

October 2016

## Deconstructing Juryless Fact-Finding in Civil Cases

Shaakirrah R. Sanders

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Shaakirrah R. Sanders, *Deconstructing Juryless Fact-Finding in Civil Cases*, 25 Wm. & Mary Bill Rts. J. 235 (2016), <https://scholarship.law.wm.edu/wmborj/vol25/iss1/6>

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## DECONSTRUCTING JURYLESS FACT-FINDING IN CIVIL CASES

Shaakirrah R. Sanders\*

### ABSTRACT

In many states, legislatures have mandated juryless fact-finding in common law-based civil cases by imposing compensatory damage caps that effectively lessen the jury's traditional and historic role as injury valuator. The primary purpose of most caps was to reign in "excessive" civil jury verdicts, which allegedly caused "skyrocketing" medical malpractice insurance premiums and litigation costs. But no legislatively imposed cap is triggered by a preliminary finding of excessiveness. Trial judges have no authority to determine whether application of a cap is just or fair to the (often) severely injured plaintiff. Despite a shared interpretive methodology with regards to the nature and scope of civil jury trial rights, states sharply disagree on the constitutionality of caps. This split does not lie in any textual interpretation of the type of civil jury trial right provided in state constitutions, for disagreement exists even among states with identical clauses.

This Article explores juryless fact-finding in civil cases by turning to Sixth Amendment jurisprudence on mandatory criminal sentencing guidelines. At first blush, compensatory damage caps appear to have little in common with criminal sentencing. Caps reduce a jury's damage findings to a fixed amount. Sentencing guidelines designated which facts were necessary to support a particular sentence. Yet, both remove the jury or ignore the jury's factual findings during a significant part of a civil case: the civil jury is removed or ignored during the "damages" phase of a case and the criminal jury is removed or ignored during the "punishment" phase of a case. Thus certain caps and certain mandatory guidelines sentencing schemes lessened the jury's role as fact-finder and intruded on the jury's verdict or decree. This Article explores both as parallel mandates of juryless fact-finding in civil and criminal cases.

Sixth Amendment jurisprudence has recently rejected mandatory juryless fact-finding for purposes of fixing punishment in criminal cases. Mandatory guidelines that required either reconsideration of a jury's factual findings or consideration of new facts were initially allowed on the theory that legislatures had authority to designate

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certain facts in a criminal case as “elements” of the offense that required a jury. Other facts could be designated “enhancements” to the punishment and did not require a jury. This grant of legislative authority was short lived. The Court has recently held that a criminal jury is required to find any fact that increases the maximum and minimum punishment. In other words, a jury is required to make factual findings that determine the high and low end of a criminal sentence regardless of whether a fact is labeled an element or an enhancement. Moreover, such factual findings are enforceable in other stages of the criminal case.

Seventh Amendment jurisprudence remains undeveloped on the issue of mandated juryless fact-finding in civil cases, but the Sixth Amendment offers three lessons about common law criminal juries that arguably should apply in the civil context. First, modern procedures cannot significantly alter certain common law characteristics of the jury trial right. Second, mandatory removal of the jury as the primary fact-finder was not authorized in common law cases. Third, a common law jury’s factual determinations were fully enforceable unless exceptional circumstances were presented. This Article applies these lessons to compensatory damage caps. This Article urges adoption of cap alternatives that encourage individual review upon necessity. Such alternatives should also advance a state’s dual interests to protect both civilly liable defendants from unreasonably high awards and severely injured plaintiffs from unreasonably low awards.

INTRODUCTION . . . . . 236

I. MANDATORY JURYLESS FACT-FINDING IN CIVIL CASES. . . . . 241

II. JURYLESS FACT-FINDING IN CRIMINAL CASES . . . . . 260

III. DECONSTRUCTING JURYLESS FACT-FINDING IN CIVIL CASES: LESSONS FROM THE SIXTH AMENDMENT CRIMINAL JURY TRIAL CLAUSE. . . . . 276

    A. *The Lesson from Apprendi: Modern Procedures Cannot Significantly Alter Certain Common Law Characteristics of the Jury Trial Right* . . . 280

    B. *The Lesson from Blakely and Booker: Mandatory Removal of the Jury as the Primary Fact-Finder Was Not Authorized in Common Law Cases* . . . . . 285

    C. *The Lesson from Alleyne: A Common Law Jury’s Factual Determinations Were Fully Enforceable Unless Exceptional Circumstances Were Presented* . . . . . 290

CONCLUSION . . . . . 294

INTRODUCTION

This is the second work in which I discuss state laws that cap compensatory damages in certain categories of common law–based civil cases. In the first work, *Uncapping Compensation in the Gore Due Process Analysis*,<sup>1</sup> I argue that the punitive

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<sup>1</sup> Shaakirrah R. Sanders, 24 WM. & MARY BILL RTS. J. 37 (2015).

damage analysis announced in *BMW of North America, Inc. v. Gore*<sup>2</sup> is based on a false premise as it applied in states that have capped compensatory damages: that the plaintiff has been fully reimbursed for actual losses.<sup>3</sup> This Article investigates compensatory damage caps in a different light—as an impermissible and ill-advised legislative mandate of juryless fact-finding in civil cases.<sup>4</sup>

Some states have long agreed that “excessive” civil jury verdicts in personal injury cases had caused a medical malpractice crisis of unprecedented magnitude.<sup>5</sup> Even though many states lacked empirical support for their claims of long-lasting and systemic excessiveness,<sup>6</sup> a mechanic and automatic cap is applied against the amount of recovery in certain categories of common law–based civil claims.<sup>7</sup> States that imposed caps most frequently did so in medical malpractice and wrongful death lawsuits, but some caps apply to all tort cases.<sup>8</sup> The most common type of cap applies to the non-economic-loss component of compensatory damage awards, which includes injuries related to pain, suffering, mental anguish and other emotional distresses, disfigurement, and the loss of consortium or capacity to enjoy life.<sup>9</sup> Other states applied their cap more broadly to encompass the economic-loss component of compensatory damages, which includes medical expenses, lost earnings, and other “objectively verifiable monetary losses.”<sup>10</sup>

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<sup>2</sup> 517 U.S. 559 (1996).

<sup>3</sup> Sanders, *supra* note 1, at 38–39.

<sup>4</sup> Compensatory damage caps have survived or failed challenges in state courts on the following constitutional grounds: the civil jury trial right, equal protection, substantive due process, separation of powers, open courts, right to an adequate remedy, access to courts, and rules against special legislation. *See infra* note 160.

<sup>5</sup> *See* hayleybarbour’s channel, *Haley’s PAC: Tort Reform*, YOUTUBE (Nov. 29, 2010), <https://www.youtube.com/watch?v=AnfXuJ3hKIY> [hereinafter *Haley’s PAC*]. *But see* Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 TEX. L. REV. 345, 347 (1995) (describing the impetus for statutory caps as “runaway juries” and the need to “curb excesses”); Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1755–64, 1785 (2013) (exploring tort reform as a political controversy surrounding civil litigation and discussing empirical work finding the effective hourly rate of contingency fee attorneys only slightly exceeding insurance attorneys).

<sup>6</sup> *See* Yeazell, *supra* note 5, at 1786 (arguing that compensatory damage caps hunt “meritorious lawsuit[s] with very high damages” not frivolous lawsuits).

<sup>7</sup> *See* Deborah R. Hensler, *Trends in Tort Litigation: Findings from the Institute for Civil Justice’s Research*, 48 OHIO ST. L.J. 479, 479 (1987) (refuting tort advocates’ premises that tort lawsuits have exploded and that civil juries in tort cases are out of control).

<sup>8</sup> *See* Hensler, *supra* note 7, at 480 (warning against using data from one area of tort litigation to make inferences about another area of tort litigation); Yeazell, *supra* note 5, at 1787 (pointing out that most U.S. civil litigation involves contracts, not torts).

<sup>9</sup> JAMES M. FISCHER, UNDERSTANDING REMEDIES 36–37 (2d ed. 2006).

<sup>10</sup> *Id.* at 36. Some states have also imposed caps on punitive damage awards. *See* David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1121 (1995).

Currently, the national tort reform debate has shifted to a discussion of whether a medical malpractice crisis or other public harm ever existed.<sup>11</sup> Missouri found that its tort reform was likely to have disproportionately burdened the young, the economically disadvantaged, and those who were most severely injured.<sup>12</sup> These classes of plaintiffs are unlikely to have the means to pay the upfront costs of bringing a colorable claim for personal injury. Despite these findings, compensatory damage caps remain the rule rather than the exception among states.

This Article does not question the existence or nonexistence of a medical malpractice crisis; instead, this Article questions whether compensatory damage caps impermissibly mandate juryless fact-finding in civil cases. In those states that have legislatively imposed compensatory damage caps, a fixed amount or limit on damages applies regardless of the jury's finding in an individual case.<sup>13</sup> In cap regimes, all jury awards over the cap are automatically deemed excessive and all awards under the cap are presumed reasonable.<sup>14</sup> For the most part, caps have been upheld under various provisions of state constitutions.<sup>15</sup> In states where caps were stricken, the most common justification was encroachment on the state civil jury trial guarantee.<sup>16</sup> To be clear, state supreme courts are split on this issue<sup>17</sup> and not all states have considered the question.<sup>18</sup>

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<sup>11</sup> THE CONG. BUDGET OFFICE, 108TH CONG., *THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES*, 12–13, 18 (2004).

<sup>12</sup> *Id.* at 4; Baldus et al., *supra* note 10, at 1122–23 (arguing that caps lack a moral justification due to their arbitrariness and the lack of a relationship between caps and “the level of compensable harm,” and hypothesizing that caps reduce insurance premiums by shifting “the costs of accidents from defendants to injured plaintiffs”).

<sup>13</sup> *See* Baldus et al., *supra* note 10, at 1121–22 (discussing how caps apply regardless of the specific facts of the case).

<sup>14</sup> *See* Murphy, *supra* note 5, at 392–93 (discussing the operation of statutory caps).

<sup>15</sup> *See* David F. Maron, *Statutory Damages Caps: Analysis of the Scope of Right to Jury Trial and the Constitutionality of Mississippi Statutory Caps on Noneconomic Damages*, 32 *MISS. C. L. REV.* 109, 110 (2013).

<sup>16</sup> *See* Murphy, *supra* note 5, at 380 n.152. States where compensatory damage caps in common law based personal injury cases violate the state civil jury trial guarantee include: Georgia, Missouri, North Dakota, Oregon, and Washington. *See* Maron, *supra* note 15, at 136–44. Alabama has ruled its cap violated the right to a trial in general. *See id.* at 136. Alabama, Illinois, New Hampshire, Texas, and Wisconsin have ruled that compensatory damage caps were unconstitutional on other grounds, including but not limited to equal protection, due process, separation of powers, open courts, right to an adequate remedy and access to courts, and rules against special legislation. *See id.* at 136–44.

<sup>17</sup> *See* Maron, *supra* note 15, at 136–44 (detailing states where compensatory damage caps do not violate the state civil jury trial guarantee, including Alaska, California, Colorado, Florida, Idaho, Indiana, Kansas, Louisiana, Maryland, Michigan, Nebraska, New Mexico, South Dakota, Utah, Virginia, and West Virginia; and detailing states where compensatory damage caps in common law based personal injury cases do not violate other provisions of the state constitution, which include California, Colorado, Florida, Kansas, Louisiana, Maryland, Minnesota, Nebraska, New Mexico, Ohio, South Dakota, Utah, and West Virginia).

<sup>18</sup> *See id.* States where compensatory damage caps have not been litigated include

Even among states with identical civil jury trial clauses, an analysis of state supreme court jurisprudence leads to a stalemate on the question of whether caps impermissibly mandate juryless fact-finding in civil cases.<sup>19</sup> Essentially, states splinter on two issues: first, whether caps exceed legislative authority by improperly diminishing or removing the jury from the fact-finding process on the question of damages; and second, whether the jury's assessment of responsibility for an injury (or damage award) is entitled to full enforcement. Few states disagree that the English common law forms the interpretive basis of state (and federal) civil jury trial rights. It is also clear that compensatory damage caps in personal injury cases neither existed nor were contemplated by the common law at the time that most state constitutions were enacted.<sup>20</sup> In the common law the civil jury determined the amount of damages and that determination was fully enforceable except in rare cases.<sup>21</sup> Yet, some state supreme courts have reasoned that legislative authority always existed to alter common law rights, including the right to a civil jury.<sup>22</sup>

This Article explores juryless fact-finding in civil cases by turning to the Sixth Amendment, which has recently addressed juryless fact-finding in mandatory criminal sentencing guidelines schemes. Much like damage caps in common law-based civil cases, mandatory guidelines altered the jury trial right in two ways: one, by mandating reconsideration of factual findings that had already been decided by a jury, or two, by mandating juryless consideration of facts that are material to punishment. Sixth Amendment Criminal Jury Trial Clause jurisprudence initially approved of such procedures and established that legislatures had authority to designate certain facts in a criminal case as “elements” of the offense and other facts as enhancements to the punishment.<sup>23</sup> This distinction proved significant. The reasonable doubt standard applied to elements, which required a jury.<sup>24</sup> The preponderance of the evidence standard applied to enhancements, which did not.<sup>25</sup> The Sixth Amendment's grant of such broad legislative authority has recently been reconsidered. Currently, where guidelines are mandatory, a criminal jury is required to find any fact that increases the *maximum* and *minimum* punishment.<sup>26</sup> Put another way, a jury is required to make factual findings that determine the high and low end of criminal punishment regardless of whether a fact is designated an “element” or an “enhancement.”

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Hawaii, Maine, Massachusetts, Mississippi, Montana, Nevada, Tennessee, and North and South Carolina. *Id.*

<sup>19</sup> See Sanders, *supra* note 1, at 89.

<sup>20</sup> See, e.g., Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 639–43 (Mo. 2012).

<sup>21</sup> See *id.* at 639, 643.

<sup>22</sup> See *id.* at 652 (Russell, J., concurring in part and dissenting in part).

<sup>23</sup> McMillan v. Pennsylvania, 477 U.S. 79, 82–85 (1986).

<sup>24</sup> *Id.* at 85.

<sup>25</sup> *Id.* at 81.

<sup>26</sup> See Alleyne v. United States, 570 U.S. \_\_\_, 133 S. Ct. 2151, 2155 (2013); Apprendi v. New Jersey, 530 U.S. 466, 486–97 (2000).

The Court's recognition and expansion of the right to a criminal jury at sentencing signals a return to common law-based principles with regards to the nature and scope of jury trial rights. As a result, this jurisprudence should prove helpful for examining whether compensatory damage caps impermissibly alter the right to a civil jury. At first blush, compensatory damage caps and criminal sentencing guidelines appear to have little in common. But upon closer inspection, damage caps and mandatory sentencing guidelines operate quite similarly. Caps reduce damages to a fixed amount that applies in all cases regardless of the jury's findings about the individual facts and circumstances.<sup>27</sup> Mandatory guidelines sentencing allowed reconsideration of the jury's determination of the facts that supported a particular sentence.<sup>28</sup> Both significantly altered the jury trial right by distinguishing when a jury was required and when a jury was not required: compensatory damage caps remove the jury from the "damages" phase of civil litigation and mandatory sentencing guidelines removed the jury from the "punishment" phase of the criminal prosecution. Both also lessened the jury's role as the finder of fact and allowed intrusion on the jury's verdict or decree.

Sixth Amendment jurisprudence provides several lessons about the intersectionality between legislative authority and jury trial rights. One, modern procedures cannot significantly alter certain common law characteristics of the jury trial right. Two, mandatory removal of the jury as the primary fact-finder was not authorized in common law cases. Finally, a common law jury's factual determinations were fully enforceable unless exceptional circumstances were presented. Based on these lessons, this Article concludes that compensatory damage caps constitute an ill-advised and impermissible mandate of juryless fact-finding in civil cases.

This Article urges state legislatures and supreme courts to heed the lessons of the Sixth Amendment when considering the propriety of imposing a compensatory damage cap. Part I of this Article examines state legislation that fixes or otherwise caps compensatory damage awards. Part I also examines the state supreme court split on whether compensatory damage caps intrude on the right to a civil jury. Part I demonstrates that compensatory damage caps reveal a fundamental disagreement among states about the nature and scope of civil jury trial rights and legislative authority to alter that right. Part II of this Article analogizes a similar tension that existed in Sixth Amendment Criminal Jury Trial Clause jurisprudence. Part II examines recent Sixth Amendment decisions limiting legislative authority to mandate juryless fact-finding at criminal sentencing. Part II argues that these decisions signal the outer limit of authority to diminish jury trial rights. Part III applies the lessons from Sixth Amendment mandatory guidelines sentencing jurisprudence to compensatory damage caps. Part III recommends adoption of cap alternatives that comport with common law principles. Such

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<sup>27</sup> See Baldus et al., *supra* note 10, at 1121–22.

<sup>28</sup> See *id.* at 1123–24 (discussing similarities between punitive damages and sentencing guidelines).

alternatives should also advance the states' dual interests to protect both civilly liable defendants and severely injured plaintiffs from unreasonably *high* and *low* civil damage awards.

### I. MANDATORY JURYLESS FACT-FINDING IN CIVIL CASES

Mandatory “juryless fact-finding” exists where state legislatures have imposed automatic and fixed caps on compensatory damages awards in certain categories of common law–based civil cases, particularly those arising in tort. As used in this part, the term “juryless fact-finding” refers to state laws that have removed the jury from the “damages” phase of civil litigation or state laws that automatically lessened the amount of compensation the jury has awarded. States that have imposed juryless fact-finding in common law–based civil cases do so on the rationale that “excessive” civil jury verdicts have caused a nationwide medical malpractice insurance crisis.<sup>29</sup> This Article questions whether mandated juryless fact-finding in civil cases impermissibly diminishes the jury’s constitutional role or unconstitutionally intrudes on the jury’s verdict or decree.

Professor Stephen Yeazell, a prominent contemporary teacher and scholar on civil procedure, has described the underpinnings of compensatory damage caps—excessive civil jury verdicts—as “political theater.”<sup>30</sup> Yeazell argues the real aim of state law tort reforms was *meritorious* lawsuits with “very high damages,” not the prevention of *frivolous* lawsuits.<sup>31</sup> Yeazell appears to have a point. Some state law compensatory damage caps apply broadly to all tort actions<sup>32</sup> and others narrowly to only

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<sup>29</sup> See generally *Haley’s PAC*, *supra* note 5. But see James L. Wright & M. Matthews Williams, *Remember the Alamo: The Seventh Amendment of the United States Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards*, 45 S. TEX. L. REV. 449, 461 (2004) (arguing that the annual amount of medical malpractice payouts remained relatively flat from 1993 to 2002 based on findings by Standard & Poor’s and the federal national Practitioners Data Bank). In 2003, the United States General Accounting Office posited that the failure of insurance companies to increase rates during periods of high investment return partially caused an increase in medical malpractice premium rates. *Id.* at 463–64; see also Hensler, *supra* note 7, at 481–82, 484 (arguing that based on data from the Administrative Office of the U.S. Courts, the National Center for State Courts, and Institute for Civil Justice, “the total tort caseload has grown very little” in the years before 1987).

<sup>30</sup> Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 111–17 (1990) (discussing the civil jury role in tort litigation).

<sup>31</sup> See Yeazell, *supra* note 5, at 1786 (noting that over ninety percent of civil judgments amount to less than \$1 million).

<sup>32</sup> See generally IDAHO CODE ANN. § 6-1603 (West 2016) (\$250,000 fixed non-economic damage cap); 735 ILL. COMP. STAT. 5/2-1115.1 (1995) (\$500,000 fixed non-economic damage cap), *invalidated by* *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997); KAN. STAT. ANN. § 60-19a02 (2014) (non-economic damage cap range from \$250,000 to \$350,000); OKLA.



wrongful death cases.<sup>33</sup> The most common type of cap applies in medical malpractice cases.<sup>34</sup> But a majority of states only applied the cap against non-economic damages such as pain and suffering.<sup>35</sup> A minority of states apply the cap against total compensation, which includes both economic and non-economic damages.<sup>36</sup> Alaska, Idaho, North Carolina, Oklahoma, South Carolina, and Tennessee refuse to apply the cap where injurious acts are reckless, intentional, or illegal.<sup>37</sup> Only Massachusetts allows the jury to ignore the cap if the failure to do so would be unfair to the plaintiff.<sup>38</sup> A

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STAT. tit. 23, § 61.2 (2016) (\$350,000 fixed non-economic damage cap); TENN. CODE ANN. § 29-39-102 (2015) (non-economic damage cap range between \$750,000 and \$1 million).

<sup>33</sup> See ME. REV. STAT. ANN. tit. 18-A, § 2-804 (2016) (\$500,000 fixed cap).

<sup>34</sup> Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 396 (2005).

<sup>35</sup> See, e.g., ALASKA STAT. § 09.55.549 (2015) (cap range between \$250,000 and \$400,000); CAL. CIV. CODE § 3333.2 (West 2016) (\$250,000 fixed cap); COLO. REV. STAT. § 13-64-302 (2015) (\$1 million fixed cap against past and future damages; imposing fixed \$250,000 non-economic damage cap, which was raised to \$300,000 in 2003); FLA. STAT. § 766.118 (2015) (\$150,000 to \$1.5 million cap range in cases resulting in injury and death), *invalidated in part* by Estate of McCall v. United States, 134 So. 3d 894 (Fla. 2014); GA. CODE ANN. § 51-13-1 (2015) (\$350,000 fixed cap; cap raised to \$700,000 when multiple institutions involved), *invalidated in part* by Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218 (Ga. 2010); MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-09 (West 2016) (\$650,000 fixed cap except where injury or death results); MASS. GEN. LAWS ANN. ch. 231, § 60H (West 2016) (\$500,000 fixed cap unless the jury finds the cap would “deprive the plaintiff of just compensation”); MICH. COMP. LAWS ANN. § 600.1483 (West 2016) (\$280,000 to \$500,000 cap range); MO. REV. STAT. § 538.210 (2015) (\$400,000 to \$700,000 cap range) (previous \$350,000 cap invalidated by Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. 2012)); MONT. CODE ANN. § 25-9-411 (2015) (\$250,000 fixed cap); NEB. REV. STAT. § 44-2825 (2016) (\$500,000 to \$2,250,000 cap range); NEV. REV. STAT. § 41A.035 (2015) (\$350,000 fixed cap); N.C. GEN. STAT. ANN. § 90-21.19 (West 2016) (\$500,000 fixed cap); N.D. CENT. CODE § 32-42-02 (2016) (\$500,000 fixed cap); OHIO REV. CODE ANN. § 2323.43 (West 2016) (cap range between \$250,000 and \$1 million); S.C. CODE ANN. § 15-32-220 (2015) (\$350,000 fixed cap); TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (West 2016) (\$250,000 fixed cap; cap raised to \$500,000 when multiple institutions involved); UTAH CODE ANN. § 78B-3-410 (West 2016) (\$250,000 to \$450,000 cap range); W. VA. CODE § 55-7B-8 (2015) (\$250,000 to \$500,000 cap range); WIS. STAT. § 893.55(4)(d)(1) (2016) (\$750,000 fixed cap).

<sup>36</sup> See generally IND. CODE § 34-18-14-3 (2015) (cap range between \$500,000 and \$1,250,000; health care provider liable for \$250,000 and remainder paid from compensation fund); LA. STAT. ANN. § 40:1231.2 (2016) (\$500,000 fixed cap; health care provider liable for \$100,000 and remainder paid from compensation fund); N.M. STAT. ANN. § 41-5-6 (West 2016) (\$600,000 fixed cap when injury or death results; health care provider liable for \$200,000 and remainder paid from compensation fund); S.D. CODIFIED LAWS § 21-3-11 (2016) (\$500,000 fixed cap); VA. CODE ANN. § 8.01-581.15 (West 2016) (cap range up to \$3 million).

<sup>37</sup> See ALASKA STAT. § 09.55.549; IDAHO CODE § 6-1603; N.C. GEN. STAT. ANN. § 90-21.19; OKLA. STAT. tit. 23, § 61.2; S.C. CODE ANN. § 15-32-220; TENN. CODE ANN. § 29-39-102.

<sup>38</sup> See MASS. GEN. LAWS ANN. ch. 231, § 60H (allowing jury to consider whether cap is just or fair).

dozen states prohibit informing the jury about the cap.<sup>39</sup> Thirteen states do not limit recovery in personal injury cases.<sup>40</sup>

For decades Professor Deborah Hensler has argued that jury awards in personal injury cases have remained relatively stable.<sup>41</sup> Additionally, Professors Neil Vidmar and Jeffrey Rice have concluded that juries provide more stable estimates of non-economic damages than arbitrators.<sup>42</sup> Ironically, among states that have imposed compensatory damage caps, what constitutes an “excessive” civil jury verdict varies widely. The amount of fixed recovery in most cap regimes ranges between \$250,000 and \$3 million.<sup>43</sup> The majority of states fix the cap at \$250,000 or \$350,000.<sup>44</sup> At \$3 million,

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<sup>39</sup> See COLO. REV. STAT. § 13-64-302; IDAHO CODE § 6-1603; KAN. STAT. ANN. § 60-19a02 (2014); MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-09; MO. REV. STAT. § 538.210; MONT. CODE ANN. § 25-9-411; N.C. GEN. STAT. ANN. § 90-21.19; N.D. CENT. CODE § 32-42-02; N.M. STAT. ANN. § 41-5-6; OHIO REV. CODE ANN. § 2323.43; OKLA. STAT. tit. 23, § 61.2; TENN. CODE ANN. § 29-39-102; see also Murphy, *supra* note 5, at 401–02 (arguing against misinforming the jury about the governing law on compensation).

<sup>40</sup> Maron, *supra* note 15, at 110 n.6, 136–44 (noting that thirteen states, and the District of Columbia, have not imposed caps on tort damage awards, including Arizona, Arkansas, Connecticut, Delaware, Iowa, Kentucky, Minnesota, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and Wyoming).

<sup>41</sup> See Hensler, *supra* note 7, at 486–96 (concluding that from 1960–1979 jury awards in personal injury cases had remained relatively stable and concluding that once one accounts for differences in the type of case juries have properly awarded higher damages based on the seriousness of the injury).

<sup>42</sup> See Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883, 884 (1993) (noting that personal injury plaintiffs prevail in only one-third to one-fifth of jury trials).

<sup>43</sup> See *infra* notes 44–52 and accompanying text.

<sup>44</sup> See, e.g., CAL. CIV. CODE § 3333.2 (West 2016) (fixed \$250,000 non-economic damage cap in medical malpractice cases); COLO. REV. STAT. § 13-64-302 (fixed \$250,000 non-economic damage cap in medical malpractice cases, which was raised to \$300,000 in 2003); GA. CODE ANN. § 51-13-1 (2015) (fixed \$350,000 non-economic damage cap in medical malpractice cases; cap raised to \$700,000 when multiple institutions involved), *invalidated by* Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218 (Ga. 2010); IDAHO CODE ANN. § 6-1603 (fixed \$250,000 non-economic damage cap in all personal injury cases); KAN. STAT. ANN. § 60-19a02 (\$250,000 non-economic damage cap in all personal injury cases fixed according to year); MO. REV. STAT. § 538.210 (fixed range of \$400,000–\$700,00 non-economic damage caps in medical malpractice cases) (previous \$350,000 cap invalidated in part by *Watts v. Lester E. Cox Med Ctrs.*, 376 S.W.3d 633 (Mo. 2012)); MONT. CODE ANN. § 25-9-411 (fixed \$250,000 non-economic damage cap in medical malpractice cases); NEB. REV. STAT. § 44-2825 (2016) (non-economic damage cap range of \$500,000 to \$2,250,000 in medical malpractice cases); NEV. REV. STAT. § 41A.035 (2015) (fixed \$350,000 cap); N.D. CENT. CODE § 32-42-02 (fixed \$500,000 non-economic damage cap in medical malpractice cases); OKLA. STAT. tit. 23, § 61.2 (fixed \$350,000 non-economic damage cap in all cases involving bodily injury); S.C. CODE ANN. § 15-32-220 (2015) (fixed \$350,000 non-economic damage cap in medical malpractice cases); TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (2016) (fixed \$250,000 non-economic damage cap in medical malpractice cases; cap raised to \$500,000 when multiple institutions involved); WIS.

Virginia's fixed cap is the highest, but it was also previously fixed at \$750,000.<sup>45</sup> No other fixed cap is set higher than \$650,000.<sup>46</sup> Washington's cap designated a formula based on the plaintiff's age.<sup>47</sup> Nine states also designated a range for their cap,<sup>48</sup> but of those only Indiana and South Carolina allow damages above \$1 million.<sup>49</sup> The highest cap range under \$2 million is Tennessee at \$750,000 to \$1 million.<sup>50</sup> The broadest cap range was Florida at \$150,000 to 1.5 million.<sup>51</sup> Colorado, Idaho, Illinois, Maryland, Michigan, North and South Carolina, Utah, West Virginia, and Wisconsin provide annual increases to the cap.<sup>52</sup> Other states do not.

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STAT. § 893.55(4)(d)(1) (2014) (fixed \$750,000 non-economic damage cap in medical malpractice cases).

<sup>45</sup> VA. CODE ANN. § 8.01-581.15 (2016).

<sup>46</sup> 735 ILL. COMP. STAT. 5/2-1115.1 (1995) (fixed \$500,000 non-economic damage cap in all personal injury cases), *invalidated by* Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997); LA. STAT. ANN. § 40:1231.2 (2016) (total damage cap of \$500,000 in medical malpractice cases); ME. REV. STAT. ANN. tit. 18-A, § 2-804 (2016) (fixed \$500,000 cap in wrongful death cases); MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-09 (West 2016) (fixed non-economic damage cap of \$650,000 in medical malpractice cases where injury or death results); MASS. GEN. LAWS ANN. ch. 231, § 60H (2016) (fixed \$500,000 non-economic damage cap in medical malpractice cases *unless the jury finds the cap would "deprive the plaintiff of just compensation"*) (emphasis added); N.C. GEN. STAT. ANN. § 90-21.19 (West 2016) (fixed \$500,000 non-economic damage cap in medical malpractice cases); N.M. STAT. ANN. § 41-5-6 (West 2016) (fixed \$600,000 non-economic damage cap medical malpractice cases when injury or death results); S.D. CODIFIED LAWS § 21-3-11 (2016) (fixed \$500,000 total damage cap in medical malpractice cases).

<sup>47</sup> WASH. REV. CODE § 4.56.250 (2016) (imposing cap in all personal injury cases), *invalidated by* Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989).

<sup>48</sup> *See generally* ALASKA STAT. § 09.55.549 (2015) (non-economic damage cap between \$250,000 and \$400,000 in medical malpractice cases); COLO. REV. STAT. § 13-64-302 (\$1 million cap against past and future damages); MICH. COMP. LAWS ANN. § 600.1483 (West 2016) (\$280,000 to \$500,000 non-economic damage cap in medical malpractice cases); OHIO REV. CODE ANN. § 2323.43 (West 2016) (non-economic damage cap range between \$250,000 and \$1 million in medical malpractice cases); UTAH CODE ANN. § 78B-3-410 (West 2016) (non-economic damage cap range between \$250,000 to \$450,000 in medical malpractice cases); W. VA. CODE § 55-7B-8 (2015) (non-economic damage cap range between \$250,000 to \$500,000 in medical malpractice cases).

<sup>49</sup> *See* IND. CODE § 34-18-14-3 (2015) (non-economic damage cap range between \$500,000 and \$1,125,000 in personal injury cases); S.C. CODE ANN. § 15-32-220 (fixed cap range between \$350,000 to \$1,050,000 in medical malpractice cases).

<sup>50</sup> TENN. CODE ANN. § 29-39-102 (2015).

<sup>51</sup> FLA. STAT. § 766.118 (2015) (imposing cap against non-economic damages in medical malpractice cases resulting in personal injury or death), *invalidated in part by* Estate of McCall v. United States, 134 So. 3d 894 (Fla. 2014) (plurality opinion).

<sup>52</sup> *See* COLO. REV. STAT. § 13-64-302; IDAHO CODE ANN. § 6-1603 (West 2015); 735 ILL. COMP. STAT. 51/2-1115.1 (1995); MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-09 (West 2016); MICH. COMP. LAWS ANN. § 600.1483; N.C. GEN. STAT. ANN. § 90-21.19 (West 2016); S.C. CODE ANN. § 15-32-220; UTAH CODE ANN. § 78B-3-410; W. VA. CODE § 55-7B-8; WIS. STAT. § 893.55(4)(d)(1) (2014).

Whether compensatory damage caps impermissibly mandate juryless fact-finding and infringe on state civil jury rights has been the subject of much state constitutional jurisprudence. Yeazell describes the civil jury as a unique U.S. institution,<sup>53</sup> albeit one adopted from the common law. With the exceptions of Colorado and Louisiana, all U.S. state constitutions, as well as the federal constitution, guarantee a civil jury in common law cases.<sup>54</sup> Despite differences in terminology, most state civil jury trial clauses appear to guarantee the same thing. Thirty-two state constitutions establish an *inviolable* civil jury trial right.<sup>55</sup> “Inviolable” is defined as “free from change or blemish: pure [or] unbroken.”<sup>56</sup> Civil jury trial clauses in Alaska, Hawaii, Michigan, and West Virginia mirror<sup>57</sup> the Seventh Amendment, which provides: “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”<sup>58</sup> The term “preserve” is defined as “to maintain unchanged” or “to keep or maintain intact.”<sup>59</sup> Massachusetts, New Hampshire, Vermont, and Virginia declare a *sacred* civil jury trial right.<sup>60</sup> In this

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<sup>53</sup> See Yeazell, *supra* note 5, at 1783 (arguing that “[a]ccording to most historical accounts” the U.S. civil jury is a unique institution that reflects distrust of judges and lawyers (citing Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 667–705 (1973))).

<sup>54</sup> See U.S. CONST. amend. VII; see also *infra* notes 55, 57, 60, 62, and accompanying text. *But see* Motz v. Jammaron, 676 P.2d 1211, 1213 (Colo. App. 1983) (acknowledging that under the Colorado Constitution there is no right to a civil jury); Tellis v. Lincoln Par. Police Jury (La. App. 2 Cir. 12/14/05); 916 So. 2d 1248, 1250 (acknowledging that the Louisiana Constitution does not include a right to a civil jury).

<sup>55</sup> See ALA. CONST. art. 1, § 11; ARIZ. CONST. art. 2, § 23; ARK. CONST. art. 2, § 7; CAL. CONST. art. 1, § 16; CONN. CONST. art. 1, § 19; FLA. CONST. art. 1, § 22; GA. CONST. art. 1, § 1, para. XI; IDAHO CONST. art. 1, § 7; ILL. CONST. art. 1, § 13; IND. CONST. art. 1, § 20; KAN. BILL OF RIGHTS § 5; KY. CONST. art. 1, § 7; MINN. CONST. art. 1, § 4; MISS. CONST. art. 3, § 31; MO. CONST. art. 1, § 22(a); MONT. CONST. art. 2, § 26; NEB. CONST. art. 1, § 6; NEV. CONST. art. 1, § 3; N.J. CONST. art. 1, para. 9; N.M. CONST. art. 2, § 12; N.Y. CONST. art. 1, § 2; N.D. CONST. art. 1, § 13; OHIO CONST. art. 1, § 5; OKLA. CONST. art. 2, § 19; OR. CONST. art. 1, § 17; PA. CONST. art. 1, § 6; R.I. CONST. art. 1, § 15; S.C. CONST. art. 1, § 14; S.D. CONST. art. 6, § 6; TENN. CONST. art. 1, § 6; TEX. CONST. art. 1, § 15; UTAH CONST. art. 1, § 10; WASH. CONST. art. 1, § 21; WIS. CONST. art. 1, § 5. *But see* COLO. CONST. art. 2, § 23 (only referring to criminal cases); WYO. CONST. art. 1, § 9 (guaranteeing an inviolable right to a criminal jury).

<sup>56</sup> *Inviolable*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1190 (2002).

<sup>57</sup> See ALASKA CONST. art. 1, § 16; HAW. CONST. art. 1, § 13; MICH. CONST. art. 1, § 14; W. VA. CONST. art. 3, § 13.

<sup>58</sup> U.S. CONST. amend. VII; see also Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432–33 (1996) (discussing the Seventh Amendment’s Civil Jury Trial and Reexamination Clauses).

<sup>59</sup> *Preserve*, THE AMERICAN HERITAGE NEW COLLEGE DICTIONARY 1102 (4th ed. 2007).

<sup>60</sup> See MASS. CONST. art. XV, pt. 1; N.H. CONST. art. 20; VT. CONST. ch. 1, art. 12; VA. CONST. art. 1, § 11.

sense, “sacred” is best defined as “reverence from violation, interference, incursion, etc., sacrosanct, inviolable.”<sup>61</sup> Civil jury trial clauses in Delaware, Maine, Maryland, and North and South Carolina can be best described as anomalies, but they contain some combination of the terms “inviolable,” “preserved,” or “sacred.”<sup>62</sup>

“Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in . . . history and jurisprudence that any seeming curtailment of the right . . . [is] scrutinized [under the federal constitution] with the utmost care.”<sup>63</sup> It is unclear whether this rule applies to state civil jury trial clauses. But for state constitutions that have expressly adopted the common law, a change that alters the common law may also alter the state constitution.<sup>64</sup> Nevertheless, Justice Harlan Stone recognized long ago that the common law was flexible, was adaptable to varying conditions, and did not prevent development of novel procedures.<sup>65</sup> Unless, warned Stone, such procedures *impaired the jury’s function to decide issues of fact*.<sup>66</sup> As noted by Professor Suja Thomas, who has thoroughly chronicled civil jury practices in the U.S. colonial era, even under an evolving standard “the substance of the right to a jury trial must be maintained such that at minimum the jury is the fact-finder as it existed at English common law.”<sup>67</sup>

Professors David Baldus, John MacQueen, and George Woodworth argue that compensatory damage caps constitute legislative interference on the domain of jury decision making.<sup>68</sup> Nevertheless, state supreme courts are currently split as to whether legislative authority exists to remove the jury or lessen the jury’s role as the primary fact-finder on the issue of damages. Specifically, states disagree whether

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<sup>61</sup> *Sacred*, 2 SHORTER OXFORD ENGLISH DICTIONARY 2644 (6th ed. 2007).

<sup>62</sup> See DEL. CONST. art. 1, § 4 (“Trial by jury shall be as heretofore.”); MD. DECLARATION OF RIGHTS art. 23 (inviolably preserving civil jury trial right); ME. CONST. art. 1, § 20 (“In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced[.]”); N.C. CONST. art. 1, § 25 (preserving civil jury trial right as sacred and inviolable); S.C. CONST. art. 1, § 14 (“The right of trial by jury shall be preserved inviolate.”). *But see* LA. CONST. art. 1, § 16 (only guaranteeing the right to a criminal jury trial).

<sup>63</sup> *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

<sup>64</sup> See *id.* at 487; see also *id.* at 490–91 (Stone, J., dissenting). *But see* Wolfram, *supra* note 53, at 732 (observing that the freedom enjoyed by the “original states” only applied to their own system of civil trials and arguing against “imposing any particular division of judge-jury functions upon the subsequently admitted states”).

<sup>65</sup> See *Dimick*, 293 U.S. at 492 (Stone, J., dissenting) (maintaining that any encroachments on the jury trial right that were impermissible in the common law would also be impermissible by the Seventh Amendment).

<sup>66</sup> See *id.*

<sup>67</sup> Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 789 (2003).

<sup>68</sup> See Baldus et al., *supra* note 10, at 1169–70 (pointing out the difficulty of identifying any upper and lower dollar limits that would be reasonable).

compensatory damage caps violated their inviolate, preserved, or sacred civil jury trial guarantee by impermissibly interfering with the jury's damage determination. This split does not lie in any textual interpretation of the meaning of the type of any civil jury trial clause. Instead, the conflict lies in the nature and scope of the civil jury trial right as it existed in the common law at the time of ratification of the specific state right to a civil jury. Curiously, the state supreme court split on this issue exists even among states with identical civil jury trial clauses and among states with close-in-time ratification of their civil jury trial right.

Professor Colleen Murphy, who has extensively written on the intersection of legislative authority and the right to a civil jury, has warned that compensatory damage caps render the jury's computation of damages illusory.<sup>69</sup> Yet, the majority of states, like Virginia in *Etheridge v. Medical Center Hospitals*,<sup>70</sup> have ruled that capped compensation schemes do not impermissibly alter the nature or scope of the civil jury trial right.<sup>71</sup> A minority of states, like Washington in *Sofie v. Fibreboard Corp.*,<sup>72</sup> disagree and have held that capped compensation infringed on the right to a civil jury.<sup>73</sup> *Etheridge* involved the reduction of a civil jury's award of \$2,750,000 pursuant to a Virginia law that at the time capped *total* damages in medical malpractice cases to \$750,000.<sup>74</sup> The plaintiff, Richie Wilson, was described as a "normal, and healthy" 35-year-old wife and mother of three children.<sup>75</sup> Wilson underwent surgery to restore her deteriorating jaw bone.<sup>76</sup> During the surgery, long portions of her rib bones were removed, reshaped, and grafted into her jaw.<sup>77</sup> Wilson was left permanently

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<sup>69</sup> Murphy, *supra* note 5, at 404 (pointing out the disingenuousness of the argument that compensatory damage caps do not alter the role of the jury because caps "render[ ] the jury's decision about compensation illusory").

<sup>70</sup> 376 S.E.2d 525 (Va. 1989).

<sup>71</sup> See *supra* note 17 and accompanying text.

<sup>72</sup> 771 P.2d 711, 728 (Wash. 1989).

<sup>73</sup> See *supra* note 18 and accompanying text. Before *Etheridge* and *Sofie*, some state supreme courts had already examined whether the application of a compensatory damage cap in common law-based personal injury cases violated the state right to a civil jury. Compare *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 602 (Ind. 1980) (\$500,000 cap in medical malpractice cases did not violate state civil jury trial clause), *overruled on other grounds by In re Stephens*, 867 N.E.2d 148, 156 (Ind. 2007) (reprimanding attorney for unreasonable contingent fees in medical malpractice case), with *Wright v. Cent. DuPage Hosp. Ass'n*, 347 N.E.2d 736, 743 (Ill. 1976) (holding \$500,000 cap against total damages violated civil jury trial clause), and *Arneson v. Olson*, 270 N.W.2d 125, 138 (N.D. 1978) (holding cap violated state civil jury trial clause).

<sup>74</sup> *Etheridge*, 376 S.E.2d at 527–28; see also VA. CODE ANN. § 8.01-581.15 (1989).

<sup>75</sup> *Etheridge*, 376 S.E.2d at 526.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* After a general surgeon, Dr. Trower, removed Wilson's rib bones, an oral surgeon grafted the reshaped bone into Wilson's jaw. *Id.* The civil jury found both Dr. Trower and the hospital negligent and found that their negligence caused Wilson's injuries. *Id.*

brain damaged, paralyzed, and confined to a wheelchair.<sup>78</sup> As a result, she was unable to care for herself or for her children.<sup>79</sup>

*Etheridge* declared Virginia's legislature had broad authority to impose a capped compensatory damage award in civil cases.<sup>80</sup> The *Etheridge* court reasoned that compensatory damage caps did "nothing more than establish the outer limits" of recovery.<sup>81</sup> *Etheridge* reasoned legislative actions presumptively reasonable unless "plainly repugnant to some provision of the state or federal constitution."<sup>82</sup> The *Etheridge* court also accepted that a correlation existed between nationwide increases in medical malpractice insurance premiums and the availability of medical malpractice insurance in Virginia.<sup>83</sup> In doing so, the court relied on a 1975 state commissioned study that demonstrated that since 1960 medical malpractice insurance rates had increased nationwide more than one thousand percent.<sup>84</sup> According to this report, the increase resulted from the number and severity of medical malpractice claims.<sup>85</sup> *Etheridge* also accepted the legislature's conclusion that it had become too expensive to purchase medical malpractice insurance in Virginia and that the availability of medical care services within the State had become endangered.<sup>86</sup> Finally, *Etheridge* afforded great deference to the Virginia legislature's judgment that the amount of the cap should reflect what medical malpractice insurers were willing to cover, which at that time was a total of \$750,000 for both economic and non-economic damages.<sup>87</sup>

Professor Charles McCormick, author of the 1935 classic *Handbook on the Law of Damages*, preaches that "from the beginning of trial by jury," the amount of damages

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<sup>78</sup> *Id.* at 527. Wilson earned approximately \$10,000 per year as a nurse before the accident. *Id.* Wilson's brain damage severely affected her memory and intelligence and caused paralysis on her left side. *Id.* Wilson's medical bills had already exceeded \$300,000 by the time of trial and such expenditures were expected to last the rest of her life. *Id.* Wilson's life expectancy was 39.9 years. *Id.* Total alleged losses amounted to \$1.9 million. *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 538.

<sup>81</sup> *Id.* at 529. *But see* Murphy, *supra* note 5, at 404 (arguing that statutory caps change the functioning of the jury).

<sup>82</sup> *Etheridge*, 376 S.E.2d at 528 (quoting *Blue Cross v. Commonwealth*, 269 S.E.2d 827, 832 (Va. 1980)) (resolving doubts in favor of the validity of legislative action).

<sup>83</sup> *Id.* at 527.

<sup>84</sup> *Id.* The study was prepared by the Virginia State Corporation Commission's Bureau of Insurance, which reported that "since 1960 medical malpractice insurance rates had increased nationwide more than [one thousand] percent." *Id.* This increase allegedly resulted from a rise in the number and severity of medical malpractice claims, of which ninety percent originated after 1965. *Id.* Insurance rate increases allegedly caused providers to cease providing services in Virginia, jeopardizing the health, safety, and welfare of state citizens. *Id.* at 527-28.

<sup>85</sup> *Id.* at 527.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 527-28. The court accepted the General Assembly's assertion that health care providers in Virginia experienced increasing difficulties obtaining medical malpractice insurance in excess of \$750,000. *Id.* at 527. The court provided no support for this finding.

were a “‘fact’ to be found by the jur[y].”<sup>88</sup> Additionally, Professor John Langbein argues that in the common law, the link between trial and jury was so close that there was “no such thing as nonjury trial” whether by legislative action or otherwise.<sup>89</sup> The *Etheridge* court appeared to disagree with McCormick and Langbein. In holding that Virginia’s compensatory damage cap did not alter the state right to a civil jury,<sup>90</sup> *Etheridge* briefly examined the scope of the civil jury trial right as it existed when Virginia’s Constitution was adopted in 1771.<sup>91</sup> *Etheridge* designated the “case stated” procedure the best portrayal of the distinction between the jury and the court during the latter part of the eighteenth century.<sup>92</sup> But as described by *Etheridge*, the “case stated” procedure was designed specifically for when only *undisputed* facts remained.<sup>93</sup> In a trial that resulted in a “case stated,” the jury’s role was limited to resolving any factual issues that might arise.<sup>94</sup> *Etheridge* did not discuss procedures that were used during the late eighteenth century when a case presented *disputed* issues of fact.<sup>95</sup> Instead, *Etheridge* held that where a case was “stated,” the parties were entitled to a jury’s assessment of damages, but not the legal effect or *enforcement* of the jury’s award.<sup>96</sup>

Professor Emeritus Dan Dobbs, a prolific scholar on the law of remedies,<sup>97</sup> describes the aim of compensatory damage awards in personal injury cases as “compensating the victim or making good the losses proximately resulting from the injury.”<sup>98</sup> Dobbs also includes both the economic—and non-economic—loss

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<sup>88</sup> CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 24 (1935).

<sup>89</sup> John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 527 (2012).

<sup>90</sup> *Etheridge*, 376 S.E.2d at 529.

<sup>91</sup> *Id.* at 528. The Virginia Constitution was ratified twenty years before the Federal Bill of Rights.

<sup>92</sup> *Id.* at 529. The Virginia Supreme Court identified three procedures that defined the jury’s role: the “case stated,” the “demurrer to the evidence,” and the “special verdict.” *Id.*

<sup>93</sup> *Id.* According to the *Etheridge* majority, the case stated procedure limited the jury’s role to resolving disputed facts. *Id.* Because Virginia’s jury trial guarantee only applies to disputed facts, the jury’s role was fulfilled once those facts were ascertained. *Id.* The law determined the rights of the parties and the remedies available to the parties. *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Presumably the case stated procedure would not apply where a case involves disputed facts. In the common law factual disputes were resolved by a jury. Langbein, *supra* note 89, at 527. Langbein posits that in the common law the link between trial and jury was such that there was “no such thing as nonjury trial.” *Id.* Langbein defines bench trials as “adjudication by the judge sitting without a jury.” *Id.* Bench trials were unknown until the later nineteenth century, well after enactment of Virginia’s Constitution in 1771. *Id.*; see also Murphy, *supra* note 5, at 361 (describing the exceptions to the common law tradition of “jury-determined compensation” as either a default judgment or a demurrer to certain amount in favor of the plaintiff).

<sup>96</sup> *Etheridge*, 376 S.E.2d at 529.

<sup>97</sup> DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION (2d ed. 1993).

<sup>98</sup> *Id.* § 8.1(1), at 647 (discussing requirement that damages in personal injury cases be proved and calculated at the trial).



components of the compensatory damage award as redress for an injured party's losses.<sup>99</sup> The redress of such losses historically constituted a legal remedy for which a jury was required.<sup>100</sup> The jury's assessment includes the injury itself and the extent of harm or value of the injury.<sup>101</sup> Both presented a question of "historical or predictive fact."<sup>102</sup> According to Dobbs, such facts vary with "the kind of harm suffered."<sup>103</sup> Yet, a majority of state supreme courts agree with *Etheridge* that the jury's constitutionally mandated role was fulfilled once disputed facts were resolved and damages were assessed (even if the latter was unenforceable).<sup>104</sup> *Etheridge* described the trial court's reduction of damages as only the mere application of the law to the facts.<sup>105</sup> Virginia's cap only dictated the outer limits, or the ceiling, of a jury's award.<sup>106</sup> Such procedures did not plainly infringe on Virginia's *sacred* civil jury trial right because, as the case stated procedure allegedly demonstrated, "the common law never recognized a right to a full recovery in tort."<sup>107</sup> *Etheridge* also described the cause of action for medical malpractice as a legislatively created tort rather than one based on the common law.<sup>108</sup> Thus in Virginia, the jury's fact-finding function extended to an assessment of damages but the law could ultimately determine the limits of recovery.<sup>109</sup> The *Etheridge* court clearly disagreed with Dobbs, McCormick, and Seventh Amendment jurisprudence, all of whom described the

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<sup>99</sup> *Id.* § 1.1, at 3–4 (distinguishing between "damages as compensation" and "noncompensatory mone[tary] awards"); see also *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001) (explaining the difference between compensatory and punitive damages).

<sup>100</sup> DOBBS, *supra* note 97, § 1.2, at 9 (distinguishing between remedies at law, which required a jury, and remedies in equity, which do not require a jury); see also Murphy, *supra* note 5, at 349 (characterizing the jury's role as injury evaluator as "the heart of [its] constitutional province").

<sup>101</sup> See *Cooper Indus., Inc.*, 532 U.S. at 432; see also Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1262 (2014) (describing the U.S. civil jury determination of "the appropriate [amount of] damages" as historically broad and discretionary).

<sup>102</sup> *Cooper Indus., Inc.*, 532 U.S. at 437 (emphasis added) (quoting *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 429 (1996) (Scalia, J., dissenting)).

<sup>103</sup> DOBBS, *supra* note 97, § 3.3(1), at 220 (explaining the lack of universal measurement for damages).

<sup>104</sup> *Etheridge v. Med. Ctr. Hosp.*, 376 S.E.2d 525, 529 (Va. 1989) (acknowledging that the jury's fact-finding function extended to the assessment of damages, but arguing that because damages were a remedy their measurement was a matter of law not fact).

<sup>105</sup> *Id.* (finding it significant that the cap is applied after the jury has fulfilled its fact-finding function).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* (citations omitted) (recognizing that "the jury trial guarantee" is limited to that which existed at common law).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

amount of compensatory damages in common law–based civil cases as an issue of fact within the province of the jury.<sup>110</sup>

Four months after *Etheridge* was decided, the Washington Supreme Court appeared to agree with Dobbs, McCormick, and Seventh Amendment jurisprudence in *Sofie v. Fibreboard Corp.*<sup>111</sup> *Sofie* involved a \$1,345,833 damage award that was reduced to \$316,377 pursuant to a section of the Revised Code of Washington that capped non-economic damages in personal injury and wrongful death cases using a formula based on the plaintiff’s age.<sup>112</sup> Austin Sofie was a 67-year-old career pipe-fitter who suffered from mesothelioma, the cause of which was asbestos exposure.<sup>113</sup> Damages proven at trial included extreme pain and consuming physical agony that could be only temporarily relieved with hot baths or “morphine cocktails.”<sup>114</sup> The *Sofie* trial judge found the jury’s award reasonable, but reduced it in accordance to Washington’s cap.<sup>115</sup> The Washington Supreme Court ruled the cap violated Washington’s *inviolable* civil jury trial right.<sup>116</sup>

While the court presumed Washington’s cap was constitutional, *Sofie* looked further beyond the question of legislative authority than *Etheridge*.<sup>117</sup> The court instead focused its examination on the civil jury trial right as it existed in the common law when Washington’s constitution was adopted in 1889.<sup>118</sup> Like the *Etheridge* court, the *Sofie* court determined that this historical “point in time” determined the scope of Washington’s right to a civil jury and the causes of action to which that right applied.<sup>119</sup> But *Etheridge* and *Sofie* diverge on whether state jury trial rights were resistant to legislative attempts to reduce the civil jury’s role as the fact-finder on compensatory damages.<sup>120</sup> Murphy describes this conflict as a larger question concerning legislative

<sup>110</sup> DOBBS, *supra* note 97, § 1.2, at 9; *see also* Tull v. United States, 481 U.S. 412, 418–19 (1987); Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

<sup>111</sup> 771 P.2d 711 (Wash. 1989).

<sup>112</sup> *Id.* at 712–13. WASH. REV. CODE § 4.56.250(2) applied to “damages for personal injury or death” and prohibited a claimant from recovering non-economic damages that exceeded “an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages . . . .” *Id.* at 713 (quoting WASH. REV. CODE § 4.56.250(2) (2016)). The jury’s economic damage award was \$191,241 and the jury’s non-economic damage award was \$1,154,592. *Id.* Mr. Sofie received \$477,200 for pain and suffering and Ms. Sofie received \$677,392 for loss of consortium. *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 712. The *Sofie* court declared the civil jury trial issue dispositive. *Id.* at 715.

<sup>117</sup> *Id.* at 715 (applying a reasonableness standard because the cap was classified as economic legislation).

<sup>118</sup> *Id.* at 716 (citing State *ex rel.* Goodner v. Speed, 640 P.2d 13 (Wash. 1982)). Washington’s constitution was adopted over a century after Virginia’s Constitution. *Id.*

<sup>119</sup> *Id.* at 720.

<sup>120</sup> *Compare id.* (“Constitutional protections are not directly subject to common law changes.”), with *Etheridge v. Med. Ctr. Hosp.*, 376 S.E.2d 525, 529 (Va. 1989) (broad legislative authority exists to alter civil jury trial rights as they existed in the common law). *Sofie*

prerogative and jury authority to determine damages.<sup>121</sup> While *Sofie* professed to examine the issues of legislative prerogative and jury authority separately, the court essentially questioned whether the amount of damages was an issue of fact “within the jury’s province.”<sup>122</sup> *Sofie* held that the constitutional nature of the right to a civil jury trial prohibited modifications by legislative action.<sup>123</sup> In effect Washington’s legislature had the authority to define the parameters of a cause of action and prescribe factors to determine liability,<sup>124</sup> but could not predetermine the limits of the jury’s fact-finding power or preset damages in common law–based civil cases.<sup>125</sup>

The *Sofie* court also appears to align more closely with Thomas, Murphy, and Langbein’s views on the nature and scope of the civil jury as that right existed in the common law. *Sofie* held “there [was] not . . . an issue whether the right to a jury attache[d]” because both the economic and non-economic components of a compensatory damage award were issues of fact.<sup>126</sup> Despite the court’s earlier protestations of the inapplicability of the Seventh Amendment,<sup>127</sup> *Sofie* looked to interpretations of that Amendment for guidance.<sup>128</sup> The *Sofie* court found that although “‘newer’ tort theories” were alleged, the heart of the claim was negligence or other misconduct that resulted in personal injury.<sup>129</sup> Those types of personal injuries were among those the common law recognized in 1889.<sup>130</sup>

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reasoned that the majority of state supreme courts that followed *Etheridge* failed to analyze the jury’s historical role in the issue of damages or failed to engage in the correct “historical constitutional analysis” to construe the right to a civil jury. *Sofie*, 771 P.2d at 723.

<sup>121</sup> Murphy, *supra* note 5, at 348–49 (framing the issue as whether and to what extent legislatures may “alter the norm of jury determination of compensation” and warning against legislative “interfere[nce] with an ‘essential function’ of” the civil jury).

<sup>122</sup> *Sofie*, 771 P.2d at 723–24. Because the civil jury’s finding of damages enjoyed a presumption of validity, that finding cannot be altered unless unsupported by the evidence. *Id.* at 721.

<sup>123</sup> *Id.* at 716, 719 (citing *Baker v. Prewitt*, 19 P. 149 (1888)) (clear evidence exists “that the jury’s fact-finding function included the determination of damages”); *see also* *Bingaman v. Grays Harbor Cmty. Hosp.*, 699 P.2d 1230, 1232 (Wash. 1985) (holding that the amount of damages was within the province of a properly instructed jury).

<sup>124</sup> *Sofie*, 771 P.2d at 727.

<sup>125</sup> *Id.* at 719 (recognizing that legislative power to “shape” litigation did not extend to altering constitutional protections and warning that caps unconstitutionally disregarded the jury’s findings).

<sup>126</sup> *Id.* at 718–19.

<sup>127</sup> *Id.* at 716 (citing *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916); *Walker v. Sauvinet*, 92 U.S. 90 (1876)); *see also* *Wright & Williams*, *supra* note 29, at 482–94 (discussing the Seventh Amendment Civil Jury Trial Clause’s unincorporated status).

<sup>128</sup> *Sofie*, 771 P.2d at 717–18 (discussing *Dimick v. Schiedt*, 293 U.S. 474 (1935) and *Tull v. United States*, 481 U.S. 412 (1987), and finding the latter case fundamentally distinguishable because it involved civil penalties in a regulatory enforcement case).

<sup>129</sup> *Id.* at 718–19 (explaining how a basic cause of action should remain as one that arises in tort even after it is categorized as a newer theory of recovery).

<sup>130</sup> *Id.* at 718.

Finally, the *Sofie* court also appeared to agree with Baldus, MacQueen, and Woodworth, who have argued that compensatory damage caps are “completely unrelated to the level of compensable harm suffered by the plaintiff,”<sup>131</sup> and that caps do not address the equitable relationship between the injury and the award.<sup>132</sup> *Sofie* reasoned that Washington’s cap impermissibly changed the trial’s outcome from a jury’s determination to a predetermined one fixed by the legislature.<sup>133</sup> Washington’s procedure reduced the civil jury trial right to a shadow without substance.<sup>134</sup> To the extent that other procedures allowed modification of the jury’s determination of damages, such exercise of authority was rare and required a case-by-case review.<sup>135</sup> In short, Washington’s cap imposed compensatory damages that were unsupported by the evidence, and caps constituted a legislative attempt to mandate legal conclusions.<sup>136</sup> To rule otherwise would result in civil juries “exist[ing] in form,” but having “no effect in function.”<sup>137</sup>

After *Sofie*, state supreme courts and state courts of appeal more commonly agreed with *Etheridge* and ruled that compensatory damage caps did not infringe on state civil jury trial rights.<sup>138</sup> Of note is Idaho, whose legislature lowered its

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<sup>131</sup> See Baldus et al., *supra* note 10, at 1122–23 (commenting that caps shift “the costs of accidents from defendants to injured plaintiffs as a means of reducing insurance premiums”).

<sup>132</sup> *Id.* at 1122 (noting how caps do not address inadequate awards).

<sup>133</sup> *Sofie*, 771 P.2d at 720. *Sofie* described this change as a direct infringement on the civil jury trial right. *Id.* at 720–21, 723.

<sup>134</sup> *Id.* at 721 (internal quotations marks omitted) (describing the Washington Constitution as one of “substance, not shadows”).

<sup>135</sup> *Id.*; see also *id.* at 724 (comparing cap and remittitur procedures).

<sup>136</sup> *Id.* at 721, 724.

<sup>137</sup> *Id.* at 724.

<sup>138</sup> See, e.g., *Evans v. State*, 56 P.3d 1046 (Alaska 2002) (holding \$250,000 cap against non-economic damages in personal injury cases and \$400,000 cap in wrongful death cases do not violate state right to a civil jury); *Stinnett v. Tam*, 130 Cal. Rptr. 3d 732 (Cal. Ct. App. 2011) (holding \$250,000 cap against non-economic damages does not violate state right to a civil jury); *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993) (holding \$500,000 to \$1 million non-economic damage cap in medical malpractice cases did not violate state right to a civil jury); *Kirkland v. Blaine Cty. Med. Ctr.*, 4 P.3d 1115 (Idaho 2000) (holding \$400,000 non-economic damage cap in personal injury cases does not violate state right to a civil jury; no litigation on subsequently enacted \$250,000 cap); *Miller v. Johnson*, 289 P.3d 1098 (Kan. 2012) (holding \$250,000 cap against non-economic damages does not violate right to civil jury trial); *Samsel v. Wheeler Transp. Servs., Inc.*, 789 P.2d 541 (Kan. 1990) (holding \$250,000 non-economic damage cap in personal injury cases does not violate state right to a civil jury); *Murphy v. Edmunds*, 601 A.2d 102 (Md. 1992) (holding \$350,000 non-economic damage cap in personal injury cases does not violate state right to a civil jury); *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. Ct. App. 2002) (holding \$280,000 cap against non-economic damages, except in cases where the plaintiff was left hemiplegic, paraplegic, quadriplegic, or cognitively disabled, does not violate state right to a civil jury because state legislature had authority to modify common law rights of actions and statutory remedies); *Adams ex rel v. Children’s Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (holding \$350,000 non-economic damage cap in medical malpractice

\$400,000 non-economic damage cap shortly after that cap was held constitutional in *Kirkland v. Blaine County Medical Center*.<sup>139</sup> The Idaho Supreme Court has

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cases does not violate state right to a civil jury), *overruled by* *Watts v. Cox Med. Ctr.*, 376 S.W. 3d 633 (Mo. 2012) (\$350,000 cap violates state civil jury trial clause; no litigation on subsequently enacted \$400,000 to \$700,000 cap range); *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43 (Neb. 2003) (holding \$1.25 million cap against total damages did not violate state right to a civil jury); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007) (holding \$350,000 cap did not violate state right to a civil jury); *Knowles ex rel. Knowles v. United States*, 544 N.W. 2d 183 (S.D. 1996) (holding \$500,000 cap against non-economic damages, unlike cap against total damages, did not violate state right to a civil jury); *Judd v. Drezga*, 103 P.3d 135 (Utah 2004) (holding \$250,000 non-economic damages did not violate state right to a civil jury); *Guzman v. St. Francis Hosp. Inc.*, 623 N.W.2d 776 (Wis. Ct. App. 2000) (holding \$350,000 non-economic damage cap in medical malpractice cases does not violate state right to a civil jury), *overruled on other grounds by* *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005) (holding \$350,000 cap violated state guarantee of equal protection; no litigation on subsequently enacted \$750,000 non-economic damage cap); *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405 (W. Va. 2011) (holding \$500,000 cap against non-economic damages in medical malpractice cases did not violate state right to a civil jury). *Compare* *Lakin v. Senco Prods.*, 987 P.2d 463 (Or. 1999) (holding \$500,000 non-economic damages cap in personal injury cases violates state right to a civil jury), *and Klutschkowski v. PeaceHealth*, 311 P.3d 461 (Or. 2013) (holding application of statutory cap on non-economic damages violates right to civil jury trial), *with* *Greist v. Phillips*, 906 P.2d 789 (Or. 1995) (holding \$500,000 non-economic damage cap in wrongful death case does not violate state right to a civil jury), *and* *Hughes v. Peacehealth*, 178 P.3d 225 (Or. 2008) (holding statutory cap on non-economic damages in wrongful death action did not violate right to civil jury trial). *But see* *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010) (\$350,000 non-economic damage cap in medical malpractice cases against a single medical facility violates state right to a civil jury). *See generally* *Watson v. Hortman*, 844 F. Supp. 2d 795 (E.D. Tex. 2012) (rejecting contention that non-economic damage cap imposed after state constitutional amendment violated the Fifth Amendment Takings Clause or the right to access to courts); *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990) (upholding non-economic damage cap in wrongful death cases).

<sup>139</sup> 4 P.3d 1115, 1122 (Idaho 2000). *Kirkland* involved a claim that was originally brought in federal district court against the defendants, a doctor and a hospital, who provided prenatal care to plaintiffs, Sandy Kirkland, and her newborn son, Bryce. *Id.* at 1116. The jury awarded compensation in the amount of \$29.7 million, which included a non-economic damage award of \$18.5 million. *Id.* at 1116–17. The \$400,000 non-economic damage cap contained in section 6-1603(1) of the Idaho Code was not applied to seventy-five percent of the award based on the jury's finding that the doctor, who was primarily liable, was reckless. *Id.* at 1117. Certification was sought in federal court on several issues of state law, including whether the cap violated the state civil jury trial right contained in article I, § 7 of the Idaho Constitution. *Id.* The *Kirkland* court professed to interpret the scope of Idaho's *inviolable* civil jury trial right as it existed in the common law at the time the state constitution was adopted—which was in 1890 (over a century after the adoption of the Virginia Constitution but one year after the adoption of the Washington Constitution). *Id.* at 1117–18. By 1871, Idaho generally recognized the right of the jury to assess and award damages in personal injury cases. *Id.* at 1118. However, Idaho's legislature had authority to abolish or modify common law rights and remedies. *Id.* at 1117

not ruled on the constitutionality of that state's current \$250,000 non-economic damage cap.

Despite the early trend of majority state supreme court agreement with *Etheridge*, *Sofie* was recently adopted by the Missouri Supreme Court in *Watts v. Cox Medical Center*.<sup>140</sup> *Watts* reconsidered the constitutionality of Missouri's \$350,000 cap against non-economic damages in medical malpractice cases.<sup>141</sup> The cap was originally upheld in *Adams v. Children's Mercy Hospital*.<sup>142</sup> The *Watts* jury awarded \$1.45 million in

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(citing IDAHO CONST. art. XXI, § 2 (“All laws now in force in the territory of Idaho which are not repugnant to this Constitution shall remain in force until they expire by their own limitation or be altered or repealed by the legislature.”) (emphasis added)); see also *Tull v. United States*, 481 U.S. 412, 417 (1987); *Dimick v. Schiedt*, 293 U.S. 474, 482–84 (1935). The *Kirkland* court could “discern no logical reason why a statutory limitation on a plaintiff's remedy is any different than other permissible limitations on the ability of plaintiffs to recover in tort actions.” *Kirkland*, 4 P.3d at 1119. Idaho's mandate of juryless fact-finding on the issue of damages in medical malpractice cases was described as such a modification. *Id.* (citing IDAHO CODE § 6-904 (referring to limitation on liability of government entities); § 6-1101-09 (referring to limitation on ski area operators); § 72-209 (referring to workers compensation laws)). *Kirkland* further analogized three statutes that allowed increases to a jury's award and reasoned that the framers of Idaho's constitution could not have intended to prohibit all laws modifying jury awards. *Id.* (citing REV. STAT. OF IDAHO TERRITORY, 1887, Title VIII, Ch. III, § 1336 (allowing for double damages against quartz mill owner whose failure to enclose causes another's livestock to drink unsafe water); § 4531 (allowing for treble damages against those who unlawfully remove another's timber); § 4533 (allowing for damages amounting to triple that of actual damages for an unlawful or forcible entry)). *Kirkland* did not distinguish the relationship between the above-mentioned causes of action and common law tort. *Id.* at 1119–20. Nevertheless, *Kirkland* held these pre-ratification statutes demonstrative of the Idaho legislature's power to modify the common law. *Id.* With little explanation, *Kirkland* disagreed with *Sofie* that a predetermined cap “plays lip service to the form of the jury.” *Id.* at 1120 (citing *Lakin*, 987 P.2d at 473 (quoting *Sofie*, 771 P.2d 771, 721 (Wash. 1989)) (the right to a jury only entitles a party to a jury's verdict, not enforcement of that verdict)). Idaho's legislature could predetermine the maximum value of compensatory damages regardless of the jury's findings of fact because Idaho did not guarantee *enforcement* of the jury's determination of the *value* or *amount* of the injury (at least in medical malpractice cases). *Id.* (maintaining that “[t]he legal consequences and effect of a jury's verdict are a matter for the legislature . . . and the courts . . .”).

<sup>140</sup> 376 S.W.3d 633, 640–42 (Mo. 2012).

<sup>141</sup> *Id.* at 637.

<sup>142</sup> 832 S.W.2d 898 (Mo. 1992) (en banc). *Adams* held that the amount of damages was a question of law, not fact, and thus not within the jury's purview. *Id.* at 907. Relying on *Etheridge*, the *Adams* court also noted that the cap only applied after the jury completed its constitutional duty: rendering the verdict. *Id.* In effect, Missouri's legislature had the “right to abrogate a cause of action cognizable under common law completely” and thus “limit recovery in those causes of action.” *Id.* (citations omitted). *But see* Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 730 (1993) (describing jury fact-finding as a “qualitative assessment of the facts” and a “determination of the legal consequences of the facts”).

non-economic damages for injuries to a mother and a newborn that arose during prenatal care and delivery.<sup>143</sup> The trial judge cited *Adams* and reduced non-economic damages pursuant to Missouri's cap.<sup>144</sup>

Like the Virginia and Washington Supreme Courts, the Missouri Supreme Court initially focused on the scope of the jury trial right as it existed in the common law in 1820 when Missouri's constitution was adopted.<sup>145</sup> According to *Watts*, since approximately 1607, the English common law allowed jury awards for both economic and non-economic damage arising out of medical negligence.<sup>146</sup> When Missouri enacted its civil jury trial clause such damages were still allowed in common law cases.<sup>147</sup> Moreover, in Missouri the *amount* or *value* of compensatory damages had always been within the scope of the civil jury's fact-finding purview.<sup>148</sup>

According to *Watts*, compensatory damage caps in medical malpractice cases neither existed nor were contemplated by the common law when Missouri enacted its *inviolable* civil jury right.<sup>149</sup> The *Watts* court was unpersuaded by the *Adams* court's reasoning that a determination of the *value* or *amount* of damages was outside the scope of the jury's constitutional role.<sup>150</sup> *Watts* disregarded this view as misconstruing the nature of the civil jury trial right once it attached.<sup>151</sup> The common law recognized cases for medical negligence<sup>152</sup> and, because the jury trial right

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<sup>143</sup> *Watts*, 376 S.W.3d at 635–36.

<sup>144</sup> *Id.* at 636. *But see* MO. REV. STAT. § 538.210 (2015) (\$400,000 to \$700,000 cap range enacted after *Watts*).

<sup>145</sup> *Watts*, 376 S.W.3d at 638. Missouri's constitution was adopted fifty years after the Virginia Constitution and sixty years before the Washington Constitution.

<sup>146</sup> *Id.* at 638, 640 (declaring “the amount of noneconomic damages . . . a fact that must be determined by a jury” and protected by the state right to a civil jury); *see also id.* (finding that medical negligence in the English common law was one of five types of private wrongs that were brought in courts of law, not equity or admiralty).

<sup>147</sup> *Id.* at 638–39 (describing the present cause of action as one fitting into the category of cases that were tried by juries at common law).

<sup>148</sup> *Id.* at 639–40 (declaring fact-finding on both liability and damages within the civil jury's constitutional task).

<sup>149</sup> *Id.* at 639 (finding that when Missouri's constitution was adopted in 1820 “the right to trial by jury . . . was not subject to legislative limits on damages”).

<sup>150</sup> *Id.* at 641–46. According to *Watts*, *Adams* suffered from four fundamental flaws. *Id.* at 642. First, *Adams* failed to recognize that the determination of damages was “one of the most significant constitutional roles performed by the jury.” *Id.* Second, the unavoidable result of *Adams* was that the civil jury trial right was directly subject to legislative limitations, which impermissibly altered constitutional norms. *Id.* (citations omitted) (“[A] statute may not infringe on a constitutional right; if the two are in conflict, then it is the statute rather than the constitution that must give way.”). Third, *Adams* relied on authority that found the civil jury trial right did not extend to civil penalties, as opposed to common law damages. *Id.* at 643–44. Finally, Missouri's *inviolable* civil jury trial right was distinguishable from Virginia's sacred civil jury trial right and thus *Adams*' reliance on *Etheridge* was misplaced. *Id.* at 644.

<sup>151</sup> *Id.* at 642–43.

<sup>152</sup> *Id.* at 638.

attached to these claims, the jury's findings on *both* liability and damages were "beyond the reach of hostile legislation."<sup>153</sup> *Watts* acknowledged remittitur and other common law procedures that allowed modification of the jury's award.<sup>154</sup> But those procedures were rarely authorized.<sup>155</sup> Moreover, Missouri retained the common law's "long-standing reluctance" to interrupt the jury's factual findings.<sup>156</sup> Accordingly, the Missouri legislature lacked authority to modify state constitutional jury procedures that reflected common law principles.<sup>157</sup>

As demonstrated, state supreme courts sharply disagree about the scope and effect of state civil jury trial clauses and the nature of that right at common law.<sup>158</sup> Such a split is curious considering all but a few states have adopted the English common law as the interpretive basis of the nature and scope of the civil jury trial right.<sup>159</sup> The core dispute among states is the scope of state legislative power to alter or replace the jury's determination of the value of an injury.<sup>160</sup> Cap-approving

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<sup>153</sup> *Id.* at 642 (internal quotation marks omitted).

<sup>154</sup> *Id.* at 639 (discussing rarity of remittitur procedure in Missouri for fear of tampering with the jury's constitutional role as fact-finder).

<sup>155</sup> *See id.* at 638–39 (discussing how English common law judges granted new trials only in cases in which the verdict was deemed inconsistent with the evidence).

<sup>156</sup> *Id.* at 639.

<sup>157</sup> *Id.* at 642–43.

<sup>158</sup> *See* Murphy, *supra* note 5, at 348–49 (describing caps as involving the intersection of legislative prerogative and jury authority to determine damages).

<sup>159</sup> *See infra* note 370 and accompanying text.

<sup>160</sup> After *Etheridge* and *Sofie*, courts also continued to disagree on whether caps violate other provisions of state constitutions. *Compare* Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156 (Ala. 1991) (holding \$400,000 non-economic damage cap unconstitutionally burdened the state right to a trial), *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 914 (Ill. 2010) (\$500,000–\$1,000,000 non-economic damage caps constituted an unconstitutional legislative remittitur), *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997) (holding \$500,000 non-economic damage cap violated state special legislation and separation of powers clauses), *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991) (holding \$875,000 non-economic damage cap violated the state equal protection clause), *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999) (holding \$250,000 to \$500,000 sliding scale cap against non-economic damages violated state guarantee of due process, state separation of powers clause, and state one-subject rule), *Woods v. Unity Health Ctr., Inc.*, 196 P.3d 529 (Okla. 2008) (holding service rules in medical malpractice cases is an impermissible special law), *and* *Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005) (holding \$350,000 cap violated the state constitutional guarantee of equal protection; no litigation on subsequent \$750,000 non-economic damage cap), *with* *Fed. Express Corp. v. United States*, 228 F. Supp. 2d 1267 (D.N.M. 2002) (holding \$600,000 cap against total damages did not violate state equal protection clause), *Stinnett v. Tam*, 198 Cal. App. Rptr. 3d 1412 (Cal. Dist. Ct. App. 2011) (holding \$250,000 cap against non-economic damages did not violate the state equal protection clause), *Scholz v. Metro. Pathologists P.C.*, 851 P.2d 901 (Colo. 1993) (holding \$1 million cap against total damages and \$250,000 cap against non-economic damages neither infringed on a fundamental right nor affected a suspect classification under state constitution; cap meets rational basis standard), *Univ. of Miami v.*



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Echarte, 618 So. 2d 189 (Fla. 1993) (holding \$500,000 non-economic damage cap against medical providers and \$1 million non-economic damage cap against medical practitioners did not violate the state right to access to courts, equal protection, substantive due process, single subject rule, nondelegation doctrine, or the takings clause), *overruled in part by* Estate of McCall v. United States, 134 So. 3d 894 (Fla. 2014) (plurality opinion) (non-economic damage cap in wrongful death cases violated the state equal protection clause), Samsel v. Wheeler Trans. Serv., Inc., 789 P.2d 541 (Kan. 1990) (holding \$250,000 cap against non-economic damages does not violate the state constitutional right to reparation for an injury after due process), Oliver v. Magnolia Clinic, 85 So. 3d 39 (La. 2012) (holding \$500,000 cap against general damages in medical malpractice cases did not violate the state equal protection or adequate remedies clauses), Butler v. Flint Goodrich Hosp. of Dillard Univ., 607 So. 2d 517 (La. 1992) (holding \$500,000 cap against total damages did not violate the state equal protection clause), Murphy v. Edmunds, 601 A.2d 102 (Md. 1992) (holding \$350,000 cap against non-economic damages in personal injury cases did not violate state equal protection clause), *aff'd*, DRD Pool Serv. Inc., v. Freed, 5 A.3d 45 (Md. 2010) (holding \$650,000 cap constitutional on basis of *stare decisis*), Schweich v. Ziegler Inc., 463 N.W.2d 722 (Minn. 1990) (holding \$400,000 cap against intangible losses does not violate the state constitutional right to a remedy), Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. 1993) (holding \$350,000 non-economic damage cap in medical malpractice cases did not violate the state equal protection clause or open courts doctrine), *overruled on other grounds by* Watts v. Cox Med. Ctr., 376 S.W.3d 633, 633 (Mo. 2012) (no litigation on subsequently enacted \$400,000 to \$700,000 cap range), Gourley *ex rel.* Gourley v. Neb. Methodist Health Sys. Inc., 633 N.W.2d 43 (Neb. 2003) (holding \$1.25 million cap against total damages in medical malpractice cases did not violate the state equal protection clause, open courts or separation of powers doctrines, or principles prohibiting special legislation), Arbino v. Johnson & Johnson, 880 N.E.2d 420 (Ohio 2007) (holding \$350,000 to \$500,000 cap did not violate the state right to a remedy, open courts, due process, or equal protection; nor does cap violate the state separation of powers doctrine), Judd v. Drezga, 103 P.3d 135 (Utah 2004) (holding \$250,000 non-economic damages violated neither separation of powers nor open courts, uniform operation of laws, or due process provisions of the state constitution), MacDonald v. City Hosp., Inc., 715 S.E.2d 405 (W. Va. 2011) (holding \$500,000 cap did not violate separation of powers, equal protection, special legislation, or special remedies provisions of the state constitution), Verba v. Ghaphery, 552 S.E.2d 406 (W. Va. 2001) (holding cap does not violate equal protection clause or separation of powers doctrine), Robinson v. Charleston Area Med. Ctr., 414 S.E.2d 877 (W. Va. 1991) (holding \$1 million non-economic damage cap in medical malpractice cases does not violate the state equal protection or substantive due process clauses; nor did cap constitute special legislation), *and* Guzman v. St. Francis Hosp. Inc., 623 N.W.2d 776 (Wis. Ct. App. 2000) (holding \$350,000 non-economic damage cap in medical malpractice cases did not violate the state equal protection or due process clauses; nor did cap violate the state constitutional right to access to courts or the state separation of powers doctrine), *overruled on other grounds by* Ferdon *ex rel.* Petrucelli v. Wis. Patients Comp. Fund, 701 N.W.2d 440, 454–56 (Wis. 2005).

Some courts were in disagreement before *Etheridge* and *Sofie*. Compare Carson v. Maurer, 424 A.2d 825 (N.H. 1980) (holding \$250,000 non-economic damage cap in medical malpractice cases violated the state equal protection clause), with Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985) (holding \$250,000 cap against non-economic damages did not involve a suspect class or a fundamental right; rational basis standard met), Fein v. Permanente Med. Grp., 695 P.2d 665 (Cal. 1985) (holding \$250,000 cap against non-economic damages did

jurisprudence suggests that legislative authority includes the power to alter common law rights. However, those courts fail to explain how such alterations do not also change the state constitution itself.<sup>161</sup> Cap-disapproving jurisprudence holds that curtailment of the civil jury trial right exceeds legislative authority.<sup>162</sup> But despite recent trends, those courts are in the minority.

Seventh Amendment jurisprudence appears to favor the view that the amount or value of damages is a fact that must be found by the civil jury and that such valuation is fully enforceable in common law cases.<sup>163</sup> But as *Sofie* noted, the federal civil jury trial right is unenforceable against the states.<sup>164</sup> Next, this Article turns to Sixth Amendment Criminal Jury Trial Clause, which *is* binding against the states<sup>165</sup> and which examines a similar attempt to legislatively mandate juryless fact-finding. Thomas has recently argued that at the time of ratification of the U.S. Constitution, the English civil jury was in many ways similar to the English criminal jury<sup>166</sup> and that “until the nineteenth century the criminal and civil jur[ies] were inseparable.”<sup>167</sup> Thus, Sixth

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not violate the state due process or equal protection clauses), *and* *Prendergast v. Nelson*, 256 N.W.2d 657 (Neb. 1977) (finding defendant failed to rebut the presumption that cap was constitutional). Additionally, see *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988) (holding that a \$500,000 cap against non-economic damages in medical malpractice cases violated open courts provision of the state constitution; a subsequent state constitutional amendment allowed for caps). See generally *Knowles ex rel. Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996) (holding \$500,000 cap against non-economic damages, unlike cap against total damages, did not violate the state open courts doctrine or due process clause).

<sup>161</sup> *Dimick v. Schiedt*, 292 U.S. 474, 487 (1987).

<sup>162</sup> See *id.* at 486.

<sup>163</sup> See *Murphy*, *supra* note 5, at 348 (arguing that the Seventh Amendment is “[l]ost in the shuffle” of proposed federal tort reform and hypothesizing whether the federal civil jury trial right would be a barrier to federal caps); *Murphy*, *supra* note 142, at 723, 726–27 (“factfinding is a constitutional function of the civil jury” and the jury’s purpose is serving “the ultimate goal of just adjudication”); *Whitehouse*, *supra* note 101, at 1252 (describing fact-finding as the core Seventh Amendment civil jury function).

<sup>164</sup> *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 716 (Wash. 1989); see *Murphy*, *supra* note 142, at 724 n.2. *Murphy* describes the lack of a coherent theory of “jury authority,” which *Murphy* defines as “the decisional role that the [U.S.] Constitution mandates for the jury once an entitlement to trial by jury has been triggered.” *Id.* at 724 (footnotes omitted). *Murphy* also discusses the Court’s lack of guidance on why some issues are exclusively for the jury, the judge, or subject to some judicial intervention or review after a jury verdict. *Id.* at 725–26 (describing jury authority as disjointed and identifying guidelines sentencing and punitive damages as current evidence of disjointedness); see also *Murphy*, *supra* note 5, at 351–52 (discussing the civil jury’s role as a check on legislative power and theorizing whether legislatures can invade the jury’s constitutional authority).

<sup>165</sup> See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (guaranteeing the right to a criminal jury in nonpetty cases).

<sup>166</sup> See *Suja A. Thomas, Blackstone’s Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195, 1207 (2014).

<sup>167</sup> *Id.* (quoting John H. Langbein, *The English Criminal Trial Jury on the Eve of the*

Amendment jurisprudence should provide useful and significant instruction about the nature and scope of jury trial rights and the limits of legislative authority to alter those rights.<sup>168</sup>

## II. JURYLESS FACT-FINDING IN CRIMINAL CASES

Sixth Amendment jurisprudence has recently examined a question similar to that which state supreme courts have been in conflict, albeit in a different context: whether legislative authority exists to mandate juryless fact-finding at the sentencing stage of a criminal prosecution. As used in this part, the term “juryless fact-finding” refers to state and federal laws that remove the jury from sentencing completely or that allow reconsideration of the jury’s trial findings during a subsequent sentencing hearing. In this sense, some sentencing procedures ultimately distinguished when a jury was required or was not required. The Court ultimately found that mandated juryless fact-finding at sentencing impermissibly lessened the jury’s fact-finder role and allowed intrusion on the jury’s verdict or decree. This Article argues that mandated juryless fact-finding in *civil* cases has the same impermissible effect as mandated juryless fact-finding in *criminal* cases.

Recent Sixth Amendment criminal sentencing jurisprudence grounds itself on common law principles and offers three lessons about the nature and scope of jury trial rights at the time of the founding. First, modern procedures cannot significantly alter certain common law characteristics of the jury right. Second, mandatory removal of the jury as the primary fact-finder was not authorized in common law cases. Third, a common law jury’s factual determinations were fully enforceable except in exceptional circumstances. These lessons about the limits of legislative authority to alter the scope and nature of *criminal* jury trial rights are of particular importance when considering whether compensatory damage caps impermissibly alter the scope and nature of *civil* jury trial rights.

Criminal sentencing procedure in the United States has undergone dramatic changes since the founding. These changes altered the historical nature of the criminal jury trial right in two significant ways: first, by removing fact-finding that supported punishment from the purview of the criminal jury; and second, by allowing reconsideration of the criminal jury’s trial findings at a lower standard of proof at sentencing. Such alterations were the result of the Court’s initial establishment of legislative authority to designate certain facts in a criminal case “elements” of the offense and other facts “enhancements” to the punishment.<sup>169</sup> This distinction proved significant. The reasonable doubt standard applied to elements and required a jury.<sup>170</sup> The

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*French Revolution*, in *THE JURY TRIAL IN ENGLAND, FRANCE, GERMANY, 1700–1900* (Antonio Padoa Schioppa ed., 1987)).

<sup>168</sup> See generally Murphy, *supra* note 142, at 742–43 (describing how the Founders had a unified vision of jury trial rights and how the U.S. Constitution’s “textual segregation” of criminal and civil jury trial rights was more “formal than substantive”).

<sup>169</sup> *McMillan v. Pennsylvania*, 477 U.S. 79, 82–86 (1986).

<sup>170</sup> *Id.* at 84 (citing *In re Winship*, 397 U.S. 358, 364 (1970)).

preponderance of the evidence standard applied to enhancements and did not require a jury.<sup>171</sup>

The Sixth Amendment does not specifically mention criminal sentencing, but a brief history of sentencing procedure at the time of the founding may be helpful to comprehending post-founding developments. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.<sup>172</sup>

The introductory clause “in all criminal prosecutions” prefaces all of the included procedural rights and protections,<sup>173</sup> of which there are seven.<sup>174</sup> This Article focuses on the right to a criminal jury.

As noted by Professors Nancy King and Susan Klein, before the founding there were relatively few felony offenses<sup>175</sup> and for most a predetermined sentence resulted, which rarely implicated the Sixth Amendment.<sup>176</sup> In pre-founding felony

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<sup>171</sup> *Id.* at 83–84.

<sup>172</sup> U.S. CONST. amend. VI.

<sup>173</sup> Benjamin C. McMurray, *Challenging Untested Facts at Sentencing: The Applicability of Crawford at Sentencing After Booker*, 37 MCGEORGE L. REV. 589, 615 (2006).

<sup>174</sup> Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 492 (2009) (identifying the Sixth Amendment’s seven procedural protections).

<sup>175</sup> Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1507–08 (2001) (noting only twenty-two federal crimes in 1790).

<sup>176</sup> Penny J. White, “*He Said,*” “*She Said,*” and *Issues of Life and Death: The Right to Confrontation at Capital Sentencing Proceedings*, 19 REGENT U. L. REV. 387, 396–97 (2007) (distinguishing modern day trials as a bifurcated fact-finding process of guilt or innocence by a jury and punishment by a judge; eighteenth century trials collapsed both stages and each offense mandated a particular punishment). A common sentence for felonies was death. See John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 2011 (2005) (citing Whitman J. Hou, *Capital Retrials and Resentencing: Whether to Appeal and Resentencing Fairness*, 16 CAP. DEF. J. 19, 30 (2003)). “At the time the [Bill of Rights] was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses.” *Woodson v. North Carolina*, 428 U.S. 280, 289 (plurality opinion) (1976) (citing HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 5–6, 15, 27–28 (rev. ed. 1967)). Execution could be by hanging, embowelment, or being burned alive. 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 376 (photo. reprint 2008) (2d American ed. 1799). Punishment for other felonies included mutilation or dismembering, slitting of the nostrils, branding of the hand, whipping, hard labor, exile, banishment, loss of liberty, and temporary imprisonment. *Id.* at 377. Blackstone

cases the defendant could predict a sentence with precision from the face of the charging instrument, which aligned punishment with the crime.<sup>177</sup> Professor John Douglass posited that criminal prosecutions consisted of a unitary trial and sentencing proceeding.<sup>178</sup> Douglass claims that by necessity pre-founding procedure required felony sentencing evidence to be presented and judged during the trial.<sup>179</sup> According to Professors Carissa and Andrew Hessick, in both purpose and effect the process of sentencing was “virtually indistinguishable from the process of conviction”<sup>180</sup> because, as Douglass argues, “the trial *was* the sentencing.”<sup>181</sup>

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made clear that the quantity or degree of punishment was “*ascertained* for every offence; and that it [was] not left in the breast of any judge, nor even of a jury, to alter that judgment. . . .” *Id.* Blackstone warned that “if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates[,] [a]nd would live in society without knowing exactly the conditions and obligations which it lays them under.” *Id.*

<sup>177</sup> See *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000); see also BLACKSTONE, *supra* note 176, at 376 (after the verdict the court pronounced the judgment “which the law hath annexed to the crime”); Stephanos Bibas, *Two Cheers, Not Three, for Sixth Amendment Originalism*, 34 HARV. J.L. & PUB. POL’Y 45, 46, 48 (2011) (maintaining that punishment was immediately imposed after guilt was announced); Douglass, *supra* note 176, at 1977 (describing English and early U.S. criminal law as dominated by mandatory penalties, not sentencing discretion). See generally McMurray, *supra* note 173, at 592 (hypothesizing that from the charging instrument alone, defendants at the time of the trial knew the sentence they would receive if convicted); White, *supra* note 176, at 397 (describing how guilt and punishment were deciding in one proceeding).

<sup>178</sup> See Douglass, *supra* note 176, at 2008 (in the Framers’ time, “a unitary trial and a single jury verdict determined not only guilt or innocence, but life or death . . . . With that system as their point of reference, they crafted a single set of adversarial rights to govern all of the proceedings . . . .”); see also White, *supra* note 176, at 397 (“[T]he criminal prosecutions, to which the Framers referred when they drafted the Sixth Amendment,” included the “finding of guilt” and “setting of punishment . . . in one proceeding.”).

<sup>179</sup> Douglass, *supra* note 176, at 2008; see also *Apprendi*, 530 U.S. at 480 n.7 (noting that, upon misdemeanants, judges frequently imposed fines or whippings); Douglass, *supra* note 176, at 2016 (noting that in the late eighteenth century, English and colonial American judges “exercised a range of discretion in choosing punishment for misdemeanants”).

<sup>180</sup> Carissa B. Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 51 (2011) (noting that U.S. colonial judges did not conduct formal sentencing proceedings because most crimes carried a particular penalty); see also Bibas, *supra* note 177, at 46 (“Eighteenth-century trials contained no sentencing phase . . . . [They were] nothing like modern sentencing proceedings.”); Douglass, *supra* note 176, at 1972 (“Unitary capital trials were the norm when the Sixth Amendment was created.”); *Id.* at 2011 (cautioning against the temptation to conclude that “the Sixth Amendment contemplates no sentencing rights” simply “because it contemplates no separate sentencing proceeding”); Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 302–03 (1992) (describing how the jury decided the facts on which sentencing was based, rendering a separate proceeding for sentencing unnecessary); White, *supra* note 176, at 396 (positing that sentencing decisions and determinations of guilt were collapsed into a single proceeding).

<sup>181</sup> Douglass, *supra* note 176, at 1973 (emphasis added); see also *id.* at 1972 (“Bifurcation—separating the guilt determination from the choice of an appropriate penalty—was a procedure

During the early twentieth century, criminal sentencing had become a distinct and separate procedural phase of the Sixth Amendment's "criminal prosecution."<sup>182</sup> While by the 1960s the Fourteenth Amendment Due Process Clause became the vehicle through which the Sixth Amendment was interpreted to apply to criminal defendants in state courts,<sup>183</sup> the Sixth Amendment was not incorporated in whole.<sup>184</sup> Interpretations of what due process required varied between the Amendment's clauses and each clause had to be separately deemed fundamental and essential to a fair trial.<sup>185</sup> Additionally, some clauses were interpreted to apply only during the trial, while others applied beyond the trial.<sup>186</sup> With regard to sentencing, the Sixth Amendment initially provided little protection against mandatory juryless fact-finding.<sup>187</sup>

By the last quarter of the twentieth century, the Honorable Marvin Frankel and others had long questioned the lack of procedural and substantive rules governing

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that evolved after the founding . . ."); *id.* at 2020 ("It was largely after the framing that the unified world [of trial and sentencing] evolved into the separate worlds."); Hessick & Hessick, *supra* note 180, at 51 (describing pre-founding sentencing as part of the trial); White, *supra* note 176, at 397 (theorizing how that pre-founding felony juries decided both the guilt and sentence of the defendant).

<sup>182</sup> See Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 279 (2005) (detailing the movement towards a structured sentencing procedure that brought greater certainty and clarity); Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 699 (2005) (describing how "[t]he indeterminate sentencing model began to unravel in the early 1970s"); see also Stephen A. Saltzburg, *Due Process, History, and Apprendi v. New Jersey*, 38 AM. CRIM. L. REV. 243, 243 (2001) (hypothesizing that the arbitrariness at sentencing hearings was compounded by the lack of rules of evidence and standards of proof).

<sup>183</sup> See Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 391 (2006).

<sup>184</sup> See *id.*

<sup>185</sup> See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding that the Sixth Amendment Jury Trial Clause applies against the States); *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (applying the Sixth Amendment Confrontation Clause against the states); *Gideon v. Wainwright*, 372 U.S. 335, 343–44 (1963) (holding that the Sixth Amendment Counsel Clause is obligatory against the states).

<sup>186</sup> See Chhablani, *supra* note 174, at 520–21 (discussing how the term "criminal prosecution" depends on the procedural right at issue).

<sup>187</sup> Compare *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000) (noting that Jury Trial Clause applies to the punishment stage of the criminal prosecution), and *Mempa v. Rhay*, 389 U.S. 128, 134–36 (1967) (maintaining that counsel was required at every critical stage of the criminal prosecution, including sentencing and probation hearings), with *Williams v. Oklahoma*, 358 U.S. 576, 583–84 (1959) (affirming *Williams v. New York*, 337 U.S. 241 (1949), and holding that there is no right to confront evidence used to fix punishment). See generally Shaakirrah R. Sanders, *Unbranding Confrontation as Only a Trial Right*, 65 HASTINGS L.J. 1257 (2014) [hereinafter Sanders, *Unbranding Confrontation*]; Shaakirrah R. Sanders, *Making the Right Call for Confrontation at Felony Sentencing*, 47 U. MICH. J.L. REFORM 791 (2014) [hereinafter Sanders, *Making the Right Call*].

sentencing hearings.<sup>188</sup> Frankel, who is widely considered as the “father” of the late twentieth-century criminal sentencing reform,<sup>189</sup> saw some of his critique addressed in *In re Winship*<sup>190</sup> and *Mullaney v. Wilbur*.<sup>191</sup> *Winship* dubbed the reasonable doubt standard a protectant of the presumption of innocence.<sup>192</sup> Every necessary fact that constituted the charged offense<sup>193</sup> must be proved by that standard.<sup>194</sup> *Mullaney* extended the reasonable doubt standard to “elements of the offense.”<sup>195</sup> But neither

<sup>188</sup> Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 7–8 (1972).

<sup>189</sup> See, e.g., Steven Greenhouse, *Marvin Frankel, Federal Judge and Pioneer of Sentencing Guidelines, Dies at 81*, N.Y. TIMES, Mar. 5, 2002, at C15.

<sup>190</sup> 397 U.S. 358 (1970).

<sup>191</sup> 421 U.S. 684 (1975).

<sup>192</sup> *In re Winship*, 397 U.S. at 363. Winship was twelve years of age when he allegedly stole \$112.00 from a woman’s pocketbook. *Id.* at 359–60. Section 744(b) of the New York Family Court Act required that “[a]ny determination at the conclusion of [an adjudicatory] hearing that a [juvenile] did act or acts must be based on a preponderance of the evidence” *Id.* at 360 (quoting N.Y. FAM. CT. ACT § 744(B)). Winship was sentenced to eighteen months, a sentence which could be reviewed and extended annually. *Id.* The Appellate Division of the New York Supreme Court affirmed without opinion. *Id.*; see also *In re Samuel W.*, 247 N.E.2d 253 (N.Y. 1969), judgment rev’d by *In re Winship*, 397 U.S. 258 (1970). The New York Court of Appeals held that juvenile proceedings were distinguishable from criminal prosecutions. *In re Samuel W.*, 247 N.E.2d. at 254. Guilt in juvenile adjudications were not convictions that affected rights or privileges; nor did juvenile convictions enjoy the protective cover of constitutionality. *Id.* at 254–55. Because delinquency status was not a crime and juvenile proceedings were not criminal, there was no deprivation of any rights. *Id.* at 257.

<sup>193</sup> *Winship*, 397 U.S. at 358–59.

<sup>194</sup> *Id.* at 364. The Court reasoned that the beyond a reasonable doubt standard dated back to the founding and was long assumed to be constitutionally required in criminal cases, even delinquency proceeding against juveniles. *Id.* at 360, 362, 367–68 (citations omitted). *But see id.* at 377 (Black, J., dissenting) (doubting whether guilt by proof beyond a reasonable doubt was expressly or impliedly commanded by the Constitution).

<sup>195</sup> *Mullaney*, 421 U.S. at 704 (holding that the “Due Process Clause requires the prosecution to prove beyond a reasonable doubt [elements of the offense] . . .”). *Mullaney* interpreted a Maine law that defined murder as an unlawful killing with malice aforethought, either expressed or implied; a killing without malice aforethought was manslaughter. *Id.* at 686 n.3 (quoting ME. REV. STAT. ANN. tit. 17, § 2651 (West 1964)). The prosecution argued defendants should have the burden to prove heat of passion, which would qualify the killing as manslaughter. *Id.* at 699. The Court rejected Maine’s argument and reasoned that *Winship* was not limited to “elements” as defined by state law. *Id.* *But see* *Patterson v. New York*, 432 U.S. 197, 205–08 (1977) (excluding affirmative defenses from the category of facts that must be proved beyond a reasonable doubt). See generally Mark D. Knoll & Richard G. Singer, *Searching for the “Tail of the Dog”: Finding “Elements” of Crimes in the Wake of McMillan v. Pennsylvania*, 22 SEATTLE U. L. REV. 1057, 1081 (1999) (“*Patterson* opened the door for creative legislatures to evade the fundamental protections afforded in *Winship* . . .”); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 462–63 (1985) (describing *Mullaney* and *Patterson* as “a dispute over how to delineate the limits of a state’s power to define the ‘essential facts’ of a crime”).

*Winship* nor *Mullaney* addressed how to determine which facts constituted “elements” or whether the reasonable doubt standard applied at sentencing hearings.<sup>196</sup>

State and federal legislatures, also responding to Frankel’s critique, codified structured sentencing rules to fix punishment.<sup>197</sup> Some of these rules removed fact-finding from the purview of the criminal jury and the sentencing judge. One example was Pennsylvania’s Mandatory Minimum Sentencing Act (MMSA),<sup>198</sup> which imposed a mandatory minimum sentence of five years for offenses committed while in “visible possess[ion]” of a firearm.<sup>199</sup> Pennsylvania’s MMSA expressly provided that “visible possess[ion]” was not an “element” of the underlying crime and that whether visible possession occurred “shall be determined at sentencing.”<sup>200</sup> The MMSA directed sentencing courts to consider evidence that was introduced at trial as well as “any necessary additional evidence” offered by either the defendant or the Commonwealth.<sup>201</sup> After four sentencing judges refused to impose the mandatory minimum sentence because it did not allow the jury to evaluate the factual accuracy of whether a defendant “visibly possessed” a firearm,<sup>202</sup> this provision was tested in *McMillan v. Pennsylvania*.<sup>203</sup>

In examining the constitutionality of structured sentencing rules, the Court would initially hinge the criminal jury trial right on whether the fact was an element to be proven at trial or whether the fact merely enhanced the punishment imposed at a sentencing hearing. The *McMillan* Court coined the term “sentencing enhancement,”<sup>204</sup>

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<sup>196</sup> *In re Winship*, 397 U.S. at 364; *see also Patterson*, 432 U.S. at 205–08 (distinguishing between affirmative defenses and statutory elements and reasoning that affirmative defenses do not allow the state to presume or infer any facts against defendants); Ronald J. Allen & Ethan A. Hastert, *From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder?*, 58 STAN. L. REV. 195, 202 (2005) (proposing that one reading of *Apprendi* and *Winship* is that a jury decision may be required even if only by a preponderance of the evidence); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1103 (2001) (discussing applicability of reasonable doubt to every fact); Leslie Yalof Garfield, *Back to the Future: Does Apprendi Bar a Legislature’s Power to Shift the Burden of Proof Away from the Prosecution by Labeling an Element of a Traditional Crime as an Affirmative Defense*, 35 CONN. L. REV. 1351, 1357 (2003) (pointing out that *Winship* could be read to apply the “beyond a reasonable doubt” standard to sentencing factors).

<sup>197</sup> *See Berman*, *supra* note 183, at 394–95 n.44.

<sup>198</sup> *Id.* at 396.

<sup>199</sup> *Id.*

<sup>200</sup> *McMillan v. Pennsylvania*, 477 U.S. 79, 81 n.1 (1986).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 82–84.

<sup>203</sup> 477 U.S. 79, 80 (1986); *see also Berman*, *supra* note 183, at 394 (discussing Pennsylvania sentencing guidelines); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 10–11 (1988) (noting the need for post-trial fact-finding procedures).

<sup>204</sup> *See Apprendi v. New Jersey*, 530 U.S. 466, 500 (Thomas, J., concurring) (*McMillan* “spawned a special sort of fact known as a sentencing enhancement.”); Knoll & Singer,



and distinguished enhancements from “offense elements.”<sup>205</sup> The element/enhancement distinction became the constitutional limit to legislative authority to mandate juryless fact-finding at criminal sentencing hearings.<sup>206</sup> While *McMillan* vested state legislatures with the freedom to elect between which facts were elements or enhancements,<sup>207</sup> *McMillan* also imposed several limitations on a state’s ability to do so. First, a state could not discard the presumption of innocence or otherwise relieve the prosecution of its burden of proof on the sentencing factor.<sup>208</sup> Second, an enhancement could not increase the maximum statutory sentence allowed under the underlying criminal offense.<sup>209</sup> Finally, the elements of an underlying offense must remain unaltered.<sup>210</sup>

*McMillan* made clear that “no Sixth Amendment right to jury sentencing” existed, even where a sentence turned on specific factual findings.<sup>211</sup> After *McMillan*, the Court recognized an internal conflict between the nature and scope of the criminal jury right as it existed in the common law before the founding and *McMillan*’s allowance of juryless fact-finding.<sup>212</sup> This conflict would ultimately undermine *McMillan*.

Post-*McMillan* jurisprudence provides three lessons about the scope and nature of the Sixth Amendment Criminal Jury Trial Clause. This jurisprudence acknowledged a right to a jury finding on facts that are material to punishment, regardless of whether such facts were found at a trial or at a criminal sentencing hearing. This

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*supra* note 195, at 1058 (attributing the “birth of the ‘sentencing factor’” to *McMillan*); see also Jeffrey L. Fisher, *Originalism as an Anchor for the Sixth Amendment*, 34 HARV. J.L. & PUB. POL’Y 53, 55 (2011) (defining a sentencing factor as a particular fact that subjects the defendant to an increased punishment).

<sup>205</sup> *McMillan*, 477 U.S. at 86.

<sup>206</sup> *Id.* at 85–88 (states have authority “to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion”) (quoting *Patterson v. New York*, 432 U.S. 197, 201–02); see also Berman, *supra* note 183, at 399.

<sup>207</sup> 477 U.S. at 85–86. The Court reasoned that the MMSA did not disregard the presumption of innocence; in fact, it created no presumptions. *Id.* at 86–87. Nor did the MMSA relieve the prosecution of its burden. *Id.* at 87. The MMSA neither altered the maximum penalty for the crime committed nor created a separate offense calling for a separate penalty. *Id.* at 87–88. Finally, the MMSA did not change the definition of any existing offense. *Id.* at 89; see also Bibas, *supra* note 177, at 1106 (discussing the factors that supported the *Apprendi* Court’s finding that sentencing enhancements were constitutional).

<sup>208</sup> *McMillan*, 477 U.S. at 86–87.

<sup>209</sup> *Id.* at 87–88.

<sup>210</sup> *Id.* at 89–90.

<sup>211</sup> *Id.* at 93 (citing *Spaziano v. Florida*, 468 U.S. 447, 459 (1984)).

<sup>212</sup> See generally Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CALIF. L. REV. 1665, 1701 (1987); Herman, *supra* note 180, at 323–25, 328, 344 (arguing that *McMillan* undermined Due Process); Knoll & Singer, *supra* note 195, at 1061–62, 1067–68, 1078–79 (discussing the historical difference between an “offense,” its “elements,” and facts looked to by a judge to determine the sentence).

Article argues that these lessons should prove helpful to a resolution of mandatory juryless fact-finding in civil cases.

*Apprendi v. New Jersey*<sup>213</sup> provides the first lesson from the Sixth Amendment Criminal Jury Trial Clause: modern procedures cannot significantly alter certain common law characteristics of the jury trial right.<sup>214</sup> Apprendi was charged under a New Jersey statute that classified unlawful possession of a firearm a second-degree offense.<sup>215</sup> Punishment for this offense ranged between five and ten years.<sup>216</sup> Under a separate statute, New Jersey extended the term of imprisonment if the unlawful possession occurred while committing a racially motivated crime.<sup>217</sup> Racial motivation did not require a finding by a jury, could be proved by a preponderance of the evidence, and increased the maximum punishment from five-to-ten years to ten-to-twenty years.<sup>218</sup> Apprendi pled guilty to two counts of unlawful possession (each of which carried a maximum punishment of ten years).<sup>219</sup> As part of the plea agreement, New Jersey reserved the right to request an enhanced sentence based on the grounds that Apprendi acted with biased purpose.<sup>220</sup> On one count of unlawful

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<sup>213</sup> 530 U.S. 466 (2000).

<sup>214</sup> *Id.* at 476–90; see also Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1814 n.180 (2003) (commenting that *Apprendi* forbids “certain determinations from being left to sentencing”). One year prior to *Apprendi*, the Court held that a jury was required to find the *traditional* elements of an offense. *Jones v. United States*, 526 U.S. 227, 252 (1999). Jones was convicted of violating the federal carjacking statute which carried a maximum 15-year sentence, unless serious bodily injury or death occurred. *Id.* at 230; 18 U.S.C. § 2119 (1988). Jones’s 25-year sentence was overturned because the serious bodily injury enhancement was not made by a jury. *Jones*, 526 U.S. at 230–31. Later, in *Castillo v. United States*, 530 U.S. 120 (2000), the Court appeared to provide a framework to distinguish between “traditional elements” and “sentencing enhancements.” *Castillo*, 530 U.S. at 124–30. Castillo was indicted for conspiring to murder federal officers in violation of 18 U.S.C. § 924(c)(1). *Id.* at 122. The federal statute also prohibited the use or carrying of a “firearm” in relation to a crime of violence and penalties increased dramatically when the firearm was a “machine gun.” *Id.* (quoting § 924(c)(1)). The Court held that despite Congress’s designation to the contrary, the “machine gun” enhancement constituted a traditional element of a separate offense and required a jury finding. *Id.* at 121.

<sup>215</sup> *Apprendi*, 530 U.S. at 468. Apprendi admitted that he fired several shots into the home of an African-American family that recently moved into Apprendi’s all-white neighborhood. *Id.* at 469. According to statements later retracted by Apprendi, he was hostile towards blacks moving into the neighborhood. *Id.*

<sup>216</sup> *Id.* at 468.

<sup>217</sup> *Id.* at 468–69.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 469–70. Apprendi also pled guilty to third-degree unlawful possession of an anti-personnel bomb. *Id.* at 470. That offense carried a penalty range of three to five years. *Id.*

<sup>220</sup> *Id.* A twenty-three-count grand jury indictment did not refer to the hate crime statute or allege that Apprendi acted with a racially biased purpose. *Id.* at 469. The potential application of the hate crime enhancement was significant. See *id.* at 470. The maximum consecutive sentence on the two counts of unlawful possession was an aggregate of twenty

possession, the sentencing judge found that Apprendi acted with a racial motivation<sup>221</sup> and imposed a twelve-year sentence instead of a ten-year sentence.<sup>222</sup> Relying on *McMillan*, the New Jersey Supreme Court found that motivation was a traditional sentencing factor.<sup>223</sup>

*Apprendi* qualified *McMillan*'s grant of legislative authority to label some facts elements that required a jury and other facts enhancements that did not require a jury.<sup>224</sup> *Apprendi* found the right to a jury determination of guilt beyond a reasonable doubt on all elements of an offense was a historical foundation of the common law.<sup>225</sup> As noted before *Apprendi* by Professors Susan Herman, Mark Knoll, and Nelson Roth, criminal prosecutions at the time of the founding linked guilt of a fact with punishment.<sup>226</sup> In short, there was no distinction between elements and enhancements.<sup>227</sup> *Apprendi* rejected the mere use of the label "sentencing enhancement" as a "principled basis" for treating elements and enhancements differently.<sup>228</sup> Reflecting on the common law, the Court recognized that "[a]ny possible distinction between an 'element' and a 'sentencing factor' was unknown to the practice of . . . trial by jury[ ] . . . as it existed during the years surrounding our Nation's Founding."<sup>229</sup> Due to the "invariable linkage" at common law between the crime and the punishment, common law trial judges had very little explicit discretion at criminal sentencing.<sup>230</sup> To whatever extent trial judges later exercised discretion at sentencing, the punishment was required to be within the statutory limits of the offense.<sup>231</sup>

*Apprendi* teaches that even though the practice of unitary trial and sentencing may have changed, modern courts cannot depart "from the jury tradition that is an indispensable part of [the U.S.] criminal justice system."<sup>232</sup> *Apprendi* declared the

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years. *Id.* If the judge enhanced one of the counts of unlawful possession, the maximum on that count alone was twenty years and the maximum for both counts could be thirty years. *Id.*

<sup>221</sup> *Id.* at 471.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 494.

<sup>224</sup> *Id.* at 487 n.13.

<sup>225</sup> *Id.* at 477 (citing 4 BLACKSTONE, *supra* note 176, at \*343).

<sup>226</sup> Herman, *supra* note 180, at 302–03; Knoll & Singer, *supra* note 195, at 1081; Roth & Sundby, *supra* note 195, at 462–63.

<sup>227</sup> *See Apprendi*, 530 U.S. at 485.

<sup>228</sup> *Id.* at 476.

<sup>229</sup> *Id.* at 478.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 481.

<sup>232</sup> *Id.* at 497. Justice Thomas argued that the Sixth Amendment's text and structure reflected the jury's constitutionally prescribed role as ultimate fact-finder. *See id.* at 518 (Thomas, J., concurring) (describing *Apprendi* as reflecting the original meaning of the Sixth Amendment).

jury trial right one of surpassing importance in the common law.<sup>233</sup> *Apprendi* limited *McMillan* to the extent that designating certain facts enhancements<sup>234</sup> rather than elements could thwart the reasonable doubt standard announced in *Winship*.<sup>235</sup> *Apprendi* embraced the principle that “any fact [other than a prior conviction] that increase[d] the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>236</sup> Legislatures could not remove from the jury the assessment of facts that increased the prescribed range of penalties to which a criminal defendant was exposed.<sup>237</sup> The relevant inquiry was not one of form, but effect: “[did] the required finding expose the defendant to a greater punishment than that authorized by [the plea or] the jury’s guilty verdict?”<sup>238</sup>

*Blakely v. Washington*<sup>239</sup> and *United States v. Booker*<sup>240</sup> provide the second lesson from the Sixth Amendment Criminal Jury Trial Clause: mandatory removal of the jury as the primary fact-finder was not authorized in common law cases. *Apprendi* renewed arguments that the Sixth Amendment required a jury determination of all facts that increased punishment, which fundamentally implicated some state and federal guidelines sentencing schemes.<sup>241</sup> While at least one concurring Justice in *Apprendi* rejected this view, one dissenter foresaw the threat.<sup>242</sup>

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<sup>233</sup> *Id.* at 478 (majority opinion) (designating guilt beyond a reasonable doubt as a historically significant companion right to a criminal jury verdict and ruling that both reflect “a profound judgment” about law enforcement and the administration of justice).

<sup>234</sup> *See id.* at 485; *see also* Knoll & Singer, *supra* note 195, at 1118 (theorizing that “*Winship* lives again”).

<sup>235</sup> *Apprendi*, 530 U.S. at 485, 490 (quoting *Jones v. United States*, 526 U.S. 227, 252–53 (1999) (Stevens, J., concurring) (a legislature may not “remove from the jury the assessment of facts that increase the prescribed range of penalties”)); *see also* Fisher, *supra* note 204, at 56 (describing *Apprendi* as a very easy case).

<sup>236</sup> *Apprendi*, 530 U.S. at 490; *see also id.* at 475–76 (discussing how *Apprendi* was foreshadowed by *Jones*); Knoll & Singer, *supra* note 195, at 1114 (discussing how pre-*Apprendi* jurisprudence excluded any item that would significantly increase the sentence from being designated a sentencing factor).

<sup>237</sup> *See Apprendi*, 530 U.S. at 491–92.

<sup>238</sup> *Id.* at 494.

<sup>239</sup> 542 U.S. 296 (2004).

<sup>240</sup> 543 U.S. 220 (2005).

<sup>241</sup> *See, e.g.*, KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 78–103 (1998) (arguing against limited judicial discretion at criminal sentencing); Michael Tonry, *Mandatory Minimum Penalties and the U.S. Sentencing Commission’s “Mandatory Guidelines,”* 4 FED. SENT’G REP. 129, 132–33 n.12 (1991) (citations omitted) (identifying the lack of judicial discretion as a common complaint about the Guidelines); *see also* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 93 (2003); Breyer, *supra* note 203, at 5–6.

<sup>242</sup> *Compare Apprendi*, 530 U.S. at 523 n.11 (Thomas, J., concurring), *with id.* at 552 (O’Connor, J., dissenting).

*Blakely v. Washington* examined sentencing guidelines enacted in Washington State,<sup>243</sup> which permitted departures from the guidelines' minimum up to the statutory maximum based on facts found at a sentencing hearing.<sup>244</sup> All departures had to be found by "substantial and compelling reason[s] justifying an exceptional source" and justified in writing with findings of fact and conclusions of law supporting it.<sup>245</sup> Blakely was charged with first-degree kidnapping, but pled guilty to second-degree kidnapping involving domestic violence and use of a firearm.<sup>246</sup> The sentencing judge imposed a thirty-seven-month enhancement after finding Blakely acted with "deliberate cruelty."<sup>247</sup> The Washington Court of Appeals affirmed the sentence and the Washington Supreme Court denied discretionary review.<sup>248</sup>

Relying on *Apprendi*, the *Blakely* Court held that where additional facts were essential to punishment, they must be found by a jury.<sup>249</sup> In effect, "the relevant 'statutory maximum' [was] not the maximum sentence . . . after finding additional facts, but the maximum [sentence] . . . without additional [facts]."<sup>250</sup> *Blakely* acknowledged that *Apprendi* gave "intelligible content to the right of jury trial."<sup>251</sup> *Blakely* relied upon the Framers' unwillingness to allow government to define or delineate the jury's role.<sup>252</sup> *Blakely* described the jury as more than a "mere procedural formality, but a fundamental reservation of power in [the U.S.] constitutional structure."<sup>253</sup> *Blakely* affirmed "the common-law ideal of limited state power accomplished by strict division of

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<sup>243</sup> *Blakely*, 542 U.S. at 298–99.

<sup>244</sup> *Id.* at 299; see also Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1089 (2005) (explaining how Washington sentencing departures work).

<sup>245</sup> *Blakely*, 542 U.S. at 299 (quoting WASH. REV. CODE ANN. §§ 9.94A 120(2)–(3) (West 2016)).

<sup>246</sup> *Id.* at 298–99. Blakely abducted his wife from their home, bound her with duct tape, and forced her at knifepoint into a wooden box that was in the bed of Blakely's pickup truck in an effort to implore his wife to dismiss their pending divorce and the related trust proceedings. *Id.* at 298. When the couple's thirteen-year-old son arrived home from school, Blakely forced the child to follow in another vehicle. *Id.* The child ultimately escaped and sought help when Blakely stopped at a gas station. *Id.* Blakely, with his wife, continued to a friend's house. *Id.* Blakely was arrested after the friend notified authorities. *Id.*

<sup>247</sup> *Id.* at 300. At the sentencing hearing, the state recommended forty-nine to fifty-three months imprisonment pursuant to the plea agreement. *Id.* The sentencing judge rejected the state's recommendation and imposed a sentence of ninety months based on deliberate cruelty, which was "a statutorily enumerated ground for [a] departure in domestic-violence cases." *Id.*

<sup>248</sup> *Id.* at 301. Blakely argued on appeal that Washington's "sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence." *Id.*

<sup>249</sup> *Id.* at 303–04.

<sup>250</sup> *Id.* Because the additional facts were essential to punishment, they must be found by a jury. See *id.* at 304.

<sup>251</sup> *Id.* at 305.

<sup>252</sup> *Id.* at 308.

<sup>253</sup> *Id.* at 306.

authority between judge and jury.<sup>254</sup> Any finding to the contrary would be an assault on jury trials in general.<sup>255</sup>

The *Blakely* Court expressly declined to determine whether *Apprendi* implicated the U.S. Sentencing Guidelines,<sup>256</sup> but less than a year later the *Booker* Court answered the question in the affirmative. *Booker* involved sentencing enhancements that were based on the amount of drugs and the defendants' role in the criminal offense.<sup>257</sup> *Booker* distinguished between mandatory and advisory sentencing models for purposes of the Sixth Amendment Criminal Jury Trial Clause.<sup>258</sup> *Booker* held that the former implicated the criminal jury trial right while the latter did not.<sup>259</sup> The *Booker* Court found no constitutional distinction between Washington's procedures and the U.S. Sentencing Guidelines: both impermissibly thwarted the requirement that punishment be based on facts found by the jury or admitted by the defendant.<sup>260</sup> In other words, mandatory juryless fact-finding for purposes of fixing punishment violated *Apprendi*.<sup>261</sup>

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<sup>254</sup> *Id.* at 313.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 305 n.9 (the Guidelines "are not before us, and we express no opinion on them"). See generally Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 785 (2008) (noting that twenty-nine states were unaffected by *Blakely* or *Booker*); Fisher, *supra* note 204, at 56–57 (discussing the legal basis for why Washington's sentencing guidelines "undermined the Framers' design"); Klein, *supra* note 182, at 709–12 (noting an "immediate circuit split on whether *Blakely* applied to the Federal Sentencing Guidelines"); Reitz, *supra* note 244, at 1086 (noting that *Blakely* is "notable for what it does *not* attempt").

<sup>257</sup> *United States v. Booker*, 543 U.S. 220, 227 (2005). *Booker* received a ninety-nine-month sentencing enhancement for obstructing justice and possessing 566 grams of crack cocaine. *Id.* In a companion case, *United States v. Fanfan*, a jury found 500 or more grams of cocaine were involved. *Id.* at 228. The sentencing court found *Fanfan* responsible for 2.5 kilograms of cocaine powder and 261.6 grams of crack cocaine. *Id.* *Fanfan* was also found to have played a leadership role in the criminal activity. *Id.* *Fanfan* would have received a 120-month enhancement, but the sentencing court declined to apply those provisions of the U.S. Sentencing Guidelines. *Id.* at 228–29.

<sup>258</sup> *Id.* at 233 (reasoning that if the federal guidelines were advisory, there would be no Sixth Amendment implications).

<sup>259</sup> *Id.* ("[W]hen a trial judge exercises his discretion to select a specific sentence . . . , the defendant has no right to a jury determination of the facts that the judge deems relevant.").

<sup>260</sup> *Id.* at 232 (quoting *Blakely*, 542 U.S. at 303). A second *Booker* majority focused on whether the Guidelines could be remedied. Exercising its power of severability, the second *Booker* majority ruled that the mandatory nature of the Guidelines made them incompatible with the U.S. Constitution. *Id.* at 258. Advisory guidelines and a reasonableness standard of appellate review cured these incompatibilities. *Id.* at 259–63.

<sup>261</sup> *Id.* at 244–45, 258–62; see also Timothy Lynch, *One Cheer for United States v. Booker*, 2005 CATO SUP. CT. REV. 215, 216 (2005) (describing the Court's unwillingness to "untangle the knots that presently encumber[ed] the constitutional right to trial by jury").

*Blakely* and *Booker* teach that a jury determination of the facts that raised the sentencing ceiling was a firmly rooted and constitutionally protected precept of the common law.<sup>262</sup> *Booker* acknowledged that under prior indeterminate schemes, sentencing courts retained the ability to enhance a sentence.<sup>263</sup> But as enhancements increased under structured sentencing schemes, the jury's finding on the underlying crime became less significant.<sup>264</sup> The federal and Washington sentencing schemes mandated the removal of the jury from the process of fact-finding on issues that were material to punishment.<sup>265</sup> Such mandatory removal essentially forced the Court to address the question of how the right to a criminal jury could be meaningfully preserved such that "the jury would still stand between the individual and the power of the government . . ."<sup>266</sup> The Court was compelled to answer this question not as a matter of jury trial formalism, but jury trial substance.<sup>267</sup>

*Allelyne v. United States*<sup>268</sup> provides the third lesson from the Sixth Amendment Criminal Jury Trial Clause: a common law jury's factual determinations were fully enforceable unless exceptional circumstances were presented. By their terms, *Apprendi*, *Blakely*, and *Booker* applied only when mandatory juryless fact-finding involved imposition of a sentence more severe than the maximum penalty allowed under a criminal statute (and after *Blakely* the sentencing guidelines calculation).<sup>269</sup> After *Apprendi* but prior to *Blakely* and *Booker*, a plurality of the Court in *Harris v. United States* distinguished between maximum and minimum sentences for *Apprendi* purposes.<sup>270</sup> According to the *Harris* plurality, the Framers would have

<sup>262</sup> *Blakely v. Washington*, 542 U.S. 297, 313 (2004).

<sup>263</sup> *Booker*, 543 U.S. at 233 (citing *Williams v. New York*, 337 U.S. 241, 246 (1949)). *But see generally* Sanders, *Unbranding Confrontation*, *supra* note 187; Sanders, *Making the Right Call*, *supra* note 187.

<sup>264</sup> *Booker*, 543 U.S. at 236.

<sup>265</sup> *Id.* at 226–27.

<sup>266</sup> *Id.* at 237.

<sup>267</sup> *See id.*

<sup>268</sup> 570 U.S. \_\_\_, 133 S. Ct. 2151 (2013).

<sup>269</sup> *See Apprendi v. New Jersey*, 530 U.S. 466, 487 n.13 (2000).

<sup>270</sup> 536 U.S. 545, 550, 560–61, 568–69 (2002) (plurality opinion). *Harris* involved whether 18 U.S.C. § 924(c)(1)(A) defines a single crime, one of which brandishing is a sentencing factor that may be considered by a judge after the trial, or multiple crimes, one of which brandishing is an essential element that must be proved to a jury. *Id.* at 552. Section 924(c)(1)(A) provides in relevant part:

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

considered facts that increased the *maximum* sentence as elements of an aggravated offense and thus within the domain of the jury.<sup>271</sup> Facts that increased the *minimum* sentence could not make the same claim.<sup>272</sup> Otherwise stated for the purposes of *Apprendi*'s constitutional analysis, only those facts that set the "outer limits of a sentence"<sup>273</sup> functioned like traditional elements.<sup>274</sup>

*Alleyne* rejected the distinction between facts that increase the minimum and maximum punishment. *Alleyne* was charged with one count of robbery affecting interstate commerce and one count of using or carrying a firearm during a crime of violence, for which the minimum sentence was five years.<sup>275</sup> *Alleyne* was also charged with brandishing a firearm, which mandated a minimum punishment of seven years.<sup>276</sup> The jury rendered a verdict of guilt beyond a reasonable doubt on the charge of robbery but not on the charge of brandishing, a result that supported only a five year sentence.<sup>277</sup> At the sentencing hearing, a judge found that brandishing

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(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A) (2012). The government neither alleged brandishing nor referenced subsection (ii) in the indictment. *Harris*, 536 U.S. at 551. Instead, *Harris* was charged with knowingly carrying a firearm while trafficking drugs and received seven years punishment based on the sentencing court's finding that brandishing occurred. *Id.* The Fourth Circuit ruled brandishing a sentencing factor, as had every other federal circuit court to address the question. *Id.* at 551–52. The *Harris* plurality agreed. *Id.* at 552.

<sup>271</sup> *Id.* at 557.

<sup>272</sup> *Id.* The plurality acknowledged that even when the legislature does not explicitly designate a fact an element or sentencing factor, competing interpretations of the statute may apply depending on whether the fact was historically treated as an offense element, and whether punishment was significantly increased. *Id.* at 552–54. The plurality reasoned that section 924(c)(1)(A) either one, actually listed offense elements in a single sentence and sentencing factors in subsections, or two, appeared to list all offense elements in a single sentence but actually set out the elements of multiple offenses in subsections. *Id.* The five-to-ten year brandishing "enhancement" was described as "consistent with traditional understandings about how sentencing factors operat[e]" and "precisely what one would expect to see in provisions meant to identify matters for the sentencing judge's consideration." *Id.* at 554.

<sup>273</sup> *Id.* at 567.

<sup>274</sup> *Id.* at 562–64 (citing *Apprendi*, 530 U.S. at 487 n.13 ("We do not overrule *McMillan*. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict . . .")).

<sup>275</sup> *Alleyne v. United States*, 570 U.S. \_\_\_, 133 S. Ct. 2151, 2155 (2013). *Alleyne* and an accomplice robbed a store manager who was transferring daily deposits to a local bank. *Id.* *Alleyne* and his accomplice targeted the manager by feigning car trouble, approaching the manager's vehicle with a gun, and demanding the store's deposits, which the manager immediately surrendered. *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 2156.



occurred by a preponderance of the evidence and imposed a seven year sentence.<sup>278</sup> The Fourth Circuit affirmed the sentencing enhancement.<sup>279</sup>

*Alleyne* described mandatory juryless fact-finding at criminal sentencing hearings as a post-founding development that conflicted with the historical nature and scope of the right to a criminal jury.<sup>280</sup> *Alleyne* acknowledged that in the common law, substantive criminal law tended to be sanction-specific and a particular sentence was prescribed for a particular offense.<sup>281</sup> Moreover, the “legally prescribed” penalty affixed to the crime included the entire range of punishment.<sup>282</sup> It followed that any fact that triggered both the mandatory (or statutory) maximum *and* minimum sentences were “ingredient[s] of the offense.”<sup>283</sup> Elevating the low end or “floor” of a sentencing range heightened “the loss of liberty associated with the crime[ ]”<sup>284</sup> and was as relevant as elevating the high end or “ceiling.”<sup>285</sup>

*Alleyne* was premised on the clear relationship at common law between crime and punishment.<sup>286</sup> *Alleyne* described *Apprendi* as a preservation of the historic role of the jury as an intermediary between the state and a criminal defendant.<sup>287</sup> *Alleyne* agrees with Langbein’s conclusion that common law era sentencing judges had little sentencing discretion.<sup>288</sup> The Court recognized that “[w]hile some early American statutes provided *ranges* of permissible sentences, . . . the ranges themselves were linked to particular facts constituting the elements of the crime.”<sup>289</sup> Reflecting on common law and early U.S. colonial procedures, the Court found a *well-established practice of submitting to the jury every fact* that served as a basis for the imposition of or an increase in punishment.<sup>290</sup> *Alleyne* found facts that trigger a mandatory minimum also alter “the prescribed range of penalties to which a criminal defendant is exposed.”<sup>291</sup> *Alleyne* deemed it “impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime” because facts that increased either end of the range of punishment produced a new penalty.<sup>292</sup>

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* (citing *United States v. Alleyne*, 457 F. App’x 348, 350 (4th Cir. 2011) (per curiam)).

<sup>280</sup> *See id.* at 2158–59.

<sup>281</sup> *Id.* at 2158. *See generally* Langbein, *supra* note 167 (describing English common law trial juries).

<sup>282</sup> *Alleyne*, 133 S. Ct. at 2160.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 2161.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 2158.

<sup>287</sup> *Id.* at 2161.

<sup>288</sup> *Id.* at 2158 (citing Langbein, *supra* note 167, at 36–37).

<sup>289</sup> *Id.* (citing STITH & CABRANES, *supra* note 241, at 9).

<sup>290</sup> *Id.* at 2159; *see also id.* at 2160.

<sup>291</sup> *Id.* at 2160 (quoting *Apprendi v. New Jersey*, 530 U.S. 460, 490 (2000)).

<sup>292</sup> *Id.*

The lessons of *Apprendi*, *Blakely*, *Booker*, and *Alleyne* should cause cap approving state supreme courts some pause. *Etheridge*'s holding that a legislatively determined cap only dictates the "outer limit" or "ceiling" of a jury's award appears to conflict with both *Apprendi* and *Alleyne*'s directive that facts which affect the *outer* and *inner* limit or ceiling are within the purview of the jury. Moreover, caps also appear to conflict with the Court's own understanding of civil jury trial procedure as it existed in the common law before and after the time of the founding.<sup>293</sup> The Court has long recognized that at the time the U.S. Constitution was ratified in 1791, the parties in common law-based civil cases were entitled to a jury determination of liability and damages—both of which were questions of fact.<sup>294</sup> Additionally, common law courts lacked authority to alter the civil jury's damage award in an action for personal injury.<sup>295</sup>

Of course, state supreme courts may not be persuaded that the Sixth Amendment's lessons are relevant to the issue of compensatory damage caps. Unlike the Sixth Amendment Criminal Jury Trial Clause, the Seventh Amendment Civil Jury Trial Clause has not been deemed fundamental or applicable against the states.<sup>296</sup> But fundamentality only speaks to the level of scrutiny a court gives during its review of an alleged constitutional violation.<sup>297</sup> Fundamental rights like the criminal

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<sup>293</sup> See *Dimick v. Schiedt*, 293 U.S. 474, 478 (1935).

<sup>294</sup> *Id.* at 486–87; see also *id.* at 478 (“[I]n all cases sounding in damages, these damages must be assessed by the jury and not by the court independently thereof[.]”); *id.* at 490 (Stone, J., dissenting) (describing the scope of the Seventh Amendment as “the essentials of the jury trial as it was known to the common law before the adoption of the Constitution”). It appears that in some cases authority was exercised to “increase or abridge” the jury’s award, but only where the amount of damages was certain. *Id.* at 479 (majority opinion). This rule did not apply in personal tort actions unless the evidence before the court required a correction of the amount of damages. *Id.* Unless the parties agreed, courts had no power to add or reduce damages to a reasonable sum where a new trial was requested. *Id.* at 480; see also *Murphy*, *supra* note 5, at 363 n.83 (citations omitted) (arguing that based on precedent, the Court “considers assessment of compensatory damages to be more fundamental to the right to jury trial than the determination of liability”); *Murphy*, *supra* note 142, at 746 (describing jury fact-finding as not an end in itself, but a means towards achieving just adjudication).

<sup>295</sup> *Dimick*, 293 U.S. at 476–77 (failing to find any general authoritative pre-ratification decision sustaining the power of an English court to increase the amount of damages fixed by a jury). To the extent that judicial discretion existed to abridge or supplement a jury’s verdict, such discretionary authority was rarely exercised. See *id.* at 480. When an award was excessive it was usual for a court to suggest a sum to prevent the necessity of a new trial. *Id.*; see also *Lord Townsend v. Hughes* (1677) 86 Eng. Rep. 850, 850 (stating that as a matter of law the “jury [is] the sole judge[ ] of the damages”).

<sup>296</sup> See *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968) (Black, J., concurring); *Walker v. Sauvinet*, 92 U.S. 90 (1876); see also *Wright & Williams*, *supra* note 29, at 519–32 (arguing that if that Amendment were incorporated, compensatory damage caps would not survive a Seventh Amendment challenge).

<sup>297</sup> See *Strict Scrutiny*, CORNELL LEGAL INFO. INST., [http://www.law.cornell.edu/wex/strict\\_scrutiny](http://www.law.cornell.edu/wex/strict_scrutiny) [<http://perma.cc/BPB3-MLRU>].

jury trial generally receive strict scrutiny.<sup>298</sup> Non-fundamental rights like the civil jury trial receive the less exacting review for reasonableness.<sup>299</sup> As strict scrutiny is not a declaration of fatality, a review for reasonableness is not a commendation.<sup>300</sup> Next, this Article hypothesizes that due to the historical similarities between criminal and civil jury trial rights, the Sixth Amendment's lessons are applicable in civil cases. As pointed out by Thomas, criminal and civil juries were inseparable until the nineteenth century.<sup>301</sup> Thus at the time of ratification of the U.S. Constitution, the English civil jury was in many ways similar to the English criminal jury.<sup>302</sup> The fact that the U.S. Bill of Rights enshrined the civil and criminal jury in separate Amendments does not remove those shared historic common law characteristics.

### III. DECONSTRUCTING JURYLESS FACT-FINDING IN CIVIL CASES: LESSONS FROM THE SIXTH AMENDMENT CRIMINAL JURY TRIAL CLAUSE

The right to a jury—whether it be civil or criminal—derives from the Magna Carta.<sup>303</sup> Thomas Jefferson viewed Anglo-American juries as pillars.<sup>304</sup> Associate Justice Joseph Story, also a revered historical constitutional commentator, affirmed that juries were among the “great bulwark[s] of [U.S.] civil and political liberties.”<sup>305</sup> Story described a Seventh Amendment that placed “upon the high ground of constitutional right[s] the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all [persons] to be essential to political and civil liberty.”<sup>306</sup> Over time the Court has allowed the legislature some discretion to modify civil jury trial rights,<sup>307</sup> but none involved a predetermination of damages in a common law-based cause of action.

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<sup>298</sup> *See id.*

<sup>299</sup> *Rational Basis*, CORNELL LEGAL INFO. INST., [http://www.law.cornell.edu/wex/rational\\_basis](http://www.law.cornell.edu/wex/rational_basis) [<http://perma.cc/DP5M-GJWY>].

<sup>300</sup> *See id.*

<sup>301</sup> *See* Thomas, *supra* note 166, at 1207.

<sup>302</sup> *Id.*

<sup>303</sup> *See, e.g.*, Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 817–28 (2014).

<sup>304</sup> Thomas Jefferson, *Query XIV: Laws, AN EXPRESSION OF THE AMERICAN MIND* 79 (R.B. Bernstein ed., 2013) (“[T]he common sense of twelve honest men gives still a better chance of just decision, than the hazard of cross and pile.”).

<sup>305</sup> 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (Thomas M. Cooley ed., 4th ed. 1873).

<sup>306</sup> 1 *id.* at 633 (footnote omitted).

<sup>307</sup> *See, e.g.*, *Capital Traction Co. v. Hof*, 174 U.S. 1, 44–45 (1899) (holding that the legislature could expand the jurisdiction of the justices of the peace where there is a “general increase in litigation”).

Thomas hypothesizes that in the common law and in the U.S. colonies, criminal and civil juries were intended to protect individuals “against the judiciary, the executive, and the legislature.”<sup>308</sup> Thomas also observed that at the time of the founding, “civil juries decided cases without significant interference.”<sup>309</sup> This lack of interference encompassed findings on damages.<sup>310</sup>

The role of civil and criminal juries in the U.S. constitutional framework is one that dates to the founding. Anti-federalists complained that the original U.S. Constitution did not provide protection for the right to a civil or criminal jury.<sup>311</sup> These concerns may have been largely rooted in protecting debtor defendants.<sup>312</sup> Jury trial advocates pointed to other important and compelling rationales.<sup>313</sup> Samuel Bryan, a founding era anti-federalist judge, pointed out that juries “preserve[d] in the hands of the people . . . [a] share . . . in the administration of justice.”<sup>314</sup> Anti-federalists also regarded the jury as a protectant against government overreach or favoritism.<sup>315</sup>

Both the Sixth Amendment right to a criminal jury and the Seventh Amendment right to a civil jury were originally intended by the Framers of the U.S. Bill of Rights to apply only against the federal government.<sup>316</sup> However, by 1968 a concurring opinion in *Duncan v. Louisiana*<sup>317</sup> acknowledged that most of the rights contained in the Bill were applicable against the states through the Fourteenth Amendment’s Due Process Clause.<sup>318</sup> The *Duncan* majority established a three prong framework to determine whether a right was fundamental, and thus incorporated to apply against the states.<sup>319</sup> The first prong asks “whether [the] right is among those ‘fundamental principles of liberty and justice [that] lie at the base of [U.S.] civil and political

<sup>308</sup> Thomas, *supra* note 166, at 1232.

<sup>309</sup> *Id.* at 1209 (citations omitted).

<sup>310</sup> *Id.* at 1209–11.

<sup>311</sup> *See* Wolfram, *supra* note 53, at 673–705.

<sup>312</sup> *Id.* (discussing role of debtors in the civil jury clause ratifying conventions).

<sup>313</sup> *Id.* at 705–10.

<sup>314</sup> *Id.* at 695–96 (quoting Letters of Centinel, No. II, Freeman’s J. (Oct. 24, 1787), reprinted in PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787–1788, at 584 (John Bach McMaster & Frederick D. Stone eds., 1888)). Wolfram posits that one of the reasons the Framers included a “constitutional guarantee of [a] civil jury trial was . . . to guard against unwanted legislation passed by a misguided national legislature.” *Id.* at 664. Wolfram hypothesizes that the Seventh Amendment brings “to light strongly felt popular beliefs” about the government and its relationship to the people and “the importance of the civil jury in preserving that relationship.” *Id.* at 669.

<sup>315</sup> *Id.* at 670–71.

<sup>316</sup> *See* *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) (discussing earlier Court assertions “that the right to jury trial is not essential to ordered liberty and may be dispensed with by the States regardless of the Sixth and Fourteenth Amendments”).

<sup>317</sup> 391 U.S. 145 (1968).

<sup>318</sup> *Id.* at 171 (Black, J., concurring).

<sup>319</sup> *See id.* at 148–49 (majority opinion).

institutions.”<sup>320</sup> The second prong asks “whether [the right] is basic in [the U.S.] system of jurisprudence.”<sup>321</sup> The final prong asks whether the right is “‘fundamental’ and ‘essential’ to a fair trial[.]”<sup>322</sup>

*Duncan* ultimately deemed the Sixth Amendment *criminal* jury a fundamental and incorporated right.<sup>323</sup> This begs the question of whether the civil jury is on equal footing. Even though all but a few U.S. state constitutions contain a right to a civil jury,<sup>324</sup> no post-incorporation jurisprudence exists on the question of whether the Seventh Amendment is among those rights that are enforceable against the states. The most historic case on this issue is *Walker v. Sauvinet*.<sup>325</sup> *Walker* involved whether the Seventh and Fourteenth Amendments were offended by a statute that required the trial judge to direct a verdict when the jury could not agree.<sup>326</sup> The Court rejected the incorporation of the federal civil jury trial right and upheld the judge’s \$1000 damage award.<sup>327</sup> As a pre-incorporation case decided in 1876, *Walker* is not particularly instructive because of the (then) overwhelming hostility towards the application of the Bill of Rights against the states.<sup>328</sup>

A modern analysis of the fundamentality of the *civil* jury trial right may be long overdue, but this Article does not engage in such an undertaking. Instead this Article focuses on the historic nature of jury trial rights and the shared common law characteristics between civil and criminal juries. A jury finding on disputed facts constitutes a core common law practice.<sup>329</sup> In the common law and in early colonial practice once the right to a jury attached, certain questions required a jury determination.<sup>330</sup> As demonstrated in *Etheridge*, *Sofie*, and *Watts*, state courts agree with federal jurisprudence that a civil jury is required for actions that are analogous to “[s]uits at common law,” as opposed to cases traditionally tried in courts of equity or admiralty.<sup>331</sup> States also agree that in order to determine where a case would have

<sup>320</sup> *Id.* at 148 (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)) (internal quotation marks omitted).

<sup>321</sup> *Id.* at 148–49 (quoting *In Re Oliver*, 33 U.S. 257, 273 (1948)).

<sup>322</sup> *Id.* at 149 (quoting *Gideon v. Wainwright*, 372 U.S. 335, 343–44 (1963)).

<sup>323</sup> *Id.*

<sup>324</sup> *See, e.g.*, *Tellis v. Lincoln Par. Police Jury*, 916 So .2d 1248, 1250 (La. Ct. App. 2005) (“The right to a civil jury trial is not a constitutionally protected right in Louisiana.”).

<sup>325</sup> 92 U.S. 90 (1876).

<sup>326</sup> *Id.* at 92.

<sup>327</sup> *Id.* at 92–93.

<sup>328</sup> *See id.* at 92.

<sup>329</sup> Lerner, *supra* note 303, at 844 (citing *Bothwell v. Bos. Elevated Ry.*, 102 N.E. 665, 669 (Mass. 1913)).

<sup>330</sup> *Id.* at 863 (“Courts relied on the old common law maxim . . . that the facts were for the jury to decide, the law for the judge.”).

<sup>331</sup> *See Tull v. United States*, 481 U.S. 412, 417 (1987). *Tull* involved claims for violation of the Clean Water Act, which prohibited the pollution of navigable waters, including their adjacent swamps, marshes, bogs and similar other areas. *Id.* at 414 (citing 33 U.S.C. §§ 1311,

been tried before a jury, one must examine both the nature of the action and the remedy sought.<sup>332</sup> Under this approach, a court must first ask whether the cause of action is similar to eighteenth-century cases brought in courts of law prior to the merger of law and equity in the English common law.<sup>333</sup> Next a court must ask whether the requested remedy is “legal or equitable in nature.”<sup>334</sup> It is firmly established that tort claims were brought in courts of law, not equity.<sup>335</sup> Additionally, federal jurisprudence views the amount of compensatory damages as a fact that requires a civil jury.<sup>336</sup> But as stated, the Seventh Amendment remains unenforceable against the states.<sup>337</sup> Thus, this Article turns to Sixth Amendment criminal jury jurisprudence, which provides instruction about the nature and scope of jury trial rights and the limits of legislative authority to alter those rights.<sup>338</sup> The Sixth

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1344, 1362(7) (2012); 33 C.F.R. § 323.2(a)(1)–(7), (c) (1986)). The defendant unsuccessfully demanded a jury. *Id.* at 415. After a fifteen-day bench trial, the judge concluded that the defendant violated the Act and ordered injunctive relief. *Id.* at 415–16. The Fourth Circuit affirmed the denial of a jury. *Id.* at 416. The Court granted certiorari to resolve the conflict between the circuits on the issue of whether the Seventh Amendment’s civil jury trial guarantee applied “when the United States sues . . . to collect a [statutory civil] penalty . . .” *Id.* at 416–17 (alterations in original) (quoting *United States v. J.B. Williams Co.*, 498 F.2d 414, 422–23 (2d. Cir. 1974)) (internal quotation marks omitted).

<sup>332</sup> See *Tull*, 481 U.S. at 417.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 417–18. The *Tull* Court reasoned that “[a]fter the adoption of the Seventh Amendment, federal courts . . . treat[ed] the civil penalty suit as a particular type of action in debt,” which in the common law required a jury. *Id.* at 418. The Court warned its analysis was not precise. See *id.* at 421. The goal was not to engage in an “‘abstruse historical’ search for the nearest [eighteenth]-century analog.” *Id.* (quoting *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970)). The relief sought was more important than finding a precise common law analogy. *Id.* The Court held that the government’s demand for civil penalties under the Clean Water Act was clearly analogous to debt actions that could be enforced in a court of law. *Id.* at 422–23. But *Tull* distinguished findings on *liability* from findings on the amount of the *fine*. *Id.* at 425 (indicating a defendant has a “constitutional right to a jury trial to determine his liability on the legal claims”). *Tull* found no right to a jury assessment of the *penalty* itself. *Id.* at 429. On this question the common law offered no resolution. *Id.* at 426. In the U.S. legal tradition *civil penalties* were fixed by Congress. *Id.* Nor was the assessment of a civil penalty an essential function for the jury at trial. *Id.* at 426–27 (describing the assessment of a civil penalty as a “highly discretionary calculation[ ] . . . [that was] traditionally performed by judges”).

<sup>335</sup> Jill Wieber Lens, *Punishing for the Injury: Tort Law’s Influence in Defining the Constitutional Limitations on Punitive Damage Awards*, 39 HOFSTRA L. REV. 595, 603 (2016).

<sup>336</sup> See *Murphy*, *supra* note 142, at 773; *Murphy*, *supra* note 5, at 349 n.2 (theorizing that civil juries were originally given broad discretion to determine general or compensatory damages but not punitive damages); *Whitehouse*, *supra* note 101, at 1262–64.

<sup>337</sup> See *Murphy*, *supra* note 142, at 724; see also *Murphy*, *supra* note 5, at 351 (indicating the Seventh Amendment has been interpreted as a constraint on Congress).

<sup>338</sup> See *Wolfram*, *supra* note 53, at 645–46 (discussing history of the Sixth Amendment Criminal Jury Trial Clause).

Amendment is of particular importance in light of the state supreme court split on compensatory damage caps, the significant impact that a cap has on the civil jury's award, and ultimately an individual's right to compensation for an injury.<sup>339</sup> Each lesson is discussed in turn.

*A. The Lesson from Apprendi: Modern Procedures Cannot Significantly Alter Certain Common Law Characteristics of the Jury Trial Right*

*Apprendi* teaches that even though criminal procedure practice changes over time, modern courts “must at least adhere to . . . basic [common law] principles . . . .”<sup>340</sup> *Apprendi* recognized the criminal jury as a right of surpassing importance in the common law and limited legislative authority to choose between facts that had to be found by a jury and facts that did not.<sup>341</sup> Reflecting on the common law at the time of the founding, *Apprendi* acknowledged that the modern distinction between elements and enhancements was unknown to trial by jury as it existed in the years surrounding the founding.<sup>342</sup> At common law, an “invariable link[]” existed between the crime and the punishment.<sup>343</sup> *Apprendi* ultimately required a jury to assess those facts that increased punishment.<sup>344</sup> The relevant inquiry was not one of form, but substance and the relevant question was whether the required finding exposed the defendant to a greater penalty than that authorized by the plea or the guilty verdict.<sup>345</sup>

Basic common law principles should also guide the constitutional assessment of civil jury rights.<sup>346</sup> Reliable common law principles can be derived upon a reflection or an analysis of history.<sup>347</sup> Thomas posits that only the common law limits the procedures that affect civil and criminal jury trial rights,<sup>348</sup> and thus

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<sup>339</sup> See Murphy, *supra* note 142, at 742–43 (arguing that because the Framers had a unified vision of jury trial rights, their “textual segregation” of criminal and civil juries was “more formal than substantive”).

<sup>340</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 483–84 (2000) (emphasis added). Justice Thomas, concurring in the judgment, argued that the Sixth Amendment’s text and structure reflected the jury’s constitutionally prescribed role as ultimate fact-finder. See *id.* at 518 (Thomas, J., concurring) (describing *Apprendi* as reflecting the original meaning of the Sixth Amendment).

<sup>341</sup> *Id.* at 478 (majority opinion). Guilt beyond a reasonable doubt was designated a historically significant companion to the right to a criminal jury verdict because both reflect “a profound judgment” about law enforcement and the administration of justice. *Id.* (quoting *In re Winship*, 397 U.S. 358, 361–62 (1970)).

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> See *id.* at 491–92.

<sup>345</sup> *Id.* at 494.

<sup>346</sup> See Thomas, *supra* note 67, at 753.

<sup>347</sup> See *id.* at 754.

<sup>348</sup> *Id.* at 751.

common law procedures are presumptively constitutional.<sup>349</sup> Conversely, the common law need not restrict the development of new procedures as long as those procedures comport with common law practices.<sup>350</sup>

Historically, compensatory damages have been “awarded to a person as compensation, indemnity or restitution for harm.”<sup>351</sup> Until recently, an enduring principle was that entitlement to compensatory damages in common law tort cases necessarily depended on the specific circumstances of an individual case.<sup>352</sup> *Robinson v. Harman*,<sup>353</sup> an English common law case involving contracts,<sup>354</sup> appears to be the first to articulate the principle of compensatory damages.<sup>355</sup> *Robinson* establishes that “where a party sustains a loss by reason of breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.”<sup>356</sup> Thus, at its origin compensatory damages were specifically designed to put a party in the same position before some harm or wrong occurred. The common law also supports the view that the amount of a compensatory damage award was based on a finding by the jury about “the injury alleged and proved.”<sup>357</sup> When awarded, compensatory damages must be “commensurate with the injury suffered[.]”<sup>358</sup>

Historically, compensatory damages have also contained both an economic loss and a non-economic loss component.<sup>359</sup> The economic loss component includes medical expenses, lost earnings, and other objectively verifiable monetary losses.<sup>360</sup> The non-economic loss component includes injuries related to pain, suffering, mental anguish and other emotional distresses, disfigurement, and the loss of consortium or capacity to enjoy life.<sup>361</sup> As described by Dobbs, compensatory damages compensate the victim for any losses resulting from an injury.<sup>362</sup> Both the economic and non-economic loss components traditionally constituted a legal remedy for which

<sup>349</sup> *Id.*

<sup>350</sup> *Id.* at 757 n.122.

<sup>351</sup> 4 RESTATEMENT (SECOND) OF TORTS § 903 (Am. Law Inst. 1979).

<sup>352</sup> See Jill Wieber Lens, *Procedural Due Process and Predictable Punitive Damages Awards*, 2012 BYU L. REV. 1, 39 (2012).

<sup>353</sup> (1848) 1 Ex. 849.

<sup>354</sup> *Id.*

<sup>355</sup> See David Campbell, *A Relational Critique of the Third Restatement of Restitution* § 39, 68 WASH. & LEE L. REV. 1063, 1097–98 (2011); see also OXFORD PRINCIPLES OF ENGLISH LAW: ENGLISH PRIVATE LAW 21.17, at 1260 (Andrew Burrows ed., 3d ed. 2013).

<sup>356</sup> Campbell, *supra* note 355, at 1097–98 (quoting *Robinson*, 1 Ex. at 855).

<sup>357</sup> *Birdsall v. Coolidge*, 93 U.S. 64, 64 (1876).

<sup>358</sup> *Id.*

<sup>359</sup> FISCHER, *supra* note 9, § 6.5, at 36–37.

<sup>360</sup> *Id.* at 36. Some states also imposed caps on punitive damage awards. See *id.* at 37.

<sup>361</sup> *Id.* at 36–37.

<sup>362</sup> DOBBS, *supra* note 97, § 8.1, at 540 (discussing requirement that personal injury damages be proved and calculated at the trial).



a jury was required.<sup>363</sup> In short, both presented a question of “*historical or predictive fact*”<sup>364</sup> that varied with the kind of harm suffered.<sup>365</sup> *St. Louis, Iron Mountain & South Railway Co. v. Craft*<sup>366</sup> signals the Court’s agreement with Dobbs. *Craft* asked whether a \$5,000 award for pain and suffering in a federal wrongful death action was excessive.<sup>367</sup> On this issue the Court noted that the damages did seem large.<sup>368</sup> However the power, duty, and responsibility for determining damages involved “*only a question of fact*” for the jury.<sup>369</sup>

Most state constitutions are not so explicit as to guarantee who determines damages, but most states agree that the English common law forms the interpretive basis to when a civil jury “attaches” to a particular cause of action.<sup>370</sup> States also

<sup>363</sup> *Id.* § 1.4, at 3 (distinguishing between remedies at law, which require a jury, and remedies in equity, which do not); *see also* Murphy, *supra* note 5, at 349.

<sup>364</sup> *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 (2000) (emphasis added) (quoting *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)).

<sup>365</sup> DOBBS, *supra* note 97, § 3.3(2), at 220 (explaining the lack of universal measurement for damages).

<sup>366</sup> 237 U.S. 648 (1915).

<sup>367</sup> *Id.* at 653–54. After the decedent was killed in an automobile accident the decedent’s administrator filed an action under the federal employer’s liability act of 1908, which had been amended in 1910. *Id.* at 653. The jury’s award of \$11,000 for the deceased’s post-accident pain and suffering was reduced to \$5,000. *Id.* at 654.

<sup>368</sup> *Id.* at 661.

<sup>369</sup> *See id.* (emphasis added); *see also* MCCORMICK, *supra* note 88, at 24 (“from the beginning of trial by jury” the amount of damages was “a ‘fact’ to be found by the jurors”).

<sup>370</sup> *See, e.g.*, *One Chevrolet Auto. v. State*, 87 So. 592, 592 (Ala. 1921) (preserving the right to a civil jury does not extend to “causes unknown to the common law”); *Frank v. Golden Valley Election Ass’n*, 748 P.2d 752, 754 (Alaska 1988) (citing ALASKA CONST. Art. I, § 16) (preserving the right to a civil jury to the “same extent as it existed at common law”); *In re Estate of Newman*, 196 P.3d 863, 875 (Ariz. Ct. App. 2008) (preserving a right to a civil jury “only in cases where it would have existed under the common law”); *Jones v. Reed*, 590 S.W.2d 6, 13 (Ark. 1979) (extending the right to a civil jury “only to common law actions”); *Franchise Tax Bd. v. Super. Ct.*, 252 P.3d 450, 452 (Cal. 2011) (limiting right to a civil jury only “as it existed at common law”); *Swanson v. Boschen*, 120 A.2d 546, 549 (Conn. 1956) (recognizing right to a civil jury as extended only to actions that were “of the same nature” as those that existed prior to 1818); *Claudio v. State*, 585 A.2d 1278, 1296 (Del. 1991) (discussing constitutional commitment to a civil jury only “as it existed at common law”); *In re Forfeiture of 1978 Chevrolet Van*, 493 So. 2d 433, 434 (Fla. 1986) (holding Florida constitutional guarantee that right to jury was “the right enjoyed of the time [Florida’s] first Constitution became effective”); *Strange v. Strange*, 148 S.E.2d 494, 495 (Ga. 1966) (“[I]n civil actions the right of jury trial exists only in those cases where the right existed prior to the first Georgia Constitution . . .”); *Hous. Fin. & Dev. Corp. v. Ferguson*, 979 P.2d 1107, 1114 (Haw. 1999) (referring “to the common law practice” to interpret Hawaii’s right to a civil jury); *Kirkland v. Blaine Co. Med. Ctr.*, 4 P.3d 1115, 1118 (Idaho 2000) (acknowledging that at the time Idaho’s Constitution was adopted, there was a civil right to a jury award of compensatory damages); *Estate of Grabow’s*, 392 N.E.2d 980, 982

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(Ill. App. Ct. 1979) (excluding causes of actions unknown to common law from the scope of the civil jury trial right); *Sims v. U.S. Fid. & Guar. Co.*, 782 N.E.2d 345, 352 (Ind. 2003) (finding prohibition against trial by civil jury reasonable where cause of action was not recognized by the common law); *Iowa Nat. Mut. Ins. Co. v. Mitchell*, 305 N.W.2d 724, 727 (Iowa 1981) (noting the constitutional right to a civil jury carries with it common-law concepts); *Waggener v. Seever Sys., Inc.*, 664 P.2d 813, 817 (Kan. 1983) (noting the question of whether the right to a civil jury applies is determinable on the basis of the common law); *Daniels v. CDB Bell, LLC*, 300 S.W.3d 204, 210 (Ky. Ct. App. 2009) (noting Kentucky law recognizes the exception for the civil right to a jury for “causes at common law that would have been regarded as arising in equity rather than law”); *State v. Anton*, 463 A.2d 703, 709 (Me. 1983) (the right to jury trial at common law “guarantees the right today”); *Davis v. Slater*, 861 A.2d 78, 86–87 (Md. 2004) (“[t]he common law . . . includes the law governing the entitlement to demand” a civil jury); *Stonehill Coll. v. Mass. Comm’n Against Discrimination*, 808 N.E.2d 205, 214 (Mass. 2004) (referring to the common law right to a civil jury); *State Conservation Dep’t v. Brown*, 55 N.W.2d 859, 861 (Mich. 1952) (the right to civil jury at common law “may not be defeated”); *Onvoy, Inc. v. Allete, Inc.*, 736 N.W.2d 611, 617 (Minn. 2007) (holding Minnesota’s right to a civil jury trial “meant to protect the right . . . as it existed” when the Minnesota Constitution was adopted); *Talbot & Higgins Lumber Co. v. McLeod Lumber Co.*, 113 So. 433, 434 (Miss. 1927) (describing the right to a civil jury as deriving from the common law); *State ex rel. Diehl v. O’Malley*, 95 S.W.3d 82, 86 (Mo. 2003) (same); *In re M.H.*, 143 P.3d 103, 106 (Mont. 2006) (rejecting applicability of the civil jury trial right because the right did not exist for such proceedings at common law); *State ex rel. Cherry v. Burns*, 602 N.W.2d 477, 482 (Neb. 1999) (preserving the right to a civil jury as it existed in the common law); *Cheung v. Dist. Ct.*, 124 P.3d 550, 557 (Nev. 2005) (noting that the Nevada Constitution was written to be interpreted with the common law in mind); *Hair Excitement, Inc. v. L’Oreal U.S.A., Inc.*, 965 A.2d 1032, 1037 (N.H. 2009) (noting that to determine if there was a civil right to a jury, one must look to whether it was a customary practice at common law); *Jersey Cent. Power & Light Co. v. Melcar Util. Co.*, 59 A.3d 561, 568 (N.J. 2013) (holding the New Jersey Constitution guarantees the right to a civil jury trial only when the right existed at common law); *Bd. of Ed. of Carlsbad Schs. v. Harrell*, 882 P.2d 511, 522 (N.M. 1994) (in the common law, the right to a civil jury determined whether a cause of action existed in a court of law or a court of equity); *Murphy v. Am. Home Prods. Corp.*, 527 N.Y.S. 2d 1 (N.Y. App. Div. 1988) (describing the common law as the underlying determinant of whether the right to a civil jury applied); *N.C. State Bar v. DuMont*, 286 S.E.2d 89, 93 (N.C. 1982) (noting constitutional right to civil jury where the right existed at common law); *State v. \$17,515.00 in Cash Money*, 670 N.W.2d 826, 827 (N.D. 2003) (stating civil jury required where demand could be made as a matter of right at common law); *Stetter v. R.J. Corman Derailment Servs., LLC*, 927 N.E.2d 1092, 1105 (Ohio 2010) (noting right to try civil jury trial applies only if right attached at common law); *State ex rel. Dugger v. Twelve Thousand Dollars*, 155 P.3d 858, 864 (Okla. Cir. App. 2007) (right to a civil jury guaranteed if such right existed at common law); *Jensen v. Whitlow*, 51 P.3d 599, 604 (Or. 2002) (Oregon Constitution guarantees a jury in civil trials if a jury was required); *Commonwealth v. One (1) 1984 Z-28 Camaro Coupe*, 610 A.2d 36, 49 (Pa. 1992) (referring to the common law to determine the scope of the right to a civil jury); *Bendick v. Cambio*, 558 A.2d 941, 945 (R.I. 1989) (noting right available if existed at common law); *C.W. Matthews Contracting Co. v. S.C. Tax Comm.*, 230 S.E.2d 223, 226 (S.C. 1976) (referring to the common law to determine the scope of the right to a civil jury); *State v. Piper*, 709 N.W.2d 783, 805 (S.D. 2006) (extending scope of civil jury

agree that “damages must be assessed by the jury” if the cause of action was analogous to a common law case that existed at the time of ratification of the state or federal constitution.<sup>371</sup> At the time the Seventh Amendment was ratified in 1791, the parties in common law cases were entitled to have a jury determine liability and damages—both of which were questions of fact.<sup>372</sup> In other words, the parties were entitled to a jury determination on “the question of liability and the extent of the injury by an assessment of damages.”<sup>373</sup> Additionally, common law courts lacked authority to increase or decrease damages in an action for personal injury.<sup>374</sup>

Langbein has observed that awarding money damages was a major distinguishing feature between English common law courts and English courts of equity.<sup>375</sup> The Court has recognized this distinction and has deemed damages an issue of fact, not law.

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trial right only to causes of action that existed at common law); *Helms v. Tenn. Dept. of Safety*, 987 S.W.2d 545, 547 (Tenn. 1999) (noting Tennessee Constitution guaranteed civil jury trial as it existed at common law); *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 291 (Tex. 1975) (right to civil jury trial exists in “all actions where that right existed” in common law); *Buck v. Robinson*, 177 P.3d 648, 653 (Utah Ct. App. 2008) (noting only actions that required a civil jury at common law require a jury today); *State v. Irving Oil Corp.*, 955 A.2d 1098, 1101 (Vt. 2008) (right to civil jury trial guaranteed if existed at common law); *Ingram v. Commonwealth*, 741 S.E.2d 62, 68 (Va. Ct. App. 2013) (denying civil jury because cause of action unknown to common law); *Quesnell v. State*, 517 P.2d 568, 579 (Wash. 1973) (en banc) (referring to the common law to determine the scope of the right to a civil jury); *State by State Road Comm’n v. Boggess*, 126 S.E.2d 26, 29 (W. Va. 1962) (noting right to civil jury trial preserved in cases that existed at common law); *State v. Abbot Labs.*, 816 N.W.2d 145, 156 (Wis. 2012) (first question to determine if right to a civil jury trial exists today is if existed at common law); *In re Estate of Cheek*, 53 P.3d 113, 116 (Wyo. 2002) (denying civil jury because not given in common law); *see also Whitehouse*, *supra* note 101, at 1251 (commenting on the Founders’ differing view that the number and differing forms of civil jury trial clauses either made inclusion of any one impractical for federal constitutional law purposes; no risk imposed because the popularity of the clause made objection to it odious to the extent of being hated). *But see Motz v. Jammarron*, 676 P.2d 1211, 1213 (Colo. App. 1983) (no entitlement to a civil jury as a matter of right); *Tellis v. Lincoln Par. Police Jury*, 916 So.2d 1248, 1250 (La. Ct. App. 2005) (because state constitution does not guarantee a right to a civil jury, the applicability of the right must be determined by looking to state statutory law).

<sup>371</sup> *Dimick v. Schiedt*, 293 U.S. 474, 478 (1935). *Dimick* involved personal injuries allegedly caused by the negligent operation of an automobile on a public highway. *Id.* at 475. The plaintiff argued the jury’s \$500 verdict was inadequate and requested a new trial, which was denied immediately after the defendant consented to a \$1,000 increase in damages. *Id.* at 475–76. The Court held that conditioning the denial of a new trial on defendant’s agreement to an increase of the damages violated the Seventh Amendment. *Id.* at 487–88.

<sup>372</sup> *See id.* at 486.

<sup>373</sup> *Id.*; *see also id.* at 490 (Stone, J., dissenting); *Murphy*, *supra* note 142, at 746; *Murphy*, *supra* note 5, at 363 n.83.

<sup>374</sup> *See Dimick*, 293 U.S. at 476–77; *see also Lord Townsend v. Hughes* (1677) 86 Eng. Rep. 994.

<sup>375</sup> Langbein, *supra* note 89, at 538–39.

Thomas observed that the common law did not appear to empower state legislatures with authority to “check” the civil jury<sup>376</sup> or otherwise “curb damages”<sup>377</sup> that were otherwise properly awarded. *Watts* held that legislatively imposed caps neither existed in nor were contemplated by the common law when most colonial constitutions were enacted.<sup>378</sup> Thomas argues that legislatively imposed caps impermissibly shifted the issue of damages to the legislature,<sup>379</sup> at least where the jury’s damage award exceeded the legislatively imposed cap.<sup>380</sup> In short, such procedures appear to take the jury “out of the damages determination.”<sup>381</sup>

Compensatory damage caps infringe on the civil jury trial right in the same way that *Apprendi* recognized that some structured sentencing guidelines infringed on the criminal jury trial right.<sup>382</sup> Both the damage award in a cap regime and the sentence in certain guidelines regimes were the result of juryless fact-finding. Additionally, caps constitute a “one-size-fits-all” approach that lacks individuality or flexibility. Caps also fail to take into account the actual harm suffered or the amount of damage in an individual case,<sup>383</sup> which has been the longstanding method for calculating compensation in common law–based civil cases. Once a cap is applied, the jury trial right as it was enshrined in the common law has been significantly altered.<sup>384</sup> Caps also result in a procedure where compensatory damage awards are no longer closely aligned with their traditional purpose: compensation for actual losses or injuries.<sup>385</sup>

*B. The Lesson from Blakely and Booker: Mandatory Removal of the Jury as the Primary Fact-Finder Was Not Authorized in Common Law Cases*

The essential lesson of *Blakely v. Washington* and *United States v. Booker* is that mandatory removal of the criminal jury as the primary fact-finder on material issues

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<sup>376</sup> See Thomas, *supra* note 166, at 1229.

<sup>377</sup> *Id.* (questioning whether such role existed for common law legislatures).

<sup>378</sup> See *Watts v. Cox Med. Ctr.*, 376 S.W.3d 633, 641 (Mo. 2012); see also Murphy, *supra* note 5, at 399.

<sup>379</sup> See Thomas, *supra* note 166, at 1236.

<sup>380</sup> *Id.*

<sup>381</sup> *Id.* at 1237.

<sup>382</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury . . .”).

<sup>383</sup> See Baldus et al., *supra* note 10, at 1124 (arguing that caps are a departure from common law concepts that each case is unique and that each case should be individually accessed).

<sup>384</sup> See Murphy, *supra* note 142, at 734 (noting that because jurors bring collective common sense, experiences, and training, juries are more capable of making “rational decision[s] about the facts” of a case). Murphy hypothesizes on the jury’s role as protectant against government abuse when “the government seeks to contort the applicable standard.” *Id.* at 735 (emphasis added).

<sup>385</sup> See Baldus et al., *supra* note 10, at 1122 (arguing caps impair the deterrent effect of the tort system).

was not authorized in the common law. *Blakely* described the jury as more than a “mere procedural formality, but a fundamental reservation of power in [the U.S.] constitutional structure.”<sup>386</sup> *Booker* confirmed a jury determination of disputed facts as a firmly rooted and constitutionally protected precept of the common law.<sup>387</sup> *Booker* acknowledged that the greater significance designated to some facts and the mandatory removal of the jury on those facts raised compelling questions as to how the right to a criminal jury could be meaningfully preserved.<sup>388</sup> The Court was compelled to answer this question not as a matter of Sixth Amendment formalism, but a matter of Sixth Amendment substance.<sup>389</sup>

The civil jury right, like its criminal counterpart, continues to be held in “jealous regard” by the American people.<sup>390</sup> In the United States, the jury always has been and still is regarded as “the normal and preferable mode of disposing of issues of fact in civil cases.”<sup>391</sup> Colonial practice reflected the common law reverence for the jury as an “indispensable element” of judicial administration.<sup>392</sup> Professor Charles Wolfram, a distinguished scholar on the constitutional history of the Seventh Amendment, described the U.S. civil jury as a “familiar and well-ensconced feature of pre-1787 political life.”<sup>393</sup> Wolfram notes that the continuity of the civil jury by the thirteen U.S. colonies after the outbreak of hostilities with England<sup>394</sup> was either “by express provision in [ ] state constitution[s], by statute, or by continuation of the practices that had applied prior to the break with England.”<sup>395</sup> According to Wolfram, “only juries could determine damages” in ratification era English courts.<sup>396</sup> Mandatory caps against compensatory damage awards neither existed nor were contemplated by the common law before or after the time when most state constitutions were enacted.<sup>397</sup>

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<sup>386</sup> *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

<sup>387</sup> *United States v. Booker*, 543 U.S. 220, 230 (2005).

<sup>388</sup> *Id.* at 237.

<sup>389</sup> *Id.*

<sup>390</sup> *Dimick v. Schiedt*, 293 U.S. 474, 478 (1935); *see also* Thomas, *supra* note 166, at 1232 (“The English viewed the jury as a protector against the judiciary, the executive, and the legislature. The American jury was established largely according to this model . . .”).

<sup>391</sup> *Dimick*, 293 U.S. at 486; *see also* Whitehouse, *supra* note 101, at 1244 (describing the historical understanding of the civil jury as “an institutional check” upon government).

<sup>392</sup> *Dimick*, 293 U.S. at 478; *see also* Thomas, *supra* note 166, at 1198 (recognizing that before the constitutional convention, all of the colonial states with written constitutions had a right to a jury trial); Whitehouse, *supra* note 101, at 1243–44 (describing U.S. jury as a pedigreed, historical, and structural element of American government); Wolfram, *supra* note 53, at 653–56 (discussing civil jury trial practice in U.S. colonies).

<sup>393</sup> Wolfram, *supra* note 53, at 653.

<sup>394</sup> *Id.* at 654.

<sup>395</sup> *Id.* at 655 (citation omitted).

<sup>396</sup> Thomas, *supra* note 67, at 781.

<sup>397</sup> *See* *Watts v. Cox Med. Ctr.*, 376 S.W.3d 633, 636 (2012); *see also* Murphy, *supra* note 5, at 399 (finding a “strong historical link between assessment of compensatory damages and the right to jury trial”).

In the common law the power of the judge and the power of the jury were distinguished by findings on the law, which were determined by the former, and findings of fact, which were determined by the latter.<sup>398</sup> But, the common law did not permit “inadequate or excessive” civil jury awards to stand.<sup>399</sup> Rather “where the verdict was excessive or trifling, the remedy was to submit the case to . . . another jury.”<sup>400</sup> Authority to increase or decrease damages did exist in the common law,<sup>401</sup> but little evidence suggests that courts often acted upon or exercised that authority.<sup>402</sup> Thomas observed that new trials were generally ordered where damages were “so high as to indicate prejudice or partiality of the jury.”<sup>403</sup> Thomas also discerned that where authority to reduce damages was exercised in U.S. colonial courts, such authority was confined to those courts sitting en banc.<sup>404</sup> Most importantly Thomas found that immediately before adoption of the Seventh Amendment in 1791, “there [was] no sustainable evidence” that new trials for excessive damages were granted in cases arising in tort.<sup>405</sup> U.S. colonial courts “adhered to the English common law rule regarding new trials for excessive damages.”<sup>406</sup> In tort cases, where damages were uncertain, the jury was given particular latitude: the movant for a new trial was required to show that damages were not only excessive, but outrageous.<sup>407</sup> Thomas clarified

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<sup>398</sup> *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

<sup>399</sup> *Id.* *Dimick* described a right to a jury that acts properly. *Id.* Thus, where the verdict is “palpably and grossly inadequate or excessive, . . . both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question[s] of liability and . . . damages.” *Id.*; see also *Murphy*, *supra* note 142, at 776 (describing a new trial as the cure for jury error).

<sup>400</sup> *Dimick*, 293 U.S. at 478. In cases where the plaintiff asks for a new trial because damages are too small, the court lacks authority to order an increase without consent. *Id.* at 480. In turn, where the defendant asks for a new trial because damages were excessive, “the [c]ourt has no power to reduce the damages to a reasonable sum instead of ordering a new trial.” *Id.* (internal quotation marks omitted). See generally *Baldus et al.*, *supra* note 10, at 1127–30 (discussing *additur* and *remittitur*); *Thomas*, *supra* note 166, at 1201–11 (observing common law and colonial U.S. practices that allowed a judge to order a new trial where damages were excessive).

<sup>401</sup> See *Dimick*, 293 U.S. at 477; see also *id.* at 481 (requiring assent of both parties before authorizing interference from the court).

<sup>402</sup> See *id.* at 477. *Dimick* found that 1733 was the last known exercise of such authority in the English common law. *Id.* (citing *Burton v. Baynes*, *Barnes Practice Cases* 153 (1733)).

<sup>403</sup> *Thomas*, *supra* note 67, at 775 (discussing the ability of eighteenth-century English common law judges to order a reduction of damages).

<sup>404</sup> See *Dimick*, 293 U.S. at 477. This practice was obsolete in England at the time the Seventh Amendment was ratified. *Id.*; see also *Thomas*, *supra* note 67, at 781; *Suja A. Thomas*, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 *WASH. U. L.Q.* 687, 744 (2004).

<sup>405</sup> *Thomas*, *supra* note 67, at 776–77; see also *id.* at 778 (describing “immeasurability of tort damages”).

<sup>406</sup> *Id.* at 782–83.

<sup>407</sup> *Id.* at 777 (citing *Sharpe v. Brice* (1774) *Eng. Rep.* 557, 557; *Beardmore v. Carrington*

that on motions for new trials for excessive damages, English common law courts emphasized the jury's fact-finding role as the "proper determiner of the damages."<sup>408</sup>

State and federal courts should adhere to common law traditions when interpreting the nature and scope of the right to a civil jury. There is no cause to assume jury trial procedures lack sufficient safeguards, of which there are many.<sup>409</sup> The trial court and the parties engage in inquiries on whether each individual juror is impartial and unbiased.<sup>410</sup> The jury engages in a process of "collective deliberation [of] the evidence and the arguments of [the parties]."<sup>411</sup> To prevent jury bias, the trial judge also acts as gatekeeper by determining the admissibility of evidence. Along with the jury, the trial judge assesses the testimony; but the trial judge can also reassess the jury's findings on liability and damages.<sup>412</sup> An appellate court has authority to affirm or overturn the entire process if an error has occurred.<sup>413</sup> Compensatory damage caps displace this process. Instead of recognizing and enforcing the jury's determination, a fixed legislative determination uniformly applies regardless of the sufficiency of the evidence presented to the jury. Fixed damages are not based on an assessment or consideration of the facts in an individual case. Nor can the application of the cap be overturned by an appellate court.

Procedures that infringe on the civil jury trial right should at a minimum meet the due process standard of reasonableness. While under this standard state legislative decisions are afforded deference, legislative action that is clearly erroneous should not be followed.<sup>414</sup> One key inquiry on the issue of reasonableness is level of inclusiveness. On this inquiry compensatory damage caps fail. An irrebuttable presumption of excessiveness applies to all awards over the cap.<sup>415</sup> All awards under the cap are presumed reasonable.<sup>416</sup> Targets of the cap are *not* chosen because they failed to provide sufficient evidence of damages,<sup>417</sup> but because the tortfeasor caused more actual damages (at least according to the jury).<sup>418</sup> Caps apply with no consideration

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(1764) 95 Eng. Rep. 790, 792 (noting the 1764 King's Bench proclamation that "there had never been a new trial granted for excessive damages in [ ] tort").

<sup>408</sup> *Id.* at 779; *see id.* at 780 (quoting *Leeman v. Allen* (1763) 95 Eng. Rep. 742, 743) (describing the common law judge's role on a motion for a new trial for excessive damages as deciding whether "the damages are beyond all measure unreasonable" and noting that "[the court] cannot say exactly what damages ought to be given").

<sup>409</sup> *See Dimick*, 293 U.S. at 456–57.

<sup>410</sup> *Id.*

<sup>411</sup> *Id.* at 456–57.

<sup>412</sup> *See id.* (noting trial judge's review of a jury award).

<sup>413</sup> *Id.* at 457.

<sup>414</sup> *Estate of McCall v. United States*, 134 So. 3d 894, 906 (Fla. 2014) (plurality opinion).

<sup>415</sup> *See Baldus et al.*, *supra* note 10, at 1121.

<sup>416</sup> *See id.*

<sup>417</sup> *See Murphy*, *supra* note 5, at 365 (noting that because caps apply regardless of the evidence, the legislature has "second-guess[ed]" the jury).

<sup>418</sup> *See id.* at 351 (stating that the real purpose of caps—the limitation of jury decisions—is in tension with the right to a civil jury).

of the nature of the injury; the degree or length of pain, suffering, disfigurement, or mental anguish experienced by the injured party; or the injured party's age or other personal characteristics that directly relate to the length or amount of harm. Except in Massachusetts,<sup>419</sup> there is no consideration of whether application of the cap is just or fair to the plaintiff. Thus, where a party successfully proves that damages exceed the cap, in all cap regimes but one the compensatory damage award will not redress actual or concrete losses.<sup>420</sup>

As applied in a common law-based civil cases, compensatory damage caps alter the historic right to the civil jury's judgment on damages. "The ability of the jury to tailor its decision to the facts and circumstances of a particular case . . . is not a vice, but a virtue."<sup>421</sup> Yet in all jurisdictions save Massachusetts, the cap's application is automatic and mechanic. Professor Renee Lettow Lerner has explained why juries were designed to protect against "arbitrary or capricious interference of the government."<sup>422</sup> Mandatory caps interfere with the civil jury's constitutionally proscribed role to "find" the amount of damages. Dobbs describes caps as a "crude means of controlling" excessiveness.<sup>423</sup> This Article agrees, for in cap regimes, some categories of provable injuries are left undercompensated. Less tortious defendants will pay the full value of the injuries they inflict, while more tortious defendants will not.<sup>424</sup> Surely the criminal justice system would suffer if misdemeanants and violent felons were punished the same. A civil justice system that awards compensation without regards to the severity of the harm similarly suffers.<sup>425</sup>

Mandatory juryless fact-finding drastically alters the balance of power between the parties in civil litigation. Tortious defendants can propose settlement offers that

<sup>419</sup> Sanders, *supra* note 1, at 39 (citing MASS. GEN. LAWS. ch. 231, § 60H (2015) (allowing jury to consider fairness of cap)).

<sup>420</sup> See Yeazell, *supra* note 5, at 1784 (positing that the unspoken target of tort reform was the right to a civil jury); see also Thomas, *supra* note 166, at 1235–37 (discussing legislative shifts of power that have removed "the jury completely out of the damages determination").

<sup>421</sup> Jeffrey R. White, *State Farm and Punitive Damages: Call the Jury Back*, 5 J. HIGH TECH. L. 79, 89 (2005).

<sup>422</sup> Lerner, *supra* note 303, at 833 (quoting *Lewis v. Garrett's Adm'rs*, 6 Miss. (5 Howard) 434, 454 (1841)).

<sup>423</sup> See generally DOBBS, *supra* note 97, § 8.1(4), at 658, § 8.8, at 683–89 (discussing statutory caps on damages).

<sup>424</sup> Lens, *supra* note 352, at 632 (arguing against consistency in tort law compensatory damage awards and hypothesizing that "some plaintiffs will not receive full compensation for their injuries" if jury fact-finding on compensatory damages "is replaced with some objective measure"); see also *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 506 (2008) (noting that it is "difficult to settle upon a particular figure" that is always appropriate).

<sup>425</sup> See Lens, *supra* note 352, at 623–26; Barry Meier & Hilary Stout, *Victims of G.M. Deadly Defect Fall Through Legal Cracks*, N.Y. TIMES (Dec. 29, 2014), <http://www.nytimes.com/2014/12/30/business/victims-of-gm-deadly-defect-fall-through-legal-cracks.html> (reporting negative effects of caps with regards to revealing product defects and reporting that victims who are unable to self-finance their cases often have difficulty finding legal representation).



severely undervalue the provable injury. But if a case proceeds to trial, a plaintiff is still required to present credible evidence of the full amount of liability, even though the judgment could ultimately constitute a fraction of the damages that were proven. Mandatory caps impose identical compensation for dissimilar injuries and constitute an unprecedented abandonment of common law principles. If such procedures are properly applied to common law torts, what prevents their application to common law cases arising in contracts and property?

*Blakely* and *Booker* recognized the jury as the “black box” of the U.S. civil and criminal justice systems.<sup>426</sup> The Framers of the U.S. Constitution sought independence in part due to the Crown’s deprivation of the “benefits of Trial by Jury.”<sup>427</sup> One benefit (or burden) of the jury is judgment as that body sees fit if that judgment is supported by the evidence. Historically, compensatory damages have been specifically designed to put a party in the same position before some harm or wrong occurred.<sup>428</sup> By necessity, this requires consideration of the specific circumstances of the individual case,<sup>429</sup> which capped compensation schemes fail to do.<sup>430</sup> Additionally, caps “deprive[] [a] jur[y] of proper legal guidance.”<sup>431</sup> Such procedures should be avoided.

*C. The Lesson from Alleyne: A Common Law Jury’s Factual Determinations Were Fully Enforceable Unless Exceptional Circumstances Were Presented*

*Alleyne v. United States* teaches that a common law criminal jury’s factual determinations were fully enforceable unless exceptional circumstances were presented. *Alleyne*’s premise was the “clear” relationship at common law between crime and punishment.<sup>432</sup> *Alleyne* rejected the distinction between facts that increase the maximum and minimum punishment, at least with regards to whether and when a jury was required.<sup>433</sup> *Alleyne* described mandatory juryless fact-finding at sentencing hearings as a post-founding development that conflicted with the historical nature and scope of the jury trial right.<sup>434</sup> *Alleyne* enshrined *Apprendi*, *Blakely*, and *Booker* as protectants of the jury and its role as an intermediary between the state and a criminal defendant.<sup>435</sup> Reflecting on common law and early American principles,

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<sup>426</sup> White, *supra* note 421, at 136.

<sup>427</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>428</sup> Lens, *supra* note 352, at 39.

<sup>429</sup> *Id.*

<sup>430</sup> See Baldus et al., *supra* note 10, at 1122 (pointing out how caps are unrelated to the level of harm suffered).

<sup>431</sup> Phillip Morris USA, v. Williams, 549 U.S. 346, 355 (2002); see also *supra* note 39 and accompanying text.

<sup>432</sup> *Alleyne v. United States*, 570 U.S. \_\_\_, 133 S. Ct. 2151, 2158 (2013).

<sup>433</sup> *Id.* at 2155.

<sup>434</sup> See *id.*

<sup>435</sup> *Id.* at 2165.

*Alleyne* found a “well-established practice of . . . submitting to the jury[ ] every fact that [served as] a basis for [the imposition of] or [an increase] in punishment.”<sup>436</sup>

In the common law a *civil jury*’s compensatory damage award was also “entitled to a strong presumption of validity”<sup>437</sup> unless exceptional circumstances were presented.<sup>438</sup> The “exceptional circumstance” that justifies the vast majority of compensatory damage caps was a medical malpractice crisis that was caused by “excessive” civil jury awards.<sup>439</sup> The Court addressed claims of systematic excessiveness with regards to civil jury verdicts in *Exxon Shipping Co. v. Baker*<sup>440</sup> and found that overall civil jury damage awards demonstrated restraint.<sup>441</sup> Moreover, in most states the factual underpinnings justifying the amount of a compensatory damage cap are cloaked in mystery. Recently, a plurality of the Florida Supreme Court in *Estate of McCall v. United States*<sup>442</sup> specifically noted the lack of legislative findings to support Florida’s compensatory damage cap.<sup>443</sup> *McCall* refused to accept legislative findings “at face

<sup>436</sup> *Id.* at 2159; *see also id.* at 2160 (noting that the beyond a reasonable doubt standard applied to such facts).

<sup>437</sup> *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 457 (1993) (plurality opinion).

<sup>438</sup> *See id.* at 458 (noting that an award significantly larger than those in similar circumstances might be one of many considerations upon review).

<sup>439</sup> *But see* Thomas, *supra* note 166, at 1229 (discussing the lack of clarity on whether in the English common law legislatures had “a role to check or curb damages”).

<sup>440</sup> 554 U.S. 471 (2008).

<sup>441</sup> *See id.* at 497–98 (finding no evidence of “mass-produced runaway awards” and noting the lack of data over the past several decades to substantiate claims of a “marked increase in the percentage of cases with punitive awards”); *see also* Hensler, *supra* note 7, at 493 (finding that outcomes in personal injury torts had not changed much in twenty-five years).

<sup>442</sup> 134 So. 3d 894 (Fla. 2014) (plurality opinion). *McCall* was decided on equal protection grounds and only as the cap applied to wrongful death cases. *Id.* at 915. *McCall* arose out of prenatal and delivery care at a United States Air Force clinic’s family practice department. *Id.* at 897. *McCall* suffered from preeclampsia and labor should have been immediately induced. *Id.* No obstetrician was available. *Id.* at 897–98. Family practice doctors transferred *McCall* to another facility and attempted to induce labor. *Id.* at 898. An obstetrician arrived several hours after *McCall* gave birth and delivered the placenta, something the family practice doctors were unable to do. *Id.* Unfortunately, the obstetrician who delivered the placenta was not aware that *McCall*’s blood pressure dropped to a dangerously low level. *Id.* For an unknown length of time after delivering the placenta, *McCall* lay in shock. *Id.* at 899. She would ultimately go into cardiac arrest and was removed from life support after four days. *Id.* She never regained consciousness. *Id.* The jury’s non-economic damage award of \$2 million was reduced to \$1 million. *Id.*

<sup>443</sup> *Id.* at 914. On certification from the Eleventh Circuit, the *McCall* plurality considered whether section 766.118 of the Florida Statutes violated the right to equal protection contained in article I, section 2 of the Florida Constitution. *Id.* at 897. On this question the plurality answered in the affirmative. *Id.* Another certified question involved whether section 766.118 violated the civil jury trial right contained in article I, section 22 of the Florida Constitution, which became effective in 1845, *id.*, after both the Virginia and Missouri Constitutions, but before the Washington and Idaho Constitutions. *McCall* acknowledged that at common law, Florida did not recognize a cause of action for wrongful death and thus the civil jury trial right did not apply to those claims. *Id.* at 915.

value.”<sup>444</sup> The plurality noted that Florida’s legislative record contained only anecdotal or inaccurate evidence of physician departures.<sup>445</sup> In fact, the number of doctors licensed to practice in Florida increased in the five years prior to enactment of the cap.<sup>446</sup> Nor was there credible evidence that patients in Florida were denied or had been directed someplace else for medical care.<sup>447</sup> Nor were there large increases in frivolous lawsuits.<sup>448</sup> Essentially, Florida’s malpractice crisis was nothing more than an “underwriting cycle,”<sup>449</sup> which had always occurred in the medical insurance industry.<sup>450</sup> As a result, Florida’s cap lacked a reasonable relationship to addressing the effects of a medical malpractice crisis.<sup>451</sup>

At common law, a jury’s award of compensatory damages was designed to put a party in the same position as before the wrong occurred. By necessity, this requires consideration of the specific circumstances of the individual case.<sup>452</sup> Capped compensation

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<sup>444</sup> *Id.* at 906. Legislative findings are presumptively correct, though subject to judicial inquiry as to accuracy. *Id.*; see Murphy, *supra* note 142, at 728–29 (identifying the jury trial right as a protectant against “abuses of official power” and describing the jury as a “one-time actor” independent from government influences or the judicial system).

<sup>445</sup> *McCall*, 134 So. 3d at 909. No credible evidence correlated high malpractice premiums with any specific physician’s departure. *Id.*

<sup>446</sup> *Id.* at 906. From 1991 to 2001, Florida’s physician supply per 100,000 people grew 19 percent in non-metropolitan areas and 10.7 percent in metropolitan areas. *Id.*

<sup>447</sup> *Id.* at 908 (noting that emergency rooms were not closing as a result of malpractice).

<sup>448</sup> *Id.* at 908. Over a fourteen-year period in Florida, only 7.5 percent of “cases [that] resulted in payments of \$1 million or more . . . involved a jury trial verdict.” *Id.* at 907 (citing Neil Vidmar et al., *Million Dollar Medical Malpractice Cases in Florida: Post-Verdict and Pre-Suit Settlements*, 59 VAND. L. REV. 1343, 1345–46 (2006)). Legal action was not required in 10.1 percent of cases where damages exceeded \$1 million. *Id.*

<sup>449</sup> *Id.* at 907–08 (finding a lack of credible evidence on whether tort reform flattened insurance rates, which suggests a medical malpractice crisis may not have existed); see also *id.* at 908 (identifying cause of flattening rates as “modulations in the insurance cycle”) (citations omitted); *id.* at 910 (“\$500,000 cap [against] noneconomic damages would achieve ‘virtually nothing’ with regard[s] to stabilizing medical malpractice insurance rates”) (quoting Testimony of Robert White, Senate Judiciary Committee Meeting, July 14, 2003, at 48, 50–51).

<sup>450</sup> *Id.* at 908 (finding cause of the two most recent medical liability insurance crises to be “dramatic increases in the amount of money that the insurance industry put in reserve for claims” after years of leaving claims under-reserved) (quoting TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* 53–54 (2005)).

<sup>451</sup> *Id.* at 901. Florida’s cap imposed a “devastating cost[ ] on a few for the purpose of ‘saving a modest amount for many.’” *Id.* at 903. Florida’s cap burdened “those who [were] most grievously injured” and “those who sustain[ed] the greatest damage and loss.” *Id.*; see also Baldus et al., *supra* note 10, at 1122 (arguing that caps “cannot be morally justified”); Murphy, *supra* note 142, at 728 (describing rationality as one of the ultimate goals of just adjudication); Whitehouse, *supra* note 101, at 1271 (“When you are alone . . . the hard square corners of the jury box stand firm against the tide of influence and money.”); Yeazell, *supra* note 5, at 1789 (“No one who has studied health care believes that malpractice litigation makes a major contribution to health costs . . .”).

<sup>452</sup> Lens, *supra* note 352, at 39–40.

schemes are not triggered jury error. Empirical evidence on the correlation between caps and medical malpractice premiums is difficult to reconcile.<sup>453</sup> According to one study, the median insurance premium paid by physicians practicing in high-risk specialties (internal medicine, obstetrics/gynecology, and general surgery) rose by 48.2 percent in states with non-economic damage caps.<sup>454</sup> This compared to a 35.9 percent rise in states without caps.<sup>455</sup> “Only 10.5 percent [of states] experienced static or declining medical malpractice premium rates following the imposition of [a] cap[.]”<sup>456</sup> States without caps experienced 18.7 percent static or declining medical malpractice premium rates.<sup>457</sup> In Florida, like in most states, insurance companies were not required to pass the savings attributed from the cap onto providers.<sup>458</sup> Instead those savings constituted a windfall.<sup>459</sup> The *McCall* plurality noted that insurers continued to request rate increases despite “*more than [a] 4,300 percent*” surge in net income following imposition of the cap.<sup>460</sup>

*Apprendi*, *Blakely*, *Booker*, and *Alleyne* mandate a return to common law principles, which encourage individuality and flexibility. Compensatory damage caps are unlike anything recognizable in the common law.<sup>461</sup> In the same way that guidelines sentencing ignored the clear relationship at common law (and in the U.S. legal tradition) between crime and punishment, caps ignore the clear relationship between the severity of harm and the amount of an award.<sup>462</sup> As a method of reform against “excessive” verdicts, caps utterly fail. This Article suggests that instead of a cap that

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<sup>453</sup> See Wright & Williams, *supra* note 29, at 463 (noting a dispute between insurers and legislators about the correlation between caps and the medical malpractice). *But see* Joanna M. Shepherd, *Tort Reforms’ Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905, 925 (2008) (cap states experienced a six to eight percent lower growth in premiums).

<sup>454</sup> *McCall*, 134 So. 3d at 910.

<sup>455</sup> *Id.*; *see also* Wright & Williams, *supra* note 29, at 463. *But see* Shepherd, *supra* note 453, at 925.

<sup>456</sup> *McCall*, 134 So. 3d at 910; *see also* Wright & Williams, *supra* note 29, at 463 (noting that of nine states with flat or declining rates, only two had caps).

<sup>457</sup> *McCall*, 134 So. 3d at 910.

<sup>458</sup> *Id.* at 911; *see also* Wright & Williams, *supra* note 29, at 464.

<sup>459</sup> *McCall*, 134 So. 3d at 911.

<sup>460</sup> *Id.* at 914. The *McCall* plurality reasoned that a medical malpractice crisis was not a permanent condition that justified the perpetual application of a damage cap. *Id.* at 914–15 (health care policy cannot be supported when an improper burden is placed “upon the shoulders of the persons and families who have been most severely injured and died as a result of medical negligence”).

<sup>461</sup> See Murphy, *supra* note 5, at 349 (noting that generally, the legislature may not interfere with an essential function of jury trial); *see also* Baldus et al., *supra* note 10, at 1122 (arguing that caps cannot be morally justified); Whitehouse, *supra* note 101, at 1271 (“When you are alone . . . the hard square corners of the jury box stand firm against the tide of influence and money.”).

<sup>462</sup> See Baldus et al., *supra* note 10, at 1122 (“[Caps] offer no relief at all to plaintiffs whose damage awards are unreasonably low, given the nature of their injuries.”).

applies in all cases, trial judges should be re-empowered to determine whether a jury's award of compensation is excessive. Where cap regimes empower trial judges with such authority, the following factors should be considered to determine whether a civil jury's compensatory damage award is excessive:

1. *The severity of the harm;*
2. *The length of time during which the injury will exist; and*
3. *The disparity between the awards of economic and noneconomic damages.*

*In analyzing the severity and length of the injury, trial courts should also consider the following subfactors:*

- a. *The degree of physical and emotional harm caused by the injury;*
- b. *Whether the harm will likely increase or decrease over time;*
- c. *Whether the harm caused the plaintiff to become physically or financially vulnerable;*
- d. *Whether the harm caused the plaintiff to exist in a vegetative state; and*
- e. *Whether the harm caused permanent disability, disfigurement, blindness, loss of a limb, paralysis, and cognitive disabilities or other trauma.*

These factors are intended as a starting point. Courts should be free to consider other factors that focus on individualized necessity.<sup>463</sup>

#### CONCLUSION

In many states, some compensatory damages awarded in common law-based civil cases are determined by a mandatory imposition of juryless fact-finding that deliberately undercompensates an injured party's catastrophic injury. Such procedures did not exist in the English common law or in the U.S. colonial era. Mandatory juryless fact-finding in the form of a compensatory damage cap results in recovery that is arbitrary and sometimes trivial. Compensatory damage caps only prevent awards that exceed a certain amount despite the evidence to support the jury's higher award. This Article suggests that Sixth Amendment jurisprudence rejecting mandatory juryless fact-finding in *criminal* cases is of particular importance to mandatory juryless fact-finding in *civil* cases. *Apprendi*, *Blakely*, *Booker*, and *Alleyne* teach that common law procedures are flexible, but modern courts must still adhere to basic principles. Mandatory removal of the jury on issues of fact was not authorized

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<sup>463</sup> Sanders, *supra* note 1, at 86–87; see Baldus et al., *supra* note 10, at 1122–23 (noting the retributive and deterrent purposes of punitive damages); Murphy, *supra* note 142, at 734–35 (discussing how the jury is better positioned to find adjudicative facts).

in the common law, and a jury's verdict is entitled to full respect and enforcement unless exceptional circumstances exist. A capped award constitutes legislative fact-finding in violation of the right to a civil jury. Such procedures should be replaced with those that comply with common law principles, which advance the states' dual interests to protect both parties in civil litigation against unreasonably *high* and *low* civil damage awards.