Brooklyn Law Review

Volume 68 | Issue 3 Article 6

1-1-2003

A Wrong Turn on the Road to Tort Reform: The Supreme Court's Adoption of De Novo Review in *Cooper Industries v. Leatherman Tool Group Inc.*

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COMMENT

A WRONG TURN ON THE ROAD TO TORT REFORM: THE SUPREME COURT'S ADOPTION OF DE NOVO REVIEW IN *COOPER INDUSTRIES v. LEATHERMAN TOOL GROUP, INC.*[*]

INTRODUCTION

As the tides of tort reform sweep through the nation, punitive damages remain at the center of fierce political and legal debate. Critics complain that tort law has run amok, with juries awarding multi-million dollar punitive damages awards on the basis of nothing more than whim or caprice.[1] Legislatures have joined in the fray by advocating everything from statutory caps[2] to raised burdens of proof.[3] However, the

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[1] One only has to look at the website of the American Tort Reform Association ("ATRA") to see the latest developments in the battle to reform tort law: http://www.atra.org.

[2] *See, e.g.*, IND. CODE ANN. § 34-51-3-4 (2002) (capping punitive damages at the greater of three times compensatory damages or $50,000); FLA. STAT. ch. 768.73 (2002) (capping certain punitive damage awards at the greater of three times compensatory damages or $500,000); NEV. REV. STAT ANN. 42.005 (2002) (capping punitive damages awards at three times the compensatory damages if more than $100,000 or $350,000 if the compensatory damages are less than $100,000); N.J. STAT. ANN. § 2A:15-5.14 (2002) (limiting punitive damages to the greater of $350,000 or five times the compensatory award).

[3] *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (2002) (requiring clear and convincing evidence); OKLA. STAT. § 9.1 (2002) (requiring clear and convincing evidence); COLO. REV. STAT. § 13-25-127(2) (2002) (requiring proof beyond a reasonable doubt); KY. REV. STAT. ANN. § 411.184 (2002) (requiring clear and convincing evidence); UTAH CODE ANN. § 78-18-1(1)(a) (2002) (requiring a predicate award of compensatory damages and clear and convincing evidence).

Some legislatures also have enacted statutes that require a percentage of the plaintiff's punitive damages award to be paid to the state. *See, e.g.*, OR. REV. STAT. § 18.540 (2001) (requiring 60% of punitive award to be paid to the state); UTAH CODE ANN. § 78-18-1(3)(a) (2001) (requiring 50% of a punitive award over $20,000 to be paid to the state); ALASKA STAT. § 09.17.020(j) (2000) (requiring 50% of a punitive damages

strongest advocates of tort reform are not found on Capitol Hill or in state capitals across the country; they are among the nine members of the Supreme Court. Using the Due Process Clause of the Fourteenth Amendment as its touchstone, the Supreme Court has spent the last thirteen years reining in the jury's broad discretion to award punitive damages.[4]

Beginning in 1989, the Supreme Court hinted in *Browning-Ferris Industries v. Kelco Disposal, Inc.*,[5] that a due process "check" might exist on a jury's discretion to award punitive damages. The Court addressed the issue again two years later in *Pacific Mutual Life Insurance v. Haslip*.[6] Focusing on procedural due process, the Court found that Alabama's common law method for assessing punitive damages was constitutional.[7] Refusing to "draw a bright mathematical line"[8] as to what would or would not pass constitutional muster, the Court nevertheless found that Alabama's jury instructions[9] and post-award judicial scrutiny[10] provided procedural safeguards that ensured a fair and reasonable process.[11]

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award to be paid to the state).

[4] *See* Pac. Mut. Life Ins. v. Haslip, 499 U.S. 1 (1991); Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257 (1989); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

[5] 492 U.S. 257. The Court in *Browning-Ferris* noted that because the defendants had "failed to raise their due process argument before either the District Court or the Court of Appeals, and made no specific mention of it in their petition for certiorari in this Court, we shall not consider its effect on this award." *Id.* at 277.

[6] 499 U.S. 1.

[7] *Id.* at 17.

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

Id. at 15.

[8] *Id.* at 18.

[9] After "thoroughly reviewing" the Alabama state court jury instructions, the Supreme Court found that although they gave the jury "significant discretion," the instructions "expressly described . . . the purposes of punitive damages, namely . . . deterrence and retribution." *Id.* at 19.

[10] Judges in Alabama apply a rigorous post-verdict test, known as the *Hammond/Green Oil* factors, to scrutinize punitive damages awards. *Id.* at 20; Hammond v. Gadsen, 493 So. 2d 1374, 1379 (Ala. 1986); Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989). This test encompasses a variety of substantive standards to ensure that the punitive award does "not exceed an amount that will accomplish society's goals of punishment and deterrence." *Haslip*, 499 U.S. at 20-21; *Green Oil*, 539 So. 2d at 222.

[11] *Haslip*, 499 U.S. at 22.

Two years later, however, the focus on procedural due process as a method for curbing a jury's discretion to award punitive damages began to lose its shine. In *TXO Production Corp. v. Alliance Resources Corp.*,[12] using procedural due process to analyze jury discretion interested only a plurality of the Court.[13] Although the plurality noted that a substantive due process issue might arise if a jury's punitive damages award was "grossly excessive,"[14] the plurality refused to take the idea any further.[15] As Justice Stevens explained, "[b]ecause no two cases are truly identical, meaningful comparisons of such [punitive damages] awards are difficult to make."[16] In contrast, other members of the Court, most notably Justice O'Connor, advocated for a substantive limit on the jury's discretion.[17] Arguing that jurors were not "infallible guardians of the public good,"[18] O'Connor urged the need for "objective factors"[19] that judges should apply when reviewing a jury's punitive damages award.[20]

Substantive due process finally came to the forefront in *BMW of North America, Inc. v. Gore*,[21] where a majority of the Court held that a jury's assessment of punitive damages can be so excessive as to violate due process.[22] The Court formulated three guideposts, known as the *BMW* factors, to assist trial judges in determining whether a jury's punitive damages award crosses the constitutional line: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference

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[12] 509 U.S. 443 (1993) (plurality opinion).

[13] The *TXO* plurality was made up of Justices Stevens, Rehnquist and Blackmun. *Id.* at 443.

[14] *Id.* at 457.

[15] *Id.*

[16] *Id.*

[17] *TXO*, 509 U.S. at 473 (O'Connor, J., dissenting).

[18] *Id.*

[19] O'Connor thought the following objective factors would be helpful in informing judges' decisions when reviewing juries' punitive damages awards: "[the] relationship between the punitive damages award and compensatory damages, awards of punitive damages upheld against other defendants in the same jurisdiction, awards upheld for similar torts in other jurisdictions, and legislatively designated penalties for similar misconduct." *Id.* at 480-81.

[20] *Id.*

[21] 517 U.S. 559 (1996). *BMW* involved a $2 million punitive damages award for BMW's failure to notify customers that it repainted cars damaged in delivery. *Id.* at 564.

[22] *Id.* at 567.

between the punitive damages award and the civil or criminal penalties authorized or imposed in comparable cases.[23]

The Court's most recent decision[24] addressing punitive damages is *Cooper Industries v. Leatherman Tool Group, Inc.*,[25] a case involving a trademark dispute between two competing hardware manufacturers. *Cooper*, however, marks a notable shift in the Court's focus. Instead of refining its procedural and substantive checks on the discretion of the jury, the *Cooper* Court placed the trial judge in the cross hairs of tort reform.

In *Cooper*, the Court decided that federal appellate courts must now apply a de novo standard when reviewing a district court's ruling on the constitutional excessiveness of a punitive damages award.[26] In other words, after a trial judge applies the *BMW* factors to a jury's punitive damages award, a circuit court should subject that decision to plenary review, thereby duplicating the trial court's analysis. According to the majority in *Cooper*, de novo review will "help to assure the uniform treatment of similarly situated persons."[27] In addition, the Court reasoned that de novo review will help to "clarify the legal principles" and "unify precedent."[28] However, the *Cooper* Court's adoption of de novo review is a wrong turn on the road to tort reform. Indeed, the benefits of de novo review will be minimal, while the application of this new standard will come at a great cost to both litigants and the judicial system itself.

Part I of this Comment explains the facts that gave rise to the *Cooper* case and analyzes the Court's opinion and reasons for adopting de novo review. Part II argues that the *Cooper* Court wrongly departed from the traditional abuse of discretion standard in reviewing a trial court's determination of constitutional punitive excessiveness. Essentially, the

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[23] *Id.* at 575.

[24] Since the publication of this Comment, the Supreme Court has granted certiorari and heard arguments in another case involving punitive damages. *See* Campbell v. State Farm Mut. Auto. Ins. Co., No. 981564, 2001 Utah LEXIS 170 (Utah Oct. 19, 2001), *cert. granted*, 122 S. Ct. 2326 (2002). The issue in *State Farm* revolves around whether the Utah Supreme Court correctly applied one of the *BMW* factors in its post-verdict review of a punitive damages award. *See* Anthony J. Sebok, *An Upcoming Supreme Court Punitive Damages Case Will Determine How Much an Individual State's Courts Can Affect Companies' Nationwide Conduct* (Oct. 28, 2002), *available at* http://writ.news.findlaw.com/sebok/20021028.html (last visited Jan. 23, 2003).

[25] 532 U.S. 424 (2001).

[26] *Id.* at 435-36.

[27] *Id.* at 438.

[28] *Id.* at 436.

question of whether a punitive damages award is unconstitutional is a mixed question of law and fact.[29] Therefore, de novo review is only appropriate if appellate inquiry will help to clarify the law and unify precedent or if the appellate court is in a better position to apply the legal standard.[30]

Accordingly, Part II of this Comment establishes that de novo review will not accomplish either of the Court's stated objectives. First, from a practical standpoint, district court judges are simply better positioned than appellate courts to apply the *BMW* factors, because they are more familiar with the facts of each case and benefit from the first-hand opportunity to assess witness credibility and demeanor. Second, because the assessment of punitive damages awards is highly fact and case-specific, there will be little room for the generalized comparisons that are necessary to clarify the law and provide useful precedent.

Part III of this Comment illustrates some of the consequences of de novo review for determinations of constitutional punitive excessiveness. First, de novo review will result in inconsistent standards of appellate review. For example, it will force appellate courts to distinguish between common law claims of punitive excessiveness, which require deferential review, and constitutional claims of punitive excessiveness, which now require de novo review. Second, de novo review will over-burden appellate courts without obtaining results that would differ significantly from those found under the traditional abuse of discretion review. Moreover, appellate review for abuse of discretion always provides a meaningful and intensive post-verdict check on excessive punitive damages awards, thereby rendering the new standard unnecessary.[31]

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[29] *See* Pullman-Standard v. Swint, 456 U.S. 273, 293 (1982) (finding that mixed questions of law and fact are defined by an application of an objective legal standard to an underlying set of facts); Ornelas v. United States, 517 U.S. 690, 696 (1996) (holding that when the issue is "whether the facts satisfy the relevant statutory or constitutional standard," it is a mixed question of law and fact) (internal citations omitted).

[30] Miller v. Fenton, 474 U.S. 104, 114 (1985).

[31] *See generally* Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15.

This Comment concludes that the *Cooper* Court's decision to subject trial judges' *BMW* analyses to plenary review is misguided and will not lead to more equitable punitive verdicts. If the Court truly seeks a system of punitive damages that comports with the requirements of due process, it should return to the focus of its original inquiry: the discretion of the jury.

I. *COOPER INDUSTRIES V. LEATHERMAN TOOL GROUP, INC.*

A. *Facts*

In the 1980s, Leatherman Tool Group ("Leatherman") introduced a multifunction pocket tool called the Pocket Survival Tool, or PST.[32] Approximately ten years later, Cooper Industries ("Cooper") decided to manufacture and market its own multifunction pocket tool, known as the ToolZall.[33] Cooper copied the basic design features of the PST and added a few new features of its own.[34] In 1996, Cooper unveiled the ToolZall at the National Hardware Show in Chicago, using promotional materials, which were actually modified pictures of Leatherman's PST.[35] In fact, a Cooper employee created a mock-up for the ToolZall by altering an actual PST and adding some distinguishing fastenings.[36] Cooper used these promotional materials depicting the altered PST in its marketing efforts all around the United States.[37] Cooper also sent a touched-up drawing of a PST to its international sales group.[38]

After the trade show, Leatherman filed a lawsuit in federal district court alleging violations of trade-dress infringement, unfair competition and false advertising under

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[32] *Cooper*, 532 U.S. at 427.

[33] *Id.*

[34] *Id.* Apparently, Cooper had intended the design of the ToolZall to be identical to that of Leatherman's PST, but changed the design after Leatherman filed suit. *Id.*

[35] *Id.* When the promotional materials appeared at the hardware show, Cooper had yet to even manufacture the first ToolZall. *Id.* at 427-28.

[36] *Id.* The mock-up was created by "grinding the Leatherman trademark from the handles and pliers of a PST and substituting the unique fastenings that were to be used on the ToolZall." Also, Cooper retouched a photograph to erase the Leatherman trademark indentation on the PST. *Id.*

[37] *Cooper*, 532 U.S. at 427-28.

[38] *Id.*

Section 43(a) of the Trademark Act of 1946 ("Lanham Act").[39] In addition, Leatherman asserted common law claims of unfair competition, passing off and false advertising.[40] The district court granted Leatherman's request for a preliminary injunction and prohibited Cooper from marketing the ToolZall using the modified PST photographs.[41] Cooper withdrew the ToolZall from the market, but the company made no attempt to retrieve the altered promotional materials from its customers for well over three months.[42]

At the conclusion of the trial, the jury found for Leatherman on all three common law claims.[43] In regard to the statutory claims, however, the jury decided that although Leatherman had trademark rights in the appearance of the PST, Cooper's infringement had not damaged Leatherman's rights.[44] The jury awarded Leatherman $50,000 in compensatory damages and $4.5 million in punitive damages.[45] Cooper then asserted a due process challenge to the punitive damages award, arguing that the damages were "grossly excessive" under *BMW*.[46] The district court, reviewing the punitive damages award, found that the award fell within the permissible constitutional range.[47] In upholding the punitive damages award, the district court specifically pointed to Cooper's intentional use of the modified PST.[48] Moreover, the

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[39] 15 U.S.C. § 1125(a) (1994 & Supp. V 1999).

[40] *Cooper*, 532 U.S. at 428.

[41] *Id.* Leatherman Tool Group, Inc. v. Cooper Indus., No. 96-1346-MA, 1996 U.S. Dist. LEXIS 21976 (D. Or. Dec. 18, 1996).

[42] *Cooper*, 532 U.S. at 428. The Supreme Court noted that although Cooper had "anticipatorily sent a notice to its sales personnel ordering a recall of all promotional materials containing the pictures of the PST," it failed to retrieve the materials from its customers until the "following April." For this reason, "the offending promotional materials continued to appear in catalogs and advertisements well into 1997." *Id.*

[43] Leatherman Tool Group, Inc. v. Cooper Indus., No. 96-1346-MA, 1997 U.S. Dist. LEXIS 22763, at *1 (D. Or. Nov. 17, 1997).

[44] *Id.*

[45] *Id.* The jury verdict was in the form of several special interrogatories. In order for the jury to award punitive damages, they had to answer "yes" to the following interrogatory: "Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?" *Cooper*, 532 U.S. at 428-29.

[46] *Cooper*, 532 U.S. at 428-29.

[47] *Id. Leatherman*, 1997 U.S. Dist. LEXIS 22763, at *10. The district court directed 60% of the punitive damages award to be paid to the Criminal Injuries Compensation Account of the State of Oregon. *Id.* at *11.

[48] *Leatherman*, 1997 U.S. Dist. LEXIS 22763, at *9.

trial court noted that the large award was appropriate given the "defendant's size and assets."[49] Finally, the district court issued a permanent injunction against Cooper, prohibiting it from marketing the original ToolZall in the United States and certain foreign countries.[50]

Cooper then appealed both the injunction and the punitive damages award.[51] In an unpublished opinion, the Court of Appeals for the Ninth Circuit applied an abuse of discretion standard and upheld the trial judge's finding that the punitive damages award was not a violation of due process.[52] Although noting that this was not a typical case of passing off,[53] the Ninth Circuit found that Cooper's use of the PST gave it an unfair advantage "by allowing it to use the sweat of Leatherman's efforts to obtain a 'mock-up' more cheaply, easily, and quickly than if it had started from scratch or waited until samples of its own product were ready."[54] The appeals court also pointed to evidence that Cooper had failed to act promptly to remove the altered promotional materials after the injunction was issued, suggesting "an indifference to legal consequences."[55] Therefore, the court concluded, the trial judge did not abuse his discretion in allowing the punitive damages award to stand.[56]

In a separate published opinion, the court addressed Cooper's challenge to the district court's injunction against copying the PST.[57] The Ninth Circuit held that trademark laws

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[49] *Id.*

[50] *Id.* at *7. Finding that the marketing in countries such as Russia was "de minimis" and did not have a "significant effect upon [Cooper's] U.S. revenues," the district court judge ordered the permanent injunction for only twenty-two out of the seventy-one foreign countries in which Cooper had marketed the PST. The foreign countries included in the permanent injunction were: Australia, Austria, Canada, Denmark, Finland, France, Germany, Hong Kong, Israel, Italy, Japan, the Netherlands, New Zealand, Norway, Saudi Arabia, Singapore, Spain, Sweden, Switzerland, South Africa, South Korea and the United Kingdom. *Id.* at *8.

[51] *Cooper*, 532 U.S. at 429.

[52] Leatherman Tool Group, Inc. v. Cooper Indus., Nos. 98-35147, 98-35415, 1999 U.S. App. LEXIS 33657, at *4 (9th Cir. Dec. 17, 1999).

[53] *Id.* The Ninth Circuit noted that typically, "one who engages in passing off is attempting to persuade the customer that an unknown or inferior product being sold *is* a famous or superior product of another." *Id.* Here, however, a customer who bought a ToolZall based on the picture of the modified PST would essentially get exactly what they saw and paid for in the photograph. *Id.*

[54] *Id.* at *5.

[55] *Id.*

[56] *Id.*

[57] Leatherman Tool Group, Inc. v. Cooper Indus., 199 F.3d 1009 (9th Cir. 1999).

did not protect the overall appearance of the PST because the combination of its distinguishing features was "functional."[58] Although "Cooper had deliberately copied the PST, it acted lawfully in doing so."[59] Thus, the court set aside the permanent injunction.[60]

B. *The Supreme Court Decision*

The Supreme Court granted certiorari to decide whether the Court of Appeals had applied the correct standard of review in evaluating the constitutionality of the punitive damages award.[61] Justice Stevens, writing for the majority, found that the Ninth Circuit erred in applying an abuse of discretion standard.[62] Instead, the Court held that federal appeals courts should now use a de novo standard of review in determining whether a punitive damages award is grossly excessive under the *BMW* guideposts.[63] Undertaking its own de novo application of the *BMW* guideposts to the damages award, the Court found that plenary review likely would have resulted in a finding that the punitive damages award against Cooper was unconstitutionally excessive.[64]

The Court began its opinion by distinguishing between the purpose of compensatory and punitive damages.[65] Compensatory damages, the Court pointed out, are "intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct."[66] Therefore, a jury's assessment of these damages is a "factual determination."[67] In contrast, punitive damages are "quasi-criminal" and operate to deter and punish the defendant's

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[58] *Id.* at 1014. Features of a product that are functional are not protected under Section 43(a) of the Lanham Act. In order for a feature to be deemed functional, it must be essential to the product's purpose or use or affect the cost or the quality of the product. 2 JEROME GILSON ET AL., TRADEMARK PRACTICE AND PROTECTION § 7.02[7][f] (2002).

[59] Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 439 (2001).

[60] 2 GILSON ET AL., *supra* note 58 § 7.02[7][f].

[61] Leatherman Tool Group, Inc. v. Cooper Indus., 205 F.3d 1351 (9th Cir. 1999), *cert. granted*, 531 U.S. 923 (2000) (No. 99-2035).

[62] *Cooper*, 532 U.S. at 431.

[63] *Id.*

[64] *Id.* at 443.

[65] *Id.* at 432.

[66] *Id.*

[67] *Cooper*, 532 U.S. at 432.

conduct.[68] Thus, the Court concluded, the jury's assessment of punitive damages is not a factual issue but simply "an expression of its moral condemnation."[69]

The Court then addressed the role of state legislatures in limiting punitive damages.[70] The Court stated that in the context of capping punitive damages, as in defining criminal offenses, the legislatures have "extremely broad discretion."[71] Noting that many states have already enacted statutes capping punitive damages, the Court found that jury determinations of punitive damages within these statutory limits would be acceptable.[72] In other words, if a trial judge determined that a jury's verdict was within the state law confines and the defendant raised no constitutional issue, a reviewing court in the federal system should apply the abuse of discretion standard rather than de novo review.

However, the Court also pointed out that the Due Process Clause of the Fourteenth Amendment imposes substantive limits on states' discretion to impose both criminal penalties and punitive damages.[73] Specifically, the Court pointed to five decisions exemplifying these limits regarding deprivations of life, liberty and property.[74] In all of those decisions, the Court noted that the findings that the punishments were severely disproportionate to the gravity of the defendant's misdeeds were based on due process violations.[75] The Court acknowledged that although there had never been an exact constitutional formula, it had repeatedly used three factors to determine whether the punishment

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[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Cooper*, 532 U.S. at 433.

[73] *Id.*

[74] *Id.* at 433-36. First, under *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996), the Court held that the Due Process Clause prevented states from imposing "grossly excessive" punishments on tortfeasors. Second, in *Enmund v. Florida*, 458 U.S. 782, 787 (1982), the Court held that a death sentence was not a legitimate penalty under the Eighth and Fourteenth Amendments for someone who had neither taken, nor attempted to take, a life. Third, in *Coker v. Georgia*, 433 U.S. 584, 592 (1977), the Court held that a death sentence for a rape was "grossly disproportionate" to the crime itself. Fourth, under *Solem v. Helm*, 463 U.S. 277, 303 (1983), the sentence of life imprisonment without parole for nonviolent felonies was also disproportionate to the offense. And fifth, in *United States v. Bajakajian*, 524 U.S. 321, 324 (1998), the Court held that a monetary forfeiture for violating a customs reporting requirement was "grossly disproportional" to the gravity of the offense.

[75] *Cooper*, 532 U.S. at 436.

violated a defendant's due process rights:[76] (1) the degree of the defendant's reprehensibility; (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and (3) sanctions imposed in other cases for comparable misconduct.[77] The Court also noted that in each of the six cases it "independent[ly] examin[ed] . . . the relevant criteria."[78] In other words, the Court itself reviewed the constitutionality of these deprivations in both criminal and civil contexts under a de novo standard.

The Court then analogized determinations of constitutional punitive excessiveness to determinations of reasonable suspicion and probable cause.[79] In *Ornelas v. United States*,[80] the Court held that trial judges' determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal.[81] The *Cooper* Court found that the reasons given in support of the *Ornelas* holding were equally applicable in a punitive damages context.[82] First, the exact meanings of probable cause and reasonable suspicion are not easily defined.[83] Instead, they take their "substantive content from the particular contexts in which the standards are being assessed."[84] The Court found that this was analogous to the concept of whether a punitive damages award is unconstitutionally excessive.[85] Second, the legal rules for probable cause and reasonable suspicion acquire their content only through application.[86] Therefore, an appellate court must conduct de novo review in order to "maintain control" and "clarify the legal principles."[87] Again, the Court analogized probable cause and reasonable suspicion to the assessment of punitive damages, finding that the *BMW* factors would "acquire more meaningful content through case-by-case application at the appellate level."[88] Third, the Court noted that

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[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 435.
[80] 517 U.S. 690 (1996).
[81] *Id.* at 691.
[82] *Cooper*, 532 U.S. at 436.
[83] *Id.*
[84] *Id.* (quoting Ornelas v. United States, 517 U.S. 690, 696 (1996)).
[85] *Id.* at 437.
[86] *Id.* (citing *Ornelas*, 517 U.S. at 697).
[87] *Cooper*, 532 U.S. at 437.
[88] *Id.* at 435.

in general, de novo review was useful to "unify precedent" and "stabilize the law."[89]

The *Cooper* Court then addressed several counterarguments to the adoption of a de novo standard of review.[90] First, Leatherman argued that de novo appellate review would implicate the Seventh Amendment's Re-Examination Clause.[91] Because courts historically have regarded the assessment of punitive damages as a "fact" within the meaning of the Seventh Amendment,[92] de novo review would amount to a re-trying of that fact, in violation of the Seventh Amendment.[93] In response to this argument, the Court reiterated its position that the assessment of punitive damages is not a fact, unlike the measure of actual or compensatory damages suffered.[94] Therefore, the Court reasoned, the Seventh Amendment was not implicated in this context.[95] However, the Court conceded that while "the jury's award of punitive damages did not constitute a finding of fact," it is indeed a "fact-sensitive undertaking."[96]

Second, Leatherman pointed out that historically, the assessment of punitive damages has always been the distinct function of the jury.[97] In *Day v. Woodworth*,[98] the earliest Supreme Court case to mention punitive damages, the Court

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[89] *Id.* (quoting *Ornelas*, 517 U.S. at 697-98).

[90] *Id.* at 437.

[91] *Id.* The full text of the Seventh Amendment is as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and *no fact tried by a jury shall be otherwise re-examined in any Court of the United States*, than according to the rules of the common law.

U.S. CONST. amend. VII (emphasis added).

[92] *See, e.g.*, Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481 (1933) ("The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of *fact* has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that *damages awarded by the jury were excessive* or were inadequate.") (emphasis added); S. Ry.—Carolina Div. v. Bennett, 233 U.S. 80, 87 (1914) ("[A] case of mere excess upon the evidence is a matter to be dealt with by the trial court . . . it does not present a question for re-examination."); Wabash Ry. Co. v. McDaniels, 107 U.S. 454, 456 (1883) ("That we are without authority to disturb the judgment upon the ground that the damages are excessive cannot be doubted. Whether the order overruling the motion for new trial . . . was erroneous or not, our power is restricted to the determination of questions of law arising upon the record.").

[93] *Cooper*, 532 U.S. at 437; U.S. CONST. amend. VII.

[94] *Cooper*, 532 U.S. at 437.

[95] *Id.*

[96] *Id.* at 437 n.11.

[97] *Id.* at 437.

[98] 54 U.S. 363 (1851).

observed that the measure of punitive damages should be "left to the discretion of the jury."[99] But the *Cooper* majority countered by reasoning that punitive damages have "evolved" since the nineteenth century.[100] Because many forms of intangible injuries were not thought to fit within the narrow scope of compensatory damages, juries often awarded punitive damages for injuries that currently would fall under pain and suffering, or other forms of compensable assessment.[101] Therefore, as the categories of compensatory damages widened, "the theory behind punitive damages has shifted towards a more purely punitive (and therefore less factual) understanding."[102]

Third, Leatherman argued that the deterrent function of punitive damages might suggest that the jury's assessment is a fact within the meaning of the Seventh Amendment.[103] For example, Leatherman pointed out that "[s]ome scholars . . . assert that punitive damages should be used to compensate for the underdeterrence of unlawful behavior that will result from a defendant's evasion of liability."[104] The Court responded by reasoning that juries do not usually engage in this type of sophisticated deterrence analysis when determining the amount of punitive damages to award.[105] Moreover, the Court noted, deterrence is only one of the many factors that a jury considers when assessing a punitive damages award.[106]

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[99] *Id.* at 371, *quoted in Cooper*, 532 U.S. at 437.

[100] *Cooper*, 532 U.S. at 437.

[101] *Id.* at 437.

[102] *Id.* (construing Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957)).

[103] *Id.*

[104] *Id.*

[105] *Cooper*, U.S. 532 at 437. To reinforce this proposition, the Court cited a study by Cass Sunstein from the *Journal of Legal Studies*. Cass R. Sunstein et al., *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237 (2000). However, Sunstein's study found that people do not normally engage in "optimal deterrence." Optimal deterrence entails adjusting the amount of damages a defendant must pay depending on the likelihood that the defendant's conduct would be detected. Considering that optimal deterrence is a "central claim in the economic analysis of law" and "second nature for those who study deterrence questions," it is hardly surprising that a jury does not engage in this level of economic analysis when assessing a punitive damages award. *Id.* at 239. The Sunstein study specifically noted that people do indeed think about deterrence when awarding punitive damages, they just do not "attempt to promote optimal deterrence." *Id.* at 241.

[106] *Cooper*, 532 U.S. at 439-40.

Next, the Court considered the practical implications of imposing a de novo standard of review on the appellate courts.[107] The Court found that institutional competence concerns did not "tip the balance in favor of deferential appellate review."[108] Taking each of the *BMW* factors individually, the Court stated that trial judges have only a "somewhat" superior advantage over appellate courts in analyzing the first factor, the degree of the defendant's reprehensibility.[109] Moreover, that advantage only exists in regard to issues turning on witness credibility and demeanor.[110] The Court found that trial and appellate courts were equally capable of analyzing the second factor, the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award.[111] And finally, the Court noted that the third factor, the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases, was more "suited to the expertise of appellate courts" because it involves "broad legal comparison."[112]

The Court then engaged in its own de novo review of the district court's rejection of Cooper's due process challenge to the punitive damages award.[113] Although observing that the de novo standard of review will likely affect the result "in only a relatively small number of cases," the Court noted that de novo review in this case might have led the Ninth Circuit to reach a different result.[114] The Court found that its consideration of the

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[107] *Id.* at 435-36.

[108] *Id.* at 440. It is hard to see how the Court reached this conclusion after it specifically pointed out that although appellate courts are better at applying the third *BMW* factor, district courts are better at applying the first *BMW* factor. Moreover, both are equally capable of applying the second *BMW* factor. *Id.*

[109] *Id.*

[110] *Id.* at 440.

[111] *Cooper*, 532 U.S. at 440.

[112] *Id.*

[113] *Id.* at 441.

[114] *Id.* By the Court's own admission, if de novo review will only affect the result in a small number of cases, one wonders why the Court would bother to adopt the change. A possible answer can be found in the *Cooper* oral arguments, in an exchange between Justice Breyer and William Bradford Reynolds, attorney for Cooper:

> Justice Breyer: And I think you're saying that if you have de novo review, you're simply going to have more articulations by appellate courts of the way trial courts ought to look at jury verdicts . . . you're saying what ought to happen in the development of the review of punitive damages is the same thing that I think happened back in the old days in the review of jury verdicts of negligence. If you go back in law reports to the twenties and the thirties when negligence law was developing, you find exhaustive appellate

three *BMW* factors "reveal[ed] a series of questionable conclusions by the District Court that may not survive *de novo* review."[115] In analyzing the first factor, the Court pointed out that the jury had been "guided by instructions that characterized the deliberate copying of the PST as wrongful."[116] Part of the punitive damages award, therefore, might have been assessed with the thought to deter this "unlawful" type of behavior in the future.[117] However, since the Ninth Circuit determined that Cooper's copying was not unlawful, knowledge of the Ninth Circuit's position might have seriously undermined the jury's assessment of the degree of Cooper's reprehensibility.[118]

In evaluating the second factor, the Court noted that incorrectly calculating the potential harm that Cooper's actions caused Leatherman may have influenced the district court.[119] Indeed, Leatherman calculated its potential harm by arguing that Cooper "anticipated 'gross profits of approximately $3 million dollars during the first five years of sales.'"[120] But, the Court noted, even if this were true, it was unreasonable to assume that all of Cooper's ToolZall sales were attributable to its use of a modified PST in promotional materials.[121] Moreover, "as the Court of Appeals [previously] pointed out, the picture of the [modified] PST did not misrepresent the features of the original ToolZall and could not have deceived potential

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> discussions of whether, you know, the train was close enough to the intersection for the driver to have been negligent in going out on the tracks and so on. . . .
>
> Mr. Reynolds: That is fair, Justice Breyer. I do think that . . . .
>
> Justice Breyer: I agree. I agree . . . the value is not only in the substantive standard, the value is in the application of that standard in sort of developed appellate discussions.

Oral Argument, Cooper Indus. v. Leatherman Tool Group, Inc., 2001 WL 209808, at *15 (Feb. 26, 2001) (No. 99-2035).

However, as this Comment points out, appellate courts only hear a miniscule number of constitutional excessiveness appeals, certainly not enough to develop a solid body of case law. Moreover, abuse of discretion review is already applied in a rigorous and well-developed manner by appellate courts in reviewing punitive excessiveness. *See* discussion *infra* Parts II.B, III.B.

[115] *Cooper*, 532 U.S. at 441.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.* at 441-42.

[120] *Cooper*, 532 U.S. at 442 (citing Respondent's Brief at 7, Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) (No. 99-2035)).

[121] *Cooper*, 532 U.S. at 442.

customers in any significant way."[122] Therefore, the Court concluded, Cooper's wrongdoing would certainly not be the chief cause of its sales volume for a five-year period.[123]

In regard to the third *BMW* factor, the Court again found fault with the district court's evaluation of the civil penalties awarded in comparable cases.[124] At trial, Leatherman argued that Cooper would have been subject to a civil penalty of up to $25,000 for each advertising violation under Oregon's Unlawful Trade Practices Act.[125] The district court agreed with Leatherman, finding that each individual piece of promotional material Cooper distributed at the trade show and to its sales force throughout the world, represented separate violations under the Act.[126] Nevertheless, the majority sided with Cooper, holding that the company's use of a single mock-up of the PST in all of its promotional material resulted in only one violation of the Act.[127]

Finally, the Court stated that it applied the *BMW* guideposts to this particular case not to "pre-judge" whether the punitive damages award was unconstitutional,[128] but

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[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* (citing OR. REV. STAT. § 646.642(3) (1997)).

[126] *Cooper*, 532 U.S. at 442.

[127] *Id.* at 443.

[128] *Id.* Not surprisingly, the Ninth Circuit reduced Leatherman's punitive award upon remand. The Court of Appeal's opinion essentially echoed the Supreme Court's analysis in *Cooper*. It is interesting to note, however, that the Ninth Circuit had an extremely difficult time figuring out the proper amount of award reduction. Referring to its new role as "not an enviable task," the appeals court "searched vainly . . . for a formula" to assist its deliberations. Leatherman Tool Group, Inc. v. Cooper Indus., 285 F.3d 1146, 1152 (9th Cir. 2002). In the end, the appeals court simply had to rely on "its combined experience and judgment" to reach a figure of $500,000. *Id.* As illustrated by the Ninth Circuit's new role as the final arbiter of the punitive damages award in this case, one of the effects of de novo review will be a shift of power away from trial judges and toward the appellate courts. One of the more interesting criticisms of the power shift inherent with the use of de novo review was articulated by Judge Patrick E. Higginbotham in *O'Bryan v. Estelle*:

> When an appellate court starts afresh, a trial court's function is reduced to that of collecting data and providing an opportunity for an extrajudicial resolution of the dispute. Even this function would experience a reduction in value as expectation of a judicial decision of consequence shifts wholly away from the trial court. The pyramidal shape of our present court structure rests on the institutional integrity of the trial court as a distinct part of the justice system. As such review is extended upward, only the last "court" in the chain retains full institutional integrity. More is afoot here than nostalgic or romantic reverence for trial courts. Finality and all values bound up in that precept are implicated.

714 F.2d 365, 392 (5th Cir. 1983) (Higginbotham, J., concurring). *See also* William V. Dorsaneo, III, *Reexaming the Right to Trial by Jury*, 54 SMU L. REV. 1695, 1733 (2001)

rather, to illustrate that the answer may hinge on the application of a de novo standard of review.[129] Therefore, the Court concluded, the judgment should be vacated and the case remanded for further proceedings utilizing a de novo standard of review.[130]

Justices Scalia and Thomas both concurred, the former in judgment only. Justice Thomas reiterated his belief "that the Constitution does not constrain the size of [a] punitive damages award" and voiced his wish to overrule *BMW*.[131] However, he conceded, *Cooper* did not present the desired opportunity, and because he agreed that de novo was the correct standard of review, he joined in the opinion of the Court.[132] Justice Scalia also restated his belief that excessive punitive damages do not implicate the Due Process Clause of the Fourteenth Amendment.[133] Moreover, citing his dissent in *Ornelas v. United States*,[134] Scalia reasserted his view that mixed constitutional questions of law and fact should not be reviewed de novo.[135] These mixed questions, Scalia noted, resist "meaningful generalization" and therefore are more conducive to review under an abuse of discretion standard.[136] However, adhering to the previous decisions of the Court, Scalia felt that de novo review best accorded with precedent.[137]

C. *The Dissent*

As the sole dissenter, Justice Ginsburg argued against the adoption of a de novo standard of review.[138] Ginsburg noted that in *Gasperini v. Center for Humanities, Inc.*,[139] the Court

("The characterization of the issue of [punitive] excessiveness as a purely legal question has the effect of removing the locus of decision-making away from juries and trial judges and toward appellate courts.").

[129] *Cooper*, 532 U.S. at 443.

[130] *Id.*

[131] *Id.* (Thomas, J., concurring).

[132] *Id.*

[133] *Id.* (Scalia, J., concurring).

[134] 517 U.S. 690 (1996).

[135] *Id.* In his *Ornelas* dissent, Justice Scalia argued that "with respect to the questions at issue here, the purpose of the determination and its extremely fact-bound nature will cause de novo review to have relatively little benefit, it is in my view unwise to require courts of appeals to undertake the searching inquiry that standard requires." *Id.* at 700 (Scalia, J., dissenting).

[136] *Cooper*, 532 U.S. at 443-44.

[137] *Id.* at 444.

[138] *Id.* (Ginsburg, J., dissenting).

[139] 518 U.S. 415 (1996).

held that appellate review of a district court's refusal to set aside a jury verdict as excessive did not implicate the Seventh Amendment only if such relief was limited to abuse of discretion.[140] Although *Gasperini* involved an award of compensatory damages, Ginsburg argued that the reasoning in that case applied equally to punitive damages.[141] Moreover, Ginsburg noted, the task of determining punitive damages has historically been consigned to the sole discretion of the jury.[142]

Justice Ginsburg then observed that although an award of punitive damages "involves more than the resolution of matters of historical or predictive fact,"[143] a jury's verdict is nonetheless predicated on determinations that the Court has characterized as "factfindings."[144] Ginsburg analogized punitive damages to compensatory damages for intangible, non-economic injuries because "[b]oth derive their meaning from a set of underlying facts as determined by a jury."[145] Consequently, "[o]ne million dollars' worth of pain and suffering does not exist as a 'fact' in the world any more or less than one million dollars' worth of moral outrage."[146]

Next, Ginsburg argued that an abuse of discretion standard was simply more practical than de novo review, because district courts have a superior advantage over appellate courts in assessing the first *BMW* factor, the reprehensibility of the defendant's conduct.[147] District courts

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[140] *Id.* Indeed, the Court in *Gasperini* specifically noted that

> [w]ithin the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility for application of [an excessiveness review]. Trial judges have the unique opportunity to consider the evidence in the living courtroom context while appellate judges only see the cold paper record.

Id. at 438. (citation and internal quotation marks omitted). The *Gasperini* Court also observed that "appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive is a relatively late, and less secure, development." *Id.* at 434.

[141] *Cooper*, 532 U.S. at 445.

[142] *Id.*

[143] *Id.* at 446.

[144] *Id.* These factfindings include: "the extent of harm or potential harm caused by the defendant's misconduct, whether the defendant acted in good faith, whether the misconduct was an individual instance or part of a broader pattern, [and] whether the defendant behaved negligently, recklessly, or maliciously." *Id.*

[145] *Id.*

[146] *Cooper*, 532 U.S. at 446. As Ginsburg noted, both pain and suffering and punitive damages "derive their meaning from a set of underlying facts as determined by a jury. If one exercise in quantification is properly regarded as factfinding, it seems to me the other should be so regarded as well." *Id.* at 446-47 (internal citation omitted).

[147] *Id.* at 448. Ginsburg pointed out that the Court in *BMW* had identified this first factor as being the "most important" in assessing the reasonableness of a punitive

can more easily assess the first factor because they view the evidence "not on a cold paper record but in the living courtroom context."[148] Moreover, Ginsburg also believed that district courts were better equipped to evaluate the second *BMW* factor, the relationship between the plaintiff's harm and the punitive damages award, especially in cases involving "intangible injury."[149] Finally, Ginsburg noted that there probably would be little variance in the outcomes between abuse of discretion and de novo review.[150] With so few benefits to changing the standard of review, Ginsburg found that abuse of discretion "hews more closely to 'the strictures of the Seventh Amendment'" and, therefore, was the better choice.[151]

II. ABUSE OF DISCRETION IS THE CORRECT STANDARD FOR REVIEWING DETERMINATIONS OF CONSTITUTIONAL PUNITIVE EXCESSIVENESS

The determination of whether a punitive damages award is unconstitutional is essentially a mixed question of law and fact.[152] This is because it involves applying a "legal" standard, the *BMW* factors, to the specific factual findings of a case.[153] As Justice Scalia noted in his *Cooper* concurrence, the "question of [the] excessiveness of punitive damages . . . [is a] fact-bound constitutional issue."[154] Moreover, the majority in *Cooper* called the assessment of punitive damages "fact-

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damages award. *Id.* at 449.

[148] *Id.* at 448 (internal citations omitted).

[149] *Id.* at 449.

[150] *Id.* Ginsburg reasoned that "in the typical case envisioned by [the *BMW* decision], where reasonableness is primarily tied to reprehensibility, an appellate court should have infrequent occasion to reverse." *Id.* at 449.

[151] *Cooper*, 532 U.S. at 450 (quoting Browning-Ferris Indus. v. Kelco Disposal Inc., 492 U.S. 257, 280 n.26 (1989)). Ginsburg observed that although appellate courts review determinations of reasonable suspicion, probable cause and the excessiveness of criminal forfeitures under a de novo standard, these determinations "typically are made without jury involvement." *Id.* at 448 n.1.

[152] *See* cases cited *supra* note 29.

[153] In the *Cooper* oral argument before the Supreme Court, Justice O'Connor asked William Bradford Reynolds, attorney for Cooper, how he would characterize the determination of constitutional punitive excessiveness. Mr. Reynolds responded, "I think it could be characterized as a mixed question of fact and law in that, as I understand what it means, it means that if you have established facts, and you're applying a legal principle to those facts, that would be a mixed question of fact and law." Oral Argument, Cooper Indus. v. Leatherman Tool Group, Inc., 2001 WL 209808, at *6 (Feb. 26, 2001) (No. 99-2035).

[154] *Cooper*, 532 U.S. at 444 (Scalia, J., concurring).

sensitive"[155] and compared determinations of excessive punitive damages to determinations of reasonable suspicion and probable cause, both "mixed-questions of law and fact."[156] Typically, in the federal system, appellate courts review factual findings for clear error and questions of law under a de novo standard.[157] Mixed determinations of law and fact, however, fall into a judicial no-man's land, resulting in the Court adopting either an abuse of discretion review or a de novo review, depending upon the issue in question.[158] Indeed, the Supreme Court in *Miller v. Fenton*[159] articulated a test for deciding the correct standard of review for mixed questions of law and fact as one of "the sound administration of justice."[160] The Court reasoned that the correct standard depends on whether one "judicial actor" is in a better position to decide the issue in question.[161] Thus, issues based on the "credibility of a witness" and involve "evaluation of demeanor" are better suited to deferential review by appellate courts.[162] Whereas issues that acquire their meaning only through application would best be given de novo review by appellate courts to clarify the legal principles.[163] According to the *Miller* test, some—but not all—mixed questions of law and fact should receive de novo review.

The determination of the constitutional excessiveness of a punitive damages award should not be reviewed under a de novo standard. First, appellate courts are not better positioned than district courts to apply the *BMW* factors. This is particularly true of the first *BMW* factor, the degree of

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[155] *Id.* at 437 n.11.

[156] *Id.* at 436.

[157] FED. R. CIV. P. 52(a); *see also* Pierce v. Underwood, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law[,] reviewable *de novo*, questions of fact[,] reviewable for clear error, and matters of discretion[,] reviewable for abuse of discretion.") (internal quotations and parenthesis omitted); Michael R. Bosse, *Standards of Review: The Meaning of Words*, 49 ME. L. REV. 368, 370-71 (1997) ("Standards of review are widely understood to be based on whether the issue is one of 'fact' or 'law.' If an issue is deemed one of 'fact,' a court generally will review it only for clear error. If an issue is deemed one of 'law,' a court will exercise a de novo review.").

[158] *See, e.g.*, Ornelas v. United States, 517 U.S. 690 (1996); Koon v. United States, 518 U.S. 81 (1996); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990); *Pierce*, 487 U.S. 552; Miller v. Fenton, 474 U.S. 104 (1985); Pullman-Standard v. Swint, 456 U.S. 273 (1982).

[159] 474 U.S. 104.

[160] *Id.* at 114.

[161] *Id.*

[162] *Id.* at 114-15.

[163] *Id.* at 114.

reprehensibility of the defendant's conduct, which is much more discernable in a living courtroom context than from the cold record at the appellate level. And as the Court specifically noted in *BMW*, this first guidepost is "[p]erhaps the most important indicium."[164] Second, the assessment of punitive damages is based upon the specific facts of each particular case.[165] Therefore, de novo review by appellate courts of these fact-intensive findings will not help to clarify the larger doctrine of punitive damages.[166] Moreover, contrary to the Court's reasoning in *Cooper*, because a punitive damages award is inexorably tied to the specific facts of each case, one case will rarely serve as useful precedent for subsequent cases. Thus, there is simply no reason to depart from the traditional abuse of discretion standard when reviewing a district court's determinations of constitutionally excessive punitive damages.

A. *Trial Judges are Better Positioned to Apply the* BMW *Factors*

District courts are simply better positioned to apply the *BMW* factors than are appellate courts. Although the majority in *Cooper* surmised that "considerations of institutional competence . . . fail to tip the balance in favor of deferential review," this proved untrue, even under the Court's own analysis.[167] Indeed, the *Cooper* Court found that while appellate courts were better suited to apply the third *BMW* guidepost, district courts were more capable of applying the first.[168] Moreover, the Court held that both courts were "equally capable" of applying the second *BMW* guidepost.[169] Therefore, it is unclear why the majority concluded that appellate courts

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[164] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996).

[165] The *Cooper* Court acknowledged that the assessment of punitive damages was a "fact-sensitive undertaking." *Cooper*, 532 U.S. at 437 n.11. *See also* Day v. Woodworth, 54 U.S. 363, 371 (1851) ("[T]he degree of punishment to be thus inflicted [i.e., punitive damages] must depend on the peculiar circumstances of each case.").

[166] Justice Scalia argued in his dissent in *Ornelas v. United States* that because determinations of probable cause and reasonable suspicion were mired in factual settings, de novo review of these issues would not help to clarify the law. Scalia argued this is primarily because "[l]aw clarification requires generalization, and some issues lend themselves to generalization much more than others." *Ornelas*, 517 U.S. at 703 (Scalia, J., dissenting). Similar to determinations of probable cause and reasonable suspicion, the fact-based assessment of punitive damages will not lend itself to the generalization necessary to clarify the law.

[167] Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 440 (2001).

[168] *Id.*

[169] *Id.*

were more competent to apply the test. Under the Court's own analysis, appellate courts do not possess any greater expertise than the district courts in applying the *BMW* factors.

First, as the majority in *Cooper* conceded, district courts have a "superior advantage" over appellate courts in applying the first *BMW* factor, the degree of reprehensibility of a defendant's conduct.[170] This is primarily because the reprehensibility of a defendant's conduct is closely tied to witness demeanor and credibility. Essentially, a trial judge can make first-hand assessments from the bench as to whether a defendant has acted in good faith or attempted to conceal a material fact. And these assessments are key to measuring the degree of a defendant's misconduct.[171] In contrast, an appellate court must rely on the "cold paper record" and is unable to replicate the insight and personal knowledge that is garnered at a "living" trial.[172] Indeed, as the Court stated in *Miller,* "[w]hen . . . the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight."[173]

Second, the majority in *Cooper* stated that district courts and appellate courts were "equally capable" of applying the second *BMW* factor, the difference between the punitive damages award and the harm or potential harm suffered by the plaintiff.[174] However, as Justice Ginsburg noted in her *Cooper* dissent, in cases involving "intangible injury," district courts are better equipped to measure the harm.[175] It is easy to see how this rings true if one considers an intangible injury such as loss of enjoyment of life.[176] Similar to a defendant's degree of

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[170] *Id.*

[171] As Leatherman argued in its brief,

> [h]ere, [Cooper's] intent and (alleged) good faith was central to the reprehensibility issue. The trial judge, having seen and heard the witnesses testify and be cross-examined, is obviously better able to discern the defendant's state of mind, evaluate demeanor and credibility and resolve the factual disputes upon which application of the *BMW* guideposts depends.

Brief of Respondent at 35.

[172] *Cooper*, 532 U.S. at 445 (Ginsburg, J., dissenting).

[173] Miller v. Fenton, 474 U.S. 104, 114 (1985).

[174] *Cooper*, 532 U.S. at 440.

[175] *Id.* at 449 (Ginsburg, J., dissenting).

[176] The claim of loss of enjoyment of life compensates a victim for the limitations on his life created by his injury. *See* Tina M. Tabacchi, Note, *Hedonic Damages, A New Trend in Compensation?*, 52 OHIO ST. L.J. 331 (1991).

reprehensibility, a plaintiff's claim of this injury would turn primarily on her and other witnesses' credibility and demeanor at trial.[177] Therefore, a district judge's direct observations at the trial level would prove far more useful in reviewing the amount of intangible harm suffered by the plaintiff than would an appellate court's distant perspective.

Third, if appellate courts do indeed possess any special advantage, it is only in applying the third *BMW* factor, a comparison of a punitive damages award to other civil penalties. As the majority noted in *Cooper*, "the broad legal comparison" necessary for the third *BMW* factor "seems more suited to the expertise of appellate courts."[178] However, it is difficult to see why the ability to more effectively apply one out of three *BMW* guideposts "tips the scale"[179] in favor of de novo appellate review. Especially in light of the fact that district courts are better situated to apply the first and "most important"[180] *BMW* guidepost, the Court's conclusion is untenable.

Finally, district courts have a general institutional advantage over appellate courts in determining constitutional excessiveness because they simply see more cases involving punitive damages. In fact, district courts handle more civil tort cases and make more determinations regarding the constitutional excessiveness of punitive damages awards then do appellate courts.[181] Indeed, in *Koon v. United States*,[182] the Court held that a district court's determination of whether to depart from sentencing guidelines should be reviewed for abuse

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[177] For example, in the case of *Isgett v. Seaboard Coastline R.R.*, the plaintiff brought a claim for loss of enjoyment of life. In upholding his claim, the court stated:

> In addition to the physical loss, expense, pain, suffering and incidental costs, the late plaintiff suffered from anxiety, frustration and the sure and certain knowledge of his incapacity along with the mental anguish described by his family. From a life of usefulness, enjoyment and acceptance he was transposed to a life of almost complete dependence. The insidious disease that was awakened by his injuries took charge of his physical body with attendant results on his nervous system.

Isgett v. Seaboard Coastline R.R., 332 F. Supp. 1127, 1138 (D.S.C. 1971).

Both the plaintiff's testimony and that of his family were key to the court's assessment of the plaintiff's intangible injuries. As the trial court noted, the "court recognizes the difficulty of passing on the issue of credibility on a cold record, such as a deposition, and his [plaintiff's] testimony, to this trial court, has the ring of truth." *Id.* at 1137.

[178] *Cooper*, 532 U.S. at 440.

[179] *Id.*

[180] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996).

[181] Brief of Respondent at 36.

[182] 518 U.S. 81 (1996).

of discretion because district courts "see so many more Guidelines cases than appellate courts."[183] The Court in *Koon* reasoned that a "district court's special competence" with regard to the "ordinariness" or "unusualness" of a case is an "important source of information," as are "the reactions of the trial judge to the fact-specific circumstances of the case."[184] The Court's reasoning in *Koon* is equally applicable to a trial judge's determinations regarding constitutional excessiveness. Since trial judges see more cases involving punitive damages, they are better positioned to assess the distinct facts in each case.

In conclusion, appellate courts have no expertise or knowledge that would give them an advantage over district courts in determining whether a punitive damages award is unconstitutional. To the contrary, district courts possess special expertise in applying both the first and second *BMW* guideposts. Finally, because district courts see more civil cases and are more familiar with punitive damage assessments, they are in a better position to make determinations of constitutional excessiveness.

B. *De Novo Review Will Not Clarify the Law or Unify Precedent*

De novo appellate review of a district court's determinations of constitutional excessiveness will not help to further clarify the doctrine of punitive damages. This is primarily because a jury's assessment of punitive damages is predicated upon a host of factual findings that are particular to each case.[185] For example, the jury in *Cooper* considered the following four factors when they determined the appropriate amount of punitive damages to award: (1) the character of Cooper's conduct that gave rise to Leatherman's unfair competition claims; (2) Cooper's motive; (3) the sum of money that was required to discourage Cooper and others from engaging in such conduct in the future; and (4) Cooper's income and assets.[186] A jury's consideration of these factors depends upon a finding of specific facts, which form the kaleidoscope through which appellate judges will look when applying the *BMW* guideposts. Therefore, any decision regarding

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[183] *Id.* at 98.

[184] *Id.* at 99.

[185] *See* cases cited *supra* note 92 and accompanying text.

[186] *Cooper*, 532 U.S. at 439 n.12.

constitutional excessiveness will be colored by these facts and provide little opportunity for the generalizations that are necessary to clarify an area of law or serve as useful precedent.

In prior decisions, the Court also recognized the inherent difficulty in utilizing fact-based legal standards to clarify the law. For example, in *Cooter & Gell v. Hartmarx Corp.*,[187] the Court held that a trial judge's determinations in a Rule 11 proceeding must be reviewed under an abuse of discretion standard.[188] Rule 11 proceedings center around whether or not an attorney had a "substantial good-faith basis" for believing that a complaint was grounded in fact and legally tenable.[189] These determinations, the Court noted, require a court to consider "legal questions . . . rooted in factual determinations."[190] Therefore, "an appellate court's review of [these determinations] is unlikely to establish clear guidelines for lower courts . . . nor will it clarify the underlying principles of law." Likewise, in *Pierce v. Underwood*,[191] the Court held that a district court's determination of whether the "position of the United States was substantially justified" under the Equal Access to Justice Act[192] must be reviewed for abuse of discretion.[193] Again, the Court held that this determination has a basis in both "law and fact" and involves consideration of unique factors that are "little susceptible . . . of useful generalization."[194]

In addition, an appellate court's de novo review of a punitive damages award for constitutional excessiveness will rarely serve as useful precedent for subsequent cases. Again, because the punitive damages award itself is a product of multiple, unique facts and circumstances a jury considers, one award is seldom relevant or helpful in comparison to another.[195]

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[187] 496 U.S. 384 (1990).

[188] *Id.*

[189] *Id.* at 398-99; FED. R. CIV. P. 11(b).

[190] *Hartmarx*, 496 U.S. at 401.

[191] 487 U.S. 552 (1988).

[192] 28 U.S.C. § 2412(d)(1)(A) (2000).

[193] *Pierce*, 487 U.S. at 562.

[194] *Id.*

[195] Justice Scalia made this same point in his *Ornelas* dissent, arguing that determinations of reasonable suspicion and probable cause are too fact-specific to serve as useful precedent. Scalia noted:

> The facts of this very case [*Ornelas*] illustrate the futility of attempting to craft useful precedent from the fact-intensive review demanded by determinations of probable cause and reasonable suspicion. On remand, in conducting *de novo* review, the Seventh Circuit might consider, *inter alia*, the

Indeed, the Court itself endorsed this proposition, most notably in *TXO* where the plurality stated that

> [s]uch [punitive damages] awards are the product of numerous, and sometimes intangible factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make.[196]

Even Justice O'Connor, arguing for the application of a constitutional test in *TXO* admitted that "[b]ecause no two [punitive damages] cases are alike, not all comparisons will be enlightening."[197] Similarly, the *Hartmarx* Court noted that "[f]act-bound resolutions cannot be made uniform through appellate review, de novo or otherwise."[198]

The *Cooper* majority, however, analogized determinations of constitutional punitive excessiveness to criminal law determinations of probable cause and reasonable suspicion.[199] Relying on *Ornelas v. United States*,[200] a case that supported de novo review of both determinations, the *Cooper* majority decided that the underlying reasoning from the criminal law was more applicable to punitive damages.[201] The

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> following factors relevant to its determination whether there was probable cause to conduct a warrantless search and reasonable suspicion justifying the investigatory stop: (i) the two NADDIS tips; (ii) that the car was a 1981 two-door General Motors product; (iii) that the car was from California, a source State; (iv) that the car was in Milwaukee; (v) that it was December; (vi) that one suspect checked into the hotel at 4 a.m.; (vii) that he did not have reservations; (viii) that he had one traveling companion; (ix) that one suspect appeared calm but shaking; and (x) that there was a loose panel in the car door. If the Seventh Circuit were to find that this unique confluence of factors supported probable cause and reasonable suspicion, the absence of any one of these factors in the next case would render the precedent inapplicable.

Ornelas v. United States, 517 U.S. 690, 703-04 (1996) (Scalia, J., dissenting). This reasoning applies equally well to the review of punitive damages.

[196] TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 457 (1993). Justice Kennedy also noted in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 41 (1991) (Kennedy, J., concurring in the judgment) that "[t]hese features of the jury system for assessing punitive damages discourage uniform results."

[197] *TXO*, 509 U.S. at 483 (O'Connor, J., dissenting).

[198] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402 (1990) (citing Mars Steel Corp. v. Cont'l Bank N.A., 880 F.2d 928, 936 (1989)).

[199] Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001).

[200] 517 U.S. 690.

[201] *Cooper*, 532 U.S. at 436. However, as Leatherman argued in its brief, "while in some circumstances the courts of appeals play the principal role in ensuring the uniform application of legal rules to particular sets of facts, see, e.g., *Ornelas v. United States*, . . . the application of the *BMW* guideposts is not such a situation." Brief of Respondent at 35-36. This is because with punitive damages, the question "is . . .

Court found that these three types of determinations are "fluid concepts" and "take their substantive content from the particular contexts in which the standards are being assessed."[202] Therefore, the Court reasoned, all "acquire more meaningful content through case-by-case application at the appellate level."[203] The Court's argument, however, ignores the fact-intensive inquiry underlying the assessment of punitive damages, probable cause and reasonable suspicion. Indeed, as Justice Scalia's dissent in *Ornelas* correctly points out, "[l]aw clarification requires generalization," and it is exactly because concepts like reasonable suspicion and probable cause cannot be "reduced to a neat set of legal rules that they will be ultimately resistant to generalization."[204]

Moreover, the Court's analogy of constitutional punitive excessiveness to these two criminal law determinations is misguided. This is primarily because a determination of probable cause or reasonable suspicion involves a judicial review of an individual's reasons for acting before a legal proceeding, namely, whether a police officer was correct in arresting a defendant. A review of punitive damages, however, involves a judicial review of the appropriateness of a punishment after a legal proceeding. Thus, there is an analytical disconnect between analogizing a justification for a particular action with the appropriateness of a punishment after said action. Indeed, if there is any common ground at all, it is merely that all three determinations involve some form of judicial review.

Furthermore, although the Court in *Cooper* characterized punitive damages as "quasi-criminal,"[205] they are still awarded under the umbrella of civil tort law. In fact, an award of punitive damages does not implicate the Fifth Amendment's prohibition against double jeopardy, and a defendant can be criminally prosecuted and incur punitive damages in a civil trial for the same offense.[206] Also, a jury does

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whether the judgment entered by the trial court falls within the zone of reasonableness." *Id.* at 34.

[202] *Cooper*, 532 U.S. at 436 (citing *Ornelas*, 517 U.S. at 696).

[203] *Id.*

[204] *Ornelas*, 517 U.S. at 703 (Scalia, J., dissenting).

[205] *Cooper*, 532 U.S. at 432 (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting)).

[206] *See* United States v. Halper, 490 U.S. 435, 451 (1989) (holding that the Double Jeopardy Clause of the Fifth Amendment does not apply to punitive damages in cases between private parties).

not determine reasonable suspicion and probable cause in criminal law, but does determine punitive damages in civil law.[207] Therefore, the more fitting analogy for punitive damages is the Court's past precedents involving civil law determinations, such as those in *Hartmarx* and *Pierce*, both of which the Court reviewed for abuse of discretion.[208]

In addition, even if de novo review could help to clarify the doctrine of punitive damages, appellate courts hear too few cases to foster a useful body of well-developed appellate discussions.[209] This is primarily because appellate courts hear only a miniscule number of punitive constitutional appeals each year.[210] Irrespective of the dearth of constitutional punitive appeals, however, the traditional abuse of discretion standard still provides adequate clarification and articulation of the *BMW* factors at the appellate level. In fact, the Ninth Circuit in *Cooper* specifically articulated its application of the *BMW* factors under the abuse of discretion standard.[211] The Ninth Circuit further explained its reasoning for upholding the punitive damages award by noting that "Cooper did not act promptly to remedy the problem even after an injunction issued" and that Cooper's passing off, although not "traditional," gave it an "unfair advantage."[212]

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[207] Justice Ginsburg pointed this out in her *Cooper* dissent: "Such determinations [reasonable suspicion and probable cause] typically are made without jury involvement." *Cooper*, 532 U.S. at 448 n.1 (Ginsburg, J., dissenting). The assessment of punitive damages, however, "has [always been] left to the discretion of the jury." *Id.* at 445 (citing Day v. Woodworth, 54 U.S. 363, 371 (1852)).

[208] *See* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) (holding that a trial judge's determinations on Rule 11 motions must be reviewed for abuse of discretion); Pierce v. Underwood, 487 U.S. 552, 562 (1988) (holding that whether the position of the United States is substantially justified under the Equal Access to Justice Act must be reviewed for abuse of discretion).

[209] As Leatherman pointed out in its brief, "[b]urdening Courts of Appeals with de novo review will make it even more difficult for them to craft well-written opinions articulating the courts' reasoning and contributing to the development of the law." Brief of Respondent at 38.

[210] *See* Rustad, *supra* note 31, at 40 (noting that federal appellate courts have heard only eleven appeals regarding punitive excessiveness since the Court's decision in *BMW*). Indeed, at the time the Court decided *Cooper*, federal appellate courts had heard only heard nineteen appeals challenging the constitutionality of a punitive damages award over $1 million within the past six years. Brief of Respondent at 37.

[211] Leatherman Tool Group, Inc. v. Cooper Indus., Nos. 98-35147, 98-35415, 1999 U.S. App. LEXIS 33657, at *4-5 (9th Cir. Dec. 17, 1999).

[212] *Id.* at *5.

In sum, a jury's assessment of punitive damages is based on unique, case-specific facts, and those facts are interwoven with the *BMW* factors. A legal standard based on fact-intensive inquiries will resist both generalizations and uniformity in outcome. Moreover, appellate courts do not hear enough punitive appeals to foster a range of discussion or a useful body of precedent. Consequently, plenary appellate review of a district court's determinations of constitutional excessiveness will neither clarify the doctrine of punitive damages nor unify precedent.

III. THE PROBLEMS WITH DE NOVO REVIEW

Aside from concerns of institutional competence, there are problems inherent in the use of de novo review. De novo review will be extremely complicated to administer without providing significantly different results than are already found under an abuse of discretion standard.[213] Moreover, there is no reason to over-burden appellate judges with de novo review when abuse of discretion is adequate to reduce a constitutionally excessive punitive damages award,[214] especially as appellate judges' workloads have risen dramatically over the years.[215] Indeed, the burdens of de novo review will outweigh considerably its minimal benefits.

First, as Justice Ginsburg noted in her *Cooper* dissent, de novo review will be "more complex" and "challenging to administer."[216] Appellate courts will have to distinguish between a multitude of claims on appeal in order to apply the correct standard of review. Perhaps most confusing, however, appellate judges will have to differentiate between common law claims of punitive excessiveness, which must be reviewed for abuse of discretion and constitutional claims of punitive excessiveness, which must now be reviewed de novo.[217] Second, in actual practice, abuse of discretion has proved more than

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[213] *See Cooper*, 532 U.S. at 445 (Ginsburg, J., dissenting).

[214] *See* Rustad, *supra* note 31, at 40 n.152 (finding that out of the eleven appeals regarding excessive punitive damages that federal appellate courts have heard since *BMW*, eight were remanded or vacated).

[215] *See* Brief of Respondent at 37. *See also* COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, Final Report, Dec. 18, 1998, submitted to the President & the Congress pursuant to Pub. L. No. 105-119 at 14 ("[S]ince 1960, circuit judgeships have grown roughly by 160%, but appeals per judgeship have grown by 450%.").

[216] *Cooper*, 532 U.S. at 445 (Ginsburg, J., dissenting).

[217] *See id.* at 446.

sufficient in providing a rigorous post-verdict check on excessive punitive damages.[218] Indeed, application of de novo review will rarely result in more reductions of punitive damages awards than abuse of discretion. According to a 1998 *Wisconsin Law Review* article by Professor Michael L. Rustad, federal appellate courts heard eleven appeals regarding the excessiveness of punitive damages since the Court's 1996 decision in *BMW*.[219] Out of those eleven awards, the appeals courts remanded or reversed eight under an abuse of discretion review.[220] In addition, various studies of punitive damages, while differing in opinion as to the frequency of these awards, have all found one thing in common: there is extensive post-trial oversight by both trial and appellate judges in reducing punitive damages awards.[221]

A. *De Novo Review Will Be Confusing to Apply*

First, de novo review will be confusing to apply, as it will result in varying standards of review within the same appeal. Constitutional punitive excessiveness appeals generally arise within a Rule 59 motion.[222] However, such motions often encompass a variety of other grounds for a new trial, such as juror misconduct or newly discovered evidence.[223] An appellate judge will have to differentiate between these claims and apply different standards of review. Moreover, since the *Cooper* Court held that common law claims of punitive excessiveness must be reviewed for abuse of discretion and constitutional punitive excessiveness must be reviewed de novo, appellate judges will be in the awkward position of having to distinguish between two similar claims.[224] Indeed, the factors underlying a common law claim of excessiveness most likely will overlap with those

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[218] *See generally* Rustad, *supra* note 31.

[219] *Id.*

[220] *Id.*

[221] *Id.* In his article, Rustad compared various studies of punitive damages awards and found that "[a]ll of the studies examining post-verdict adjustments confirm that punitive damages are strictly scrutinized by trial and appellate judges." *Id.* at 41.

[222] A Rule 59 motion is a motion for a new trial or remittitur. The most common grounds for relief under this motion are excessive damages, verdicts against the clear weight of evidence or an unfair trial. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 59.13 (3d ed. 1997).

[223] *Id.*

[224] *See* Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 450 (2001) (Ginsburg, J., dissenting).

underlying a constitutional claim of excessiveness.[225] In addition, as Justice Ginsburg noted in her *Cooper* dissent, appellate courts also will have to distinguish a district court's findings of historical fact, which may be reviewed only for "clear error."[226] Adding to the complexity of this review is the uncertainty of the correct standard to be applied in cases where a state has adopted a scheme confining the amount of punitive damages to a proportion of the compensatory damages.[227] Although the *Cooper* Court hinted that this situation might call for review under abuse of discretion, thereby implicitly acknowledging its support of statutory caps, it left the question unanswered.[228]

The Court has frowned upon this disjointed approach to appellate review in the past, most notably in *Cooter & Gell v. Hartmarx Corp.*[229] In *Hartmarx*, the Court specifically refused to adopt a three-tiered standard of review for Rule 11 motions.[230] Similar to *Cooper*, the defendants in *Hartmarx* advocated a review of historical facts for clear error, determinations of whether or not a lawyer violated Rule 11 for abuse of discretion, and the appropriate sanctions awarded by a district court under a de novo standard.[231] In rejecting this confusing approach, the *Hartmarx* Court pointed to the need for a unifying standard of review.[232] Moreover, the Court adopted an abuse of discretion standard for all three issues, finding that "a district court, familiar with the issues and litigants . . . is better situated than the court of appeals to

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[225] *See, e.g.*, Mosing v. Domas, 830 So. 2d 967, 978 (La. 2002) ("We note that two of the *BMW* factors . . . mirror three of the factors traditionally considered by Louisiana appellate courts in reviewing exemplary damage awards . . . ."); Romo v. Ford Motor Co., 99 Cal. App. 4th 1115, 1147 (Cal. Ct. App. 2002) ("In reviewing the verdict the appellate court is guided by three main [state law] factors: the reprehensibility of the defendant's conduct, the actual harm suffered by the victims, and the wealth of the defendant."). *See also* Brief of Respondent at 41. As the Leatherman brief noted, "[i]ndeed, the same portion of the district court's decision may provide a common predicate for the federal constitutional and state-law excessiveness questions." *Id.*

[226] *Cooper*, 532 U.S. at 450 (Ginsburg, J., dissenting).

[227] *See infra* note 234.

[228] *Id.* at 440 n.13. The Court stated "[w]e express no opinion on the question of whether *Gasperini* would govern—and *de novo* review would be inappropriate—if a State were to adopt a scheme that tied the award of punitive damages more tightly to the jury's finding of compensatory damages." *Id.*

[229] 496 U.S. 384 (1990).

[230] *Id.* at 405.

[231] *Id.*

[232] *Id.* at 403.

marshal the pertinent facts and apply the fact-dependent legal standard."[233]

In the end, appellate courts reviewing determinations of constitutional punitive excessiveness will be faced with a confusing, multi-tiered standard of review. An appellate judge will have to review some challenges de novo, others for abuse of discretion and factual findings for clear error. In addition, if an appellate court is applying the substantive law of a state that has adopted some form of restriction on punitive damages, the court will be in the uncomfortable position of trying to guess the correct standard of review.[234]

B. *De Novo Review Will Not Provide Significantly Different Results*

Abuse of discretion review provides a sufficiently rigorous and intensive post-verdict check on excessive punitive damages. In fact, it is difficult to imagine that de novo review will result in a greater number of punitive damages award reductions. As Justice Ginsburg noted in her *Cooper* dissent, "that approach [de novo review] and mine [abuse of discretion review] will yield different outcomes in few cases."[235] Rustad's 1998 article only reinforces this proposition. Rustad found that federal appeals courts using abuse of discretion review had upheld only three out of eleven punitive damages awards since the Court's decision in *BMW*.[236] The remaining eight awards were either remanded or reversed.[237] For example, in

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[233] *Id.*

[234] This confusion recently occurred in *John St. John v. Coisman*, 799 So. 2d 1110 (Fla. Dist. Ct. App. 2001). Judge Sharp, who wrote the opinion, held that de novo review was applicable when reviewing a trial judge's determination of the constitutionality of a punitive damages award, even though the damages were capped under Florida law. *Id.* at 1112. Whereas Judge Sawaya, in his dissent, strongly argued that *Cooper*'s de novo standard of review did not apply when punitive damages were capped pursuant to Florida's statutory scheme. *Id.* at 1120-26 (Sawaya, J., concurring & dissenting in part).

[235] *Cooper*, 532 U.S. at 450 (Ginsburg, J., dissenting).

[236] Rustad, *supra* note 31, at 40. The following three cases were affirmed under an abuse of discretion standard: *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123 (9th Cir. 1997) (affirming a $500,000 punitive damages award in a RICO claim); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (affirming a $1.2 billion punitive damages award in a class action lawsuit for human rights violations including torture and executions); and *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996) (affirming punitive damages awards of $60,000 each for two prisoners who were beaten by guards and denied medical assistance). Rustad, *supra* note 31, at 40 n.151.

[237] Rustad, *supra* note 31, at 40. The following eight cases were either reversed, vacated or remitted under an abuse of discretion standard: *Continental Trend*

Continental Trend Resources, Inc. v. OXY USA, Inc.,[238] the Tenth Circuit used the abuse of discretion standard to slash a punitive damages award for tortious interference from $30 million to $6 million.[239] Likewise, in *Kimzey v. Wal-Mart Stores, Inc.*,[240] the Eighth Circuit applied the abuse of discretion standard and reduced a punitive damages award from $5 million to a mere $50,000.[241] Nor have smaller punitive damages awards escaped the intense scrutiny of abuse of discretion. In *Lee v. Edwards*,[242] the Second Circuit reduced a $200,000 punitive damages award to $75,000.[243] And in *Patterson v. P.H.P. Healthcare Corp.*,[244] the Fifth Circuit vacated a $150,000 punitive damages award arising out of a race discrimination case.[245] As the Court in *Koon v. United States*[246] pointed out, the mere fact that the standard of review is abuse of "discretion does not mean [that] appellate review is an empty exercise."[247]

Moreover, four studies of punitive damages awards have found that post-verdict scrutiny of these awards at both the trial and appellate levels is sufficiently rigorous.[248] The first study ("Rustad/Koenig 1"), conducted by Professors Michael L.

Resources, Inc. v. OXY USA, Inc., 101 F.3d 634 (10th Cir. 1996) (reducing a punitive damages award from $30 million to $6 million); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) (reducing a punitive damages award from $5 million to $350,000); *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418 (2d Cir. 1997) (noting that in light of the small compensatory damages claimed by members of a class action, a possible punitive damages award of $50,000 would not be feasible under *BMW*); *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996) (remitting a $200,000 punitive damages award to $75,000); *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782 (6th Cir. 1996) (holding that Section 504 of the Rehabilitation Act of 1973 did not provide for punitive damages and vacating plaintiff's punitive damages award of $1.3 million); *Atlas Food Systems & Services Inc. v. Crane National Vendors, Inc.*, 99 F.3d 587 (4th Cir. 1996) (affirming a district court's remittitur of a punitive damages award from $4 million to $1 million); *BE & K Construction Co. v. United Brotherhood of Carpenters*, 90 F.3d 1318 (8th Cir. 1996) (reversing the judgment due to insufficient evidence and noting that the punitive damages award appeared excessive under *BMW*); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996) (vacating a $150,000 punitive damages award as excessive under *BMW*). Rustad *supra* note 31, at 40 n.152.

[238] 101 F.3d 634 (10th Cir. 1996).

[239] *Id.*

[240] 107 F.3d 568 (8th Cir. 1997).

[241] *Id.*

[242] 101 F.3d 805 (2d Cir. 1996).

[243] *Id.*

[244] 90 F.3d. 927 (5th Cir. 1996).

[245] *Id.*

[246] 518 U.S. 81 (1996).

[247] *Id.* at 98.

[248] *See* Rustad, *supra* note 31 (discussing the four studies at length).

Rustad and Thomas H. Koenig, analyzed punitive damages awards in state and federal products liability cases from 1965 to 1990.[249] The second study ("Rustad/Koenig 2"), also conducted by Professors Rustad and Koenig, examined state and federal punitive damages awards in medical malpractice cases between 1963 and 1993.[250] The third study, undertaken by the Government Accounting Office ("GAO"), analyzed punitive damages awards in products liability cases from five states between 1983 and 1985.[251] The fourth study, conducted by Judge Richard Posner and Professor William Landes ("Posner/Landes"), examined products liability cases "reported in the most recent volume of each of the West Publishing Company's case reporters."[252] The Posner/Landes study also scrutinized products liability cases in federal appellate courts between 1982 and November of 1984.[253] Although each study employed different techniques and examined various tort claims, all found that punitive damages often were reduced upon post-trial review.[254]

For example, the Rustad/Koenig 1 study found that while "[a] quarter of the punitive damages awards in products liability were affirmed by appellate courts," a greater number of verdicts were reduced.[255] Indeed, "[n]early one-third of the punitive damages verdicts were ultimately reversed or reduced by appellate panels."[256] Likewise, the Rustad/Koenig 2 study concluded that "[j]udges frequently vacate, remit or reverse punitive damage awards in medical malpractice cases."[257] In fact, the study found that "[o]nly 58% of verdicts reviewed post-

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[249] *Id.* at 42-43.

[250] Michael L. Rustad & Thomas H. Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, not "Moral Monsters,"* 47 RUTGERS L. REV. 975 (1995).

[251] Rustad, *supra* note 31, at 22-23. The five states studied were Arizona, Massachusetts, Missouri, North Dakota and South Carolina. *Id.*

[252] William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, REGULATION, Sept./Oct. 1986, at 34.

[253] *Id.* at 34-35.

[254] Rustad, *supra* note 31, at 40. Moreover, Rustad noted that the studies also found that "[p]unitive damages are far more likely to be reversed or remitted than compensatory damages." *Id.*

[255] *Id.* at 42. The Rustad/Koenig 1 study also found that "four in ten punitive damages verdicts were ultimately settled post-trial. For cases settled prior to appeal, the plaintiff received the full amount of punitive damages in only about one in two cases." *Id.*

[256] *Id.*

[257] *Id.* at 44.

trial were affirmed."[258] Similarly, the GAO study found "post-trial reductions in 82% of the twenty-three punitive damages verdicts studied."[259] Moreover, "[a]ppellate courts reversed or remanded for retrial all punitive damage awards on which they ruled."[260] Finally, the Posner/Landes study found that out of the 172 cases studied, courts upheld punitive damages on appeal in only four.[261] This amounted to punitive damages awards surviving appellate scrutiny in "fewer than three percent of the cases."[262] Thus, de novo review will not result in greater scrutiny or more reductions than under abuse of discretion review.

Furthermore, de novo review, while garnering the same results as abuse of discretion, will over-burden appellate courts. Indeed, defendants will be more eager to appeal a punitive damages award if they are assured a plenary second look by appellate courts. This will only increase the already exhaustive caseload facing federal judges today.[263] In fact, a study by the Administrative Office of the U.S. Courts found that "[f]ederal judges have seen their caseload and associated workload rise significantly over the past five years."[264] Appellate judges in particular have seen a dramatic increase in their caseload.[265] In 1997, Congress went so far as to create a commission[266] to study the federal appellate system and recommend structural changes to deal with the courts'

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[258] Rustad & Koenig, *supra* note 250, at 1012. Rustad/Koenig 2 also found that "[o]verall, the median punitive damage award was 1.21 times the median compensatory damage award." *Id.* at 1009-10.

[259] Rustad, *supra* note 31, at 42.

[260] *Id.*

[261] *Id.* at 41.

[262] *Id.*

[263] *See generally* COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, Final Report, Dec. 18, 1998, submitted to the President & Congress Pursuant to Pub. L. No. 105-119; Behrens v. Pelletier, 516 U.S. 299, 322 (1996).

[264] Judicial Business of the United States Courts, 1999 Annual Report of the Director, Mar. 14, 2000, at 15.

[265] *See* COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, Final Report, Dec. 18, 1998, submitted to the President & Congress pursuant to Pub. L. No. 105-119 at 14 ("Over the last 100 years, filings per appellate judgeship have increased by almost a factor of six. By contrast, filings per judgeship in the district courts have not even doubled."); Judicial Conference of the United States, Long Range Plan for the Federal Courts 132 (Dec. 1995) ("[I]f conditions seriously deteriorate in the courts of appeals, it may be necessary to consider some limitations on the right to appeal.").

[266] Commission on Structural Alternatives for the Federal Courts of Appeals.

burgeoning workload.[267] Among other problems, the Commission's report found that "circuit judges have been faced with relentlessly increasing caseloads"[268] due to the fact that "since 1960, circuit judgeships have grown roughly by 160%, but appeals per judgeship have grown by 450%."[269] The Supreme Court has also voiced concern about this problem, cautioning in *Behrens v. Pelletier*[270] that rising litigation "threatens busy appellate courts with added numbers of essentially similar, if not, repetitive appeals, at a time when overloaded dockets threaten the federal appellate system."[271] Similarly, in *Anderson v. Bessemer City*,[272] the Court warned that "duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly . . . at a huge cost in diversion of judicial resources."[273] Further, in *Cooter & Gell v. Hartmarx Corp.*,[274] the Court endorsed abuse of discretion review, and noted that "such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district courts."[275] The *Hartmarx* Court added that abuse of discretion review will "discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation."[276]

In sum, de novo review for determinations of constitutional punitive excessiveness will differ little from abuse of discretion in terms of results. However, de novo review will burden appellate courts by adding to an already

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[267] COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, Final Report, Dec. 18, 1998, submitted to the President & Congress pursuant to Pub. L. No. 105-119 at iv. "Congress created this Commission on Structural Alternatives for the Federal Courts of Appeals . . . to submit . . . recommendations to the President and Congress on changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the appellate caseload." *Id.*

[268] *Id.* at 14.

[269] *Id.*

[270] 516 U.S. 299 (1996).

[271] *Id.* at 322 (Breyer, J., dissenting). *See also* Remarks of Chief Justice William H. Rehnquist, Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 146 F.R.D. 205, 257 (Apr. 1993) ("One of the chief needs of our generation is to deal with the current appellate capacity crisis in the Federal Courts of Appeals. Few could argue about the existence of such a crisis, born of spiraling federal filings and an increased tendency to appeal District Court decisions.").

[272] 470 U.S. 564 (1985).

[273] *Id.* at 574-75.

[274] 496 U.S. 384 (1990).

[275] *Id.* at 404.

[276] *Id.*

overwhelming caseload. And, because abuse of discretion review is sufficiently rigorous to scrutinize punitive damages awards, there is no reason to depart from the traditional standard.

CONCLUSION

The Supreme Court has consistently voiced its concern over the arbitrariness and lack of fundamental fairness involved in juror assessments of punitive damages awards. In formulating the *BMW* guideposts, the Court expressed the need for protection against "purely arbitrary behavior" in awarding punitive damages.[277] The Court in *Haslip* noted that "unlimited jury discretion . . . may invite extreme results."[278] And in her *TXO* dissent, Justice O'Connor vehemently argued for a proportionality framework for punitive damages to ward off capricious and arbitrary jury behavior.[279] Now, with the adoption of de novo review in *Cooper*, the Court has shifted its attention away from the jury and onto the trial judge.

However, the Court's decision to curb the discretion of the trial judge is the wrong way to ensure that punitive damages awards comport with due process. Indeed, the real problem with punitive damages is that there are few, if any, standards to guide juries in the deliberative process. The typical punitive damages instruction merely asks juries to consider an amount that it thinks appropriate to both punish and deter a defendant.[280] It is the lack of standards in the jury room that has lead to the inconsistent and, at times, outrageous awards that we hear so much about from the newsroom. Therefore, the Court would be better advised to

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[277] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 (1996).

[278] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

[279] TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 477 (1993) (O'Connor, J., dissenting).

[280] For example, a New York pattern jury instruction is as follows:

> There is no exact rule by which to decide the amount of punitive damages. The amount that you award as punitive damages need not have any particular ratio or relationship to the amount you award to compensate the plaintiff for (his, her) injuries. If you find that the defendant's act was (wanton and reckless, malicious), you may award such amount as in your sound judgment and discretion you find will punish the defendant and discourage the defendant or other (people, companies) from acting in a similar way in the future.

N.Y. PATTERN JURY INSTRUCTIONS-Civil 2:278, Damages-Punitive (3d ed. 1996).

refine its procedural checks on the boundless discretion of the jury.

One way the Court could accomplish this task would be to incorporate the *BMW* factors into jury instructions. This would provide a suitable framework within which a jury could make a punitive damages assessment based on substantive standards. A trial judge would then review the jury's application of the *BMW* factors "de novo" and appellate courts would review trial judges' decisions for abuse of discretion. If all three actors in the judicial process were working with the same guideposts, it might help to bring more consistency to the verdicts.

Perhaps the most interesting idea, however, has come from Professor Richard W. Murphy in his recent *Washington Law Review* article.[281] Professor Murphy advocates the use of "explanatory verdicts" for juries when awarding punitive damages.[282] These verdicts would articulate a jury's underlying reasons for assessing a specific punitive damages award and provide an opportunity for the jury to present them at trial.[283] Professor Murphy argues that explanatory verdicts would be helpful for three reasons.[284] First, explanatory verdicts would ensure that juries "exercise their punitive discretion reasonably and legally."[285] Moreover, if a jury's explanatory verdict was shown to be erroneous, a court could easily correct it by "asking a jury to reconsider in light of supplemental instructions."[286] Second, since juries use punitive damages to "send messages" to defendants, "these messages would be clearer if juries used words as well as numbers to express them."[287] The jury's ability to verbalize their moral outrage might even lead to a reduction in excessive damages. Third, explanatory verdicts could prove to be a useful research tool to learn "how real juries in real cases justify their verdicts."[288]

In the end, there are no easy solutions to ensure that punitive damages comport with due process. But, though the

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[281] Richard W. Murphy, *Punitive Damages, Explanatory Verdicts, and the Hard Look*, 76 WASH. L. REV. 995 (2001).

[282] *Id.*

[283] *Id.*

[284] *Id.* at 995.

[285] *Id.*

[286] Murphy, *supra* note 281, at 995.

[287] *Id.*

[288] *Id.*

full impact of the *Cooper* decision remains to be seen, one thing is clear: de novo review is not the answer.[289]

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[289] Although the Supreme Court handed down its opinion in *Cooper* less than two years ago, there is already widespread confusion among state courts concerning the implementation of de novo review. For example, appellate level courts in Georgia, Louisiana, South Dakota, Indiana, New Jersey, Alaska, Minnesota and California have all adopted de novo review in reviewing a trial court's review of the constitutionality of an award of punitive damages, while retaining deferential review for common law claims of punitive excessiveness. *See* Cent. Bering Sea Fisherman's Assoc. v. Anderson, 54 P.3d 271, 277 (Alaska 2002); Baker v. Nat'l State Bank, 801 A.2d 1158, 1162-63 (N.J. Super. Ct. App. Div. 2002); Stroud v. Lints, 760 N.E.2d 1176, 1180 (Ind. Ct. App. 2002); Leisinger v. Jacobson, 651 N.W.2d 693, 696 n.2 (S.D. 2002); Mosing v. Domas, 830 So. 2d 967, 970 (La. 2002); Time Warner Entm't Co. v. Six Flags Over Georgia L.L.C., 563 S.E.2d 178, 183 (Ga. Ct. App. 2002); Brantner Farms, Inc. v. Garner, No. C6-01-1572, 2002, Minn. App. LEXIS 625, at *17 (Minn. Ct. App. June 4, 2002); Romo v. Ford Motor Co., 122 Cal. Rptr. 2d. 139, 165 (Ca. Ct. App. 2002). The Utah Supreme Court, on the other hand, has adopted de novo review for all claims of punitive excessiveness. *See* Diversified Holdings. L.C. v. Turner, Nos. 20000730 & 20010021, 2002 Utah LEXIS 222, at * 3 (Utah Dec. 27, 2002). The Supreme Court of New Mexico, questioned whether the standard of review in *Cooper* was even constitutionally mandated by the Supreme Court at all, or merely imposed in the exercise of its supervisory powers of the federal courts. *See* Aken v. Plains Elec. Generation & Transmission Coop., Inc., 49 P.3d 662, 668 (N.M. 2002). After deciding that *Cooper* did indeed represent a constitutional mandate, the New Mexico court articulated the "correct" standard of review when passing on the constitutionality of a punitive damages award as follows: "that an appellate court must read the record before it bearing in mind, with respect to each relevant factor announced in *BMW*, . . . whether the jury's award of punitive damages is comparatively reasonable." *Id.* at 669. An appeals court in Iowa decided that *Cooper* required de novo review for claims of punitive excessiveness under the Due Process Clause, but failed to even mention, let alone apply, the *BMW* factors. *See* Grabbe v. Holiday Mobile Home Court, No. 2-079/01-0794, 2002 Iowa App. LEXIS 940, at *9, *12, *13 (Iowa Ct. App. Aug. 28, 2002).

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