdict,[57] the Court promulgated a new inquiry that required both an identification of the state interest furthered by the punitive award[58] and an inquiry into whether the award proportionally furthered the legitimate state interest.[59] The Court's discussion of proportionality revolved around three guideposts: (1) the degree of reprehensibility of the defendant's acts or omissions, (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages awarded, and (3) the difference between the particular remedy awarded and the civil penalties imposed in analogous cases.[60]

Another seven years passed before the Court refined its punitive damages-due process analysis. In *State Farm Mutual Automobile Insur-*

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54 TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 443 (1993) (holding that "a general concern of reasonableness properly enters into the constitutional analysis."); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) (holding that "[a]lthough a mathematical bright line cannot be drawn between the constitutionally acceptable and the constitutionally unacceptable that would fit every case, general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.").

55 *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

56 *See generally* 517 U.S. 559 (1996) (holding that the $2 million punitive damages award is grossly excessive, and therefore exceeds the constitutional limit). The Court did, however, strike down a punitive damage award two years earlier in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 435 (1994). The majority reached this decision, however, because the state court system in Oregon disallowed appellate reversal of a punitive damage award in which the defendant's sole basis for a new trial or reversal request stemmed from the amount of punitive damages awarded. *Id.* at 426–27. Consequently, the procedure, rather than the award itself, grounded the *Oberg* Court's holding. *Id.* at 434–35.

57 To support this claim for punitive damages, the plaintiff showed that BMW had a nationwide policy of not disclosing to consumers any pre-sale repairs made on vehicles, which resulted in their portraying 983 refinished cars as new between 1983 and the trial date. *Gore*, 517 U.S. at 564.

58 *Id.* at 568.

59 *Id.* at 596–97 (Breyer, J., concurring).

60 *Id.* at 574–75.

ance Co. v. Campbell,[61] the Court struck down a Utah jury's $145 million punitive damage award as grossly excessive in light of the accompanying $1 million compensatory damage award.[62] Applying the *Gore* guideposts, the *State Farm* Court focused primarily on the punitive-to-compensatory damage award ratio.[63] Without drawing the line at any specific ratio, the Court declared, "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1, or, in this case, of 145 to 1."[64] Even though the Court refused to draw a bright line ratio rule, the Court took a step closer in that direction by using the 145 to 1 ratio as "clear evidence" that the award lacked proportionality.[65] The Court went so far as to say that "[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."[66]

In 2008, the Court had an opportunity to refine its ratio-cap analysis when the *Exxon* case finally came before it.[67] It is important to note the case's procedural posture. *Exxon* presented a question of first impression regarding the extent to which maritime law allows an award of punitive damages.[68] In *State Farm* and *Gore*, the Court had to determine whether the awards violated the defendants' rights to due process; however, in *Exxon* the Court did not conduct any due process analysis, but rather set the punitive-to-compensatory damage award ratio at 1:1 as the federal common law standard for maritime claims.[69] As such, the opinion provides much deeper insight into the justices' views because constitutional analysis did not constrain the way in which they could express their views.[70] Additionally, this case marked the first time in which Chief Justice Roberts voted on the punitive damage ratio-cap issue.[71]

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61 538 U.S. 408 (2003).

62 *Id.* at 429.

63 *See id.* at 425–26.

64 *Id.* at 425.

65 *See id.*

66 *Id.*

67 Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2611 (2008).

68 *Id.* at 2619.

69 *Id.* at 2633; *compare Campbell*, 538 U.S. 408 (2003) (holding that a punitive damage award that substantially outweighs the compensatory damages is excessive and violative of due process), *and Gore*, 517 U.S. 559, 585–86 (1996) (holding that a "grossly excessive" punitive damages award violates constitutional due process), *with Exxon*, 128 S. Ct. at 2626 (noting that "[t]oday's enquiry differs from due process review because the case arises under federal maritime jurisdiction, and we are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process.").

70 *Exxon*, 128 S. Ct. at 2626.

71 *Id.* at 2611. Unfortunately, Justice Alito took no part in deciding the case, so his views remain unknown. *Id.*

Ultimately, in a 6-3 opinion, the Court held that a 1:1 punitive-to-compensatory award ratio-cap should govern federal maritime cases,[72] but the reasoning that the Court used in reaching this conclusion could easily extend to all federal common law cases. The *Exxon* majority approvingly cited a study, performed by Professor Theodore Eisenberg and his colleagues, that found a median punitive-to-compensatory damage award ratio of 0.62:1 in jury trials and a 0.66:1 ratio in bench trials.[73] This study concluded that the similarity in award rates probably meant that judges and juries reach similar conclusions, and the slight difference may only reflect a tendency of defendants to route punitive award cases to judges rather than juries, who are perceived as more punitive damage award-friendly.[74] The Court also cited a study, performed by Neil Vidmar and Mary Rose that analyzed civil cases in Florida state courts between 1989 and 1998.[75] This study found a median ratio of 0.67:1 in cases with punitive damage awards.[76]

Drawing on such empirical evidence, the Court concluded that juries do award punitive damages somewhat consistently, but that "stark unpredictability of punitive awards" marred the system.[77] Noting that the Eisenberg study's finding of a mean ratio of 0.62:1 also found a mean ratio of 2.90:1 with a standard deviation of 13.81,[78] Justice Souter's majority opinion asserted that "[t]he spread in state civil trials is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories."[79] In an attempt to reduce unpredictability, the Court decided that a 1:1 ratio should cap the amount of punitive damages that a jury could award in maritime cases.[80] Again, this empirically-based reasoning could drive the extension of a 1:1 cap into other areas of federal law, which, as Part III will argue, would be a positive development in the law of punitive damages.

III. PROPOSALS FOR REFORM OF PUNITIVE DAMAGES LAW

Professor George L. Priest, a commentator who writes frequently on tort reform, argued, "What is needed for punitive damages reform is a prudential judgment of the appropriate cap or limit to punitive damages that will allow some room for punishing egregious behavior but constrain

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72 *See id.* at 2633.

73 *Id.* at 2625 & n.14.

74 Eisenberg et al., *supra* note 53, at 293.

75 *Exxon*, 128 S. Ct. at 2625.

76 Neil Vidmar & Mary Rose, *Punitive Damages by Juries in Florida: In Terrorem and in Reality*, 38 HARV. J. ON LEGIS. 487, 492 (2001).

77 *Exxon*, 128 S. Ct. at 2625.

78 Eisenberg et al., *supra* note 53, at 269.

79 *Exxon*, 128 S. Ct. at 2625.

80 *Id.* at 2633.

the deleterious effects of unlimited punitive damages judgments on consumers."[81] This Note proposes to reform punitive damage awards in a way that comports with Professor Priest's view of how the system should change. Part A of this section will provide background information about capping punitive damages. Part B will argue that extending the *Exxon* 1:1 cap would appropriately limit punitive damages. Part C will propose that juries should have discretion to exceed the 1:1 cap for particularly egregious cases, but only if the plaintiff can carry a two-part heightened standard of proof.

A. *Background Information on Capping Punitive Damages*

The push for a cap on punitive damage awards did not start with the U.S. Supreme Court. Proponents of tort reform have been waging the battle for a cap on punitive damages for over a decade in the state legislatures. The North Carolina[82] and Texas[83] state legislatures passed reform measures in 1995. Numerous other states have followed suit.[84] States generally have chosen to cap punitive damages in one of three ways. One group of states, which includes Georgia, caps punitive damages at an absolute dollar amount, usually between $250,000 and $350,000.[85] A second group of states, which includes Colorado, Connecticut, and Pennsylvania, uses punitive-to-compensatory damage ratio caps to impose ceilings on punitive damage awards, like the U.S. Supreme Court did in *Exxon*.[86] The third group of states, which includes Alabama, Alaska, Florida, Indiana, Kansas, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, and Texas, uses a hybrid of the two systems.[87]

The imposition of such caps has spawned a significant group of detractors.[88] Some argue that caps unreasonably treat all defendants the same, making no exceptions for defendants who have behaved in a par-

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81 Priest, *supra* note 1, at 839.

82 *See* N.C. GEN. STAT. § 1D-25 (2007). The reform limits the award of punitive damages in most actions to the greater of $250,000 or three times the award of compensatory damages. *Id.*

83 *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon 2009). The statute limits punitive damage awards for most actions to the greater of $200,000 or twice the award of economic damages plus non-economic damages, up to $750,000. *Id.*

84 Jonathon Klick & Catherine Sharkey, *What Drives the Passage of Damage Caps?* 2 (Univ. of Pa. Inst. for Law & Econ., Working Paper No. 09-09), *available at* http://ssrn.com/abstract=1342535.

85 Robbennolt, *supra* note 15, at 169 n.308. Some states allow awards above the cap if they involve special claims set out by statute. *Id.* Georgia, for example, allows punitive damage awards greater than $250,000 if the harm results from product liability or substance abuse. *Id.*

86 *Id.* at 169 n.309. Colorado uses a 1:1 ratio. *Id.* Connecticut uses a 2:1 ratio. *Id.* Pennsylvania generally uses a 2:1 ratio. *Id.*

87 *See id.* at 169 n.310.

88 *See id.* at 169–70.

ticularly egregious manner.[89] Others argue that in some cases caps withhold from juries the tools needed to effectuate optimal deterrence, one of the two reasons that punitive damages are part of the system in the first place.[90] They argue that punitive damage caps provide defendants with the ability to calculate the maximum liability that could result if they engage in particular types of misconduct. This incentivizes defendants to proceed with harmful behavior if the profits derived exceed the resulting compensatory payouts.[91] A third common argument found in the literature theorizes that caps paradoxically act as an "anchoring" force that increases the typical jury's punitive damages award.[92]

B. *Positive Implications of Extending the 1:1* Exxon *Cap to Other Areas of the Law*

Implementing a cap based on the *Exxon* 1:1 ratio will likely exert a positive influence on the American civil justice system, while affecting only a limited number of cases. The Eisenberg study provided empirical data that the median ratio of punitive-to-compensatory damages in jury trials is 0.62:1.[93] Even using the 0.67:1 median found by the Vidmar and Rose study,[94] a 1:1 ratio provides considerable room for a jury to exercise its discretion and to exceed the punitive-to-compensatory ratio that the median jury would impose. A 1:1 ratio-cap permits a jury to exceed the median ratio by over 50%. Most juries would not feel the pressure of the cap because most juries do not even approach the 1:1 ratio. This fact can be inferred from the disparity between the Eisenberg study's 0.66 median ratio and the 2.90 mean ratio. A rudimentary understanding of statistics indicates that this disparity between the mean and median re-

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89 *See, e.g.*, Thomas M. Melscheimer & Steven H. Stodghill, *Due Process and Punitive Damages: Providing Meaningful Guidance to the Jury*, 47 SMU L. REV. 329, 347–48 (1994). Justice Ginsburg falls into this category, as evidenced by her dissent in *Exxon,* in which she questioned whether the Court would increase the ratio for a defendant who acted in a more blameworthy manner than did Exxon. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2639 (2008) (Ginsburg, J., dissenting) ("The 1:1 ratio is good for this case, the Court believes, because Exxon's conduct ranked on the low end of the blameworthiness scale: Exxon was not seeking 'to augment profit' nor did it act 'with a purpose to injure.' What ratio will the Court set for defendants who acted maliciously or in pursuit of financial gain? Should the magnitude of the risk increase the ratio and, if so, by how much?").

90 *See, e.g.*, Jacqueline Perczek, Note, *On Efficiency, Punishment, Deterrence, and Fairness: A Survey of Punitive Damages Law and a Proposed Jury Instruction*, 27 SUFFOLK U. L. REV. 825, 865–66 (1993).

91 *See id.*

92 Robbennolt, *supra* note 15, at 171–73. Robbennolt and Studebaker successfully showed that mock juries operating under the instruction of a cap consistently returned higher awards than did mock juries that had the freedom to choose any award of their own volition. *See* Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 J.L. & HUM. BEHAV. 353, 359, 361, 364–66 (1999).

93 Eisenberg et al., *supra* note 53, at 269.

94 Vidmar & Rose, *supra* note 76.

sults from the majority of awards being heavily skewed toward a lower ratio. Thus, the cap would constrain the discernible outlier verdicts that drive the mean ratio significantly higher than the median ratio. Without such a cap, the *Exxon* Court's noted fears about unpredictability present a potential hazard for litigants trying to navigate the unwieldy American civil litigation system.

Even if, as some commentators argue, the empirical evidence does not bear out the fact that verdicts actually are highly unpredictable,[95] the media likely fosters this perception, and the perception alone likely hinders the settlement process. For example, Jeffrey Rachlinski argues that those who subscribe to law and economics theory assume that a litigant will settle only when the settlement's value exceeds the expected cost of continuing to litigate.[96] Rachlinski, however, points to empirical research performed in the field of cognitive behavioral psychology that suggests decision makers contemplating gains tend toward risk aversion, while decision makers contemplating losses tend toward risk-seeking behavior.[97] This behavioral phenomenon, he argues, carries over into the realm of litigation, where plaintiffs tend toward settlement because they are risk-averse, and defendants tend toward taking their chances at trial because they are risk-seeking and settlement constitutes a sure loss.[98]

Defendants facing the prospect of punitive damages must use a different calculus than defendants who only face the prospect of compensatory damages. Insurance policies often do not cover punitive damage awards, and sometimes an award of punitive damages abrogates the company's obligation to pay the compensatory award portion.[99] Additionally, punitive damages have single-handedly forced profitable businesses into immediate bankruptcy.[100] For these reasons punitive damages can act as a type of "corporate capital punishment."[101] These factors likely result in defendants proceeding in a more risk-averse manner than they would if they only faced compensatory damages. However, the 1:1 ratio-cap would mitigate these factors because it would enable a defendant to predict the maximum loss possible. Without the fear of a jury returning a figure grossly exceeding anything the defendant had contemplated at the outset of litigation, a defendant may zealously litigate against frivolous claims.

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95 *See* Eisenberg et al., *supra* note 53, at 290–93.

96 Jeffrey J. Rachlinski, *Gains, Losses & The Psychology of Litigation*, 70 S. CAL. L. REV. 113, 117 (1996).

97 *Id.* at 119.

98 *Id.* at 129.

99 Symposium, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1414 (1993).

100 *Id.* at 1414–15.

101 *Id.* at 1415.

The possibility of substantial punitive damages almost certainly changes the behavior on both sides of the dispute. News reports about juries returning enormous punitive damage awards may cause plaintiffs to "shoot for the moon" more frequently than they otherwise would, and thus settle less often.[102] A 1:1 cap would encourage settlement by subduing the urges of meritorious plaintiffs to litigate zealously in hopes of receiving a windfall from an enormous punitive damage award. Because defendants would no longer have to fear unimaginably high punitive damage awards and would therefore be more likely to litigate than settle, the cap would weed out those plaintiffs who bring frivolous claims looking for easy cash from a quick settlement.

Some evidence about juror attitudes and limitations also suggests that an occasional outlier verdict should be expected. Product liability cases, for example, often present necessarily complex testimony that the typical juror finds dull.[103] The complexity of such technical evidence often bores jurors or leaves them confused.[104] To make matters worse, these cases have a tendency to drag on for weeks or months at a time, with a plethora of expert witnesses being called to testify during the course of the trial.[105] While studies have shown that many jurors "begin with strong assumptions about unjustified lawsuits and concern for a litigation explosion," studies have also shown that seriously injured plaintiffs may tug at jurors' heartstrings.[106] When a plaintiff testifies about the event that caused the injury, the witness is very likely to have the jury's undivided attention. The nature of such complex trials makes this testimony probably the least important of any, but the most likely to be remembered during deliberation. Furthermore, while researchers disagree over the extent to which jurors tend to have a natural dislike for large corporations,[107] most would agree that jurors tend to hold corpora-

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102 *See* Aaron D. Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. MICH. J.L. REFORM 575, 612 (1985).

103 *See* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 10 (1982).

104 *See id.*

105 *Id.*

106 NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 274 (2007). Professor Jennifer Robbennolt also conducted a study in which she reviewed seventy-five previous studies of this phenomenon and, concluded that people tend to assign greater responsibility for the happening of an accident when the plaintiff has suffered serious harm as compared to less serious harm. *Id.*

107 *Compare* Owen, *supra* note 103, at 11 ("[J]urors have a natural sympathy for a seriously injured person that is reinforced when the defendant is a manufacturer, for many people are hostile toward major institutions in general and 'big business' in particular. Some jurors may thus be tempted to simplistic explanations of the issue . . . that comport with their preconceived notions of manufacturers' oppression of consumers."), *with* VIDMAR & HANS, *supra* note 106, at 278 ("[J]urors seem to use the same basic template to assess individual and corporate responsibility . . . .").

tions to a higher standard for their conduct, which puts corporations at a disadvantage in the civil justice system.[108] Some feel that the media fuels a negative bias toward institutions and big business by portraying such entities as "foolish, greedy, or criminal" and "as the embodiment of all that is wrong with America."[109]

These problems may not be confined to product liability cases either. Similar problems may also arise during trademark infringement and patent infringement cases because those cases frequently involve both technical testimony and corporate defendants. The tendency to hold corporations to a higher standard may arise in any and all suits by individuals against big business.[110] Trial tools such as jury instructions and voir dire seem unlikely to completely remove such tendencies from the jury pool.

C. *Proposing Heightened Standards of Proof for Awards Exceeding the 1:1 Cap*

Concerns about handcuffing the jury with a rigid 1:1 ratio-cap are well-founded. After all, the jury's primary function is to serve as a diverse and representative cross section of the community,[111] and a strict cap may obstruct it from fully relaying the community's sentiments. There can, however, be a middle ground between imposing a ratio-cap and maintaining the jury's province over expressing the community's sentiments. Finding this middle ground can be accomplished by heightening the standards of proof necessary for a plaintiff who wants the jury to award punitive damages in excess of the 1:1 ratio. The proposed heightened standards would have two components. First, the plaintiff would have to prove that the defendant acted with an evil mind. Second, the plaintiff would have to prove this element beyond a reasonable doubt. Justice Ginsburg, one of three dissenting justices in the *Exxon* decision, criticized the majority's 1:1 ratio-cap due to the majority's lack of guidance on when a jury can deviate from that 1:1 cap.[112] These heightened proof standards address Justice Ginsburg's criticism head-on.

The evil mind standard comes from a line of precedent arising out of Arizona state common law. Arizona applies the evil mind standard to every punitive damage claim.[113] The Supreme Court of Arizona adopted and delineated the contours of this standard in its 1986 decision in *Linthi-*

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108 *See* VIDMAR & HANS, *supra* note 106, at 279.

109 Owen, *supra* note 103, at 11 n.56.

110 VIDMAR & HANS, *supra* note 106, at 279.

111 *Id.* at 74–76.

112 Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2639 (2008) (Ginsburg, J., dissenting).

113 Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 680 (Ariz. 1986) (en banc) (holding that a jury must find evidence that the defendant manifested an evil mind before the jury can award punitive damages).

cum v. Nationwide Life Insurance Company.[114] The *Linthicum* Court admonished lower courts to focus their inquiry on the mental state of defendants facing punitive damage claims.[115] Under the evil mind test, the mere commission of a tort is not enough to warrant punitive damages.[116] Although a jury may infer an evil mind through circumstantial evidence, the defendant must have acted outrageously or in a manner that "create[d] a tremendous risk of harm to others," in addition to having either acted with intent or with a conscious disregard of an unjustifiably substantial risk of significant harm to the plaintiff.[117] In short, the plaintiff must show that "the defendant's evil hand was guided by an evil mind."[118]

The second standard that should control revolves around the standard of proof. Whenever a plaintiff requests a punitive damage award exceeding the 1:1 cap, the plaintiff should have to prove the evil mind element *beyond a reasonable doubt*. The beyond a reasonable doubt standard, applied primarily in criminal cases, is the highest standard used in American courts. Colorado, however, decided to try reining in excessive punitive damage awards by enacting a statute providing that for all claims of punitive damages, the plaintiff must prove the claim beyond a reasonable doubt.[119] To impose a jury's recommended punitive damage award, Oklahoma state law requires *both* the jury to find by clear and convincing evidence that the defendant acted intentionally *and* the court to find beyond a reasonable doubt that a defendant acted intentionally and threatened human life.[120]

Of course, the argument that the beyond a reasonable doubt standard would materially impact the awarding of punitive damages assumes that juries can capably differentiate between different standards of proof. Although juries report struggling with the terms typically employed to describe burdens of proof,[121] research suggests that jurors generally understand the beyond a reasonable doubt standard, and when they misunderstand it, it is because they interpret it as a *higher* standard than that which beyond a reasonable doubt actually intends to require.[122]

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114 *See id.* at 675.

115 *Id.* at 679.

116 *Id.* (citing Rawlings v. Apodaca, 726 P.2d 565, 578 (Ariz. 1986)).

117 *Id.* at 679–80.

118 *Rawlings*, 726 P.2d at 578. The Supreme Court of Missouri also cited *Rawlings* and the quote "[T]he plaintiff must prove that the defendant's evil hand was guided by an evil mind" as an accurate characterization of its own law of punitive damages. Burrnett v. Griffith, 769 S.W.2d 780, 787 (Mo. 1989).

119 COLO. REV. STAT. § 13-25-127(2) (2003).

120 OKLA. STAT. tit. 23, § 9.1 (2009).

121 VIDMAR & HANS, *supra* note 106, at 129.

122 *See id.* at 161. Research by Geoffrey Kramer and Dorean Koening found that jurors tend to equate "guilty beyond a reasonable doubt" with 100 percent certainty. Geoffrey

The O.J. Simpson case provides anecdotal evidence that juries can competently differentiate between the standards.[123] When the state of California tried Simpson for double murder, the jury returned a verdict finding Simpson not guilty.[124] After the verdict, one of the alleged victim's fathers filed suit against Simpson for the wrongful death of his daughter.[125] In the wrongful death civil case, which applied a preponderance of the evidence standard, the jury returned a verdict for the plaintiff, finding it more likely than not that Simpson killed his ex-wife, Nicole Brown Simpson, and Ron Goldman.[126] On its face, these divergent verdicts suggest that juries may have the capacity to distinguish between different burdens of proof.[127]

Because juries seem to possess this competency, requiring proof beyond a reasonable doubt that the defendant acted with an evil mind for awards exceeding the 1:1 cap would vastly improve the punitive damages system that currently exists in the United States. This heightened burden of proof standard would serve three functions. It would advance (1) the goal of retribution, (2) the goal of optimal deterrence, and (3) the goal of increasing the legitimacy of large punitive damage awards.

The evil mind standard advances the goal of retribution, one of two purposes that theoretically underpin the imposition of punitive damages. If a plaintiff provides enough evidence to meet the heightened standard, it allows a jury to exceed the 1:1 ratio-cap for tortious actions that spark the community's disdain. The evil mind standard ensures that the defendant facing punitive damages acted more egregiously than a defendant who merely acted negligently or recklessly.[128] By requiring such a high and specific mental state, the test reduces the likelihood that a jury will punish a corporation solely because the jury believes the corporation should comply with a higher standard.[129] The test also would afford defendants greater protection from punitive damage awards that result from the jury finding higher levels of culpability when a plaintiff has suffered serious injury from an act of negligence.[130]

Kramer & Dorean Koening, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401, 414–15 (1990).

123 VIDMAR & HANS, *supra* note 106, 196–97.

124 *Id.* at 196.

125 *Id.* at 196–97.

126 *Id.* at 197.

127 *See id.* Of course, it is important to note that different juries sat for the different trials. *Id.* As a result, other factors could possibly explain the different results. These factors include different attitudes, different presentations of the evidence, the judges diverging on the admission of questionable evidence, and possible bias to the civil jurors from the extensive media circus that the criminal case triggered.

128 *See* Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 680 (Ariz. 1986) (en banc).

129 *See supra* Part II.B.

130 *See id.*

The proposed heightened proof standard for awards exceeding the 1:1 cap better advances the goal of retribution than does setting either an absolute maximum dollar amount on punitive damages or an absolute ratio ceiling on punitive-to-compensatory awards, as was done by a group of states.[131] One concern that grounded the *Exxon* dissents by Justices Stevens and Breyer relates to this issue. Stevens argued, "[T]he jury could reasonably have given expression to its 'moral condemnation' of Exxon's conduct in the form of this [17.4:1 punitive-to-compensatory] award."[132] Breyer similarly explained, "The jury could reasonably have believed that Exxon knowingly allowed a relapsed alcoholic repeatedly to pilot a vessel filled with millions of gallons of oil through waters that provided the livelihood for the many plaintiffs in this case."[133]

Under the strict 1:1 ratio-cap adopted by the *Exxon* majority, the most punishment that the jury could dole out against Exxon was the $287 million that matched the compensatory damages. But if the proposed evil mind standard applied, the jury would have more discretion in awarding a larger amount of damages if the plaintiffs could establish beyond a reasonable doubt that Exxon acted with an evil mind. The heavy burden that the plaintiff would bear seems to make it likely that under the proposed rule, the 1:1 ratio-cap would govern because Exxon probably neither intended nor would have knowingly allowed its severely inebriated captain to navigate around an underwater reef. Yet, the possibility exists that the plaintiffs could have proven these facts, thus satisfying the concerns harbored by Stevens and Breyer, and suggesting that reaching a middle ground in this controversial area of the law is possible.

The heightened proof standards also advance the goal of optimal deterrence, the second theoretical underpinning of punitive damages law. Optimal deterrence is the notion that punitive damages serve the purpose of closing the gap between the compensatory damages awarded and the amount of damages needed to deter future repetition of harmful behavior.[134] If a defendant calculated that its tortious conduct would result in 100 deaths per year and that the resulting compensatory damages would amount to $500,000 per death, it could then determine whether the profits resulting from its tortious act would exceed the aggregate payout for the deaths. Unless the law closes the gap to make the tortious conduct unprofitable, the defendant could proceed profitably with its egregious behavior as long as the behavior grossed the defendant more than $50

131 *See supra* Part II.A.

132 Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2638 (2008) (Stevens, J., dissenting).

133 *Id.* at 2640 (Breyer, J., dissenting).

134 *See* Robbennolt, *supra* note 15, at 130.

million per year.[135] On the other hand, an exceedingly large award can result in over-deterrence. When the law over-deters, individuals or entities operate inefficiently to avoid accidents.[136] When a jury awards an excessive punitive damage award, it over-deters others from engaging in similar conduct, which may result in inefficient accident avoidance.[137]

The 1:1 ratio-cap strives to cut down on over-deterrence by reducing excessive punitive damages. State systems that use absolute dollar figure ceilings or absolute punitive-to-compensatory damage award ratio caps attempt to achieve the same goal. Only focusing on reducing over-deterrence may, however, result in under-deterrence. It is for this reason that absolute dollar figure ceilings or absolute ratio-caps do not accomplish the goal of optimal deterrence as well as the proposed 1:1 ratio-cap with an option for deviation would.

This very criticism drives much of Justice Ginsburg's dissent in *Exxon*. The rigidity of a 1:1 ratio-cap concerned her a great deal because it gave no guidance for when and if lower courts could deviate from the 1:1 standard.[138] If the *Exxon* Court's new rule categorically barred deviation from the 1:1 rule, then cases might arise where the jury will lack the tools necessary to adequately deter a tortfeasor. Indicating her concern about this point, Justice Ginsburg questioned, "What ratio will the Court set for defendants who acted maliciously or in pursuit of financial gain?"[139] This concern—along the lines of the dissents by Stevens and Breyer—might also be a concern that juries lack the tools necessary to carry out retribution. The proposed heightened proof standards would alleviate this unease in the same way it alleviated the concerns of her two dissenting colleagues.

The third goal achieved by the evil mind standard is that it would increase the public's belief in the legitimacy of large punitive damages awards. Achievement of this goal requires improving the accuracy of jury verdicts. If punitive damage awards do suffer from significant variability, then the cap should rein in the outliers because few cases will likely provide sufficient evidence to prove the evil mind standard beyond a reasonable doubt. Cases in which the jury does find that the plaintiff met such an exacting standard allow the legal system and the public to place more faith in the award's accuracy because the defendant's behavior must have been egregious, and the proof of such behavior must have been substantial. After all, research demonstrates that juries understand

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135 *See* Sunstein et al., *supra* note 44, at 238 n.4.

136 *See* Carl Shapiro, *Symposium on the Economics of Liability*, 5 J. ECON. PERSP. 3, 5 (1991).

137 *Cf. id.*

138 *See Exxon*, 128 S. Ct. at 2639 (Ginsburg, J., dissenting).

139 *See id.*

the exacting standard that beyond a reasonable doubt entails.[140] As Neil Vidmar and Valerie Hans explain,

> Research shows us that jury acquittals with which the trial judge disagrees are more likely to occur than jury convictions with which the trial judge disagrees. When the jury diverges from the legal expert, it is in the direction of acquitting rather than convicting . . . . The jury's tendency to acquit is consistent with the adage that it is better to let ten guilty persons go free than to convict one innocent person.[141]

Even if the Eisenberg study correctly claims that punitive damages awards are somewhat predictable, the evil mind standard should increase the public's confidence that the defendant behaved egregiously, and the beyond a reasonable doubt standard should increase the public's confidence that the jury returned an accurate verdict.

The evil mind standard is superior to a system that strictly relies on the use of remittitur by trial courts and appellate courts for several reasons. One major problem with permitting an appellate court to use remittitur to reduce a verdict that appears to be an outlier is that it makes the trial judge or appellate court a kind of "super fact-finder."[142] Jurors have the unique experience of hearing live testimony and seeing witnesses' demeanors. Appellate courts, on the other hand, are not nearly as well-equipped as a jury to make decisions on whether an award makes sense in light of the evidence presented at trial because the appellate court must rely strictly upon the trial transcript.[143] When the trial court judge reduces the award, "the trial judge becomes a jury of one."[144] Except for the most egregious cases of excessiveness, trial and appellate judges have no greater capacity to improve upon the results returned by juries.[145] Consequently, the proposed heightened standards keep decisions about an award's appropriateness in the hands of the individuals with the greatest amount of information—the jury.

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140 VIDMAR & HANS, *supra* note 106, at 196. Admittedly, this tendency by jurors may not result directly, solely, or even at all from the charge of "proof beyond a reasonable doubt," but rather from the jurors understanding that their decision will determine whether a person will spend years in a penitentiary and suffer severe consequences, even after release from prison. But it also suggests that jurors may associate more seriousness with the charge of "beyond a reasonable doubt" even in a civil context because of their association with the phrase in the criminal context.

141 *Id.*

142 *See* Firestone v. Crown Ctr. Redevelopment Corp., 693 S.W.2d 99, 110 (Mo. 1985) (abolishing the use of remittitur in Missouri).

143 *See id.* (citing Burdict v. Mo. Pac. Ry. Co., 27 S.W. 453, 458–66 (Mo. 1894)).

144 Irene Deaville Sann, *Remittiturs (and Additurs) in the Federal Courts: An Evaluation with Suggested Alternatives*, 38 CASE W. RES. L. REV. 157, 213 (1987–88).

145 *See* MacQueen & Woodworth, *supra* note 28, at 1120.

The heightened standards of proof would also improve upon a system that relies solely on remittitur by improving judicial economy and efficiency. Some critics view remittitur as a procedure that "encourages waste of judicial time and energy."[146] When a jury returns an award, a defendant has nothing to lose by filing a motion for remittitur.[147] Trial courts and appellate courts then have to rule on these motions.[148] The defendant might lose on its request. If this happens, then the status quo, from the defendant's perspective, has not changed.[149] If the defendant wins, however, the plaintiff will have to choose between a new trial and accepting the reduced damages award proposed by the court.[150] In practice, the plaintiff accepts the remittitur almost every time.[151] Additionally, before the court returns its decision on the remittitur motion, it must meticulously calculate the appropriate damages award, which will end up wasted if the plaintiff selects a new trial instead.[152] The heightened proof standard proposal, meanwhile, should improve judicial economy because the more exacting standards of proof should inspire greater confidence in judges reviewing awards for accuracy.

CONCLUSION

This Note has argued for a tort reform measure that serves as a compromise between those who advocate for a rigid fixed-ratio cap on punitive damages and those who want to maintain the jury's ability to represent community values. The proposal is two-part: (1) impose a 1:1 punitive-to-compensatory damages cap on punitive damage awards; and (2) for cases in which the plaintiff requests a punitive damage award in excess of the 1:1 ratio, allow the jury to exceed the cap only if the plaintiff can prove beyond a reasonable doubt that the defendant acted with an evil mind. This new two-part standard reduces the likelihood of outlier verdicts, while still permitting juror discretion for those cases in which egregious behavior by a defendant is proven beyond a reasonable doubt. These proposals perform what many think to be impossible—provide a middle ground between punitive damage award caps and maintain the integrity of the jury's province.

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146 *See, e.g.*, Sann, *supra* note 144, at 214–15.
147 *See id.* at 215.
148 *See id.*
149 *See id.*
150 *See id.*
151 *See, e.g.*, Sann, *supra* note 144, at 215.
152 *See id.*