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COMMENT: JUDGE OR JURY: WHO SHOULD ASSESS PUNITIVE DAMAGES?

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SUMMARY:

... The constitutionality of judicial assessment has recently been addressed by the highest courts of Kansas and Ohio, with conflicting results. ... The Supreme Court reversed the Fourth Circuit, finding that the developer was entitled to a jury trial for a determination of liability, but was not entitled to a jury assessment of the civil penalty. ... Justice Wright, joined by Chief Justice Moyer, dissented. ... On the state level, the Kansas Supreme Court in *Smith v. Printup* interpreted its jury trial provision to permit judicial assessment of punitive damages. ... Thus, the Kansas Supreme Court correctly concluded that the Kansas jury trial guarantee does not bar judicial assessment of punitive damages. ... However, a commentator advocating jury assessment of punitive damages has warned of the danger of judicial bias, arguing that judges may be influenced by political pressures and biased in favor of the wealthy and the government. ... Thus, if punitive damage awards are reduced, fewer plaintiffs may choose to expend the trouble and cost necessary to bring suit and vindicate their rights. ... The jury trial guarantees of the Kansas and Ohio constitutions, as discussed above, should be interpreted to permit judicial assessment of punitive damages. ... Similarly, the jury trial provisions of the Kansas and Ohio constitutions should be construed to permit judicial assessment of punitive damages. ...

TEXT:

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I. INTRODUCTION

Over the past two decades, state legislatures throughout the nation have sharply altered the manner in which punitive damages are awarded. Many states have capped the total judgment that a plaintiff may receive, ¹ heightened the standard of evidence for determining whether punitive damages should be awarded, ² or permitted bifurcation of trials for the assessment of punitive damages. ³ As part of this trend, the state legislatures of several states took from jurors the power to assess punitive damages and placed it in the hands of the trial judge. ⁴

This transfer of power from jury to judge has been controversial. Many commentators have contended that a judge has greater experience in meting out punishment and can therefore better assess punitive damages. ⁵ However, opponents of this shift of power argue that the

[*1090] amount of punitive damages should reflect jurors' outrage at a defendant's conduct. ⁶ Further, they argue that a defendant's right to trial by jury is violated when a judge assesses punitive damages. ⁷

The constitutionality of judicial assessment has recently been addressed by the highest courts of Kansas and Ohio, with conflicting results. In *Zoppo v. Homestead Insurance Co.*, ⁸ the Ohio Supreme Court held that judicial assessment violates the right to trial by jury under the Ohio Constitution. ⁹ In contrast, the Kansas Supreme Court held in *Smith v. Printup* ¹⁰ that the Kansas Constitution does not bar judicial assessment of punitive damages. ¹¹

This Comment examines the practice of judicial assessment of punitive damages, both as a matter of constitutional law and as a matter of policy. In Part II, this Comment will provide an overview of the traditional doctrine of punitive damages and the move toward tort reform. In Part III, this Comment will examine the consistency of judicial as- **[*1091]** sessment of punitive damages with the right to trial by jury. Part III will examine the right to trial by jury under the United States Constitution, the Kansas Constitution, and the Ohio Constitution, discussing in detail the reasoning of the courts in *Zoppo* and *Printup*. Finally, in Part IV, this Comment will conclude that as a matter of constitutional law and as a matter of policy, judges should be permitted to assess punitive damages.

II. PUNITIVE DAMAGES

A. An Historical Overview

Punitive damages have been known as "exemplary damages," "vindictive damages," and "smart money." ¹² The United States Supreme Court has stated that punitive damages are not compensation for an injury. ¹³ Instead, "they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." ¹⁴ Thus, punitive damages focus primarily on the character of a defendant's conduct, rather than on the extent of a plaintiff's injuries. ¹⁵

As a practical matter, an assessment of punitive damages generally involves two phases. In the first phase, a jury ¹⁶ determines whether a defendant is liable for punitive damages. ¹⁷ Specifically, defendants are liable for punitive damages only if their conduct is deemed worse than "mere negligence," such as a showing of spite or actual malice. ¹⁸ The **[*1092]** vast majority of jurisdictions generally require that a plaintiff also establish actual injury and be entitled to at least nominal damages before a defendant will be liable for punitive damages. ¹⁹

In the second phase, the amount of punitive damages is assessed. A jury traditionally has discretion in determining the amount of the award. ²⁰ A court often simply instructs jurors to award punitive damages sufficient to punish the defendant and to deter the defendant and others from similar misconduct. ²¹ Factors that jurors may consider in assessing punitive damages include the seriousness of the defendant's misconduct, the extent of the plaintiff's injury, and the wealth of the defendant. ²²

A defendant may seek judicial review of the amount of punitive damages assessed against him. A court reviewing the award will consider whether it was reasonable. ²³ Courts have reversed awards of punitive damages, for example, after determining that an award was motivated by "passion" or "prejudice," ²⁴ or that it "shocked the conscience" of the court. ²⁵ Upon determining that punitive damages are excessive, a reviewing court generally has the power to order a remittitur ²⁶ or a new trial. ²⁷ At the appellate level, the usual standard **[*1093]** of review is whether the trial court's decision regarding the award constituted an abuse of discretion. ²⁸

B. The Rationale of Punitive Damages

Most jurisdictions recognize that punitive damages serve both to punish defendants for past crimes and to deter the commission of future crimes.²⁹ Although courts often discuss punishment and deterrence in tandem, the two concepts provide differing rationales for the imposition of punitive damages.³⁰

Once an actor has knowingly inflicted an injury, punishment serves to express society's shock and condemnation of such conduct.³¹ Punishment is therefore retrospective and serves to penalize an actor.³² Punitive damages also serve to deter a defendant and others from misconduct.³³ In contrast to the punishment rationale, the deterrence rationale of punitive damages is prospective and seeks to influence future conduct.³⁴

Ideally, an award of punitive damages would simultaneously punish a defendant and deter the defendant and others.³⁵ Thus, the punishment and deterrence rationales of punitive damages are closely allied. **[*1094]** In fact, several commentators have maintained that these two purposes should be considered jointly because inflicting punishment for past actions also tends to deter future misconduct.³⁶

C. Modifications of the Doctrine of Punitive Damages

Despite the recognized purposes of punitive damages, their use has been subject to great criticism in recent years.³⁷ The critics, who have included former Vice President Dan Quayle³⁸ and Justice Sandra Day O'Connor,³⁹ have contended that punitive damage awards are "skyrocketing"⁴⁰ and have been awarded in a "random and capricious manner."⁴¹ In this atmosphere of criticism, proponents of tort reform have strived to change the manner for imposing punitive damages at both the federal and state level.⁴²

On the federal level, Congress has considered adopting across-the-board limits on punitive damages.⁴³ On the state level, state legislatures have adopted several methods of reform. For example, some states have set statutory caps on the total amount of punitive damages that can be awarded,⁴⁴ have required that a portion of punitive damages be paid to the state or a state-sponsored fund,⁴⁵ or have enacted general prohibitions of punitive damages in specific types of cases.⁴⁶ Finally, three states--Connecticut, Kansas, and Ohio--have required judicial assessment of punitive damages.⁴⁷ The Connecticut statute, which is limited to products liability cases, has not been subject to much dispute.⁴⁸ In contrast, the Ohio and Kansas measures are broader in scope,⁴⁹ and their constitutionality has been addressed by the highest courts of their respective states.⁵⁰

III. CONSTITUTIONALITY OF JUDICIAL ASSESSMENT OF DAMAGES

An examination of the constitutionality of judicial assessment of punitive damages begins with the Seventh Amendment of the United States Constitution.⁵¹ The Seventh Amendment is not directly binding upon the states,⁵² but nearly all of the states, including Kansas and Ohio, have jury trial provisions that are analogous to the Seventh Amendment.⁵³ Thus, Seventh Amendment jurisprudence is persuasive **[*1096]** authority in state actions and is instructive in discussing the right to trial by jury under the constitutions of the states.⁵⁴ Seventh Amendment jurisprudence is also important in understanding the differing approaches of the Printup and Zoppo courts when analyzing the right to trial by jury under their state constitutions.⁵⁵

A. Federal Right to Trial by Jury

1. Analysis of the United States Supreme Court for Ascertaining Right to Jury Trial

The Seventh Amendment provides, "In Suits at common law . . . the right of trial by jury shall be preserved" ⁵⁶ In interpreting the Seventh Amendment, the United States

Supreme Court has encountered two distinct issues: whether a particular cause of action requires a jury trial and whether a particular element of a cause of action mandates a jury trial. ⁵⁷ In examining whether a cause of action requires a jury trial, the Court has considered both the historical analog of the action and whether the action was legal or equitable in nature. ⁵⁸

In examining an element of a cause of action, the Court has found that the right to trial by jury is invoked only if the element at issue is one of the "fundamental elements" of a jury trial. ⁵⁹ *Colgrove v. Battin* ⁶⁰ is an example of a case in which the Court considered whether an element of a jury trial was a fundamental element. The issue in *Colgrove* centered on whether a civil trial with a six-member jury complied with the mandates of the Seventh Amendment. ⁶¹ In considering [*1097] the issue, the Court discussed the language of the Seventh Amendment, noting that the language was intended to preserve the right to jury trial in suits at common law, but not to set in stone every characteristic of trial by jury. ⁶² The Court went on to examine the history of the Seventh Amendment, finding that the framers adopted the Seventh Amendment because they feared that the jury trial would be abolished, not because they sought to preserve every characteristic of the civil jury trial. ⁶³

The Court then set forth the standard for its analysis of the case before it. ⁶⁴ Prior cases had held that the Seventh Amendment preserves "the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure" ⁶⁵ In *Colgrove*, the Court reaffirmed this statement, noting that the Seventh Amendment does not bind federal courts to the exact procedure or details of the common-law right of trial by jury. ⁶⁶

Having set forth the standard for analysis, the Court examined whether the Seventh Amendment required a twelve-member jury to preserve the substance of the right to trial by jury. ⁶⁷ The Court noted that the purpose of a jury in a civil suit is to ensure fair and equitable resolution of factual issues, ⁶⁸ and it stated that the reliability of jury verdicts is not a function of jury size. ⁶⁹ Thus, the Court concluded that a twelve-member jury is not a fundamental element of trial by jury. ⁷⁰

In a subsequent case, *Tull v. United States*, ⁷¹ the Court examined both a cause of action and an element of a cause of action, clarifying [*1098] how the two types of cases interact. In *Tull*, the United States government had sued the petitioner, a real estate developer, alleging that the developer had violated the Clean Water Act. ⁷² The government sought injunctive relief and civil penalties. ⁷³ At trial, the district court denied the developer's demand for a jury trial. ⁷⁴ The court then found that the developer had violated the act and imposed \$ 325,000 in civil fines. ⁷⁵ On appeal, the Fourth Circuit Court of Appeals affirmed, rejecting the developer's argument that he was entitled to a jury trial. ⁷⁶ The Supreme Court reversed the Fourth Circuit, finding that the developer was entitled to a jury trial for a determination of liability, but was not entitled to a jury assessment of the civil penalty. ⁷⁷

The Court began by examining the developer's right to a jury trial for a determination of liability for the statutory cause of action. In resolving this issue, the Court first compared the action to the type of action that was tried by jury at common law and, second, evaluated the nature of the remedy sought. ⁷⁸ Finding that the cause of action could be deemed analogous to either a legal or an equitable cause of action, ⁷⁹ the Court stated, "We need not rest our conclusion on what has been called an 'abstruse historical' search for the nearest 18th-century analog." ⁸⁰ The Court therefore proceeded to examine the nature of the remedy sought, determining whether it was legal or equitable. ⁸¹ The Court noted that remedies aimed at punishing culpable individuals were historically issued by courts of law, where there was a right to a jury. ⁸² The Court further stated that the penalties issued under the Clean Water Act were punitive in nature. ⁸³ Thus, the Court concluded [*1099] that the cause of action was legal, and the developer had a Seventh Amendment right to have liability determined by a jury. ⁸⁴

The Court also considered whether the Seventh Amendment guarantees trial by jury for the assessment of civil penalties, an element of a cause of action.⁸⁵ The Court, quoting Colgrove, stated that the question was whether the element involved the " 'substance of the commonlaw right of trial by jury' " or a " 'fundamental' " element of trial by jury.⁸⁶ The Court noted that fundamental elements must be tried by a jury,⁸⁷ but it stated that Congress could choose to set a fixed amount for civil fines without reference to judge or jury.⁸⁸ Because the element of fixing civil fines need not be presented to a jury, the Court reasoned that the element of fixing civil penalties is not a fundamental element of trial by jury.⁸⁹ The Court also noted that an assessment of civil penalties entails discretionary calculations with multiple factors, and such calculations are usually performed by a judge.⁹⁰

In a footnote, the Court further clarified the reach of Seventh Amendment protections with regard to the remedy phase of a civil trial.⁹¹ To that end, the Court stated, "Nothing in the Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial, . . . and we have been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial."⁹² Thus, in the Court's view, neither the **[*1100]** language of the Seventh Amendment nor historical evidence showed that the founding fathers intended to extend the right to trial by jury to the remedy phase of a trial.⁹³

2. Applying the Court's Analysis to the Assessment of Punitive Damages

The Court has not spoken directly to the issue of whether a judge may assess punitive damages consistently with the Seventh Amendment.⁹⁴ Since Tull, the Court has issued several noteworthy decisions regarding punitive damages, but none has addressed the issue of judicial assessment.⁹⁵ However, some guidance is available from the federal circuit courts of appeal. The Fourth Circuit has twice examined the practice of judicial assessment of punitive damages in light of Tull.⁹⁶ These cases specifically addressed the issue of whether a judge can remit a jury verdict of punitive damages without granting the plaintiff the option of a new trial for a jury determination of punitive damages.⁹⁷ Initially, in *Shamblin's Ready Mix, Inc. v. Eaton Corp.*,⁹⁸ **[*1101]** the Fourth Circuit concluded that the Seventh Amendment does not prohibit judicial assessment of damages.⁹⁹ However, in *Defender Industries v. Northwestern Mutual Life Insurance Co.*,¹⁰⁰ the court overruled *Shamblin's* and concluded that the Seventh Amendment does prohibit judicial assessment of punitive damages.¹⁰¹ This section examines the reasoning of both *Shamblin's* and *Defender*.

In *Shamblin's*, the plaintiff brought equipment to the defendant for repair and sued in conversion when the defendant failed to return the equipment.¹⁰² At trial, a jury awarded \$ 3,531 in compensatory damages and \$ 600,000 in punitive damages.¹⁰³ The defendant appealed, and the Fourth Circuit affirmed the compensatory damages award, but set aside the punitive damages award, finding that the punitive damages award was tainted by the plaintiff's improper and prejudicial closing argument.¹⁰⁴ On remand to determine the amount of punitive damages, a jury awarded \$ 650,000.¹⁰⁵ The defendant appealed, and the Fourth Circuit determined that the award was excessive, finding that it was based on improper, prejudicial evidence and a misleading closing argument by plaintiff's counsel.¹⁰⁶ The court, without remanding for a third jury determination of punitive damages, reduced the award to \$ 60,000.¹⁰⁷ The court deemed this amount appropriate to punish the company because relatively low-ranking employees were responsible for the misconduct.¹⁰⁸

In rendering its decision, the court discussed the constitutionality of judicial assessment of punitive damages.¹⁰⁹ Specifically, the court examined whether the Seventh Amendment prohibits a reduction of a **[*1102]** punitive damages award by a judge without remanding for a new trial.¹¹⁰ The court began by examining the practices of other federal circuit courts of appeals.¹¹¹ It noted that four circuits--the first, sixth, seventh, and eighth--had reduced an award of punitive damages without remanding for a new trial.¹¹² In three of those cases, the courts reduced awards that were determined by juries,¹¹³ but none of the courts

discussed the Seventh Amendment.¹¹⁴ In a footnote, the Shamblin's court mentioned that the Seventh Circuit, in a subsequent case, concluded that the Seventh Amendment prohibits judicial assessment of damages.¹¹⁵ However, the Fourth Circuit deemed this case contrary to Tull and declined to follow it.¹¹⁶

Having discussed the opinions of the federal circuit courts, the court then examined relevant precedent from the United States Supreme Court.¹¹⁷ First, it distinguished an 1889 case, *Kennon v. Gilmer*.¹¹⁸ In that case, the Fourth Circuit explained, the United States Supreme Court found that the Seventh Amendment prohibits judicial assessment of compensatory damages, but the Court did not address the assessment of punitive damages.¹¹⁹ The Fourth Circuit stated that *Kennon* was not controlling in Shamblin's because of the marked differences between compensatory damages and punitive damages.¹²⁰ Specifically, an award of compensatory damages is intended to make a plaintiff whole, and it involves findings of fact regarding the extent of harm to the plaintiff.¹²¹ In contrast, punitive damages serve a public goal by punishing and deterring reprehensible conduct.¹²²

After distinguishing *Kennon*, the Fourth Circuit discussed the Supreme Court's decision in *Tull*.¹²³ Reasoning that neither the language of the Seventh Amendment nor the historical evidence presented to the Court suggested that the Seventh Amendment extends to the remedy phase of a civil trial,¹²⁴ the Tull court found that the plaintiff was not entitled to an assessment of civil penalties by a jury.¹²⁵ The Fourth Circuit found this reasoning applicable to the assessment of punitive damages.¹²⁶ In support of its conclusion, the Fourth Circuit noted that the Supreme Court has recognized the similarity between civil penalties and punitive damages.¹²⁷ The court concluded that, like the assessment of civil penalties, the assessment of punitive damages is not a fundamental element of trial by jury.¹²⁸

However, the Fourth Circuit reexamined its reasoning en banc in *Defender Industries v. Northwestern Mutual Life Insurance Co.*¹²⁹ In *Defender*, the plaintiff brought an action for, inter alia, fraud stemming from a contract with the defendant, an insurance company.¹³⁰ At the district court level, a jury awarded \$ 106,513.74 in actual damages and \$ 5,000,000 in punitive damages.¹³¹ The district court, without remanding for a new trial, found the award of punitive damages excessive and reduced it to \$ 10,000.¹³²

On appeal, the Fourth Circuit noted that the district court failed to follow traditional procedure in assessing punitive damages when it did not offer the option of a new trial.¹³³ Instead, the district court had [*1104] exercised authority as permitted under the Shamblin's decision.¹³⁴ The Fourth Circuit then questioned the underlying basis for its Shamblin's decision.¹³⁵ The Fourth Circuit noted that the Shamblin's court based its decision in large part on *Tull*, but it stated that the *Tull* decision was narrower than the Shamblin's court had believed.¹³⁶ The Fourth Circuit conceded that *Tull* contained "some rather broad language," but it maintained that *Tull* should be construed as applying to civil penalties, and not extending to punitive damages.¹³⁷

Having expressed its doubt about the Shamblin's reasoning, the Fourth Circuit then undertook a new examination of whether an assessment of punitive damages is a fundamental element of trial by jury.¹³⁸ Beginning its examination, the Fourth Circuit discussed decisions issued by the United States Supreme Court regarding punitive damages.¹³⁹ The Fourth Circuit stated that the Court's 1889 decision in *Kennon*, which it had discussed in Shamblin's, stood for the proposition that tort damages must be assessed by a jury.¹⁴⁰ The Fourth Circuit then discussed two decisions issued by the Supreme Court since *Tull*, though these cases did not speak directly to the Seventh Amendment issue.¹⁴¹

First, the *Defender* court discussed the opinion of the Supreme Court in *Browning-Ferris Industries v. Kelco Disposal, Inc.*¹⁴² In *Browning-Ferris*, the Supreme Court addressed the application of the Eighth Amendment to the assessment of punitive damages, but it also discussed the procedure that has been followed in reviewing an award of punitive damages.

¹⁴³ Specifically, the Court explained that the role of a district court is to determine whether a jury's verdict is within the confines of state law and to determine whether a new trial or remittitur should be ordered. The role of the appellate court, then, is to review lower court proceedings for an abuse of discretion. Finally, the traditional role of the United States Supreme Court is to determine whether the appellate court erred, but not to substitute its judgment for [*1105] that of a jury. ¹⁴⁴

Second, the Fourth Circuit also briefly referred to the United States Supreme Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*. ¹⁴⁵ In *Haslip*, the Court explained that the traditional commonlaw approach entailed assessment of punitive damages by a jury, with appellate review ensuring reasonableness of the award. ¹⁴⁶ The Fourth Circuit contended that the Court's statements in *Browning-Ferris* and *Haslip* indicated that jury assessment of punitive damages is a fundamental element of a civil trial. ¹⁴⁷

After discussing opinions issued by the United States Supreme Court, the Defender court examined the practice of other federal circuit courts with regard to judicial assessment of punitive damages. ¹⁴⁸ The court noted that several circuits have reduced awards of punitive damages without remanding for a new trial and without discussing the Seventh Amendment issue. ¹⁴⁹ However, the Fourth Circuit noted that only two circuits had considered the issue, and both concluded that the Seventh Amendment guarantees the right of jury assessment of punitive damages. ¹⁵⁰ [*1106]

The Defender court, having discussed the decisions of the United States Supreme Court and federal circuit courts, concluded that the assessment of punitive damages by a jury is a fundamental element of trial by jury. ¹⁵¹ The court therefore overruled *Shamblin's* and held that the Seventh Amendment requires assessment of punitive damages by a jury. ¹⁵²

In summary, the United States Supreme Court in *Tull* concluded that, in determining whether an element of a civil trial must be tried by a jury under the Seventh Amendment, a court must consider whether the element is a fundamental element of trial by jury. ¹⁵³ Further, the Court examined whether a specific remedy, a civil fine, was a fundamental element, ¹⁵⁴ and the Court made general statements about the applicability of the Seventh Amendment to the remedy phase of a civil trial. ¹⁵⁵ However, the Court has not spoken directly to the issue of the constitutionality of judicial assessment of punitive damages. The confusion that exists regarding this issue is evidenced by the strikingly divergent decisions of the Fourth Circuit in *Shamblin's* and *Defender*. ¹⁵⁶

B. Kansas Right to Trial by Jury

Like the federal courts, state courts have experienced confusion in their analyses of judicial assessment of punitive damages under their relevant jury trial provisions. ¹⁵⁷ The highest courts of Kansas and Ohio have addressed the issue, reaching different results. ¹⁵⁸ An examination of the Kansas analysis should include a discussion of the state's practice regarding punitive damages, the Kansas jury trial provision [*1107] and, finally, *Smith v. Printup*, the case in which the Kansas Supreme Court determined whether the Kansas jury trial provision barred judicial assessment of punitive damages. ¹⁵⁹

The Kansas practice regarding punitive damages is similar to approaches of other states. ¹⁶⁰ Kansas courts have stated that a plaintiff has no general right to punitive damages; the right is generally dependent upon the receipt of at least nominal damages. ¹⁶¹ Additionally, Kansas courts, like a majority of other state courts, recognize that punitive damages serve to punish a defendant and to deter a defendant and others from future misconduct. ¹⁶² Thus, Kansas courts have stated that punitive damages are not compensatory in nature, but instead they are awarded by focusing on the character of a defendant's actions. ¹⁶³

The Kansas guarantee of trial by jury, section 5 of the Bill of Rights of the Kansas

Constitution, provides, "The right of trial by jury shall be inviolate."¹⁶⁴ The Kansas Supreme Court interpreted this provision in addressing the constitutionality of judicial assessment of punitive damages in *Smith v. Printup*.¹⁶⁵ In that case, a jury determined that the driver of a moving van and the company leasing his services were liable for punitive damages after the driver lost control of the van and collided into a pickup truck, resulting in two deaths.¹⁶⁶ The court, pursuant to Kansas statute 60-3701, assessed punitive damages against the defendants.¹⁶⁷

On appeal, the defendants alleged that Kansas statute 60-3701 violated the guarantee of trial by jury under the Kansas Constitution.¹⁶⁸ The court agreed with the defendants that punitive damages were available at common law, and they were assessed by a jury.¹⁶⁹ However, the court stated that punitive damages are not awarded as a matter of right,¹⁷⁰ but because the defendant deserves punishment.¹⁷¹ Additionally, the court stated that a claim for punitive damages is not a cause of action; it is incident to and dependent upon an award for actual damages.¹⁷²

The court then set forth the issue to be resolved.¹⁷³ The court stated that the issue was whether the historical assessment of punitive damages by a jury constitutes a right that existed at common law.¹⁷⁴ As a threshold issue, the court noted that compensatory damages must be assessed by a jury, but it stated that this fact does not indicate that punitive damages must be assessed by a jury.¹⁷⁵ Instead, the court found that it must examine the character of the claim to determine whether a right to trial by jury exists.¹⁷⁶

With regard to the character of a punitive damages claim, the court noted that the amount of punitive damages may be regarded as a factual issue, but the court proceeded to set forth critical characteristics of punitive damages that distinguish them from actual damages.¹⁷⁷ The court stated that punitive damages were not considered a remedy at common law, but they were merely incident to a cause of action.¹⁷⁸ It added that punitive damages are not compensatory, and there is no [*1109] right to punitive damages.¹⁷⁹ Thus, the court noted, the purpose of awarding punitive damages is not to recognize any special merit in the plaintiff's case, but to punish a defendant and deter a defendant and others.¹⁸⁰ Further, it stated that punitive damages may be regarded as equitable in nature.¹⁸¹ Thus, the Kansas Supreme Court concluded that, despite the fact that juries had historically assessed punitive damages, a claim for punitive damages was not a right at common law.¹⁸²

The court then reasoned that because punitive damages do not constitute a right, the legislature could constitutionally abolish punitive damages.¹⁸³ Given this broad power to abolish punitive damages, the court concluded that the legislature must have the power to take less drastic steps, such as requiring judicial assessment of punitive damages or capping the amount of punitive damages.¹⁸⁴ The court therefore concluded that Kansas statute 60-3701, which permits judicial assessment of punitive damages, did not violate the state's guarantee of trial by jury.¹⁸⁵ [*1110]

C. Ohio Right to Trial by Jury

An examination of judicial assessment of punitive damages under the Ohio Constitution should include a discussion of the Ohio practice regarding punitive damages, the state's jury trial provision and, finally, a discussion of *Zoppo v. Homestead Insurance Co.*, in which the Ohio Supreme Court addressed the consistency of judicial assessment of punitive damages with the Ohio jury trial guarantee.¹⁸⁶ Ohio's practice regarding punitive damages has been typical of that of other states.¹⁸⁷ Punitive damages have not been awarded as a matter of right for the plaintiff.¹⁸⁸ Instead, they are awarded to punish a defendant for misconduct.¹⁸⁹

The Ohio guarantee of trial by jury, Section V of Article I of the Ohio Constitution, provides that the right to trial by jury "shall be inviolate. . . ." ¹⁹⁰ The provision has been interpreted to guarantee trial by jury for those causes of action in which the right existed at common law

at the time of the adoption of the Ohio Constitution,¹⁹¹ and it was at issue in Zoppo, where courts considered its consistency with an Ohio statute requiring judicial assessment of punitive damages.¹⁹² At the court of appeals level in Zoppo, the court employed the Tull fundamental elements test, which had not previously been used in interpreting the Ohio jury trial provision.¹⁹³ Applying the test, the appel- [*1111] late court found that assessment of punitive damages is not a fundamental element of trial by jury, and the court therefore held that the statute was constitutional.¹⁹⁴

On appeal, the Ohio Supreme Court did not adopt the Tull fundamental elements test.¹⁹⁵ In an opinion written by Justice Francis E. Sweeney, the court focused on the historical treatment of the assessment of punitive damages.¹⁹⁶ To that end, the court set forth its perception of the issue to be resolved, stating, "The right [to trial by jury] extends to those causes of action where the right existed at common law. Thus, in analyzing the validity of R.C. 2315.21(C)(2), we must . . . determine whether there existed a common-law right for a jury to assess the amount of punitive damages."¹⁹⁷ Having set forth the issue, the court noted that juries assessed punitive damages historically¹⁹⁸ and that punitive damages are an important part of a civil trial.¹⁹⁹ Thus, the court concluded that the statute violated the right to a jury trial under the Ohio Constitution because the statute interfered [*1112] with this traditional role.²⁰⁰

The court was unpersuaded by arguments that its reasoning in a prior case, *Digital & Analog Design Corp. v. North Supply Co.*²⁰¹ compelled a different result.²⁰² In *Digital*, the Ohio Supreme Court considered whether the Ohio jury trial provision guaranteed assessment of attorney fees by a jury.²⁰³ Because there was no action to recover punitive damages historically and because an examination of the nature of attorney fees revealed that an award of attorney fees is "a punitive (and thus equitable) remedy that flows from a jury finding of malice and the award of punitive damages,"²⁰⁴ the *Digital* court held that the Ohio Constitution does not guarantee assessment of attorney fees by a jury.²⁰⁵ However, the Zoppo court stated that any language in *Digital* regarding punitive damages was merely dicta, and the court rejected the reasoning in *Digital* to the extent that it equated attorney fees with punitive damages.²⁰⁶

Justice Wright, joined by Chief Justice Moyer, dissented. The Zoppo dissent contended that the court was thwarting the Ohio legislature's efforts to reform the tort system.²⁰⁷ The dissent acknowledged that a litigant has the right to a jury trial in a tort action, in accordance with historical practice.²⁰⁸ However, it argued that the analysis in this case should not end with this broad conclusion.²⁰⁹ Instead, the dissent contended that the relevant issue, with which the court failed to come to terms, is whether a plaintiff has the right to an assessment of punitive damages by a jury.²¹⁰

The proper inquiry, the dissent argued, is whether an assessment of punitive damages is a fundamental element of trial by jury.²¹¹ In a [*1113] footnote, the dissent acknowledged that the fundamental elements test has been used to interpret the Seventh Amendment, not the jury trial guarantee of the Ohio Constitution.²¹² However, the dissent contended that the analysis in the Seventh Amendment cases is persuasive because of the similarity between the amendment and the Ohio jury trial guarantee.²¹³

Beginning its examination, the dissent considered the role of a jury in a tort action.²¹⁴ The purpose of a tort action is to compensate a plaintiff, the dissent observed, and the role of a jury is to determine liability and the amount of damages necessary to compensate a plaintiff.²¹⁵ The dissent therefore acknowledged that the assessment of compensatory damages may be a fundamental element that must be performed by a jury.²¹⁶

The dissent proceeded to examine whether an assessment of punitive damages is a fundamental element of trial by jury.²¹⁷ Specifically, the dissent discussed the nature of punitive damages, the purpose of punitive damages and whether a plaintiff has a right to

punitive damages.²¹⁸ The recognized purpose of punitive damages in Ohio is to punish a defendant, not to compensate a plaintiff.²¹⁹ Thus, the dissent stated that the purpose of punitive damages differed from the essential purpose of a tort action, and an assessment of punitive damages is therefore outside the essential function of a jury in a tort action.²²⁰ The dissent noted that punitive damages, unlike compensatory damages, are not fact sensitive. Instead, the decision-maker must have a broad perspective in order to fairly punish a defendant.²²¹ In this respect, the dissent argued that an assessment of punitive damages is analogous to criminal sentencing, and that the knowledge and experience of a judge should be called upon in both contexts to ensure adequate and fair punishment of a defendant.²²² Thus, an assessment of punitive damages should not be deemed a fundamental element.²²³ Finally, the dissent argued that a plaintiff is not entitled to punitive damages as a matter of right.²²⁴ In support of this argument, the dissent noted that an assessment of punitive damages in Ohio is permissive, not mandatory.²²⁵ The dissent further noted that its argument is supported by the analysis of the Printup court, which reasoned that because a state legislature has the power to abolish punitive damages, it must also have the power to regulate them.²²⁶ Thus, the dissent concluded that an assessment of punitive damages is not a fundamental element of trial by jury, and it argued that the statute at issue should be found constitutional.²²⁷

In summary, the constitutionality of judicial assessment of punitive damages has been subject to dispute. On the federal level, the United States Supreme Court in *Tull v. United States* addressed the constitutionality of judicial assessment of one remedy--civil penalties--but the Court did not directly address judicial assessment of punitive damages.²²⁸ Two circuit court cases have addressed the issue in light of the *Tull* opinion. The Fourth Circuit, in *Shamblin's Ready Mix, Inc. v. Eaton Corp.*,²²⁹ concluded that the Seventh Amendment did not bar judicial assessment of punitive damages. However, the Fourth Circuit, sitting en banc, overruled *Shamblin's* in *Defender Industries v. Northwestern Mutual Life Insurance Co.*,²³⁰ concluding that the Seventh Amendment barred judicial assessment of punitive damages. On the state level, the Kansas Supreme Court in *Smith v. Printup*²³¹ interpreted its jury trial provision to permit judicial assessment of punitive damages. In contrast, however, the Ohio Supreme Court in *Zoppo v. Homestead Insurance Co.*²³² construed the Ohio jury trial guarantee to bar judicial assessment of punitive damages. [*1115]

IV. DISCUSSION

A resolution of the question of who should hold the power to assess punitive damages entails an examination of both constitutional and policy arguments. Thus, this Section first examines the constitutional arguments regarding the power to assess punitive damages, focusing on the constitutions of the United States, Kansas, and Ohio. Second, this Section evaluates the policy arguments that have been advanced regarding whether judge or jury should assess punitive damages. Finally, this section concludes with recommendations for the courts of the United States, Kansas and, Ohio regarding their practices for the assessment of punitive damages.

A. Constitutionality

An evaluation of the constitutional arguments regarding judicial assessment of punitive damages begins with a discussion of whether an assessment of punitive damages constitutes a fundamental element of trial by jury under the Seventh Amendment. This section proceeds to evaluate the decision of the Kansas Supreme Court in *Smith v. Printup*, holding that the Kansas Constitution does not bar judicial assessment of punitive damages.²³³ Finally, this section examines the reasoning of the court and the dissent of the Ohio Supreme Court in *Zoppo v. Homestead Insurance Co.*, in which the court held that the Ohio Constitution bars judicial assessment of punitive damages.²³⁴

1. Seventh Amendment

a. Meeting the Definition of Fundamental Element

The United States Supreme Court has stated that the Seventh Amendment was not intended to preserve every characteristic of the common law right of trial by jury, but only the fundamental elements of trial by jury.²³⁵ A fundamental element is one that is necessary to preserve the "substance of the common-law right of trial by jury."²³⁶ Thus, the Court has evaluated elements to determine whether they are necessary to preserve the substance of the right to trial by jury.²³⁷ It **[*1116]** should also be noted that the Court, in discussing what constitutes a fundamental element, has stated that nothing in the language of the Seventh Amendment or historical evidence presented to the Court indicates that the Seventh Amendment was intended to extend to the remedy phase of a civil trial.²³⁸

An evaluation of the nature and purpose of punitive damages indicates that an assessment of punitive damages does not meet the Court's definition of a "fundamental element" of trial by jury.²³⁹ Regarding the nature of punitive damages, the United States Supreme Court has recognized that punitive damages do not serve to compensate a plaintiff.²⁴⁰ Instead, the Court has recognized that punitive damages are by nature a penalty.²⁴¹ However, the Court has not deemed a penalty to be a fundamental element,²⁴² and it has not required jury assessment of other penalties. For example, the Court has explicitly recognized the similarity of the penal nature of punitive damages and civil penalties,²⁴³ and it has concluded that civil penalties need not be assessed by a jury.²⁴⁴ An assessment of punitive damages is also analogous to criminal sentencing, and criminal sentencing generally has not been performed by a jury.²⁴⁵ Therefore, the nature of punitive damages indicates that an assessment of punitive damages is not a fundamental element of trial by jury because punitive damages are a penal remedy, **[*1117]** analogous to civil penalties and criminal sentencing, and thus failing to fall under the protection of the Seventh Amendment.²⁴⁶

Similarly, the purpose of punitive damages indicates that an assessment of punitive damages is not a fundamental element of trial by jury. The fundamental role of a jury is to resolve questions of liability and compensation.²⁴⁷ However, punitive damages are not a matter of liability or compensation; they serve to punish and deter wrongful conduct.²⁴⁸ Therefore, because the purposes of punitive damages fall outside the fundamental role of a jury, it follows that an assessment of punitive damages is not a fundamental element of trial by jury.²⁴⁹

b. Consistency of Judicial Assessment with Supreme Court Precedent

The conclusion that judicial assessment of punitive damages is not barred by the Seventh Amendment gains further support when judicial assessment of damages is compared to elements that the Court has evaluated in prior cases. First, judicial assessment of punitive damages can be compared to the twelve-member jury at issue in *Colgrove v. Battin*.²⁵⁰ In *Colgrove*, the Court found that a twelve-member jury is not a fundamental element of trial by jury, reasoning that a twelve-member jury is not necessary to achieve fair and equitable resolution of factual issues.²⁵¹ *Colgrove* can be construed as protecting the interest of **[*1118]** a plaintiff in a fair and equitable resolution of his claim.²⁵² However, as discussed above, punitive damages generally focus not on a plaintiff's right to compensation, but instead on the reprehensibility of a defendant's conduct.²⁵³ Therefore, jury assessment of punitive damages, like a twelve-member jury, is not necessary to resolve the factual issues of a plaintiff's claim, and judicial assessment of punitive damages can be deemed permissible under the Seventh Amendment consistently with *Colgrove*.

Second, an assessment of punitive damages can be compared to an assessment of civil penalties, which the Court addressed in *Tull v. United States*.²⁵⁴ The Tull court concluded that an assessment of civil penalties was not a fundamental element of trial by jury,²⁵⁵ and the Court's reasoning can be extended to an assessment of punitive damages.²⁵⁶ Though

some minor differences exist between civil penalties and punitive damages, their similarities overpower their differences. ²⁵⁷ Therefore, an assessment of civil penalties, like an assessment of punitive damages, can be performed by a judge consistently with the Seventh Amendment. ²⁵⁸

Additionally, the Court's reasoning in *Tull* may be applicable in the area of punitive damages. ²⁵⁹ In *Tull*, the Court reasoned that because it is undisputed that Congress has the power to fix the amount of civil penalties, it follows that civil penalties need not be assessed by a jury to comply with the Seventh Amendment. Thus, the Court found that the assessment of civil penalties cannot be a fundamental element of trial by jury. ²⁶⁰ Applying this reasoning to the area of punitive damages, it appears that if Congress has the power to fix the amount of punitive damages without violating the Seventh Amendment, then it follows that punitive damages need not be assessed by a jury and are not a fundamental element of trial by jury. ²⁶¹ Thus, the question is whether Congress has the power under the Seventh Amendment to set statutory caps on punitive damages. Although the United States Supreme Court has not addressed this issue, lower courts have argued persuasively that statutory caps do not violate the Seventh Amendment. ²⁶² Therefore, because it appears that Congress has the power under the Seventh Amendment to set statutory caps of punitive damages, it follows under the *Tull* reasoning that an assessment of punitive damages is not a fundamental element. ²⁶³ [*1120]

c. Circuit Court Cases Addressing Judicial Assessment

A discussion of whether the Seventh Amendment bars judicial assessment of punitive damages would be incomplete without an evaluation of the opinions on this issue by the federal circuit courts of appeals. Although the weight of authority in the circuit courts holds that judicial assessment of punitive damages violates the Seventh Amendment, ²⁶⁴ only two circuit court cases have evaluated judicial assessment of punitive damages considering the Supreme Court's decision in *Tull*. ²⁶⁵ In the first case, *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, the Fourth Circuit concluded that judicial assessment of punitive damages does not violate the Seventh Amendment, ²⁶⁶ but the court overruled this decision in the second case, *Defender Industries v. Northwestern Mutual Life Insurance Co.* ²⁶⁷ However, the *Shamblin's* decision was better reasoned and more consistent with precedent. ²⁶⁸

The *Shamblin's* decision properly construed precedent in determining whether the Seventh Amendment barred judicial assessment of punitive damages. In *Shamblin's*, the Fourth Circuit correctly concluded that the United States Supreme Court's decision in *Kennon v. Gilmer*, which found that a court may not substitute its own judgment for a jury's verdict regarding compensatory damages, did not address punitive damages and was therefore not controlling. ²⁶⁹ The Fourth Circuit then correctly noted that the Supreme Court's reasoning in *Tull* was applicable to punitive damages. ²⁷⁰ As the Fourth Circuit observed, the [*1121] *Tull* reasoning that civil penalties are not fundamental elements of trial by jury is applicable because civil penalties are analogous to punitive damages. ²⁷¹ Further, the Fourth Circuit properly argued that punitive damages should not be deemed a fundamental element of trial by jury because punitive damages are by nature a penalty designed to punish and deter misconduct. ²⁷² Therefore, the court correctly held that the Seventh Amendment does not require jury assessment of punitive damages. ²⁷³

However, the Fourth Circuit overruled *Shamblin's* in *Defender Industries v. Northwestern Mutual Life Insurance Co.* ²⁷⁴ The *Defender* court conceded that *Tull* contained "rather broad language," but the court argued that *Tull* should not be broadly construed. ²⁷⁵ Instead, the *Defender* court contended that recent Supreme Court cases have recognized the fundamental role of punitive damages, and it quoted dicta from Supreme Court cases that purportedly supported this contention. ²⁷⁶ However, the reasoning of the court is flawed. ²⁷⁷ As discussed above, the reasoning of *Tull* should extend to an assessment of punitive damages. ²⁷⁸ The dicta quoted by the *Defender* court merely explains the traditional procedure regarding the

doctrine of punitive damages.²⁷⁹ The Court discussed the traditional role of appellate courts reviewing an assessment of punitive damages, but it never discussed any limitations on their power by the Seventh Amendment.²⁸⁰ Further, the Court did not discuss the importance of an assessment of punitive damages to trial by jury.²⁸¹ Thus, the Defender court's reliance on this [*1122] dicta is misplaced. Although the court's conclusion is in line with the weight of authority on this issue,²⁸² the conclusion is inconsistent with Supreme Court precedent.²⁸³

2. Kansas Right to Trial by Jury

The Kansas jury trial guarantee, like the Seventh Amendment, preserves the right to jury trial.²⁸⁴ In determining whether a characteristic must be tried by a jury under the Kansas jury trial guarantee, the Kansas Supreme Court in *Smith v. Printup* examined whether the characteristic constituted a right at common law.²⁸⁵ It should be noted that the *Printup* analysis is similar to the United States Supreme Court's analysis in *Tull*, which evaluated whether an element of a jury trial should be deemed a fundamental element of trial by jury.²⁸⁶ Just as a characteristic must be tried by a jury if it is a fundamental element under the Seventh Amendment,²⁸⁷ so must a characteristic be tried by a jury if it was a right at common law under the Kansas jury trial guarantee.²⁸⁸

The *Printup* court's reasoning in evaluating this issue was solid. The court properly considered the character of punitive damages to determine whether a plaintiff was entitled to them as a matter of right.²⁸⁹ As the court correctly noted, an award of punitive damages is [*1123] generally dependent upon the recovery of compensatory damages.²⁹⁰ Further, a plaintiff has no general right to punitive damages, and punitive damages serve to punish and deter misconduct.²⁹¹ Additionally, as the court indicated, punitive damages may be regarded as equitable in nature.²⁹² Thus, the court correctly concluded that the character of punitive damages indicates that they were not a right at common law.²⁹³

Having determined that a plaintiff was not entitled to punitive damages as a matter of right at common law, the court then correctly noted that it follows that a state legislature has the power to abolish punitive damages.²⁹⁴ Further, as the court argued, because the state legislature can abolish punitive damages, it can accomplish anything short of that, such as requiring judicial assessment of punitive damages.²⁹⁵ While the *Tull* court reasoned that an assessment of civil penalties was not a fundamental element of trial by jury because Congress can set the penalties and, therefore, can delegate this power,²⁹⁶ the *Printup* court reasoned that a state legislature can abolish punitive damages and, therefore, can require that they be assessed by a judge.²⁹⁷ Thus, the Kansas Supreme Court correctly concluded that the Kansas jury trial guaran- [*1124] tee does not bar judicial assessment of punitive damages.²⁹⁸

3. Ohio Right to Trial by Jury

Just as judicial assessment of punitive damages should be deemed constitutional under the constitutions of the United States and Kansas, so should it be deemed constitutional under the Ohio Constitution. As the dissent in *Zoppo v. Homestead Insurance Co.* argued, an assessment of punitive damages is not fundamental to trial by jury and is therefore not encompassed within the jury trial guarantee of the Ohio Constitution.²⁹⁹ This conclusion must be reached, as the dissent noted, because the Ohio jury trial provision guarantees a jury determination of elements falling within the fundamental role of the jury, which is to resolve questions of liability and to ensure that a plaintiff is made whole.³⁰⁰ However, punitive damages are not intended to benefit a plaintiff, but instead to punish a defendant,³⁰¹ and a recovery of punitive damages is generally contingent upon a plaintiff's receiving at least nominal damages.³⁰²

Further, an assessment of punitive damages, similar to criminal sentencing, requires a broad perspective so that the punishment and deterrence goals of punitive damages can be

achieved.³⁰³ Thus, as the Zoppo dissent correctly argued, the purpose and nature of punitive damages indicate that they are not within the jury's fundamental role [*1125] and are therefore outside of the Ohio right to trial by jury.³⁰⁴

The decision of the Ohio Supreme Court in Zoppo that the Ohio jury trial guarantee bars judicial assessment of punitive damages, therefore, was mistaken.³⁰⁵ The court focused in Zoppo on the historical treatment of punitive damages,³⁰⁶ employing a method of analysis similar to that of prior cases interpreting the jury trial provision.³⁰⁷ However, the fact that an element historically was part of trial by jury should not determine that the element must forever be part of trial by jury in Ohio.³⁰⁸ Ohio has recognized some departures from the common law. For example, Ohio civil juries can consist of only eight members,³⁰⁹ although juries historically consisted of twelve members.³¹⁰ Additionally, the Ohio Constitution was amended to permit non- [*1126] unanimous jury verdicts, although unanimity was required at common law.³¹¹ Further, the Ohio Supreme Court, like the United States Supreme Court, has cited no historical evidence indicating that the jury trial provision was intended to extend beyond the liability phase of a civil trial.³¹² Thus, instead of focusing on historical treatment in examining an element of trial by jury, the court should inquire whether an element constitutes part of the right of trial by jury.³¹³ This inquiry reveals, as discussed above, that an assessment of punitive damages is not encompassed within the Ohio right to trial by jury, and a judge can therefore assess punitive damages consistently with the Ohio jury trial guarantee.

In summary, the Seventh Amendment should be interpreted to permit judicial assessment of punitive damages. An assessment of punitive damages fails to meet the Court's definition of a fundamental element, and this conclusion is reinforced when an assessment of punitive damages is compared to the elements at issue in *Colgrove v. Battin*³¹⁴ and *Tull v. United States*.³¹⁵ Thus, the Fourth Circuit's decision in *Shamblin's Ready Mix, Inc. v. Eaton Corp.*³¹⁶ was well-reasoned, and the court's decision in *Defender Industries v. Northwestern Mutual Life Insurance Co.*³¹⁷ to overrule *Shamblin's* was mistaken. On the state level, the decision of the Kansas Supreme Court in *Smith v. Printup*³¹⁸ that judicial assessment of punitive damages was not barred by the Kansas Constitution was solid and consistent with the state's jury trial guarantee. However, the Ohio Supreme Court decision in *Zoppo v. Homestead Insurance Co.*³¹⁹ was wrongly decided, and the court should have construed the Ohio jury trial provision to permit judicial assessment of punitive damages. [*1127]

B. Policy Arguments Regarding Power to Assess Punitive Damages

In addition to the constitutional arguments, commentators have debated whether judge or jury should be permitted to assess punitive damages as a matter of policy.³²⁰ As a threshold matter, it is important to note that judges and jurors differ regarding the assessment of punitive damages.³²¹ Specifically, empirical studies have found, as many commentators have contended, that juries award higher punitive damages than judges.³²² Commentators have disagreed regarding whether the difference reflects bias by either jury or judge or simply indicates a difference in value judgments.³²³

The policy arguments regarding judicial assessment of punitive damages have addressed five distinct areas. First, they have centered on the respective roles of judge and jury, examining whether an assessment of punitive damages falls within the role of judge or jury.³²⁴ In addressing this area, proponents of judicial assessment have noted that a judge often takes the role of performing highly discretionary calculations that require consideration of a multitude of factors.³²⁵ Thus, although a determination of liability may be within the realm of a jury,³²⁶ proponents of judicial assessment have argued it is the role of a judge to distinguish "wrong" from "very wrong" behavior and to mete out appropriate punishment.³²⁷ In support of this argument, the commentators have noted that a judge metes out penalties in criminal sen- [*1128] tencing³²⁸ and assesses civil penalties.³²⁹ A judge performs a similar function in the assessment of punitive damages.³³⁰ Thus, the commentators have

argued that the judicial role of setting penalties is recognized when a judge is permitted to assess punitive damages.³³¹

Opponents of judicial assessment of punitive damages, in contrast, have argued that it is the role of a jury to determine whether conduct violates society's standards of decency.³³² In this respect, juries engage in "ad hoc norm elaboration"; in other words, juries draw inferences from facts and reach discretionary judgments, with their verdicts serving as measurements of the conduct deemed acceptable by society.³³³ At least one commentator has argued that just as jurors reflect community values and establish norms in determining liability, they serve this same function in assessing punitive damages.³³⁴ Thus, the commentator has argued that jurors can indicate the extent to which society condemns a defendant's conduct through the amount of punitive damages awarded.³³⁵

An evaluation of these arguments reveals that advocates of judicial [*1129] assessment of punitive damages have the stronger argument.³³⁶ Punitive damages are by nature a penalty,³³⁷ and an assessment of punitive damages is analogous to criminal sentencing.³³⁸ Thus, an assessment of punitive damages is fundamentally a calculation of a penalty, rather than an indication of community values, and an assessment of punitive damages is within the role of a judge.³³⁹

In addition to debating the proper roles of judge and jury, commentators have disagreed regarding whether judge or jury can better achieve punishment and deterrence.³⁴⁰ Regarding punishment, proponents of judicial assessment have argued that the greater experience and range of knowledge of a judge may enable a judge to reach a more suitable and fair determination of the quantity of a penalty.³⁴¹ Similarly, regarding deterrence, the commentators have argued that the experience and legal knowledge of a judge may better enable a judge to weigh social policy concerns and economic factors that must be considered in achieving deterrence.³⁴² Accordingly, they have argued that the experience of a judge enables the judge to better achieve punishment and deterrence.

In contrast, at least one commentator has argued that juries rival judges at achieving punishment and deterrence.³⁴³ With regard to punishment, the commentator has argued that punishment is essentially a moral judgment, and judges are no better at reaching moral judgments than juries are.³⁴⁴ Thus, he has argued, because it is the role of juries [*1130] to reflect community values, perhaps the moral judgment of the extent to which conduct should be punished with punitive damages is best left in the hands of the jury.³⁴⁵

With regard to deterrence, the commentator has argued that juries can make moral judgments and achieve total deterrence.³⁴⁶ Many commentators have discussed deterrence as if it were a unitary concept, but tort law recognizes two types of deterrence, optimal and total.³⁴⁷ Optimal deterrence is a system that "would determine the net social cost of the defendant's conduct, enhance that amount to reflect the improbability of detection and judgment, and require the defendant to pay the enhanced amount."³⁴⁸ Because optimal deterrence focuses on social cost, rather than a defendant's state of mind, some defendants in an optimal deterrence system may choose to persist in their wrongful acts because they are willing to pay the cost.³⁴⁹ Total deterrence, in contrast, imposes "a penalty tailored to ensure that [a defendant] cannot profit by her wrong, or an in terrorem penalty sufficient to deter virtually any potential tortfeasor."³⁵⁰ The commentator has acknowledged that judges may be better at achieving optimal deterrence,³⁵¹ but he has contended that juries are clearly capable of achieving total deterrence.³⁵² In fact, the commentator has argued, when juries assess punitive damages, they can clarify society's view of conduct and establish norms regarding the amount of damages necessary to totally deter the conduct at issue.³⁵³ Thus, if total deterrence is sought, jurors can achieve this goal and simultaneously fulfill their role of setting norms and indicating community values.³⁵⁴

An evaluation of these arguments reveals that proponents of judicial assessment of punitive

damages have a stronger argument. It should be noted that even the proponents of jury assessment apparently do not contend that juries are better at achieving punishment and deterrence; they contend only that juries are not worse.³⁵⁵ However, the arguments [*1131] that the greater experience of a judge enables a judge to effectively and fairly assess penalties carry weight; it seems reasonable that a more experienced decision-maker generally would be a more effective decision-maker.³⁵⁶ Therefore, it appears likely that a judge would be better than a jury at achieving punishment and deterrence.³⁵⁷

The policy arguments also have centered around historical intent.³⁵⁸ In this regard, one commentator has argued that the party which fought for the adoption of the Seventh Amendment, the Anti-Federalists, intended for the functions of a jury to include preventing judicial bias and serving as a vehicle for direct self-government for the community.³⁵⁹ The commentator has argued that jury assessment of punitive damages is necessary to carry out these functions envisioned by the Anti-Federalists.³⁶⁰

An evaluation of these arguments reveals that the issue of whether the framers intended for punitive damages to be assessed by a jury is open to debate.³⁶¹ The United States Supreme Court in *Tull* concluded that very little direct evidence existed concerning the intention of the Seventh Amendment, and the Court stated that it was presented with no evidence that the amendment extended to the remedy phase of a civil trial.³⁶² The commentator, however, disagreed with the Court and set forth evidence indicating that the framers may have intended for punitive damages to be assessed by a jury.³⁶³ [*1132]

In addition to the issue of historical intent, commentators also have addressed the potential for avoiding judge and jury error in the assessment of punitive damages. Proponents of judicial assessment have identified two sources of jury error, confusion and bias, that may be decreased with judicial assessment of damages.³⁶⁴ Regarding jury confusion, the commentators have noted that empirical studies indicate that it is not uncommon for juries to misunderstand the instructions given to them.³⁶⁵ Because judges have greater experience working with the doctrine of punitive damages, the critics have contended that judges are less likely to be confused regarding the importance and purpose of punitive damages.³⁶⁶

Regarding jury bias, commentators have argued that jurors are biased against wealthy defendants and may play "Robin Hood" in assessing punitive damages against them, whereas judges are better able to avoid this bias.³⁶⁷ As the commentators have noted, empirical studies confirm that juries assess significantly higher awards against wealthy defendants and the government.³⁶⁸ Additionally, the commentators have argued that other factors, such as the attractiveness of the parties and the histrionics of the attorneys, may lead juries to be biased in favor of one of the litigants.³⁶⁹

However, a commentator advocating jury assessment of punitive damages has warned of the danger of judicial bias, arguing that judges [*1133] may be influenced by political pressures and biased in favor of the wealthy and the government.³⁷⁰ In this regard, the commentator has noted that modern federal judges appear to be more likely than juries to find against a plaintiff in cases involving personal injury, constitutional tort and discrimination.³⁷¹ Further, the commentator has contended that judges are subject to political pressures which do not affect jurors, such as the pressures to secure re-election or an appointment to an appellate court.³⁷² A jury, in contrast, may be considered the only governmental agency without such political ambitions.³⁷³ Additionally, because a jury award is the collective judgment of a group of people, the individual prejudice of any one juror may not be reflected in the award.³⁷⁴

An evaluation of these arguments reveals that advocates of judicial assessment of punitive damages have the stronger argument. A risk exists that either a judge or a jury will intentionally act upon bias.³⁷⁵ However, the risk of inadvertently acting upon bias appears greater with a jury.³⁷⁶ In other words, judges may be more likely to recognize and avoid

their own biases.³⁷⁷ Further, because judges have greater experience, the risk that an award will reflect confusion appears greater with jury assessment of punitive damages.³⁷⁸ Accordingly, the risk of jury error appears greater than that of judicial error, and the power of assessing punitive damages may be better placed in the hands of a judge.³⁷⁹ [*1134]

Finally, the policy arguments have addressed other concerns, such as the need to reduce uncertainty costs and preserve incentives for plaintiffs to vindicate their rights. Proponents of judicial assessment of punitive damages have argued that the experience and knowledge of judges allows for greater consistency in the assessment of punitive damages.³⁸⁰ They have argued that a judge is more likely to have experience assessing punitive damages and, therefore, the judge may achieve greater consistency because the judge is in a better position to compare factors, such as egregiousness of the defendant's conduct, with those of past cases.³⁸¹ Further, if greater consistency is achieved in awarding punitive damages, then litigation costs may be reduced.³⁸² For example, when punitive damages are assessed by a jury, parties may differ greatly in their subjective expectations regarding appropriate punitive damages, and their differing expectations may increase the likelihood that they will be unable to reach an out-of-court settlement.³⁸³ Thus, rather than reach a settlement, both parties may expend the money and resources for a trial.³⁸⁴ Commentators have argued, therefore, that judicial assessment of punitive damages will result in greater consistency in punitive damages awards and a reduction of litigation costs.³⁸⁵

Proponents of jury assessment of punitive damages, however, have cited benefits of jury assessment, such as promoting democracy and en- [*1135] couraging vindication of rights.³⁸⁶ With respect to promoting democracy, at least one commentator has argued that jury assessment of punitive damages provides the opportunity for jurors to participate in government.³⁸⁷ Accordingly, the decision that the jurors reach constitutes their collective judgment, or a form of direct self-government by the people.³⁸⁸ Additionally, as the commentator has argued, the decision of who assesses punitive damages may impact whether parties choose to bring suit and vindicate their rights.³⁸⁹ Many commentators have agreed that juries will give higher awards than judges will,³⁹⁰ and that a potential litigant will weigh the costs and trouble of litigation against the size of an expected award in deciding whether to settle a dispute, and, possibly, whether to litigate in the first place.³⁹¹ Thus, if punitive damage awards are reduced, fewer plaintiffs may choose to expend the trouble and cost necessary to bring suit and vindicate their rights.³⁹²

An evaluation of these arguments reveals that the arguments for judicial assessment of punitive damages are stronger. The arguments that judicial assessment of punitive damages benefits defendants and the community carry weight; it seems reasonable to seek consistency and fairness in the imposition of penalties.³⁹³ However, arguments favoring jury assessment of punitive damages can be criticized because the goals of achieving democracy and vindicating plaintiffs' rights can be met with judicial assessment of punitive damages. Interests in democracy are served because a jury still determines liability for a cause of action, calculates compensatory damages and determines liability for punitive damages; only the power to assess punitive damages is taken [*1136] from the jury.³⁹⁴ Additionally, plaintiffs still have incentive to vindicate their rights. In fact, the procedure for awarding compensatory damages is unaltered.³⁹⁵ Only the procedure for assessing punitive damages, which generally are not intended to benefit plaintiffs, is altered.³⁹⁶ Therefore, judicial assessment of punitive damages should be advocated because it may result in greater consistency and fairness, while still recognizing interests in democracy and permitting the vindication of the rights of plaintiffs.

In summary, judicial assessment of punitive damages should be advocated as a matter of policy. An assessment of punitive damages falls within the role of a judge. Further, judges likely will be better at achieving the goals of punitive damages, punishment and deterrence. The issue of whether the framers intended for jurors to assess punitive damages is open to debate. However, judicial assessment of punitive damages appears likely to redress the

problems of jury confusion and bias. Finally, judicial assessment likely will benefit defendants and the community by establishing grater consistency in punitive damages awards and reducing uncertainty costs.

C. Recommendations for Courts of the United States, Kansas and Ohio

It is the role of the legislature to determine which policy option will best suit the needs of citizens.³⁹⁷ In attempting to fulfil this role, state legislatures throughout the nation have adopted several methods of tort reform,³⁹⁸ including judicial assessment of punitive damages.³⁹⁹ As a general rule, the policy decision of the legislature, as long as it can be implemented consistently with constitutional guarantees, should be respected.⁴⁰⁰ **[*1137]**

1. Judicial Assessment of Punitive Damages in Federal Courts

The United States Congress has not enacted a general requirement that punitive damages must be assessed by a judge.⁴⁰¹ Furthermore, Congress has not expressed an intention to grant judges the power to assess punitive damages. In the absence of such federal legislation, federal courts may be hesitant to exercise the power to assess punitive damages.⁴⁰²

An example of a case in which a court should have been hesitant to exercise this power is *Defender Industries v. Northwestern Mutual Life Insurance Co.*⁴⁰³ In *Defender*, a jury awarded \$ 5 million in punitive damages, and the trial judge, without submitting the issue to another jury, concluded the award was grossly excessive and reduced it to \$ 10,000.⁴⁰⁴ Such a drastic reduction of punitive damages, a reduction of more than ninety-nine percent of the award, without consulting a jury may have been an abuse of the court's discretion.⁴⁰⁵

However, a stronger argument for judicial assessment can be made under the facts of *Shamblin's Ready Mix, Inc. v. Eaton Corp.*⁴⁰⁶ Under the unusual facts of *Shamblin's*, the Fourth Circuit found that jury awards were excessive as a result of impropriety on the part of plaintiff's counsel on two prior occasions.⁴⁰⁷ The court decided to assess punitive damages rather than remand for a third jury determination of punitive damages.⁴⁰⁸ Under these facts, a strong argument can be made for judicial assessment; the court had already determined that **[*1138]** two prior jury awards of punitive damages were influenced by impropriety on the part of plaintiff's counsel, and the court's decision to conserve resources and assess an appropriate amount of punitive damages may have been a proper exercise of the court's discretion.⁴⁰⁹

2. Judicial Assessment of Punitive Damages in Kansas and Ohio

In contrast to the United States Congress, the legislatures of Kansas and Ohio have enacted statutes requiring judicial assessment of punitive damages.⁴¹⁰ The jury trial guarantees of the Kansas and Ohio constitutions, as discussed above, should be interpreted to permit judicial assessment of punitive damages.⁴¹¹ Additionally, it should be noted that the decision of the legislatures to require judicial assessment of punitive damages was a sensible policy choice.⁴¹² Therefore, the courts of Kansas and Ohio should respect the choice of the legislatures and permit judicial assessment of punitive damages.

V. CONCLUSION

As states move toward tort reform, the merits of judicial assessment of punitive damages have been subject to debate. Although the weight of authority in the federal courts has concluded that judicial assessment of punitive damages violates the Seventh Amendment, these courts have misconstrued the Seventh Amendment and Supreme Court precedent.⁴¹³ The Seventh Amendment should not be interpreted to bar ju- **[*1139]** dicial assessment of punitive damages.⁴¹⁴ Similarly, the jury trial provisions of the Kansas and Ohio constitutions

should be construed to permit judicial assessment of punitive damages. ⁴¹⁵

The policy arguments regarding judicial assessment of punitive damages also indicate that this practice is a sensible method of tort reform. Judges are likely to be better at achieving punishment and deterrence, ⁴¹⁶ and judicial assessment of punitive damages is likely to result in a reduction of uncertainty costs. ⁴¹⁷ Thus, in jurisdictions where the legislature constitutionally has chosen this method of tort reform, specifically in Kansas and Ohio, the courts should abide by the decision of the legislature and permit judicial assessment of punitive damages. ⁴¹⁸

FOOTNOTES:

†n1 States that cap punitive damages can be divided into two general categories. First, several states set a limit on the total monetary amount of damages. See, e.g., ALA. CODE section 6-11-21 (1993) (setting a cap of \$ 250,000 on punitive damages, except in cases involving a pattern of intentional wrongful conduct, actual malice, libel, slander or defamation); VA. CODE ANN. section 8.01-38.1 (Michie 1992) (limiting punitive damages to \$ 350,000). Second, several states limit punitive damages based on the amount of recoverable actual damages. See, e.g., COLO. REV. STAT. section 13-21-102 (1987) (requiring that punitive damages shall not exceed actual damages); FLA. STAT. ANN. section 768.73 (West Supp. 1995) (generally limiting punitive damages to three times compensatory damages).

†n2 Numerous states have enacted the heightened standard of evidence through statutes. For statutes requiring a heightened standard of evidence, see, for example, ALASKA STAT. section 09.17.020 (1994); GA. CODE ANN. section 51-12-5.1 (Michie Supp. 1995); UTAH CODE ANN. section 78-18-1 (1992).

†n3 When a case is bifurcated, the first phase involves a determination of liability by the trier of fact, and the second phase involves assessment of damages. For a discussion of this procedure, see generally 5 MARILYN MINZER ET AL., DAMAGES IN TORT ACTIONS, section 40.64[2] (1991). Many states have enacted statutes permitting bifurcation in cases involving punitive damages, and the majority of these states call for assessment of punitive damages by the trier of fact. See, e.g., GA. CODE ANN. section 51-12-5.1; MINN. STAT. ANN. section 549.20 (West Supp. 1995).

†n4 See CONN. GEN. STAT. ANN. section 52-240b (West 1991); KAN. STAT. ANN. section 60-3701 (1994). Additionally, the Ohio legislature enacted a statute requiring judicial assessment of punitive damages, OHIO REV. CODE ANN. section 2315.21 (Anderson 1995), but the statute was found unconstitutional by the Ohio Supreme Court. See *infra* notes 196-206 and accompanying text.

†n5 For commentators advocating judicial assessment, see Richard C. Ausness, Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation, 74 KY. L.J. 1, 96-97 (1985) (discussing the benefits of judicial assessment in products liability actions); Elissa D. Cohen, Popular Disenchantment with our Current Tort System--Reforming Punitive Damages in Ohio, 14 U. DAYTON L. REV. 201, 224-25 (1988); Griffin B. Bell & Perry E. Pearce, Punitive Damages and the Tort System, 22 U. RICH. L. REV. 1, 2 (1987) (suggesting judicial assessment of punitive damages as one of three possible reforms for the tort system); Grant P. DuBois, Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster, 43 INS. COUNSEL J. 344, 353 (1976); Dorsey D. Ellis, Jr., Punitive Damages, Due Process, and the Jury, 40 ALA. L. REV. 975, 997-99, 1008 (1989) (discussing the benefits of judicial assessment in the context of advocating heightened evidentiary standards for the assessment of damages by juries); Jane Mallor & Barry Roberts, Punitive Damages: Toward a Principled Approach, 31 HASTINGS L.J. 639,

664-66 (1980); Note, The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.U. L. REV. 1158, 1171 (1966) [hereinafter Reappraisal]; David G. Owen, Civil Punishment and the Public Good, 56 S. CAL. L. REV. 103, 120-21 (1982) [hereinafter Owen, Public Good]; David G. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. CHI. L. REV. 1, 52 (1982) (focusing on products liability actions); David G. Owen, Punitive Damages in Products Liability Litigation, 74 MICH. L. REV. 1257, 1320-21 (1976) (focusing on products liability actions) [hereinafter Owen, Products Liability]; Robert W. Pritchard, The Due Process Implications of Ohio's Punitive Damages Law--A Change Must be Made, 19 U. DAYTON L. REV. 1207, 1234-42 (1994); Dan Quayle, Civil Justice Reform, 41 AM. U. L. REV. 559, 565 (1992); James B. Sales & Kenneth B. Cole, Jr., Punitive Damages: A Relic That Has Outlived Its Origins, 37 VAND. L. REV. 1117, 1167-68 (1984).

†n6 For commentators arguing in support of jury assessment of damages, see generally Alan H. Scheiner, Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power, 91 COLUM. L. REV. 142 (1991); Margaret M. Koesel, Invading the Province of the Jury: Section 2315.21(C) and Judicial Determination of the Amount of Punitive Damages, 15 OHIO N.U. L. REV. 55 (1988).

†n7 See generally Scheiner, *supra* note 6; Koesel, *supra* note 6. See also STANTON G. DARLING II, OHIO CIVIL JUSTICE REFORM ACT 120-21 (1987).

†n8 644 N.E.2d 397 (Ohio 1994). For a discussion of the majority and dissenting opinions in Zoppo, see *infra* notes 192-227 and accompanying text.

†n9 Zoppo, 644 N.E.2d at 401.

†n10 866 P.2d 985 (Kan. 1993). For a discussion of the Printup opinion, see *infra* notes 165-85 and accompanying text.

†n11 Printup, 866 P.2d at 994, 998.

†n12 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES section 2.1(A) (2d ed. 1989); Note, Exemplary Damages in the Law of Torts, 70 HARV. L. REV. 517, 517 (1957) (noting the usage of these different terms) [hereinafter Exemplary Damages].

†n13 Gertz v. Welch, 418 U.S. 323, 350 (1974).

†n14 *Id.*

†n15 5 MINZER ET AL., *supra* note 3, section 40.10; see also Smith v. Wade, 461 U.S. 30, 54 (1983). The doctrine of punitive damages was first articulated by an English court in 1763. See Wilkes v. Wood, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (C.P. 1763). For a discussion of the English common law recognition of punitive damages, see generally 1 SCHLUETER & REDDEN, *supra* note 12, section 1.3; Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 275 n.20 (1989). The American courts adopted the doctrine by the late eighteenth century. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15 (1991). By the middle of the nineteenth century, the United States Supreme Court recognized that the doctrine of punitive damages was a wellsettled principle of American law. Day v. Woodward, 54 U.S. (13 How.) 363, 371 (1851) (stating that "to question the awarding of punitive damages will not admit of argument"). *Id.*

†n16 In most cases at common law, jurors acted as triers of fact and assessed punitive damages. However, it should be noted that in some cases a trial judge can take the role of trier of fact and assess punitive damages in this capacity.

†n17 A plaintiff is not entitled to punitive damages as a matter of right; the jury has discretion to determine whether punitive damages should be awarded. 1 SCHLUETER & REDDEN, *supra* note 12, section 6.1(A); 5 MINZER ET AL., *supra* note 3, section 40.11.

†n18 The level of culpability varies with the jurisdiction, but courts generally require "circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, section 2, at 9-10 (5th ed. 1984) (footnotes omitted).

†n19 1 SCHLUETER & REDDEN, *supra* note 12, section 6.1(D)(3); 5 MINZER ET AL., *supra* note 3, section 40.30.

†n20 *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991); see also 1 SCHLUETER & REDDEN, *supra* note 12, section 6.1.

†n21 *Haslip*, 499 U.S. at 15 (noting that "under the traditional common law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct"); see also 5 MINZER ET AL., *supra* note 3, section 40.14 n.2 (listing examples of courts that have instructed jurors to assess punitive damages to punish the defendant and to deter the defendant and others).

†n22 See 5 MINZER ET AL., *supra* note 3, section 40.14.

†n23 In determining whether a verdict is excessive, courts may consider the particular circumstances of a case and whether the award is consistent with the goals of punitive damages. 5 MINZER ET AL., *supra* note 3, section 40.83.

†n24 1 SCHLUETER & REDDEN, *supra* note 12, section 6.1(B); 5 MINZER ET AL., *supra* note 3, section 40.82.

†n25 See 5 MINZER ET AL., *supra* note 3, section 40.82.

†n26 Remittitur is defined as follows:

The procedural process by which an excessive verdict of the jury is reduced. If money damages awarded by a jury are grossly excessive as a matter of law, the judge may order the plaintiff to remit a portion of the award. In the alternative, the court may order a complete new trial or a trial limited to the issues of damages. The court may also condition a denial of a motion for new trial upon the filing by the plaintiff of a remittitur in a stated amount.

BLACK'S LAW DICTIONARY 1295 (6th ed. 1990) (citations omitted).

†n27 1 SCHLUETER & REDDEN, *supra* note 12, sections 6.2-.3; see also *Browning Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989).

†n28 1 SCHLUETER & REDDEN, *supra* note 12, section 6.1(A); 5 MINZER ET AL., *supra* note 3, section 40.82; *Browning-Ferris*, 492 U.S. at 279.

†n29 5 MINZER ET AL., *supra* note 3, section 40.12. For cases noting the deterrence and punishment purposes of punitive damages, see, for example, *Smith v. Wade*, 461 U.S. 30, 54 (1983); *Gertz v. Welch*, 418 U.S. 323, 350 (1974). Other purposes of punitive damages have

been recognized. For example, some states have recognized that punitive damages can serve the purpose of providing compensation to the plaintiff, such as for the plaintiff's attorney's fees. See generally 5 MINZER ET AL., *supra* note 3, section 40.12[3].

✚n30 1 SCHLUETER & REDDEN, *supra* note 12, section 2.2(A)(1); 5 MINZER ET AL., *supra* note 3, section 40.12. For cases discussing the two purposes together, see, for example, *Wade*, 461 U.S. at 54; *Preston v. Murty*, 512 N.E.2d 1174, 1176 (Ohio 1987). A minority of jurisdictions recognize only one of the two rationales. See generally 5 MINZER ET AL., *supra* note 3, section 40.12.

✚n31 Dorsey D. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 4-8 (1982). For a discussion of the level of culpability required for the imposition of punitive damages, see *supra* note 18 and accompanying text.

✚n32 Ellis, *supra* note 31, at 8. Punitive damages also may play a quasi-criminal role, creating a bridge between the tort policy of finding fault and the criminal law policy of punishing wrongs to society. 5 MINZER ET AL., *supra* note 3, section 40.12[1]. Further, punitive damages may provide adequate punishment when compensatory damages alone would not suffice. See *Exemplary Damages*, *supra* note 12, at 524.

✚n33 5 MINZER ET AL., *supra* note 3, section 40.12[2]; RESTATEMENT (SECOND) OF TORTS section 908 (1979); see also *Wade*, 461 U.S. at 54.

✚n34 Ellis, *supra* note 31, at 8; Charles T. McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N.C. L. REV. 129, 130 (1930) (noting that in some cases, compensatory damages are a great deterrent, but "the danger of the addition of punitive damages seems calculated to increase decidedly the deterrent value of the verdict").

✚n35 See *Mallor & Roberts*, *supra* note 5, at 648.

✚n36 See *id.*; *Exemplary Damages*, *supra* note 12, at 522.

✚n37 For a discussion of the criticism, see Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1275-76 (1993).

✚n38 See *Quayle*, *supra* note 5, at 564 (contending that if the traditional approach to punitive damages was not reformed, it would "continue to generate disproportionately high awards in a random and capricious manner").

✚n39 Justice O'Connor has criticized the traditional doctrine of punitive damages in several cases. See, e.g., *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 482 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) (stating that "punitive damages are skyrocketing"); *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2728-29 (1993) (O'Connor, J., dissenting) (contending that "arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decisionmaking. . . . This is especially true in the area of punitive damages . . .").

✚n40 *Browning-Ferris*, 492 U.S. at 282 (O'Connor, J., dissenting). However, the issue of whether punitive damages are, in fact, skyrocketing has been subject to debate. See, e.g., RAND INSTITUTE FOR CIVIL JUSTICE, ANNUAL REPORT (1992-93) (finding that the frequency of punitive damages awards has increased, especially against businesses); Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1 (1993) (presenting statistical data and contending that there is no crisis in punitive damages awards for products liability).

†n41 Quayle, *supra* note 5, at 564.

†n42 For a discussion of states' approaches to tort reform, see generally 1 SCHLUETER & REDDEN, *supra* note 12, section 9.13.

†n43 See Neil A. Lewis, Senate, 61-37, Approves Narrow Punitive-Damages Curb, N.Y. TIMES, May 10, 1995, at B10. The United States House of Representatives moved to limit punitive damages in all civil suits to \$ 250,000 or three times the amount awarded for medical bills and lost wages, whichever was greater. *Id.* However, the Senate in May of 1995 instead adopted a measure that was narrower in scope, limiting damages only in products liability actions to \$ 250,000 or twice the amount awarded for medical bills, lost wages, and pain and suffering. *Id.* A conference committee was to be established to attempt to reach a compromise. *Id.*

†n44 See *supra* note 1.

†n45 See, e.g., FLA. STAT. ANN. section 768.73; UTAH CODE ANN. section 78-18-1.

†n46 Several states prohibit recovery of punitive damages unless a law expressly provides for recovery. See, e.g., CONN. GEN. STAT. ANN. section 47-212 (West 1995) (applying to cases under the Common Interest Ownership Act); S.D. CODIFIED LAWS ANN. section 21-1-4 (1987); VT. STAT. ANN. tit. 9A, section 1-106 (1994) (applying to cases arising under the Uniform Commercial Code).

†n47 See *supra* note 4.

†n48 See CONN. GEN. STAT. ANN. section 52-240b.

†n49 See KAN. STAT. ANN. section 60-3701; OHIO REV. CODE ANN. section 2315.21. However, the Ohio statute was found unconstitutional by the Ohio Supreme Court, see *infra* notes 192-206 and accompanying text.

†n50 For a discussion of the Ohio Supreme Court's holding on the constitutionality of judicial assessment, see *infra* notes 192-206 and accompanying text. For a discussion of the Kansas Supreme Court's holding on the constitutionality of judicial assessment, see *infra* notes 165-85 and accompanying text.

†n51 U.S. CONST. amend. VII.

†n52 See *Pearson v. Yewdall*, 95 U.S. 294, 296 (1877).

†n53 ALA. CONST. art. 1, section 11; ALASKA CONST. art I, section 16; ARK. CONST. art. II, section 7; CAL. CONST. art. I, section 16; CONN. CONST. art. 1, section 19; DEL. CONST. art. 1, section 4; FLA. CONST. art. 1, section 22; GA. CONST. art. 1, section 1 1 11; HAW. CONST. art. 1, section 13; IDAHO CONST. art I, section 7; ILL. CONST. art I, section 13; IND. CONST. art. I, section 20; IOWA CONST. art I, section 9; KAN. CONST. Bill of Rights section 5; KY. CONST. section 242; ME. CONST. art I, section 20; MD. CONST., Declaration of Rights art. 23; MASS. CONST. pt. I, art. 15; MICH. CONST. art. 1, section 14; MINN. CONST. art I, section 4; MISS. CONST. art. III, section 31; MO. CONST. art I, section 22(a); MONT. CONST. art. III, section 26; NEB. CONST. art. I, section 6; NEV. CONST. art I, section 3; N.H. CONST. pt. 1, art. 20; N.J. CONST. art. 1, 1 9; N.M. CONST. art. II, section 12; N.Y. CONST. art. I, section 2; N.C. CONST. art. I, section 25; N.D. CONST. art I, section 13; OHIO CONST. art. 1, section 5; OKLA. CONST. art. II, section 19; OR. CONST. art VII, section 3; PA. CONST. art. I, section 6; R.I. CONST. art. I, section 15; S.C. CONST. art. I, section 14; S.D. CONST. art. VI, section 6; TENN. CONST. art. I, section 6; TEX. CONST. art I, section 15; UTAH CONST. art. I, section 10; VT. CONST. ch. 1, art. 12; VA. CONST. art. 1, section

11; WASH. CONST. art. 1, section 21; W. VA. CONST. art. III, section 13; WIS. CONST. art I, section 5; WYO. CONST. art. I, section 9.

†n54 See, e.g., Digital & Analog Design Corp. v. North Supply Co., 590 N.E.2d 737, 742 n.1 (Ohio 1992); Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 403 n.2 (Wright, J., dissenting) (Ohio 1994).

†n55 For a discussion of Printup, see *infra* notes 165-85 and accompanying text. For a discussion of Zoppo, see *infra* notes 192-206 and accompanying text.

†n56 U.S. CONST. amend. VII.

†n57 The two different approaches can be seen in the Tull opinion. See *infra* notes 71-93 and accompanying text.

†n58 See Tull v. United States, 481 U.S. 412, 417-25 (1987).

†n59 See, e.g., Tull, 481 U.S. at 425-27; Colgrove v. Battin, 413 U.S. 149, 156 n.11 (1973).

†n60 413 U.S. at 149.

†n61 *Id.* at 149-51. In Colgrove, a Montana district court empaneled a six-member jury for a diversity case in compliance with a local procedural rule. *Id.* at 150. The petitioner sought a writ of mandamus from the Court of Appeals for the Ninth Circuit, alleging, *inter alia*, that the rule violated the Seventh Amendment. *Id.* The Ninth Circuit Court of Appeals sustained the legality of the rule and denied the writ. *Id.* at 151. The United States Supreme Court, in an opinion written by Justice Brennan, affirmed the denial of the writ. *Id.* Four justices dissented from the Court's holding. See *id.* at 165-88.

†n62 *Id.* at 152. The Court stated: "On its face, this language is not directed to jury characteristics, such as size, but rather defines the kind of cases for which jury trial is preserved, namely 'suits at common law.'" *Id.* The Court also noted that it had found six-member juries constitutional in certain criminal cases. *Id.* at 151 (citing Williams v. Florida, 399 U.S. 78 (1970)).

†n63 *Id.* at 152-56.

†n64 *Id.* at 156-57.

†n65 *Id.* at 156 (quoting Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935)).

†n66 *Id.* at 156 (citing Galloway v. United States, 319 U.S. 372 (1943)). The court added that new devices may be used to adapt the institution to meet present needs, provided that the substance of the right to trial by jury is preserved. *Id.* at 157 (citing Ex Parte Peterson, 253 U.S. 300, 309-10 (1920); Funk v. United States, 290 U.S. 371, 382 (1933)).

†n67 *Id.* at 157-60.

†n68 *Id.* at 157 (citing Gasoline Prods. Co. v. Champlin Co., 283 U.S. 494, 498 (1931)).

†n69 *Id.*

†n70 *Id.* The Court went on to find that dicta stating trial by jury meant trial by a twelvemember jury was unpersuasive, *id.* at 157-58, and that a six-member jury was

adequate to meet the mandates of the Seventh Amendment, *id.* at 158-60.

†n71 481 U.S. 412 (1987).

†n72 *Id.* at 414. At issue was the Clean Water Act's prohibition of the discharge of dredged or fill material into navigable waters. *Id.* (citing 33 U.S.C. sections 1311, 1344 & 1362(7); 33 C.F.R. sections 323.2(a)(1)-(7) (1986)).

†n73 *Id.* at 414-15.

†n74 *Id.* at 415.

†n75 *Id.* at 415-16. Of the fine, \$ 250,000 was to be suspended upon restoration of a waterway. *Id.* at 415. However, the developer stated that he had no choice but to pay the entire fine because he would need to purchase land from third parties at a cost of more than \$ 700,000 to complete the restoration. *Id.* at 415-16. The Court also ordered separate injunctive relief. *Id.* at 416.

†n76 *Id.*

†n77 *Id.* at 427.

†n78 *Id.* at 417-25.

†n79 *Id.* at 420. It concluded that the cause of action was analogous to both an action in debt, which required a jury trial at common law, and a public nuisance action, as the government contended. *Id.*

†n80 *Id.* at 421 (citing *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970)).

†n81 *Id.* at 422-25. The Court considered the nature of the remedy sought in Part IIB of its opinion. *Id.*

†n82 *Id.* at 422.

†n83 See *id.* at 422-23.

†n84 *Id.* at 423, 425.

†n85 *Id.* at 425-27.

†n86 *Id.* at 426 (quoting *Colgrove v. Battin*, 413 U.S. 149, 156 n.11, 157 (1973)).

†n87 *Id.*

†n88 *Id.* The Court noted, "Congress' authority to fix the penalty by statute has not been questioned, and it was also the British practice." *Id.* (citation omitted).

†n89 *Id.* at 426-27. Therefore, according to the Court, Congress can delegate the power to assess civil penalties to a trial judge without violating the Seventh Amendment. *Id.* at 427. Justice Scalia, joined by Justice Stevens, concurred with the Court for Parts I and II but dissented from Part III. *Id.* at 427-28. He found fault with the majority's logic in Part III, contending that it does not follow that Seventh Amendment rights cannot be invoked in cases where Congress has not fixed the amount of a civil fine. *Id.* at 427. Justice Scalia further stated that the majority created a form of adjudication he had never before encountered by providing for jury determination of liability and judicial assessment of civil fines. *Id.* at 428.

To that end, he stated that "even punitive damages are assessed by the jury" after a jury determination of liability. *Id.* Justice Scalia acknowledged that it was tempting to analogize judicial assessment of civil fines to the judicial role in criminal sentencing. *Id.* However, noting that a heightened standard of proof is used to determine liability in criminal trials, Justice Scalia stated the government must "take the bitter with the sweet." *Id.* In other words, the government takes the benefit of proving a case by only a preponderance of the evidence along with the disadvantage of accepting an assessment of civil fines by a jury. See *id.*

†n90 *Id.* at 427.

†n91 *Id.* at 426 n.9.

†n92 *Id.* For an argument that the framers in fact intended to extend the Seventh Amendment to the remedy phase, at least with regard to punitive damages, see Scheiner, *supra* note 6, at 145-60.

†n93 *Id.* The Court reiterated its statement from *Colgrove* that the history of the Seventh Amendment shows that the amendment was adopted because of fear that the civil trial would be abolished. *Id.* (citing *Colgrove v. Battin*, 413 U.S. 149, 152 (1973)).

†n94 The fact that the Court has not spoken to this issue has resulted in some confusion. For example, in *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, the Fourth Circuit concluded that judicial assessment of punitive damages is constitutional. 873 F.2d 736, 742 (4th Cir. 1989), overruled by *Defender Indus. v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 502 (4th Cir. 1991) (en banc). However, the court overruled itself in *Defender*, concluding that judicial assessment of punitive damages violates the Seventh Amendment. *Defender*, 938 F.2d at 507.

†n95 For example, in *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, the Court addressed whether an award of punitive damages was excessive under the Eighth Amendment or federal common law. 492 U.S. 257 (1989). Additionally, in *Pacific Mut. Life Ins. Co. v. Haslip*, the Court addressed Due Process issues, concluding that the common law method of assessing punitive damages is not a per se violation of due process, 499 U.S. 1, 17-18 (1991), and that the amount of punitive damages assessed in that particular case did not violate due process, *id.* at 23-24. The Court has also issued *TXO Prod. Corp. v. Alliance Resources Corp.*, in which it concluded that the punitive damages award in that case did not violate due process, 113 S. Ct. 2711, 2722-23 (1991), and that the procedure used to award punitive damages also did not violate due process, *id.* at 2723-24.

†n96 The first case is *Shamblin's*, 873 F.2d at 740-42. However, the Fourth Circuit overruled this case in *Defender*, 938 F.2d at 507. Other circuits have addressed judicial assessment of punitive damages since the *Tull* decision was issued, but they have not examined judicial assessment of punitive damages in light of the *Tull* decision. See, e.g., *Haluschak v. Dodge City of Wauwatosa*, 909 F.2d 254, 256-57 (7th Cir. 1990) (finding that judicial assessment of punitive damages violates the Seventh Amendment); *Morgan v. Woessner*, 997 F.2d 1244, 1258-59 (9th Cir. 1993) (indicating that a judge should not assess punitive damages).

†n97 The facts and reasoning of *Shamblin's* and *Defender* are discussed *infra* notes 102-28 & 129-52 and accompanying text, respectively.

†n98 873 F.2d at 736.

†n99 *Id.* at 740-42.

†n100 938 F.2d 502 (4th Cir. 1991) (en banc).

↕n101 Id. at 507.

↕n102 873 F.2d at 737-38.

↕n103 Id. at 737.

↕n104 Id.

↕n105 Id.

↕n106 Id. at 739. Specifically, a witness testified that the defendant had a policy of withholding equipment that was submitted for consideration of whether it was covered by a warranty until the defendant got payment for repair. Id. Cross-examination revealed, however, that the witness did not have personal knowledge of the defendant's policies. Id. Nevertheless, plaintiff's counsel stated to the jury in his closing argument:

What's scary about this case is not once did anyone get up here and tell you we've changed our corporate policies If your verdict is not large enough . . . what these people are going to do is they are going to laugh, they are going to say juries in West Virginia are going to condone our type of business practice, and they are going to continue to do it again and again until someone can stop it.

Id.

↕n107 Id. at 743.

↕n108 Id.

↕n109 Id. at 740-42.

↕n110 Id. at 740.

↕n111 Id. at 740-41.

↕n112 Id.

↕n113 Id. The cases mentioned by the court included Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 207 (1st Cir. 1987) (\$ 3,000,000 award reduced to \$ 300,000), Bell v. City of Milwaukee, 746 F.2d 1205, 1267, 1279 (7th Cir. 1984) (\$ 350,000 award reduced to \$ 50,000), and Guzman v. Western State Bank, 540 F.2d 948, 954 (8th Cir. 1976) (\$ 25,000 award reduced to \$ 10,000). Shamblin's, 873 F.2d at 740. In the fourth case the court cited, the original assessment of damages was reached by a judge in a bench trial. Id. at 740-41 (citing Shimman v. Frank, 625 F.2d 80, 102, 104 (6th Cir. 1980) (\$ 75,000 award reduced to \$ 20,000)).

↕n114 Shamblin's, 873 F.2d at 741.

↕n115 Id. at 740 n.2 (citing McKinnon v. City of Berwyn, 750 F.2d 1383, 1391-92 (7th Cir. 1984)).

↕n116 Id.

†n117 Id. at 741-42.

†n118 Id. at 741 (discussing Kennon v. Gilmer, 131 U.S. 22 (1889)).

†n119 Id. (citing Kennon, 131 U.S. at 28-30).

†n120 Id.

†n121 Id.

†n122 Id. For a discussion of the purposes of punitive damages, see *supra* notes 29-36 and accompanying text.

†n123 Shamblin's, 873 F.2d at 741-42. The facts and reasoning of Tull are discussed *supra* notes 71-93 and accompanying text.

†n124 Tull, 481 U.S. at 426 n.9.

†n125 Id. at 427.

†n126 Shamblin's, 873 F.2d at 741.

†n127 Id. (citing Tull, 481 U.S. at 422 n.7).

†n128 Id. at 741-42. The court proceeded to conclude that eighteenth century cases did not require it to distinguish Tull. Id. at 742. The court noted that eighteenth century juries could not award damages for intangible harms, such as pain and suffering, but, in light of the present law of damages that permits the compensation of parties for intangible harm, the compensatory function of punitive damages is now "vestigial." Id. The court concluded that no principled distinction exists between civil penalties and punitive damages. Id.

†n129 938 F.2d 502 (4th Cir. 1991) (en banc).

†n130 Id. at 503-04. The plaintiff originally brought suit for breach of contract, breach of contract accompanied by a fraudulent act, fraud, constructive fraud and negligence arising from misrepresentations and fraudulent statements by the defendant's agents. Id. at 504. The district court granted the defendant's motion for a directed verdict on all of the claims except for fraud and constructive fraud. Id.

†n131 Id. The jury awarded compensatory damages in the exact amount the plaintiff had paid in premiums to the defendant while the insurance policy was in effect. Id.

†n132 Id. The district court ordered, however, that if its award was vacated on appeal, a new trial would be held to determine the amount of punitive damages. Id. at 503.

†n133 Id. at 505.

†n134 Id. (citing Shamblin's Ready Mix, Inc. v. Eaton Corp., 873 F.2d 736, 743 (4th Cir. 1989), overruled by Defender, 938 F.2d 502 (4th Cir. 1991) (en banc)).

†n135 Id. at 505-06.

†n136 Id.

†n137 Id. at 506.

¶n138 Id. at 506-07.

¶n139 Id.

¶n140 Id. at 506. As discussed above, the Fourth Circuit characterized Kennon differently in the Shamblin's opinion, concluding that the Kennon case spoke only to compensatory damages and was irrelevant to punitive damages. See *supra* notes 118-22 and accompanying text.

¶n141 Defender, 938 F.2d at 506-07.

¶n142 Id. (citing *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989)).

¶n143 Browning-Ferris, 492 U.S. at 278-79 (cited in *Defender*, 938 F.2d at 506-07).

¶n144 The Defender court quoted the following portion of the Browning-Ferris opinion:

It is not our role to review directly the award for excessiveness, or to substitute our judgment for that of the jury. Rather, our only inquiry is whether the Court of Appeals erred in finding that the District Court did not abuse its discretion in refusing to grant petitioners' motion, under Federal Rule of Civil Procedure 59, for a new trial or remittitur

. . . In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law

In reviewing an award of punitive damages, the role of the District Court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The Court of Appeals should then review the District Court's determination under an abuse-of-discretion standard.

Defender, 938 F.2d at 506 (quoting *Browning-Ferris*, 492 U.S. at 278-79).

¶n145 Id. at 507 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)).

¶n146 The Defender court quoted the following portion of the opinion:

Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

Id. (quoting *Haslip*, 499 U.S. at 15).

¶n147 Id. at 506.

†n148 Id. at 507.

†n149 Id. These cases were cited in Shamblin's; see supra note 113 and accompanying text.

†n150 Defender, 938 F.2d at 507. Neither of the cases that the Fourth Circuit mentioned discusses the Tull opinion. See *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1447-48 (10th Cir. 1987); *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1391-92 (7th Cir. 1984). The McKinnon opinion was issued three years prior to Tull; in fact, the Shamblin's court distinguished it, viewing it as inconsistent with Tull. See supra notes 115-16 and accompanying text. The second opinion, *O'Gilvie*, was issued just two months after Tull, and it discusses the Seventh Amendment issue very briefly. The court stated that in the ordinary case "the plaintiff must be offered a choice between a new trial and accepting a remittitur to avoid a serious problem under the Seventh Amendment" *O'Gilvie*, 821 F.2d at 1447. However, the court concluded that it was not dealing with an ordinary remittitur case because the trial court was without power to order a remittitur under the unusual circumstances of the case. Id. at 1447-48.

†n151 Defender, 938 F.2d at 507.

†n152 Id.

†n153 *Tull v. United States*, 481 U.S. 412, 426 (1987).

†n154 Id. at 426-27.

†n155 Id. at 426 n.9.

†n156 See Shamblin's, 873 F.2d at 742; Defender, 938 F.2d at 507.

†n157 See, e.g., *Smith v. Printup*, 866 P.2d 985 (Kan. 1993) (concluding that judicial assessment of punitive damages is not barred by the Kansas jury trial provision); *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397 (Ohio 1994) (concluding that judicial assessment of punitive damages is barred by the Ohio jury trial provision).

†n158 See supra note 157.

†n159 866 P.2d at 997-98.

†n160 For a discussion of the conditions that states have required before punitive damages will be awarded, see supra notes 18-19 and accompanying text.

†n161 For example, the Kansas Supreme Court stated in *Schippel v. Norton*, 16 P. 804, 807 (Kan. 1888): "Where no actual damage is suffered, surely no exemplary damages can be allowed. Exemplary damages can never constitute the basis of a cause of action." *Printup*, 866 P.2d at 992.

†n162 See *Folks v. Kansas Power & Light Co.*, 755 P.2d 1319, 1323 (Kan. 1988). The purposes of punitive damages are discussed supra notes 29-36 and accompanying text.

†n163 See *Nordstrom v. Miller*, 605 P.2d 545, 549 (Kan. 1980).

†n164 KAN. CONST. Bill of Rights section 5. An example of a case interpreting this provision is *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988). In that case, the Kansas Supreme Court concluded that a \$ 100,000 cap on total recovery in medical malpractice actions violated the jury trial guarantee. Id. at 258.

†n165 866 P.2d 985 (Kan. 1993).

†n166 Id. at 990. In Printup, the driver of the van lost control and crossed the median of the Kansas Turnpike, crashing into the pickup truck. Id. The crash resulted in the deaths of the driver and passenger of the pickup truck. Id. The plaintiffs, including the administrator of the estate of the passenger in the pickup truck, brought suit against the driver of the moving van, his employer and the company that leased his services. Id.

†n167 Id. The court awarded \$ 20,000 against the driver and \$ 100,000 against the company that leased his services. Id.

†n168 Id. at 991. The constitutionality of the statute was one of the eleven issues the plaintiffs raised on appeal. Id. The statute provides:

In any civil action in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted by the court to determine the amount of such damages to be awarded.

KAN. STAT. ANN. section 60-3701(a) (1994).

†n169 Printup, 866 P.2d at 993.

†n170 Id. at 992.

†n171 Id.

†n172 Id.

†n173 Id.

†n174 Id. The court stated: "The question we must resolve . . . is whether the fact that juries historically have determined the amount of punitive damages rises to the level of a right that existed at common law." Id.

†n175 Id. at 993-94. The court stated that the right to a jury assessment of compensatory damages is guaranteed because it involves factual issues and because the presence of a claim for compensatory damages indicated a suit at law, which has traditionally been tried by a jury. Id.

†n176 Id. at 994.

†n177 Id.

†n178 Id.

†n179 Id.

†n180 Id. The purposes of punitive damages are discussed supra notes 29-36 and accompanying text.

†n181 Printup, 866 P.2d at 994. The court cited *Digital & Analog Design Corp. v. North Supply Co.*, 590 N.E.2d 737 (Ohio 1992). In that case, the Ohio Supreme Court indicated that punitive damages may be deemed equitable. See *id.* at 742. It should be noted, however, that the Ohio Supreme Court rejected some of the Digital decision's reasoning in *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 401-02 (Ohio 1994). See discussion of *Zoppo* infra notes 202-06 and accompanying text.

†n182 Printup, 866 P.2d at 994. The court stated: "Given the character of a claim for punitive damages, the fact that juries historically determined punitive damages at common law does not establish that such determination was a right at common law." *Id.*

†n183 *Id.*

†n184 *Id.* Having raised the issue of the power of a legislature to alter the traditional doctrine of punitive damages, the court surveyed the practices in other jurisdictions regarding alterations of the traditional doctrine. *Id.* at 995-98. The court found, *inter alia*, that eight states required payment of a portion of punitive damages to the state or a state-sponsored fund. *Id.* at 995. Courts had addressed the constitutionality of four of the state statutes, finding two of the statutes unconstitutional and two constitutional. *Id.* at 995-96. The court stated, however, that none of these statutes or cases answered the relevant question, which was the extent to which the historical doctrine of punitive damages can be altered consistently with the Kansas Constitution. *Id.* at 996.

Additionally, the court discussed a case analogous to the present case, in which a dissenting judge made the argument that if the legislature has the power to abolish punitive damages, it must also have the power to modify the method of assessment of punitive damages. *Id.* at 997 (discussing *Henderson v. Alabama Power Co.*, 627 So. 2d 878, 899 (Ala. 1993) (Maddox, J., concurring in part, dissenting in part)). Finding this argument persuasive, the court stated that nothing in the Kansas Constitution or in the common law prevents the legislature from requiring judicial assessment of damages. *Id.* at 996.

†n185 *Id.*

†n186 644 N.E.2d 397 (Ohio 1994).

†n187 For a discussion of the traditional doctrine of punitive damages, see supra notes 12-40 and accompanying text.

†n188 For a discussion of the traditional doctrine of punitive damages, see supra notes 12-40 and accompanying text; see, e.g., *Zoppo*, 644 N.E.2d at 404 (Wright, J., dissenting).

†n189 See, e.g., *Western Union Tel. Co. v. Smith*, 59 N.E. 890, 892 (Ohio 1901) (noting the punitive damages are awarded to punish a guilty party for wrongful acts). It should be noted that most states recognize the dual purposes of punitive damages to punish and deter, see supra notes 32-40 and accompanying text, but Ohio case law has focused on their purpose of punishing a defendant. See *Western Union*, 59 N.E. at 892; *Zoppo*, 644 N.E.2d at 404 (Wright, J., dissenting).

†n190 OHIO CONST. art. I, section 5. The provision states: "The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury." *Id.*

†n191 *Belding v. State ex rel. Heifner*, 169 N.E. 301, 301 (Ohio 1929); *Sorrell v. Thevenir*, 633 N.E.2d 504, 510 (Ohio 1994).

†n192 The courts addressed the constitutionality of OHIO REV. CODE section 2315.21(C)(2)

(Anderson 1995), which required judicial assessment of punitive damages. The statute provided: "In a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court." Id.

¶n193 See Zoppo, No. 62926, 1993 WL 262641, at *7 (Ohio Ct. App. July 8, 1993). For a discussion of the test, see *Tull v. United States*, 481 U.S. 412, 426 (1987). The appellate court opinion discussed the constitutionality of the statute under the Tull fundamental elements test, but the court never mentioned that the test had previously been reserved for Seventh Amendment cases, and the Seventh Amendment has not been applied to the states. See Zoppo, 1993 WL at *7. The facts of the Zoppo case were set forth by the Ohio Supreme Court when the case reached the court on appeal. Zoppo, 644 N.E.2d at 398. The defendant, an insurance company, insured a building belonging to the plaintiff. Id. The building was a restaurant-bar, and it was destroyed in a fire started with kerosene. Id. After investigating the fire, the defendant denied coverage to the plaintiff, alleging that evidence showed the plaintiff participated in starting the fire and that the plaintiff made material misrepresentations about his whereabouts at the time of the fire. Id. The plaintiff then brought suit for breach of contract and bad faith refusal to settle. Id. At trial, the jury awarded \$ 80,000 in compensatory damages for breach of contract and \$ 187,800 for bad faith. Id. Additionally, the jury found the defendant liable for punitive damages. Id. After the jury crucial determination of liability, the court assessed \$ 50,000 in punitive damages against the defendant. Id.

¶n194 Zoppo, 1993 WL at *7. Specifically, the court of appeals stated, "we hold that plaintiff has not demonstrated beyond a reasonable doubt that R.C. 2315.21(C)(2) is unconstitutional." Id.

¶n195 See Zoppo, 644 N.E.2d at 401-02.

¶n196 See id. Justices Douglas and Resnick concurred. Id. at 402. Justice A. William Sweeney concurred in the syllabus and judgment only. Id.

¶n197 Id. at 401 (citations omitted). In the opinion, the court stated that it "must first determine" whether there existed a common law right to jury assessment of punitive damages. Id. The second issue, the court explained, was whether there were sufficient facts to justify awarding punitive damages. Id. at 402. The court then determined that the award was justified. Id.

¶n198 Id. The court stated:

Prior to the 1987 enactment of R.C. 2315.21(C)(2) . . . , juries in this state had the integral role of determining not only when punitive damages were justified but also of assessing the amount of such damages. Clearly, the assessment of punitive damages by the jury stems from the common law and is encompassed within the right to trial by jury. However, the legislature, by enacting R.C. 2315.21(C)(2) and by permitting only the court to determine the amount of punitive damages, has in effect abrogated the common-law right of the jury to assess the amount of punitive damages.

Id. (citation omitted).

¶n199 Id.

¶n200 Id.

↗n201 590 N.E.2d 737 (Ohio 1992).

↗n202 Zoppo, 644 N.E.2d at 401-02.

↗n203 Digital, 590 N.E.2d at 741-42.

↗n204 Id. at 742.

↗n205 Id.

↗n206 Zoppo, 644 N.E.2d at 401-02 (citing Digital, 590 N.E.2d at 742-43).

↗n207 Id. at 403 (Wright, J., dissenting).

↗n208 Id. (Wright, J., dissenting).

↗n209 Id. (Wright, J., dissenting).

↗n210 Id. (Wright, J., dissenting). The dissent stated,

Appropriate analysis in the case cannot, and should not, end with the broad conclusion that an individual has a jury-trial right with respect to tort actions. This case presents a much narrower question: whether a plaintiff has a right to have a jury decide the amount of the punitive damages award. That is the issue and the majority simply fails to come to grips with it.

Id. (Wright, J., dissenting).

↗n211 Id. (Wright, J., dissenting) (citing Tull v. United States, 481 U.S. 412 (1987); Colgrove v. Battin, 413 U.S. 149 (1973)).

↗n212 See id. at 403 n.2 (Wright, J., dissenting).

↗n213 Id. (Wright, J., dissenting).

↗n214 Id. at 403 (Wright, J., dissenting).

↗n215 Id. (Wright, J., dissenting).

↗n216 Id. (Wright, J., dissenting).

↗n217 Id. at 403-04 (Wright, J., dissenting).

↗n218 Id. at 404 (Wright, J., dissenting).

↗n219 Id. (Wright, J., dissenting) (citing Preston v. Murty, 512 N.E.2d 1174, 1176 (Ohio 1987)).

↗n220 Id. (Wright, J., dissenting). The dissent noted that the Printup court had also concluded that an assessment of punitive damages is not a fundamental element. Id. (Wright, J., dissenting) (citing Smith v. Printup, 866 P.2d 985, 994 (Kan. 1993)). The Printup opinion is discussed supra notes 165-85 and accompanying text.

†n221 Zoppo, 644 N.E.2d at 404 (Wright, J., dissenting).

†n222 Id. (Wright, J., dissenting). The similarity between assessing punitive damages and criminal sentencing has been recognized by several commentators. See *infra* note 328 and accompanying text.

†n223 Zoppo, 644 N.E.2d at 404 (Wright, J., dissenting).

†n224 Id. (Wright, J., dissenting).

†n225 Id. (Wright, J., dissenting).

†n226 Id. (Wright J., dissenting) (citing Smith v. Printup, 966 P.2d 985, 994 (Kan. 1993)). The Printup case is discussed *supra* notes 165-85 and accompanying text.

†n227 See Zoppo, 644 N.E.2d at 404 (Wright, J., dissenting).

†n228 See 481 U.S. 412, 425-27 (1987).

†n229 873 F.2d 736, 742 (4th Cir. 1989), overruled by Defender Indus. v. Northwestern Mut. Life Ins. Co., 938 F.2d 502 (4th Cir. 1991) (en banc).

†n230 938 F.2d at 507.

†n231 866 P.2d 985, 994, 998 (Kan. 1993).

†n232 644 N.E.2d 397, 401 (Ohio 1994).

†n233 866 P.2d 985, 994, 998 (Kan. 1993).

†n234 644 N.E.2d 397, 401 (Ohio 1994).

†n235 See Colgrove v. Battin, 413 U.S. 149, 152-57 (1973); Tull v. United States, 481 U.S. 412, 426 (1987).

†n236 Colgrove, 413 U.S. at 157 (quoted in Tull, 481 U.S. at 426).

†n237 See, e.g., Colgrove, 413 U.S. at 157; Tull, 481 U.S. at 425-27.

†n238 Tull, 481 U.S. at 426 n.9. The Court's statements are quoted in the text accompanying note 92, *supra*.

†n239 See Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 403-04 (Ohio 1994) (Wright, J., dissenting); Shamblin's Ready Mix, Inc. v. Eaton Corp., 873 F.2d 736, 742 (4th Cir. 1989) (concluding that an assessment of punitive damages is not a fundamental element), overruled by Defender Indus. v. Northwestern Mut. Life Ins. Co., 938 F.2d 502 (4th Cir. 1991) (en banc); see also Colleen P. Murphy, Integrating the Constitutional Authority of Civil and Criminal Juries, 61 GEO. WASH. L. REV. 723, 802-03 (1993) (noting that punitive damages are penal in nature, similar to civil penalties and criminal sentencing, and arguing that the Seventh Amendment does not bar judicial assessment of punitive damages); Jonathan Kagan, Comment, Toward a Uniform Application of Punishment: Using the Federal Sentencing Guidelines as a Model for Punitive Damage Reform, 40 UCLA L. REV. 753, 772 (1993) ("Efforts to restrict jury discretion in punitive damage determinations do not seem to run afoul of the Constitution."); Pritchard, *supra* note 5, at 1237-38 (stating that judicial assessment of punitive damages appears to be constitutional). But see Defender, 938 F.2d at

507 (concluding that an assessment of punitive damages is a fundamental element of trial by jury); Scheiner, *supra* note 6, at 18497 (arguing that jury assessment of punitive damages is a fundamental element because the framers intended for the jury to protect the interests of common people and because the amount of damages awarded may determine whether a plaintiff chooses to vindicate his rights).

↗n240 Gertz v. Welch, 418 U.S. 323, 350 (1974).

↗n241 *Id.*

↗n242 See Tull, 481 U.S. at 425-27.

↗n243 *Id.* at 422 n.7.

↗n244 *Id.* at 425-27.

↗n245 For a discussion of the similarity between punitive damages and criminal sentencing, see *infra* note 328 and accompanying text.

↗n246 See Zoppo, 644 N.E.2d at 403-04 (Wright, J., dissenting) (applying the fundamental elements test and concluding that an assessment of punitive damages is not a fundamental element); Kagan, *supra* note 239, at 772; Murphy, *supra* note 239, at 802-03 ("The Constitution should not be deemed to guarantee jury calculation of punitive damages, just as it does not guarantee jury participation in either civil penalty assessment or in certain aspects of sentencing.").

↗n247 Zoppo, 644 N.E.2d at 403-04 (Wright, J., dissenting); see also Colgrove v. Battin, 413 U.S. 149, 157 (1973) (stating that a 12-member jury is not a fundamental element of trial by jury because it is not necessary for a fair and equitable resolution of factual issues); Tull, 481 U.S. at 426 n.9 (indicating that the Seventh Amendment may not extend to the remedy phase of a civil trial).

↗n248 Gertz v. Welch, 418 U.S. 323, 350 (1974). For a discussion of the purposes of punitive damages, see *supra* notes 29-36 and accompanying text.

↗n249 Murphy, *supra* note 239, at 802-03 ("The typical purpose of punitive damages is not compensation to the plaintiff, but furthering public policy goals such as retribution and deterrence. Thus, the Constitution should not be deemed to guarantee jury calculation of punitive damages . . ."). (footnotes omitted); Zoppo, 644 N.E.2d at 403-04 (Wright, J., dissenting) (applying the fundamental elements test and concluding that an assessment of punitive damages falls outside the fundamental role of a jury).

↗n250 413 U.S. 149 (1973). For a discussion of the case, see *supra* notes 60-70 and accompanying text.

↗n251 Colgrove, 413 U.S. at 157.

↗n252 Colgrove could conceivably be construed broadly to require jury resolution of all factual issues. See *id.* at 157 (stating "the purpose of the jury trial . . . in civil cases is to assure a fair and equitable resolution of factual issues . . ."). However, such a broad reading of Colgrove would be inconsistent with Tull. In Tull, the Court found that an assessment of civil penalties is not a fundamental element of trial by jury. Tull, 481 U.S. at 425-27. Although factual issues may be raised regarding the amount of civil penalties necessary to punish a defendant, the Court found that these issues need not be resolved by a jury. See *id.* In fact, the Court indicated that the Seventh Amendment may not extend to the remedy phase of a civil trial. *Id.* at 426 n.9. Thus, Colgrove may be construed as protecting only a

defendant's right to have liability and compensatory damages determined by a jury. See *id.* (indicating that the Seventh Amendment may not extend to the remedy phase of a civil trial); *Zoppo*, 644 N.E.2d at 403-04 (Wright, J., dissenting) (applying the fundamental elements test and concluding that punitive damages may be assessed by a judge); *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, 873 F.2d 736, 740-42 (4th Cir. 1989) (applying the fundamental elements test and concluding that punitive damages may be assessed by a judge), overruled by *Defender Indus. v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 502 (4th Cir. 1991) (en banc).

†n253 See *supra* note 15 and accompanying text.

†n254 481 U.S. 425-27 (1987). For a discussion of the case, see *supra* notes 71-93 and accompanying text.

†n255 *Tull*, 481 U.S. at 425-27.

†n256 See *Shamblin's*, 873 F.2d at 741-42; *Murphy*, *supra* note 239, at 802-03.

†n257 One commentator has argued that punitive damages must be distinguished from civil penalties because punitive damages are awarded to a private plaintiff, rather than the government, and the risk of judicial bias in favor private wealth and power is therefore greater. *Scheiner*, *supra* note 6, at 209-12. However, the U.S. Supreme Court has explicitly recognized the similarity between civil penalties and punitive damages. *Tull*, 481 U.S. at 422 n.7 (noting that civil penalties are similar to punitive damages in that both exact punishment and are not fixed fines); see also *Shamblin's*, 873 F.2d at 741-42 (arguing that the *Tull* reasoning can be applied to punitive damages). Further, punitive damages and civil penalties should be likened because both are subject to discretion and serve the purposes of punishment and deterrence. *Murphy*, *supra* note 239, at 802-03 (concluding that the Seventh Amendment should not bar judicial assessment of punitive damages).

†n258 See *Zoppo*, 644 N.E.2d at 403-04 (Wright, J., dissenting) (applying the fundamental elements test and concluding that judicial assessment of punitive damages is not a fundamental element); *Shamblin's*, 873 F.2d at 741-42; *Murphy*, *supra* note 347, at 802-03; see also *Kagan*, *supra* note 239, at 772 (stating that restrictions on jury discretion regarding punitive damages appear to be constitutional).

†n259 The fact that this reasoning could extend to other areas was noted by one commentator, who stated: "There is nothing within *Tull*, however, that would limit its reasoning to civil penalties." *Scheiner*, *supra* note 6, at 208 (but arguing that *Tull* should be narrowly construed).

†n260 See *Tull*, 481 U.S. at 425-27. For a discussion of the case, see *supra* notes 71-93 and accompanying text.

†n261 Cf. *Tull*, 481 U.S. at 425-27.

†n262 See *Davis v. Omitowaju*, 883 F.2d 1155, 1162 (3d Cir. 1989); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1331 (D. Md. 1989). As one commentator explained:

The seventh amendment, however, could not bar damage caps. The amendment requires that actions and issues existing under the law be tried to a jury, not that certain actions and issues must be provided by law so that they can be tried to a jury. . . . When damages are capped, no legal issue exists concerning damages above that cap, and therefore there is no issue to be tried to a jury concerning damages above the cap.

Scheiner, *supra* note 6, at 144 n.16 (citations omitted).

†n263 See Tull, 481 U.S. at 426-27 ("Since Congress itself may fix the civil penalties, it may delegate that determination to trial judges.").

†n264 *Defender Indus. v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 502, 507 (4th Cir. 1991) (en banc); *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1447-48 (10th Cir. 1988); *McKinnon v. City of Berwyn*, 750 F.2d 1388, 1391-91 (7th Cir. 1984). However, several circuits have reduced punitive damages awards without remanding for a new trial, but they have not discussed the Seventh Amendment issue. See *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 207 (1st Cir. 1987); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1267, 1279 (7th Cir. 1984); *Guzman v. Western State Bank*, 540 F.2d 948, 954 (8th Cir. 1976).

†n265 *Shamblin's*, 873 F.2d at 740-43; *Defender*, 938 F.2d at 505-07.

†n266 *Shamblin's*, 873 F.2d at 742.

†n267 *Defender*, 938 F.2d at 507.

†n268 See *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d at 403-04 (Wright, J., dissenting) (applying the fundamental elements test and concluding that assessment of punitive damages is not a fundamental element); see also *Murphy*, *supra* note 239, at 802-03 (concluding that judicial assessment of punitive damages should not be barred by the Seventh Amendment); *Kagan*, *supra* note 239, at 772 (finding that restrictions of jury discretion regarding punitive damages do not appear to violate the Seventh Amendment).

†n269 See *Shamblin's*, 873 F.2d at 741 (citing *Kennon v. Gilmer*, 131 U.S. 22, 28-30 (1889)). It should be noted that the Fourth Circuit construed *Kennon* differently in *Defender*, contending the case stands for the proposition that tort damages must be assessed by a jury. *Defender*, 938 F.2d at 506. However, as the *Shamblin's* court argued, the case should not be deemed controlling regarding judicial assessment of punitive damages because the case did not address punitive damages. See *Kennon*, 131 U.S. at 28-30.

†n270 See *Shamblin's*, 873 F.2d at 741-42. For a discussion of the applicability of the Tull fundamental elements test to punitive damages, see *supra* notes 235-49 and accompanying text.

†n271 *Shamblin's*, 873 F.2d at 742. For a discussion of the similarities between civil penalties and punitive damages, see *supra* note 257 and accompanying text.

†n272 *Shamblin's*, 873 F.2d at 742. For a discussion of the purpose and nature of punitive damages indicating that punitive damages are a fundamental element of trial by jury, see *supra* notes 235-49 and accompanying text.

†n273 See *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 403-04 (Ohio 1994) (Wright, J., dissenting) (applying the fundamental elements test and concluding that assessment of punitive damages is not a fundamental element); *Murphy*, *supra* note 239, at 802-03 (concluding that the Seventh Amendment does not bar judicial assessment of punitive damages).

†n274 938 F.2d 502, 507 (4th Cir. 1991).

†n275 *Id.* at 506.

†n276 See id.

†n277 See Zoppo, 644 N.E.2d at 403-04 (Wright, J., dissenting) (applying the fundamental elements test and concluding that assessment of punitive damages is not a fundamental element); Murphy, supra note 239, at 802-03 (concluding that the Seventh Amendment does not bar judicial assessment of punitive damages).

†n278 See supra notes 235-49 and accompanying text.

†n279 See Defender, 938 F.2d at 506-07. The quotations are provided supra notes 144 & 146.

†n280 See Defender, 938 F.2d at 506-07.

†n281 See id.

†n282 For a list of courts that found judicial assessment of punitive damages unconstitutional, see supra note 264.

†n283 See Zoppo, 644 N.E.2d at 403-04 (Wright, J., dissenting) (applying the fundamental elements test and concluding that assessment of punitive damages is not a fundamental element); Kagan, supra note 239, at 772 (arguing that restrictions on a jury's role in assessing punitive damages should be found constitutional); Pritchard, supra note 5, at 1239 ("Requiring the court to assess punitive damages after the jury finds liability appears to be constitutional."); Murphy, supra note 239, at 802-03 (concluding that the reasoning of Tull should be extended to permit judicial assessment of punitive damages).

†n284 The Kansas jury trial guarantee provides: "The right of trial by jury shall be inviolate." KAN. CONST. Bill of Rights section 5.

†n285 See Smith v. Printup, 866 P.2d 985, 993 (Kan. 1993) (stating that "the question that we must resolve, however, is whether the fact that juries historically have determined the amount of punitive damages rises to the level of a right that existed at common law").

†n286 See Tull v. United States, 481 U.S. 412, 425-27 (1987). The approaches are similar in that both evaluate the element independent of other elements of the action. See id. at 426 (evaluating civil penalties without considering other elements of the plaintiff's suit); Printup, 866 P.2d at 993-94 (evaluating punitive damages without evaluating other elements of the plaintiff's suit). Further, under both approaches, courts evaluate the nature of the element. See Tull, 481 U.S. at 426-27 (considering whether the element at issue was fundamental); Printup, 866 P.2d at 994 (considering the character of the element at issue in determining whether it constituted a right).

†n287 See Tull, 481 U.S. at 426.

†n288 See Printup, 866 P.2d at 993.

†n289 See id. at 994.

†n290 See id. (observing that "punitive damages were not considered a remedy at common law, but merely incident to those causes of action in tort requesting compensatory damages"). For a discussion of this general rule, see supra note 19 and accompanying text.

†n291 Printup, 866 P.2d at 994. For a discussion of the traditional doctrine and the recognized purpose of punitive damages, see supra notes 12-36 and accompanying text.

¶n292 A difference of opinion exists regarding whether punitive damages should be deemed legal or equitable. Compare Scheiner, *supra* note 6, at 201-02 (arguing that punitive damages are a legal remedy) with *Digital & Analog v. North Supply*, 590 N.E.2d 737, 742-43 (Ohio 1992) (arguing that an award of attorney fees is a "punitive (and thus equitable) remedy") and *Printup*, 866 P.2d at 994 (stating that punitive damages may be an equitable remedy). The United States Supreme Court has indicated that damages that are punitive should be deemed legal. See *Curtis v. Loether*, 415 U.S. 189, 195-97 (1974); *Tull v. United States*, 481 U.S. 412, 422 (1987).

¶n293 *Printup*, 866 P.2d at 994. The court's analysis is similar to that of the dissent in *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 403-04 (Ohio 1994) (Wright, J., dissenting) (concluding that the nature and purpose of punitive damages indicate that punitive damages need not be assessed by a jury under the Ohio Constitution).

¶n294 *Printup*, 866 P.2d at 994.

¶n295 *Id.* The court stated:

Because a plaintiff does not have a right to punitive damages, the legislature could, without infringing upon a plaintiff's basic constitutional rights, abolish punitive damages. If the legislature may abolish punitive damages, then it also may, without impinging upon the right to trial by jury, accomplish anything short of that, such as requiring the court to determine the amount of punitive damages or capping the amount of the punitive damages.

Id.

¶n296 *Tull v. United States*, 481 U.S. 412, 426 (1987).

¶n297 *Printup*, 866 P.2d at 994.

¶n298 See *id.* at 997-98. The result the court reached is similar to that of the United States Supreme Court in *Tull*, 481 U.S. at 426, and to that of the dissenting justices of the Ohio Supreme Court in *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 403-04 (Wright, J., dissenting); see also *Murphy*, *supra* note 239, at 802-03 (arguing that judicial assessment of punitive damages should be deemed constitutional under the federal constitution); *Kagan*, *supra* note 239, at 772 (arguing that restrictions on jurors' discretion in assessing punitive damages do not appear unconstitutional under the federal constitution); *Pritchard*, *supra* note 5, at 1231, 1234-38 (stating that judicial assessment of punitive damages appears constitutional under the constitutions of Ohio and the United States).

¶n299 *Zoppo*, 644 N.E.2d at 403-04 (Wright, J., dissenting); see also *Pritchard*, *supra* note 5, at 1234-39 (stating that judicial assessment of punitive damages appears consistent with the Ohio Constitution). But see *Koesel*, *supra* note 6, at 78-81 (arguing that Ohio jury trial provision should be construed to bar judicial assessment of punitive damages).

¶n300 *Zoppo*, 644 N.E.2d at 404 (Wright, J., dissenting); *Tull*, 481 U.S. at 426 n.9 (indicating that the federal jury trial guarantee may not extend to the remedy phase of a civil trial).

¶n301 Ohio cases have focused on the punishment goal of punitive damages. See, e.g., *Preston v. Murty*, 512 N.E.2d 1174, 1176 (Ohio 1987); *Zoppo*, 644 N.E.2d at 404 (Wright, J.,

dissenting). For a discussion of the purposes of punitive damages, see *supra* notes 29-36 and accompanying text.

†n302 See *Printup*, 866 P.2d at 992-93; see also *supra* note 19 and accompanying text.

†n303 *Zoppo*, 644 N.E.2d at 404. For a discussion of a judge's ability to achieve punishment and deterrence, see *infra* notes 340-57 and accompanying text.

†n304 *Zoppo*, 644 N.E.2d at 403-04 (Wright, J., dissenting); see also Pritchard, *supra* note 5, at 1234-30 (stating that judicial assessment of punitive damages appears to be permissible under the Ohio jury trial guarantee); Murphy, *supra* note 239, at 802-03 (arguing that judicial assessment of punitive damages should be deemed constitutional under the federal constitution); Kagan, *supra* note 239, at 772 (arguing that restrictions on jurors' discretion in assessing punitive damages do not appear unconstitutional under the federal constitution).

It should be noted that the mandate of prior cases that the jury trial be preserved for a cause of action historically tried by jury will continue to be recognized; such a cause of action could continue to be tried by jury. For cases stating that such causes of action must be tried by jury, see *Sorrell v. Thevenir*, 633 N.E.2d 504, 510 (Ohio 1994), *Belding v. State ex rel. Heifner*, 169 N.E. 301, 301 (Ohio 1929). Only an element that does not constitute a right of trial by jury could be removed from the province of the jury. See *Zoppo*, 644 N.E.2d at 403-04 (Wright, J., dissenting); see also *Tull*, 481 U.S. at 426 (noting that a non-fundamental element is not within the protection of the Seventh Amendment); *Printup*, 866 P.2d at 994 (indicating that the Kansas jury trial guarantee protected an element only if it constituted a right at common law).

†n305 See *Zoppo*, 644 N.E.2d at 403-04 (Wright, J., dissenting); see also Pritchard, *supra* note 5, at 1234-30 (finding that judicial assessment of punitive damages appears constitutional under the Ohio jury trial guarantee). But see Koesel, *supra* note 6, at 78-81 (arguing that the Ohio jury trial provision bars judicial assessment of punitive damages).

†n306 See *Zoppo*, 644 N.E.2d at 401-02.

†n307 See Koesel, *supra* note 6, at 70 ("Ohio courts have generally applied the historical test to ascertain whether a claim may be tried to a jury."). However, the court has not focused exclusively on history. As early as 1888, the court noted that the right to trial by jury depends on the nature of the relief sought. See *Gunsaulus v. Pettit*, 17 N.E. 231, 231 (1888); see also *Digital & Analog Design Corp. v. North Supply Co.*, 590 N.E.2d 737, 741-42 (Ohio 1992) (focusing upon the historical treatment and nature of an award of attorney fees, as well as discussing persuasive authority from the United States Supreme Court, in determining whether the right to trial by jury under the Ohio Constitution extended to awarding attorney's fees).

†n308 See *Zoppo*, 644 N.E.2d at 403-04 (Wright, J., dissenting); see also Pritchard, *supra* note 5, at 1234-39 (concluding that although an assessment of punitive damages historically was performed by a jury, the Ohio jury trial guarantee appeared to allow for judicial assessment of punitive damages); *Colgrove v. Battin*, 413 U.S. 149, 156-57 (1973) (stating that the Seventh Amendment does not preserve every characteristic of trial by jury, but instead only the fundamental elements of trial by jury); *Tull*, 481 U.S. at 426 (noting that the federal constitution preserves only the fundamental elements of jury trial).

†n309 See OHIO R. CIV. P. 38(B).

†n310 See *Colgrove*, 413 U.S. at 157.

†n311 See OHIO CONST. art. I, section 5.

†n312 See Tull, 481 U.S. at 426 n.9; Zoppo, 644 N.E.2d at 401-02.

†n313 See Zoppo, 644 N.E.2d at 403-04 (Wright, J., dissenting) (examining whether an assessment of punitive damages was a fundamental element, thus constituting a right of trial by jury); see also Printup, 866 P.2d at 993-94 (examining whether an assessment of punitive damages was a right at common law); Tull, 481 U.S. at 426 (noting that the Seventh Amendment preserves only the fundamental elements of trial by jury).

†n314 413 U.S. 149 (1973).

†n315 481 U.S. 412 (1987).

†n316 873 F.2d 736 (4th Cir. 1989), overruled by Defender Indus. v. Northwestern Mut. Life Ins. Co., 938 F.2d 502 (4th Cir. 1991) (en banc).

†n317 Defender, 938 F.2d at 507.

†n318 866 P.2d 985 (Kan. 1993).

†n319 664 N.E.2d 397 (Ohio 1994).

†n320 See, e.g., Mallor & Roberts, supra note 5, at 664-66.

†n321 See M. PETERSON ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, PUNITIVE DAMAGES: EMPIRICAL FINDINGS 26-31 (1988). In the Rand Institute study, punitive damages were reduced in a significant number of cases for which post-verdict information was reported, with the likelihood of reduction having a relationship to the amount of the award. In cases with awards less than \$ 50,000, damages were reduced 30 percent of the time. In contrast, in cases with awards greater than \$ 50,000, damages were reduced 80 percent of the time. It should be noted that these numbers reflect both judicial reduction of damages when a case was appealed and settlements after a jury award, presumably because the parties expected damages would be reduced on appeal. See id.

†n322 Studies show that juries assess higher damages awards against wealthy defendants. See, e.g., J. FLEMING, THE AMERICAN TORT PROCESS 111-12 (1988); James K. Hammitt et al., Tort Standards and Jury Decisions, 14 J. LEGAL STUD. 751, 753-56 (1985).

†n323 See infra notes 364-79 and accompanying text.

†n324 Compare Ellis, supra note 5, at 1008 ("The amount of punitive damages should be a decision for the judge, not the jury, as is the case with fines.") with Scheiner, supra note 6, at 187-89 (arguing that the decision should be made by a jury because it is the role of juries to engage in ad hoc norm elaboration).

†n325 See Tull v. United States, 481 U.S. 412, 427 (1987); Mallor & Roberts, supra note 5, at 664.

†n326 See, e.g., Mallor & Roberts, supra note 5, at 665.

†n327 See, e.g., Owen, Public Good, supra note 5, at 120; Mallor & Roberts, supra note 5, at 664.

†n328 The analogy between criminal sentencing and punitive damages has been noted by judges and commentators. E.g., Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 404 (Ohio

1994) (Wright, J., dissenting); Mallor & Roberts, *supra* note 5, at 664-65; Reappraisal, *supra* note 5, at 1171. It should be noted that one commentator distinguished punitive damages from criminal sentencing because punitive damages are not sought by the government. See Scheiner, *supra* note 6, at 209-12. Additionally, he argued that judicial assessment of punitive damages is not constitutionally required, just as judicial sentencing is not constitutionally required. *Id.* However, those commentators who have compared punitive damages assessment with criminal sentencing are not arguing that the two are identical, nor that judicial assessment of punitive damages is constitutionally required; they argue only that a judge's role is similar in both contexts. See, e.g., Zoppo, 644 N.E.2d at 404 (Wright, J., dissenting); Mallor & Roberts, *supra* note 5, at 664-65.

†n329 See *Shamblin's Ready Mix v. Eaton Corp.*, 873 F.2d 736, 741-42 (4th Cir. 1989) (noting the comparison between civil penalties and punitive damages and citing Supreme Court cases recognizing the similarity). But see Scheiner, *supra* note 6, at 209-12 (distinguishing between civil penalties and punitive damages). For a discussion of the analogy between civil penalties and punitive damages, see *supra* note 257 and accompanying text.

†n330 Punishment and deterrence are generally recognized as the primary goals of punitive damages. See *supra* notes 29-36 and accompanying text.

†n331 See Mallor & Roberts, *supra* note 5, at 664; Owen, *Public Good*, *supra* note 5, at 120.

†n332 See Scheiner, *supra* note 6, at 188-89.

†n333 *Id.* However, at least one commentator has argued that the work of juries entails very few cases in which their knowledge of community standards is valuable. George L. Priest, *Justifying the Civil Jury*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 103, 111-17 (Robert E. Litan ed., 1993). In fact, cases involving complex or conflicting social values or issues of governmental power comprised less than one-fourth of the cases heard by juries in a study of Cook County courts. *Id.* at 131. In contrast, juries spent the majority of their time resolving issues from routine accidents involving routine injuries. See *id.* at 111-17.

†n334 See Scheiner, *supra* note 6, at 187-89.

†n335 See *id.*

†n336 See Ellis, *supra* note 5, at 1008.

†n337 *Gertz v. Welch*, 418 U.S. 323, 350 (1974) (stating that punitive damages are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence").

†n338 For a discussion of this analogy, see *supra* note 328.

†n339 Ellis, *supra* note 5, at 1006-08.

†n340 Compare Owen, *Public Good*, *supra* note 5, at 120 ("Judges have more familiarity than do juries with distinguishing 'wrong' from 'very wrong' behavior (and fixing the appropriate level of punishment therefor) upon a formal social scale . . .") with Scheiner, *supra* note 6, at 170-79 (arguing that juries rival judges at achieving punishment and deterrence).

†n341 Commentators have argued that judges are better than juries at making this determination because judges are more experienced and less susceptible to bias and confusion. See, e.g., Mallor & Roberts, *supra* note 5, at 664; Ellis, *supra* note 5, at 1006-08; DuBois, *supra* note 5, at 353.

†n342 Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 302 (1983); Owen, *Products Liability*, *supra* note 5, at 132021; see also Mallor & Roberts, *supra* note 5, at 664 (arguing that judges are better at evaluating public policy concerns and economic factors).

†n343 See Scheiner, *supra* note 6, at 170-79.

†n344 See *id.* at 173. An example of a case in which judge and jury may differ is a breach of contract suit. *Id.* A judge may find that if the breach was an "efficient breach," or a breach resulting in a savings of money, large damages are not warranted to punish the conduct. *Id.* However, a jury may believe that it is morally wrong to break one's word, and it may assess damages to punish this moral wrong. *Id.* Because it cannot be proven that efficiency is more important than keeping commitments, it cannot be shown that the judge's conclusion is better than the jury's. *Id.*

†n345 See *id.* at 171-73 & 188-89.

†n346 *Id.* at 173-79.

†n347 *Id.* at 173.

†n348 *Id.* at 174 (footnotes omitted).

†n349 *Id.* at 174-75.

†n350 *Id.* at 175.

†n351 *Id.* at 178 ("If optimal deterrence is the goal, jury assessment of the amount of the award makes little sense.").

†n352 *Id.* at 178-79.

†n353 *Id.* ("The jury serves its traditional function of norm elaboration.").

†n354 *Id.*

†n355 See *id.* at 170-79. With regard to meeting the goal of punishment, Scheiner stated: "Whether to inflict punishment is a purely moral judgement . . . One cannot conclude that judges are right and juries are wrong." *Id.* at 173. With regard to achieving deterrence, he stated, "If optimal deterrence is the goal, jury assessment of the amount of the award makes little sense. . . . In contrast, jury assessment of punitive damages makes sense if the goal of total deterrence is adopted." *Id.* at 178. He then argued that a jury fulfills its traditional function of elaborating norms when it assesses punitive damages. *Id.* at 178-79. It should be noted, additionally, that Scheiner argued that greater uncertainty costs accompany jury assessment of punitive damages, and these uncertainty costs may result in increased deterrence. *Id.* at 179.

†n356 See Mallor & Roberts, *supra* note 5, at 664.

†n357 See *id.* at 664; Owen, *Public Good*, *supra* note 5, at 120.

†n358 Scheiner, *supra* note 6, at 145-60.

†n359 *Id.* The commentator discussed the views of the Anti-Federalists in arguing that the Tull case, discussed *supra* notes 71-93 and accompanying text, should not be extended to

permit judicial assessment of punitive damages. Scheiner, *supra* note 6, at 145-60 & 204-12.

†n360 Scheiner, *supra* note 6, at 145-60.

†n361 Compare *id.* (arguing that the framers intended for punitive damages to be assessed by a jury) with *Tull v. United States*, 481 U.S. 412 (1987), which stated:

Although " 'we have almost no direct evidence concerning the intention of the seventh amendment itself,' the historical setting in which the Seventh Amendment was adopted highlighted a controversy that was generated . . . by fear that the civil jury itself would be abolished." We have been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial.

Id. at 426 n.9 (citations and footnote omitted).

†n362 *Tull*, 481 U.S. at 426 n.9.

†n363 Scheiner, *supra* note 6, at 145-60.

†n364 See Mallor & Roberts, *supra* note 5, at 664 (arguing that judges "are less likely to be impressed by the histrionics of counsel and so to be inflamed by passion or prejudice"); Pritchard, *supra* note 5, at 1241 (stating that jurors "may be less likely than a trial judge to fully comprehend the true purpose of punitive damages awards").

†n365 See Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries*, VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 333, at 137, 151 ("A growing body of studies indicates that some jurors may fail to comprehend as much as 50 percent of the judge's instructions regarding the law.") (citation omitted). See generally Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77 (1988). But see Scheiner, *supra* note 6, at 164 n.120 (stating that claims that juries are typically irrational or ignorant "must be wrong in light of evidence that juries obey instructions and understand significance of expert testimony").

†n366 See Pritchard, *supra* note 5, at 1241; Ellis, *supra* note 5, at 1006-07.

†n367 DuBois, *supra* note 5, at 353; Mallor & Roberts, *supra* note 5, at 665. The reason for jurors' willingness to assess higher verdicts against wealthy corporate defendants has been subject to debate. See MacCoun, *supra* note 365, at 162-64.

†n368 MacCoun, *supra* note 365, at 162 (noting several studies have concluded that juries awarded significantly higher awards against corporate or government defendants than individual defendants).

†n369 For a discussion of the effect of the attractiveness of a plaintiff on a civil jury, see WALTER F. ABBOTT ET AL., *JURY RESEARCH: A REVIEW AND BIBLIOGRAPHY* section 5.19 (1993). The behavior of counsel may also improperly sway a jury. See Mallor & Roberts, *supra* note 5, at 664 (stating that judges are "less likely to be impressed by the histrionics of counsel").

†n370 See Scheiner, *supra* note 6, at 159, 168-69.

↕n371 Id. at 168 n.137.

↕n372 Id.

↕n373 Id. ("Jurors act free from any concern for the political ramifications of their decisions.").

↕n374 See Stephen A. Saltzburg, Improving the Quality of Jury Decisionmaking, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, supra note 333, at 162 ("A jury selected from a cross section of the community is likely to have members whose biases or prejudices cancel or neutralize each other, but nothing cancels or neutralizes those of a judge.").

↕n375 For example, a judge may intentionally award less in damages to benefit a wealthy defendant or the government, see Scheiner, supra note 6, at 159, while a jury may intentionally award greater damages against a wealthy defendant, see DuBois, supra note 5, at 353 (arguing that judicial assessment may remedy the "Robin Hood" philosophy of jurors).

↕n376 Mallor & Roberts, supra note 5, at 664; Pritchard, supra note 5, at 1240-41.

↕n377 Mallor & Roberts, supra note 5, at 664. As one commentator stated:

The judge very often perceives the stimulus that moves the jury, but does not yield to it. . . . The perennial amateur, layman jury cannot be so quickly domesticated to official role and tradition; it remains accessible to stimuli which the judge will exclude.

HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY, 497-98 (1966).

↕n378 Ellis, supra note 5, at 1006-07.

↕n379 See Mallor & Roberts, supra note 5, at 664; Pritchard, supra note 5, at 1240-41; Ellis, supra note 5, at 1006-07.

↕n380 See Pritchard, supra note 5, at 1240-41 ("The coupling of [the stimuli of passion and bias] and the fact that juries hear only one case create an environment of uncertainty and unpredictability that the trial judge can avoid."); Owen, Products Liability, supra note 5, at 1320; Peter H. Schuck, Mapping the Debate on Jury Reform, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, supra note 333, at 306, 312.

It should be noted that at least one commentator has argued that punitive damages awards would not be more predictable with judicial assessment. See Scheiner, supra note 6, at 180. Because of the vague instructions for the assessment of punitive damages and inconsistencies in the use of remittitur, the commentator argues that punitive damage awards would not be more predictable. Id. However, the commentator contends that punitive damage awards would be generally lower with judicial assessment of punitive damages. Id. It appears contradictory to argue that punitive damage awards would not be more predictable, and yet to argue that they would be generally lower; in other words, if punitive damages would be lower, that must mean that they would also be more predictable.

↕n381 See Mallor & Roberts, supra note 5, at 664.

†n382 Ellis, *supra* note 31, at 55-57. Commentators generally acknowledge that there is uncertainty regarding the amount of punitive damages that a jury will assess, and this uncertainty results in additional litigation costs. See, e.g., *id.* at 43-57; Scheiner, *supra* note 6, at 17879. Many commentators have perceived these additional costs as a negative result of jury assessment of damages, see, e.g., Ellis, *supra* note 31, at 43-57, but one commentator has argued that the uncertainty costs may be perceived as a positive result because these costs may lead to greater deterrence of misconduct, see Scheiner, *supra* note 6, at 178-79.

†n383 Ellis, *supra* note 31, at 56-57; George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. L. REV. 199.

†n384 Ellis, *supra* note 31, at 56-57; Priest, *supra* note 383, at 199.

†n385 See Priest, *supra* note 383, at 199. This may lead to greater trial delay. *Id.*

†n386 See Scheiner, *supra* note 6, at 194-96.

†n387 See *id.* at 195-96 (contending that jury assessment of damages is a form of democracy that should be preserved). However, at least one commentator has argued that the actual participatory and educational value of jury service is limited because of the small likelihood that citizens will be called for jury service. See Priest, *supra* note 333, at 120-24. In fact, a study of juries in Cook County indicated that jurors served, on average, once in every 260.2 years. *Id.* at 122.

†n388 Scheiner, *supra* note 6, at 195-96.

†n389 See *id.* at 194-96.

†n390 See Koesel, *supra* note 6, at 79 ("Judges are thought to make more consistent, lower awards.").

†n391 Scheiner, *supra* note 6, at 194-95 ("To both plaintiffs and defendants, the sum total of tort doctrine, jury preferences, judicial intervention and appellate decision is reflected in one variable--the expected verdict. . . . Thus, the allocation of discretionary power over damages determines who governs the civil litigation system. . . .") (footnote omitted).

†n392 See *id.*

†n393 See Ellis, *supra* note 5, at 1008 (arguing that judicial assessment would enhance fairness and predictability); Mallor & Roberts, *supra* note 5, at 664 (arguing that judicial assessment will increase the likelihood that punitive damages will be applied in a "principled manner").

†n394 See KAN. STAT. ANN. section 60-3701(a) (1994) ("The trier of fact shall determine . . . whether punitive damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted by the court to determine the amount of such damages to be awarded."); CONN. GEN. STAT. ANN. section 52-240b (1991) ("If the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such damages").

†n395 See KAN. STAT. ANN. section 60-3701; CONN. GEN. STAT. ANN. section 52-240b.

†n396 See KAN. STAT. ANN. section 60-3701; CONN. GEN. STAT. ANN. section 52-240b. For a discussion of the purposes of punitive damages, see *supra* notes 32-40 and accompanying text.

†n397 See *Fullilove v. Klutznick*, 448 U.S. 448, 502 (1980) ("[Congress'] Constitutional role is . . . to make policy . . .").

†n398 For a discussion of different methods of tort reform, see *supra* notes 37-50 and accompanying text.

†n399 For state statutes requiring judicial assessment of punitive damages, see *supra* note 4.

†n400 See, e.g., *Fullilove*, 448 U.S. at 502 ("[Congress'] Constitutional role is . . . to make policy . . ."); *Kosak v. United States*, 465 U.S. 848, 862 (1984) ("Petitioner and some commentators argue that [the statute at issue] should not be construed in a fashion that denies an effectual remedy to many persons. . . . That contention has force, but it is properly addressed to Congress, not to this Court.").

†n401 Congress has, however, required judicial assessment of damages in certain areas. For federal statutes requiring judicial assessment of punitive damages, see, for example, Petroleum Marketing Practices Act, 15 U.S.C. section 2805(d)(2) (1988) (requiring judicial assessment of punitive damages); Patent Act, 35 U.S.C. section 284 (1988) (permitting judicial assessment of damages).

†n402 As one commentator stated: "In the absence of legislation limiting the jury's participation in calculating punitive damages, federal courts perhaps should follow what Haslip called the 'common-law method for assessing punitive awards': initial determination by the jury and judicial review for reasonableness." Murphy, *supra* note 239, at 803 (footnote omitted) (but adding that initial determination by a judge may be more sensible). The question of whether courts, in fact, have the constitutional power under the Seventh Amendment to assess punitive damages is discussed *supra* notes 235-83 and accompanying text.

†n403 938 F.2d 502 (4th Cir. 1991) (en banc).

†n404 *Id.* at 505. For a discussion of the facts of the case, see *supra* notes 129-32 and accompanying text.

†n405 The standard on appeal for a punitive damages award has been abuse of discretion. See *supra* note 28 and accompanying text. The same standard of appeal would presumably apply to judicial assessment of punitive damages. See DuBois, *supra* note 5, at 353 (advocating judicial assessment and noting that "there remains the remedy of appellate review . . .").

†n406 873 F.2d 736 (4th Cir. 1989), overruled by *Defender*, 938 F.2d 502.

†n407 *Shamblin's*, 873 F.2d at 740.

†n408 *Id.* at 742-43.

†n409 See *id.* at 742 ("We conclude that remanding for yet a third trial would constitute an enormous waste of judicial as well as the parties' resources.")

†n410 See KAN. STAT. ANN. section 60-3701(a) (1994); OHIO REV. CODE ANN. section 2315.21(C)(2) (Anderson 1995) (found unconstitutional by the Ohio Supreme Court).

†n411 For an argument agreeing with the Kansas Supreme Court's decision in *Printup* that judicial assessment of punitive damages can be implemented consistently with the Kansas

jury trial guarantee, see *supra* notes 284-98 and accompanying text. For an argument disagreeing with the Ohio Supreme Court's decision in *Zoppo* that judicial assessment of punitive damages cannot be implemented consistently with the Ohio jury trial guarantee, see *supra* notes 299-313 and accompanying text.

✦n412 For an evaluation of the policy arguments regarding judicial assessment of punitive damages, see *supra* notes 320-96 and accompanying text.

✦n413 *Defender*, 938 F.2d at 507; *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1447-48 (10th Cir. 1988); *McKinnon v. City of Berwyn*, 750 F.2d 1388, 1391-91 (7th Cir. 1984). However, several circuits have reduced punitive damages awards without remanding for a new trial, but they have not discussed the Seventh Amendment issue. See *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 207 (1st Cir. 1987); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1267, 1279 (7th Cir. 1984); *Guzman v. Western State Bank*, 540 F.2d 948, 954 (8th Cir. 1976). For a discussion of the consistency of judicial assessment of punitive damages with the Seventh Amendment, see *supra* notes 235-83 and accompanying text.

✦n414 See *Zoppo v. Homestead Ins. Co.*, 664 N.E.2d at 403-04 (Ohio 1994) (Wright, J., dissenting) (applying the fundamental elements test and concluding that assessment of punitive damages is not a fundamental element); see also *Murphy*, *supra* note 239, at 802-03 (concluding that the reasoning of *Tull* should be extended to permit judicial assessment of punitive damages); *Kagan*, *supra* note 239, at 772 ("Efforts to restrict jury discretion in punitive damage determinations do not seem to run afoul of the Constitution."); *Pritchard*, *supra* note 5, at 1239 ("Requiring the court to assess punitive damages after the jury finds liability appears to be constitutional.").

✦n415 The Kansas Supreme Court interpreted the state's jury trial provision to permit judicial assessment of punitive damages. See *Smith v. Printup*, 866 P.2d 985 (Kan. 1993). For a discussion of the case, see *supra* notes 165-85 and accompanying text. In contrast, the Ohio Supreme Court interpreted the Ohio jury trial provision to bar judicial assessment of punitive damages. See *Zoppo*, 644 N.E.2d at 397. For a discussion of the case, see *supra* notes 192-206 and accompanying text.

✦n416 *Owen*, *Public Good*, *supra* note 5, at 120; *Mallor & Roberts*, *supra* note 5, at 664. For arguments that judges are better at achieving punishment and deterrence, see *supra* notes 340-42 and accompanying text.

✦n417 See *Ellis*, *supra* note 5, at 1008 ("The amount of punitive damage should be a decision for the judge. . . . These changes in procedure would render the process less unfair. They would also reduce the uncertainty associated with punitive damages claims and enhance predictability"). For arguments that judicial assessment of punitive damages will result in a reduction of uncertainty costs, see *supra* notes 380-85 and accompanying text.

✦n418 See *Printup*, 866 P.2d at 994; *Zoppo*, 644 N.E.2d at 403-04.

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