BEYOND *STATE FARM*: DUE PROCESS CONSTRAINTS ON NONECONOMIC COMPENSATORY DAMAGES

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INTRODUCTION

Punitive damages and noneconomic compensatory damages[1] share much in common. In the seventeenth, eighteenth, and nineteenth centuries, such damages were largely undifferentiated and, in some respects, interchangeable, with punitive damages serving in part as an avenue of recovery for types of intangible harms not yet expressly recognized as compensable. Unlike economic damages, which have long been subject to relatively robust judicial scrutiny, judges traditionally have left determination of punitive and noneconomic compensatory damages almost exclusively to juries, subject only to review under such amorphous standards as abuse of discretion, passion or prejudice, or "shocks the conscience."

Since 1991, however, the Supreme Court of the United States has decided a line of cases interpreting the Due Process Clause of the Fourteenth Amendment[2] as imposing limits, both substantive and procedural, on awards of *punitive* damages. Primarily in response to a concern that traditional modes of review were increasingly failing to reign in "runaway" punitive damages awards, the Court has dramatically increased the scope of judicial involvement in reviewing punitive damages awards for excessiveness. The Court's decision in

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1. For purposes of this article, noneconomic compensatory damages include any type of award designed to make a party whole and for which there is no lawful market for valuing the injury. Depending on the jurisdiction, these damages may encompass such items as physical pain and suffering, inconvenience and sense of loss caused by physical injury, loss of bodily members or functions, emotional distress, loss of consortium, loss of companionship, loss of parental guidance, disfigurement, fear of approaching injury, concern over the future effects of an injury, loss of freedom, loss of enjoyment of life, and hedonic damages for loss of pleasures. *See* RESTATEMENT (SECOND) OF TORTS § 905 cmts. a-h (1979); 2 DAN B. DOBBS, THE LAW OF TORTS, § 377 (2001); Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265, 296 (1998); Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities*, 6 PSYCH. PUB. POL'Y & L. 712 (2000). This article takes no position regarding the forms of noneconomic injury, if any, for which the law should allow recovery, other than to note that the matter is the subject of a long-running debate that will not be resolved any time soon. *Compare* Charles P. Kindregan & Edward M. Swartz, *The Assault on the Captive Consumer: Emasculating the Common Law of Torts in the Name of Reform*, 18 ST. MARY'S L.J. 673, 703 (1987) ("A substantial injury causing loss of physical well-being, mental tranquillity, affection, companionship, self-esteem, and the ability to use one's own body in a relatively pain-free environment is an injury which should hardly be diminished when compared to the loss of economic assets."), *with* Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 780 (1985) ("While a defendant who is liable for such [noneconomic damage] costs suffers monetary loss, the plaintiff continues to experience pain and suffering. These damages, consequently, are not transferable. Granting liability for nontransferable costs does not reallocate damage; rather it burdens both parties with the injury's cost.") (footnotes omitted).

2. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

State Farm Mutual Automobile Insurance Co. v. Campbell[3] is the latest and perhaps most far-reaching of these punitive damages decisions, imposing for all intents and purposes a presumptive nine-to-one maximum ratio of punitive to compensatory damages in most cases, and arguably a one-to-one maximum ratio in cases involving substantial compensatory damages awards.

The question remains, however, whether the due process concern for avoiding arbitrary deprivations of property requires similar scrutiny of noneconomic compensatory damages. This is especially true given the largely common origins of punitive damages and noneconomic compensatory damages, as well as the concerns regarding the manner in which punitive damages are awarded that led the Court to break from historical practice and to ratchet up the level of judicial scrutiny for such awards. As with punitive damages, juries have increasingly awarded—and courts have upheld—unusually large awards of noneconomic compensatory damages. Although appellate decisions involving million-dollar noneconomic compensatory damages awards were rare fifteen or twenty years ago, today courts have begun to affirm eight-figure awards casually in unpublished opinions that simply repeat the mantra that every case is unique and that the court cannot say that the verdict is beyond the range permitted by the evidence. The same flaws in common-law punitive damages procedure that led to the Supreme Court's current due process jurisprudence, including inadequate guidance to juries, lack of objective criteria against which to measure outcomes, and the absence of principled bases for judicial review, have now been exposed with regard to the procedures by which juries award and courts review noneconomic compensatory damages.

Part I of this article examines the history of judicial review of noneconomic damages awards for excessiveness, tracing the development of judicial review from English common law through the widespread adoption in the United States of the prevailing standards for evaluating such awards. Part II examines why the current standards of judicial review for evaluating excessiveness of noneconomic compensatory damages are inadequate. Part III provides an overview of the Supreme Court's punitive damages jurisprudence, with emphasis on statements by the justices reflecting concerns that also apply with respect to noneconomic compensatory damages.

Part IV argues that the due process principles that have informed

3. 123 S. Ct. 1513 (2003).

the Court's punitive damages decisions require similarly enhanced procedural safeguards with respect to noneconomic compensatory damages. The article proposes modifying current practice in three respects to ensure that awards of noneconomic compensatory damages comport with the Due Process Clause. First, juries should be informed of the range of previous awards for comparable cases. Providing that objective information should enhance the ability of juries to reach informed and appropriate determinations. Second, trial courts should exercise a two-tiered review of noneconomic compensatory damages verdicts. Where a verdict is within the range established by prior comparable cases, traditional deference to jury fact-finding is appropriate. Where, however, a verdict exceeds awards in comparable cases, trial courts should treat the award as presumptively excessive and should remit the verdict unless the record contains a clear and objective basis warranting the departure. Third, appellate courts should review for abuse of discretion a trial court's selection of comparable cases, as well as a trial court's decision to uphold a verdict that falls within the range established by those comparable cases, but should review de novo a decision allowing noneconomic compensatory damages that exceed that range. These proposed changes would bring the law of noneconomic compensatory damages into line with current punitive damages jurisprudence and would protect the rights of all litigants to be free of arbitrary deprivations of property while still preserving the unobjectionable aspects of the common-law system for awarding damages and respecting the jury's role in this process.

I. THE HISTORY OF JUDICIAL REVIEW OF NONECONOMIC COMPENSATORY DAMAGES AWARDS

As discussed below, early English courts considered their role in reviewing damages awards to be limited to determining whether the jury's verdict had been tainted by misconduct. Beginning in the middle of the seventeenth century, however, the courts began to examine damages awards purely on the ground that a party contended that the verdict was too large. The English courts used various formulations of the test for excessiveness and did not differentiate between compensatory and punitive damages for these purposes. The reported decisions also use similar terminology when analyzing economic and noneconomic compensatory damages, although the courts quickly recognized that reviewing these various types of damages involved very different inquiries and afforded greater

deference to verdicts involving noneconomic damages. American decisions followed these English precedents, eventually settling into a pattern of reviewing all types of damages for "passion or prejudice" or inquiring whether the verdict "shocks the conscience." In addition, the right to a jury trial embodied in the Seventh Amendment to the United States Constitution[4] affects in some respects how courts have approached review of compensatory damages.

A. The Origins of Judicial Review of Damages Awards for Excessiveness in the English Courts

As Lord Kenyon noted in 1792, "[t]he ancient method of correcting the errors of juries was by the harsh proceeding of attaint, which was productive of no remedy to the aggrieved party."[5] In his view, "the Courts did wisely to rid themselves of such an inconvenience in the administration of justice, by the milder remedy of setting aside an erroneous verdict, and sending the case back to the revision of another jury."[6] Thus arose the procedural device of awarding a new trial. Before the middle of the seventeenth century, however, the English courts appear to have construed their authority in ruling on a motion for new trial as confined to the question whether misconduct during the trial or on the part of the jury had corrupted the verdict, not whether the damages themselves were excessive.[7]

Beginning in 1655, the courts began to consider seriously the propriety of granting new trials for excessiveness alone. In that year, the King's Bench entertained a motion for a new trial in *Wood and Gunston*[8] based "[u]pon the supposition that the dammages were excessive, and that the jury did favour the plaintif."[9] The matter involved an action for slander, and the jury awarded the plaintiff £1500.[10] The court observed that "[i]t is in the discretion of the Court

4. "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.

5. Duberley v. Gunning, 4 T.R. 651, 654, 100 Eng. Rep. 1226, 1227 (K.B. 1792).

6. *Id.*

7. *See* Beardomre v. Carrington, 2 Wils. 244, 95 Eng. Rep. 790 (C.P. 1764) (observing "that there is not one single case (that is law) in all the books to be found, where the Court has granted a new trial for excessive damages in actions for torts").

8. Style 466, 82 Eng. Rep. 867 (K.B. 1655).

9. *Id.*

10. *Id.* In this case, as in many English cases of this era, the decision does not reveal whether the award was for punitive or compensatory damages, or for some combination of the two. *See* Honda Motor Co. v. Oberg, 512 U.S. 415, 422 n.2 (1994) (noting that "there is no suggestion that different standards of judicial review were applied for punitive and

in some cases to grant a new tryal, but this must be a judicial, and not an arbitrary discretion, and it is frequent in our books for the Court to take notice of miscariages of juries, and to grant new tryals upon them."[11] The court continued, "[I]t is for the peoples benefit that it should be so for a jury may sometimes by indirect dealings be moved to side with one party, and not to be indifferent betwixt them, but it cannot be so intended of the Court; wherefore let there be a new tryal the next term."[12]

During the following century, courts continued to debate their authority to review awards for excessiveness apart from a finding of misconduct. For example, twenty-two years later in *Lord Townsend v. Dr. Hughes*,[13] the Court of Common Pleas declined to grant a new trial in a slander action that resulted in a £4000 verdict for the plaintiff. The court noted that "a precedent was cited of a new trial granted" upon the ground of excessiveness "and no other," and one justice favored granting a new trial, but the other three justices voted against a new trial because, in their view, "the jury are the sole judges of the damages."[14]

In the 1726 decision in *Chambers v. Robinson*,[15] by contrast, the King's Bench granted a new trial on the basis of excessive damages alone. In an action for malicious prosecution, the jury awarded the plaintiff £1000. The Court held that "it was but reasonable he should try another jury, before he was finally charged with [£1000]."[16] The decision then notes that "a new trial being had, the same damages were given again; upon which the defendant applied to the Court, who said it was not in their power to grant a third trial."[17]

Subsequent decisions, however, narrowed and ultimately rejected the *Chambers* precedent. Thirty-two years later, the Court of Common Pleas in *Wilford v. Berkley*[18] declined to grant a new trial in an action for criminal conversion where the jury returned a verdict of

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compensatory damages before the 20th century"); *see also* Leith v. Pope, 2 Black. W. 1327, 96 Eng. Rep. 777 (K.B. 1779) (making no distinction between punitive and compensatory damages in reviewing a jury verdict for excessiveness).

11. *Wood and Gunston,* 82 Eng. Rep. at 867.

12. *Id.*

13. 1 Mod. 232, 86 Eng. Rep. 850 (C.P. 1677).

14. *Id.*; *see also* Dove v. Martin, Comb. 169, 170, 90 Eng. Rep. 410, 410 (K.B. 1688) ("Court will not grant a new trial or a new writ of enquiry upon every excessiveness of damage, but only where they are extravagantly expensive.").

15. 2 Str. 691, 93 Eng. Rep. 787 (K.B. 1726).

16. 93 Eng. Rep. at 788.

17. *Id.*

18. 1 Burr. 609, 97 Eng. Rep. 472 (C.P. 1758).

£500 notwithstanding the defendant's annual earnings of £50. The court began by noting that "there was no doubt of the power of the Court to exercise a proper discretion in setting aside verdicts for excessiveness of damages, in cases where the quantum of the damage really suffered by the plaintiff could be apparent," or in cases where the damages "were of such a nature that the Court could properly judge of the degree of the injury, and could see manifestly that the jury had been outrageous in giving such damages as greatly exceeded the injury."[19] The court determined, however, that the case before it "was very different, where it depended upon circumstances which were properly and solely under the cognizance of the jury, and were fit to be submitted to their decision and estimate."[20] In light of the nature of the injury, "the Court could not say that [£500] was too much; or that [£50] would have been too little."[21] The court concluded its analysis by noting as a further basis for denying a new trial another case in which an identical damages award for criminal conversation had been sustained.[22]

In 1764, the Court of Common Pleas explicitly rejected the reasoning and precedential weight of *Chambers*. In *Beardmore v. Carrington*,[23] the court considered an action for trespass and false imprisonment in which the jury awarded the plaintiff £1000 in damages where agents of the crown allegedly ransacked a private residence looking for seditious papers and detained the plaintiff for six and one half days. The court distinguished *Wood and Gunston* as having resulted in a new trial "not . . . for excessive damages, but for tampering with the jury."[24] The court then dismissed *Chambers* as "the only case where ever a new trial was granted merely for the excessiveness of damages only," and noted that it was "not satisfied with the reason given in that case, and think it of no weight."[25] The court reasoned that the rationale in *Chambers* of desiring to give the defendant another chance before a new jury was unsound because that rule would just as easily have justified a third or fourth trial. The court concluded, "[T]herefore we are free to say this case is not law; and that there is not one single case (that is law) in all the books to be found, where the Court has granted a new trial for excessive damages

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. 2 Wils. 244, 95 Eng. Rep. 790 (C.P. 1764).
24. 95 Eng. Rep. at 792.
25. *Id.* at 793.

in actions for torts."[26] The court took care to note that it did not "lay down any rule that there never can happen a case of such excessive damages in tort where the Court may not grant a new trial; but in that case the damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against, at first blush."[27] The justices concluded that they "cannot say the damages . . . are enormous," and thus a new trial was not warranted.[28]

Nine years later, in *Huckle v. Money*,[29] the court considered a £300 verdict against a king's messenger for trespass, assault, and imprisonment, based on the confinement of the plaintiff for six hours, during which time the defendant "used him very civilly by treating him with beef-steaks and beer."[30] The court began by remarking that "the law has not laid down what shall be the measure of damages in actions of tort; the measure is vague and uncertain, depending upon a vast variety of causes, facts, and circumstances."[31] The court noted that in light of the minimal actual harm inflicted, "perhaps [£20] damages would have been thought damages sufficient," but on the facts of this case the court thought that the jury had "done right in giving exemplary damages."[32] The court refused to grant a new trial, commenting that "it is very dangerous for the Judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages."[33]

By the close of the eighteenth century, the proposition that courts

26. *Id.*
27. *Id.*
28. *Id.* at 794.
29. 2 Wils. 205, 95 Eng. Rep. 768 (C.P. 1763).
30. *Id.*
31. *Id.*
32. *Id.* at 768-69.
33. *Id.*; *see also* Benson v. Sir Thomas Frederick, 3 Burr. 1845-46, 97 Eng. Rep. 1130 (K.B. 1766) (rejecting excessiveness challenge to £150 verdict for wrongful discipline of militia member, with Lord Mansfield noting that he had "no doubt but that it might be right to give an opportunity of reconsidering verdicts where excessive damages had been given"); Fabrigas v. Mostyn, 2 Black. W. 929, 96 Eng. Rep. 549 (C.P. 1773) (rejecting excessiveness challenge to £3000 verdict for trespass and false imprisonment but refusing to accept the principle that "in no case of personal injury the damages can be excessive," because "[s]ome may be so monstrous and excessive, as to be in themselves an evidence of passion or partiality in the jury"); Bruce v. Rawlins, 3 Wils. 62, 63, 95 Eng. Rep. 934, 935 (C.P. 1770) (rejecting excessiveness challenge to £100 verdict for trespass, noting that "[t]he case must be very gross, and the damages enormous, for the Court to interpose"); Redshaw v. Brook, 2 Wils. 405, 95 Eng. Rep. 887, 888 (C.P. 1769) (rejecting excessiveness challenge to £200 verdict for trespass: "[Y]et how can we draw the line to fix the measure of damages in this case? I cannot say the jury have done wrong; and perhaps if I had been one of the jury, some of them might have convinced me that [£200] damages are little enough.").

had the power to review damages awards for excessiveness and to order new trials under appropriate circumstances had gained wide acceptance in the English courts. For example, in *Goldsmith v. Lord Sefton*,[34] the court awarded a new trial following a £200 verdict for assault. Chief Baron Macdonald stated that he had "no doubt that the power of the Court extends to granting a new trial in all cases."[35] He observed that "Courts never interpose to set aside a verdict, except upon a 'glaring case of outrageous damages.'"[36] The Chief Baron cited a case in which "the injury was much more serious than here, the damages not so great, yet the verdict was set aside."[37] He concluded, "By the whole current of authorities, it appears that we are bound to protect a party where, by the improper warmth or worse passions of a jury, damages glaringly and outrageously great have been given against him."[38] Baron Hotham added that "[i]t is as much the duty of the Court to protect the party from injustice of the jury, as to submit to their finding in those things which are exclusively within their province. The present verdict is such as cannot be justified."[39]

Similarly, in *Hewlett v. Cruchley*,[40] the court denied a new trial after a £2000 verdict for malicious prosecution but observed that "it is now well acknowledged in all the courts of Westminster-hall, that whether in actions for criminal conversation, malicious prosecutions, words, or any other matter, if the damages are clearly too large, the courts will send the inquiry to another jury."[41] The court examined the issue of damages from the perspective of a market-based transaction: "The Plaintiff is put on his trial, and holds up his hand at the Old Bailey in the presence of hundreds. What sum would bribe any man to put himself in that situation?"[42] "Could any one say," the court asked, "that any rational man of character would for [£]2000[] put himself in this situation? If not, the damages are not excessive."[43]

34. 3 Anst. 808, 145 Eng. Rep. 1046 (Ex. 1796).
35. 145 Eng. Rep. at 1046.
36. *Id.* (citation omitted).
37. *Id.*
38. *Id.*
39. *Id.*
40. 5 Taunt. 277, 128 Eng. Rep. 696 (C.P. 1813).
41. 128 Eng. Rep. at 698.
42. *Id.*
43. *Id.*

B. English Decisions Recognize the Conceptual Differences Between Reviewing Economic and Noneconomic Damages

By the middle of the eighteenth century, the English courts had also recognized that the task of reviewing an award of damages for economic injury is fundamentally different from reviewing an award for noneconomic or punitive damages. In *Beardmore v. Carrington*,[44] the court perceived a "great difference between cases of damages which be certainly seen, and such as are ideal, as between assumpsit, trespass for goods, where the sum and value may be measured, and actions of imprisonment, malicious prosecution, slander, and other personal torts, where the damages are matter of opinion, speculation, ideal."[45] Likewise, in *Sharpe v. Brice*,[46] the Court of Common Pleas noted that although "the jury have not a despotic power" in tort cases, for purposes of evaluating a claim of excessiveness "the same rule does not prevail upon questions of tort, as of contract. In contract the measure of damages is generally matter of account, and the damages given may be demonstrated to be right or wrong."[47] "But in torts," the court noted, "a greater latitude is allowed to the jury: and the damages must be excessive and outrageous to require or warrant a new trial."[48]

In 1792, the King's Bench decided *Duberley v. Gunning*,[49] involving a motion for a new trial following a £5000 verdict for criminal conversation. Lord Kenyon observed that although "under all the circumstances, I think the damages were much larger than ought to have been given," he was not sure "what conclusion . . . to draw."[50] In his view, the "difficulty arises from being unable to fix any standard by which I can ascertain the excess which, according to my view of the case, I think the jury have run into."[51] He continued, "In many cases where the Court have said that the damages were too great, they have had some grounds to proceed upon, by which the excess might fairly be measured. But where there is no such standard,

44. 2 Wils. 244, 95 Eng. Rep. 790 (K.B. 1764).

45. 95 Eng. Rep. at 792. Although some early English cases characterize the distinction in terms of contract versus tort, in reality these courts are expressing the conceptual difference between economic and noneconomic damages. The court's inclusion of "trespass for goods" in *Beardmore* as an example of a claim for which damages were ascertainable demonstrates that the focus was not on the technical denomination of the cause of action, but rather on the nature of the injury at issue.

46. 2 Black. W. 942, 96 Eng. Rep. 557 (K.B. 1774).

47. 96 Eng. Rep. at 557.

48. *Id.* (footnote omitted).

49. 4 T.R. 651, 100 Eng. Rep. 1226 (K.B. 1792).

50. 100 Eng. Rep. at 1228.

51. *Id.*

how are the errors of the jury to be rectified?"[52] Justice Ashhurst was of the view that before the court can set aside a verdict for excessiveness, "they ought to be able to ascertain some rule by which the damages are to be measured, and to which the facts may be applied."[53] He wrote, "Where damages depend in any wise, upon calculation, the Court have some medium to direct them, by which they are enabled to correct any mistake of the jury."[54] "But," he noted, "where there is no such light to guide them, where the damages depend upon mere sentiment and opinion, the Court have no line to go by; and therefore it would be very dangerous for us to interfere."[55] The court decided, three votes to one, to deny a new trial.[56]

Similarly, in *Goldsmith v. Lord Sefton*,[57] Chief Baron Macdonald noted the difficulties inherent in reviewing a £200 verdict for assault. He remarked that "[i]n matters of contract, the Court have, in general, a certain principle, by which they can determine whether the verdict is proportioned to the injury or not."[58] However, "[i]n matters of tort this is more difficult."[59]

C. American Courts Adopt "Passion or Prejudice" or "Shock the Conscience" Approaches to Judicial Review

In the early nineteenth century, American courts began to entertain challenges to damages awards on the basis of excessiveness. These courts initially tended to address excessiveness by invoking the notion of juror passion and misconduct based on the size of the award. Early decisions focused closely on the facts of comparable cases and demonstrated a willingness to remit awards, even for noneconomic compensatory damages, that exceeded awards in factually comparable cases. By the middle of the twentieth century, many courts began to shift the focus of the excessiveness inquiry away from presumed juror misconduct toward a consideration of whether the award, standing alone, shocks the judicial conscience.

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52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. In *Jones v. Sparrow*, 5 T.R. 257, 101 Eng. Rep. 144 (K.B. 1793), the King's Bench, refusing to follow *Duberley*, granted a new trial on the basis of excessiveness after a £40 verdict for assault and battery. The court distinguished *Duberley* as not having been a unanimous decision, adding that "whether rightly or not decided, that is a case sui generis, and cannot govern the present." 101 Eng. Rep. at 144.
57. 3 Anst. 808, 145 Eng. Rep. 1046 (Ex. 1796).
58. 145 Eng. Rep. at 1046.
59. *Id.*

The 1822 decision in *Blunt v. Little*[60] is generally viewed as the first instance in which a court in the United States asserted the authority to grant a new trial based solely on excessive damages. The defendant in a malicious prosecution action sought a new trial after the jury returned a $2000 verdict. Justice Story opened his discussion of the size of the verdict by observing that "[a]s to the question of excessive damages, I agree, that the court may grant a new trial for excessive damages."[61] In examining the precedent for that authority, the court cited only English law, noting that "[s]o far as the contrary doctrine may be supposed to be maintained by *Duberley v. Gunning*, it has been qualified or overturned in *Chambers v. Caulfield* and *Hewlett v. Cruchley*."[62] Justice Story remarked that analyzing a verdict for excessiveness "is indeed an exercise of discretion full of delicacy and difficulty."[63] Nevertheless, if it "appear[ed] that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case."[64] Although Justice Story presided over the trial and considered the matter "a strong case for damages," he wrote that he "should have been better satisfied, if the damages had been more moderate."[65] He concluded, "After full reflection, I am of opinion, that it is reasonable, that the cause should be submitted to another jury, unless the plaintiff is willing to remit $500 of his damages. If he does, the court ought not to interfere farther."[66]

By the middle of the nineteenth century, state courts likewise began to acknowledge their role in reviewing damages awards for excessiveness. In *Collins v. Albany & Schenectady Rail Road Co.*,[67] for example, the court considered a motion for a new trial by a railroad after an injured passenger obtained a verdict for $11,000. The plaintiff suffered the partial amputation of a foot, was crippled for life, and may have had his life shortened as a result of the injury. Nevertheless, the court determined that the verdict was excessive, ordering a new trial unless the plaintiff consented to a remitted

60. 3 F. Cas. 760 (C.C.D. Mass. 1822) (No. 1578).
61. *Id.* at 761.
62. *Id.* (citations omitted).
63. *Id.*
64. *Id.* at 761-62.
65. *Id.* at 762.
66. *Id.*
67. 12 Barb. 492 (N.Y. Sup. Ct. 1852).

judgment of $5000.[68]

In *Clapp v. Hudson River Railroad Co.*,[69] the court addressed a challenge to a $6000 verdict awarded to a plaintiff who suffered a broken and permanently shortened leg in a railroad accident. "[W]hen the damages found by the jury are either so large or so small as to force upon the mind of every man familiar with the circumstances of the case, the conviction that, by some means, the jury have acted under the influence of a perverted judgment," the court stated, "it is the duty of the court, in the exercise of a sound judicial discretion, to grant a new trial."[70] The court then reviewed in detail the facts in *Collins* and compared the two sets of injuries. "In this case," the court noted, "the injury was undoubtedly severe, but it was far less serious in its character or consequences" than had been the case in *Collins*.[71] "Am I not justified, then," the court asked, "in assuming that a verdict of $11,000 in the one case was not more extravagant than a verdict of $6000 in the other?"[72] The court regarded it as a matter of common knowledge that "in actions against rail road corporations to recover damages for personal injuries, juries are apt to be far more liberal in awarding damages than in other cases of a kindred character."[73]

Relying on the 1655 King's Bench ruling in *Wood and Gunston* as the source of judicial power to grant new trials on the basis of excessiveness, the court warned that "[i]t is in those cases where, the law being unable to furnish the jury with any measure of damages, the whole question is referred to them without any guide or restriction, that the jury is most likely to err."[74] The court then continued, "Their feelings, their passions and their prejudices are appealed to by all the arts of eloquence, and sometimes not without success. Under such circumstances, it is no surprising thing that the verdict should occasionally testify to the effects of such influences."[75] The court did not interpret the record as "furnish[ing] evidence that the jury acted under the influence of undue motives," nor did it "regard the damages as very grossly excessive."[76] Nevertheless, the court viewed the damages as "sufficiently large to show that, whatever the influence

68. *Id.*
69. 19 Barb. 461 (N.Y. Sup. Ct. 1854).
70. *Id.* at 463.
71. *Id.* at 464.
72. *Id.*
73. *Id.*
74. *Id.* at 467.
75. *Id.*
76. *Id.*

may have been, whether it was prejudice against the defendants, or a desire to punish them for the carelessness of their agents, the verdict has been rendered under some misconception of duty, or some perversion of judgment."[77] The court denied the motion for a new trial conditioned upon the plaintiff's acceptance of a reduced verdict of $4000.

Twelve years later, in *Murray v. Hudson River Railroad Co.*,[78] the New York courts once again addressed an excessiveness challenge to a personal injury verdict, this time involving an $8000 award for the loss of a hand. The excessiveness inquiry began with a comparative review of other damages awards. The court wrote, "I would by no means under estimate the serious injuries which the plaintiff has received; but there have been, and are constantly occurring, more serious ones, for which less damages are awarded."[79] The court, examining the facts and verdicts in eight other cases in which new trials or conditional new trials had been ordered on the basis of excessiveness, concluded that "[i]n the light of these cases, and of others which might be cited, I am of opinion that it is our duty . . . to set aside the verdict for excessiveness of damages and grant a new trial unless the plaintiff will consent to accept a less sum."[80] The court observed that "the difficulty is in finding some standard by which to estimate the proper amount of damages."[81] "The evidence does not give it," the opinion continued, "[a]nd the jury seem to have given the rein too largely to loose and indefinite conjecture."[82] Although the justice who authored the opinion preferred to remit the verdict to $4000, the other justices favored a somewhat larger final award, and the court granted a new trial unless the plaintiff agreed to a remitted award of $6000.[83]

In 1889, the United States Supreme Court endorsed, in dictum, the concept of evaluating excessiveness of damages on the basis of juror passion. In *Arkansas Valley Land & Cattle Co. v. Mann*,[84] the Court reviewed a judgment in an action for conversion of cattle in which the jury awarded the plaintiff $39,958.33, and the trial court denied the defendant's motion for a new trial conditionally upon the plaintiff's

77. *Id.*
78. 47 Barb. 196 (N.Y. Sup. Ct. 1866), *aff'd*, 48 N.Y. 655 (1871).
79. *Id.* at 201.
80. *Id.* at 202.
81. *Id.* at 204.
82. *Id.* at 205.
83. *Id.*
84. 130 U.S. 69 (1889).

acceptance of a remitted award of $17,125, which the plaintiff accepted. The defendant appealed, and the Court affirmed the remitted judgment.[85] Writing for the Court, Justice Harlan stated, "It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury, and grants a new trial, where the damages are palpably or outrageously excessive."[86] "Undoubtedly," Justice Harlan observed, if "the jury, in finding their verdict, were either governed by passion, or had deliberately disregarded the facts that made for the defendant," then "it would have been in accordance with safe practice to set aside the verdict and submit the case to another jury."[87]

By the middle of the twentieth century, some courts began to describe their task in reviewing awards for excessiveness in terms that did not expressly involve juror misconduct or prejudice. In *Leverton v. Curtis Publishing Co.*,[88] one of the earliest federal appellate court decisions relying on this approach, the court considered a defendant's challenge to a $5000 verdict in favor of the plaintiff based on an alleged invasion of privacy resulting from publication of a photograph. The court "agree[d] that the jury was pretty liberal with the defendant's money."[89] Nevertheless, the court acknowledged "the limitation of our authority in controlling the amount of verdicts unless they are so high as to shock the judicial conscience."[90] Taking into consideration the fact that the trial judge did not view the award as excessive, the court did "not think that this case is strong enough to call upon us to substitute our judgment for either his or that of the jury."[91]

The standards of review currently used in state and federal trial courts represent a variety of phrasings, but they essentially boil down to two approaches: one that looks for an inference of juror misconduct in the form of passion or prejudice and one that looks at the verdict itself without regard to whether the jury engaged in any presumed misconduct. Most state courts endorse the "passion or prejudice" mode of review,[92] while a smaller number employ the "shocks the

85. The defendant challenged the judgment on Seventh Amendment grounds as an unlawful reexamination of the facts by the trial court. *See infra* Part I.E.

86. 130 U.S. at 74.

87. *Id.* at 74-75.

88. 192 F.2d 974 (3d Cir. 1951).

89. *Id.* at 978.

90. *Id.*

91. *Id.*

92. *See* Autozone, Inc. v. Leonard, 812 So. 2d 1179, 1183 (Ala. 2001); Am. Nat'l Watermattress Corp. v. Manville, 642 P.2d 1330, 1340 (Alaska 1982); Valley Nat'l Bank

conscience" formulation.[93] Other states use a combination of these two approaches,[94] and a small number of states review for an "abuse of discretion," or a "miscarriage of justice," or not at all.[95] Many federal trial courts tend to employ the "shocks the conscience"[96] standard, "passion or prejudice" review,[97] or a combination of those approaches.[98] Other federal courts examine whether the verdict is "monstrous"[99] or constitutes a "miscarriage of justice,"[100] standards

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v. Brown, 517 P.2d 1256, 1260 (Ariz. 1974); Collins v. Hinton, 937 S.W.2d 164, 171 (Ark. 1997); Bertero v. Nat'l Gen. Corp., 529 P.2d 608, 623 (Cal. 1974); Quedding v. Arisumi Bros., 661 P.2d 706, 709 (Haw. 1983); Barlow v. Int'l Harvester Co., 522 P.2d 1102, 1119 (Idaho 1974); Snelson v. Kamm, 787 N.E.2d 796, 816 (Ill. 2003); Burnett v. State, 467 N.E.2d 664, 665 (Ind. 1984); Burgess v. Taylor, 44 S.W.3d 806, 813 (Ky. Ct. App. 2001); Harris v. Soley, 756 A.2d 499, 508 (Me. 2000); Purdone v. Locke, 807 So. 2d 373, 376 (Miss. 2002); Mahoney v. Nebraska Methodist Hosp., Inc., 560 N.W.2d 451, 458 (Neb. 1997); Miller v. Schnitzer, 371 P.2d 824, 828-29 (Nev. 1962), *abrogated on other grounds by* Ace Truck & Equip. Rentals, Inc. v. Kahn, 746 P.2d 132 (Nev. 1987); Bennett v. Lembo, 761 A.2d 494, 499 (N.H. 2000); Lozoya v. Sanchez, 66 P.3d 948, 960 (N.M. 2003); Willis v. W. Union Tel. Co., 123 S.E. 307, 308 (N.C. 1924); Eriksen v. Boyer, 225 N.W.2d 66, 75 (N.D. 1974); Moskovitz v. Mt. Sinai Med. Ctr., 635 N.E.2d 331, 345 (Ohio 1994); Clark v. Bearden, 903 P.2d 309, 312 (Okla. 1995); Hendricks v. Portland Elec. Power Co., 292 P. 1094, 1094 (Or. 1930); Kiser v. Schulte, 648 A.2d 1, 4 (Pa. 1994); Miller v. City of West Columbia, 471 S.E.2d 683, 687 (S.C. 1996); Rogen v. Monson, 609 N.W.2d 456, 460 (S.D. 2000); Van Sickel v. Howard, 882 S.W.2d 794, 795 (Tenn. Ct. App. 1994); Jorgensen v. Gonzales, 383 P.2d 934, 936 (Utah 1963); Lorrain v. Ryan, 628 A.2d 543, 548 (Vt. 1993); Wash. State Physicians Ass'n v. Fisons Corp., 858 P.2d 1054, 1072-73 (Wash. 1993); Kessel v. Leavitt, 511 S.E.2d 720, 812 (W. Va. 1998); Page v. Am. Family Mut. Ins. Co., 168 N.W.2d 65, 69-70 (Wis. 1969); Francis v. Pountney, 972 P.2d 143, 146 (Wyo. 1999).

93. *See* Young v. Frase, 702 A.2d 1234, 1237 (Del. 1997); Econ. Exterminators of Savannah, Inc. v. Wheeler, 576 S.E.2d 601, 603 (Ga. Ct. App. 2003), *cert. denied* (Ga. Apr. 29, 2003); Morris v. Francisco, 708 P.2d 498, 503-04 (Kan. 1985); Rayborn v. Diamond Offshore Co., 832 So. 2d 1052, 1057 (La. Ct. App. 2002); Schoenecke v. Ronningen, 315 N.W.2d 612, 614 (Minn. 1982); Onstad v. Payless Shoesource, 9 P.3d 38, 46 (Mont. 2000); Baxter v. Fairmont Food Co., 379 A.2d 225, 233 (N.J. 1977); Esner v. Janisziewski, 580 N.Y.S.2d 551, 554 (App. Div. 1992); Proffitt v. Ricci, 463 A.2d 514, 519 (R.I. 1983); Schnupp v. Smith, 457 S.E.2d 42, 50 (Va. 1995).

94. *See* Wochek v. Foley, 477 A.2d 1015, 1018 (Conn. 1984); Phillips v. District of Columbia, 458 A.2d 722, 724 (D.C. 1983); Odoms v. Travelers Ins. Co., 339 So. 2d 196, 198 (Fla. 1976); Horak v. Argosy Gaming Co., 648 N.W.2d 137, 150-51 (Iowa 2002); Moore v. Spangler, 258 N.W.2d 34, 39 (Mich. 1977); Giddens v. Kansas City S. Ry. Co., 29 S.W.3d 813, 821-22 (Mo. 2000).

95. *See* Peterson v. Shaffer, 352 P.2d 281, 283 (Colo. 1960) ("if the jury was capricious, arbitrary or swayed by emotion"); Maritime Overseas Corp. v. Ellis, 971 S.W.2d 402, 407 (Tex. 1998) (examining whether award is "manifestly unjust"); *cf.* Schofield v. Uebel, 254 A.2d 655, 657 (Md. 1969) ("Ordinarily the question whether the verdict is excessive is not a matter for review by this Court.").

96. *See* McKinnon v. Kwong Wah Rest., 83 F.3d 498, 506 (1st Cir. 1996); Scala v. Moore McCormack Lines, Inc., 985 F.2d 680, 683 (2d Cir. 1993); Keenan v. City of Philadelphia, 983 F.2d 459, 469 (3d Cir. 1992).

97. *See, e.g.*, Eiland v. Westinghouse Elec. Corp., 58 F.3d 176, 183 (5th Cir. 1995).

98. *See* Krys v. Lufthansa German Airlines, 119 F.3d 1515, 1530 (11th Cir. 1997); Fitzgerald v. Mountain States Tel. & Tel. Co., 68 F.3d 1257, 1261 (10th Cir. 1995).

99. *See* Allied Sys., Ltd. v. Teamsters Auto. Transp. Chauffers, Demonstrators & Helpers, 304 F.3d 785, 792 (8th Cir. 2002); Gordon v. United Van Lines, Inc., 130 F.3d

that—like "shocks the conscience" review—focus on the size of the award rather than the presumed conduct of the jury.

In practice, of course, it is difficult to discern any meaningful differences in outcomes when courts review damages under one standard or another. There is little basis for differentiating between drawing an inference of juror misconduct from the size of an award and basing review on the size of the award itself. Moreover, state and federal appellate courts generally review a trial court's ruling on a motion for a new trial based on excessiveness for an abuse of discretion.[101] The results of the excessiveness inquiry seem to follow no discernible pattern other than general deference to verdicts and reduction or rejection of awards when the trial judge or a majority of the appellate court feels that the award is too large.

D. To Compare or Not to Compare Awards in Other Cases

As demonstrated above, there is a long history of courts considering awards in factually comparable cases as part of the inquiry into whether an award of noneconomic compensatory damages is excessive. At least as far back as the 1758 decision in *Wilford v. Berkley*,[102] and continuing through such other important early cases as *Goldsmith v. Lord Sefton*[103] in 1796, *Blunt v. Little*[104] in 1822, *Clapp v. Hudson River Railroad Co.*[105] in 1854, and *Murray v. Hudson River Railroad Co.*[106] in 1866, courts focused on decisions rendered in similar cases as a tool for evaluating whether the jury had gone too far. To this day, many courts view awards for intangible damages in comparable cases as a highly relevant indicator of the appropriate range of reasonable, dispassionate, unbiased awards for a given type of injury.[107]

282, 287 (7th Cir. 1997); Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1435 (9th Cir. 1996).

100. *See* Hetzel v. County of Prince William, 89 F.3d 169, 171 (4th Cir. 1996); Myers v. City of Cincinnati, 14 F.3d 1115, 1119 (6th Cir. 1994); Taylor v. Wash. Terminal Co., 409 F.2d 145, 148-49 (D.C. Cir. 1969), *cited in* Fields v. Wash. Metro. Area Transit Auth., 743 F.2d 890, 895 (D.C. Cir. 1984).

101. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 434-35, 438 (1996).

102. 1 Burr. 609, 97 Eng. Rep. 472 (K.B. 1758).

103. 3 Anst. 808, 145 Eng. Rep. 1046 (Ex. 1796).

104. 3 F. Cas. 760 (C.C.D. Mass. 1822) (No. 1578).

105. 19 Barb. 461 (N.Y. Sup. Ct. 1854).

106. 47 Barb. 196 (N.Y. Sup. Ct. 1866), *aff'd*, 48 N.Y. 655 (1871).

107. *See* Salinas v. O'Neill, 286 F.3d 827, 830-31 (5th Cir. 2002) ("This use of comparison is a recognition that the evaluation of emotional damages is not readily susceptible to 'rational analysis.' . . . In practice, our evaluation of what a jury could have awarded is tied to awards in cases with similar injuries." (citations omitted)); Hetzel v. County of Prince William, 89 F.3d 169, 172 (4th Cir. 1996) ("That this award is

At the same time, a number of state courts have expressly refused to accord significant weight, or even any weight at all, to awards in other cases. In *Ritter v. Stanton*,[108] for example, the plaintiff suffered "massive" injuries after he walked between a stationary tractor trailer and one that was backing up and became pinned between the two vehicles.[109] At trial, his counsel requested that the jury award "$3 million for past disfigurement; $10 million for future disfigurement; $7 million for past pain and suffering / ability to function as a whole person; $30 million for future pain and suffering; $2 million for past loss of consortium; and $10 million for future loss of consortium," plus "$2 million for future medical expenses" and "$1,281,741 in special damages."[110] "After deliberating for a relatively short time" and reducing the damages by twenty percent to reflect the plaintiff's comparative fault, the jury returned a verdict of $55 million in compensatory damages.[111] Although the opinion is not entirely clear on the point, if one assumes that the economic and noneconomic damages reflected in the $55 million verdict are the same proportions as the economic and noneconomic damages that plaintiff's counsel requested, the verdict encompassed $2.8 million in economic damages and $52.2 million in noneconomic compensatory damages.[112] The trial court entered judgment on the verdict, and the

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outrageous is confirmed by even a cursory analysis of the impressive array of cases cited by the appellee in support of the jury verdict."); Scala v. Moore McCormack Lines, Inc., 985 F.2d 680, 684 (2d Cir. 1993) ("In determining whether a particular award is excessive, courts have reviewed awards in other cases involving similar injuries, 'bearing in mind that any given judgment depends on a unique set of facts and circumstances.'" (citation omitted)); Wulf v. City of Wichita, 883 F.2d 842, 875 (10th Cir. 1989) ("[W]hile comparisons with other cases are not dispositive, . . . [o]ur review of the record, informed by a review of awards granted in other comparable cases, indicates that the award [was excessive]."); Hagge v. Bauer, 827 F.2d 101, 109 (7th Cir. 1987) ("Lest we grope for objective standards of compensatory damages in thin air, comparability has developed as an element of damage award analysis . . . ."); Wochek v. Foley, 477 A.2d 1015, 1019 (Conn. 1984) (citations omitted) ("Although other cases are not determinative of the proper amount of damages in this case, they do 'offer some guidance in determining the range of those necessarily flexible limits of fair and reasonable compensation by which the amount of the verdict must be tested.'"); Palenkas v. Beaumont Hosp., 443 N.W.2d 354, 356 (Mich. 1989) (considering "whether the amount actually awarded is comparable to awards in similar cases within the state and in other jurisdictions").

108. 745 N.E.2d 828 (Ind. Ct. App. 2001).

109. *Id.* at 832.

110. *Id.* at 833.

111. *Id.*

112. The court notes that the $55 million figure reflects a twenty percent reduction in the award based on the plaintiff's fault. *Id.* For an award to be $55 million after a twenty percent reduction, the original unreduced figure would have been $68,750,000. The total amount that the plaintiff's counsel requested, however, was just under $65.3 million, indicating that the jury either got its math wrong by nearly $3.5 million or chose to award more than counsel had requested. If the latter, then unless the jury ignored the court's

defendant appealed.

The Indiana appellate court affirmed, rejecting the defendant's argument that the award was excessive. "Traditionally, the jury has been afforded a great deal of discretion in assessing damage awards," the court noted, although "[t]his discretion is not limitless."[113] The court then observed, "This court will set aside an award of compensatory damages as impermissibly excessive where it is apparent . . . that the amount of damages is so great that it cannot be explained upon any basis other than passion, partiality, prejudice, corruption, or some other improper element."[114] "To warrant reversal," the court continued, "the award 'must appear to be so outrageous as to impress the Court at 'first blush' with its enormity.'"[115] Although "[t]he role of the jury in awarding compensatory damages is clear," the court acknowledged that "numerous practical problems arise when a jury is actually faced with calculating and awarding damages, particularly in areas where the damages are not easily quantified."[116] Building from the premise that "[t]here simply are no standards by which to measure the effects of injuries or to convert them into dollar amounts;"[117] the court stated that "[w]here the damages cannot be calculated with mathematical certainty, the jury has liberal discretion in assessing damages."[118]

Noting that "Indiana has not heretofore adopted the comparability analysis for evaluating compensatory damage awards," the court observed that "[t]he vast majority of Indiana cases simply consider whether the verdict was reasonable in light of the evidence presented at trial" and that "each case should be considered on its own evidence."[119] The court wrote, "If a comparability analysis is applied to reduce awards exceeding the range of purportedly similar cases, the effects are far reaching. Because a comparability analysis effectively places a 'cap' on the jury's award regardless of the evidence, it can be

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charge, the addition to the award must reflect an increase in the noneconomic component of the award. In that case, the noneconomic portion of the verdict would actually be $52.4 million (i.e., *(($68,750,000 - $3,281,741) / $68,750,000) x $55,000,000*), with $2.6 million in economic damages. In the context of an award above $50 million, of course, a difference of $200,000 one way or the other is not especially material.

113. *Id.* at 843-44.

114. *Id.* at 844.

115. *Id.* (citations omitted).

116. *Id.* at 845.

117. *Id.* at 849.

118. *Id.* at 845

119. *Id.* at 846.

considered to be second-guessing jury decisions."[120] The court continued, "Furthermore, because all cases are unique, the search for comparable or similar cases is inherently flawed. The nature and extent of pain and suffering are seldom, if ever, alike in any two cases."[121] The court then reviewed the evidence in the case in minute detail, reciting at great length every bit of the physical and emotional toll that the injuries caused for the plaintiff and his family.[122] The court concluded that the evidence supported the verdict and rejected the defendant's excessiveness and due process challenges.[123]

Several other state courts have likewise refused to engage in an analysis of comparable verdicts as part of the excessiveness inquiry. In *Raimondi v. Ford Motor Co.*,[124] a California jury awarded $38.8 million in compensatory damages to an individual injured in an automobile accident, as well as $13 million to his spouse for loss of consortium. Based on the jury's finding that the plaintiff was fifty percent at fault for his injuries, the court reduced the award to $19.4 million for the husband and $6.5 million for the wife.[125] In response to Ford's argument that the loss of consortium award to the wife was more than six times larger than any other reported verdict for loss of consortium in the entire state in the preceding ten years, the California appellate court dismissed the notion of comparability analysis altogether, stating that "[t]he fact that other juries have awarded less in other cases involving different evidence is not a basis for reversal."[126] The court did not address Ford's excessiveness challenge with respect to the $19.4 million award in favor of the husband and denied Ford's petition for rehearing, and the California Supreme Court denied review.[127]

In *Gilbert v. DaimlerChrysler Corp.*,[128] a Michigan jury awarded $21 million in compensatory damages to a plaintiff alleging sexual harassment. In support of its argument that the award was excessive,

120. *Id.* at 848.

121. *Id.* at 849.

122. *Id.* at 850-56.

123. *Id.* at 856-58.

124. No. A091865, slip op. (Cal. Ct. App. May 31, 2001). As an unpublished decision, this case is not precedential in California. *See* CAL. R. CT. 977(a). The author represented Ford Motor Company in that litigation.

125. *Id.* at 1.

126. *Id.* at 18.

127. Raimondi v. Ford Motor Co., No. S099025 (Cal. Sept. 19, 2001).

128. No. 227392, 2002 WL 1767672, at *1 (Mich. Ct. App. July 30, 2002), *leave to appeal granted*, 661 N.W.2d 232 (Mich. 2003) (No. 122457). The author represents DaimlerChrysler in that litigation

DaimlerChrysler noted that the verdict was more than seventy times the largest single-plaintiff sexual harassment award ever affirmed in a published Michigan decision, even including cases where the harassment allegations were more severe. The Michigan appellate court rejected such a comparative analysis: "While some opinions make fleeting reference to comparable jury awards, the core analysis remains focused on the evidence in the case at bar."[129] In the court's view, "[j]ury awards in different cases involving wholly unrelated facts are not particularly germane to whether the trial court erred in denying remittitur, especially when the awards cited were given many years ago."[130] "That the jury exercised its independence by awarding Gilbert only about fifteen percent of the $140,000,000 [her counsel] said was appropriate suggests that it decided the amount of the award on how it perceived the evidence, . . . not because of passion, bias, or misunderstanding."[131] The court affirmed the verdict.[132]

E. Compensatory Damages and the Seventh Amendment

In addition to the historical common-law bases for judicial deference to the damages verdicts of juries, the Seventh Amendment provides a further reason for courts to proceed cautiously in reviewing damages awards. Exercise of judicial oversight in the area of excessive damages raises the concern that a court not undermine the "right of trial by jury" or "re-examine" any "fact tried by a jury," except to the extent that the court is acting "according to the rules of the common law."[133] The Supreme Court has provided a certain amount of guidance in this area, although some aspects of the Court's Seventh Amendment jurisprudence now appear to be in tension with

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129. *Id.* at *31. Of course, one of the courts that has made purportedly "fleeting reference" to comparability analysis is the Michigan Supreme Court, perhaps shedding some light on why the Michigan Supreme Court has elected to review the *Gilbert* case. *See* Palenkas v. Beaumont Hosp., 443 N.W.2d 354, 358 (Mich. 1989); Precopio v. Detroit Dep't of Transp., 330 N.W.2d 802, 808-09 (Mich. 1982).

130. 2002 WL 1767672 at *31.

131. *Id.*

132. *Id.* Other courts have also declined to consider comparable awards as part of evaluating excessiveness challenges. *See, e.g.*, Collins v. Hinton, 937 S.W.2d 164, 170 (Ark. 1997) ("We make such determinations on a case-by-case basis, as precedents are of little value in appeals of this kind, with the understanding that a jury has much discretion in awarding damages in personal injury cases."); Phillips v. District of Columbia, 458 A.2d 722, 724 (D.C. 1983) ("Regardless of the comparative size of a verdict, the excessiveness determination turns on whether, based on the facts and circumstances of the particular case, the verdict was the result of passion, prejudice, or mistake.").

133. U.S. CONST. amend. VII. This portion of the Seventh Amendment is often referred to as the "Reexamination Clause."

the Court's recent punitive damages case law.[134]

Around the turn of the last century, the Court addressed the constitutionality of common-law remittitur procedure with respect to a defendant's right to a jury trial. In *Arkansas Valley*, the Court held that the denial of a new trial conditioned upon a plaintiff's acceptance of a remittitur does not violate a defendant's right to trial by jury.[135] The defendant argued that a trial court's award of a substantial remittitur necessarily includes a determination that the jury acted out of "passion" or other misconduct, thus warranting the complete rejection of the verdict and a new trial. The Court disagreed and noted that resolution of such issues is "addressed to the discretion of the court, and cannot be reviewed at the instance of the party in whose favor the reduction was made."[136]

In *St. Louis, Iron Mountain, & Southern Railway Co. v. Craft, Inc.*,[137] the Court considered, among other issues, a defendant's excessiveness challenge to a judgment under the Federal Employers' Liability Act in favor of the estate of an employee who was run over by a train and who may have remained conscious for half an hour thereafter before dying.[138] The jury awarded the plaintiff $1000 for economic loss and $11,000 for pain and suffering, and the state supreme court affirmed the judgment after reducing the pain and suffering component to $5000.[139] According to the Court, "[t]he award does seem large, but the power, and with it the duty and responsibility, of dealing with this matter, rested upon the courts below. It involves only a question of fact, and is not open to reconsideration here."[140] Although the decision does not expressly mention the Seventh Amendment in connection with this proposition, the Court relies on several precedents that either explicitly address the Seventh Amendment or, in turn, cite other decisions involving the Seventh Amendment, strongly suggesting that the Seventh Amendment is the basis of the Court's holding regarding excessiveness.[141]

Eight decades later, in *Gasperini v. Center for Humanities, Inc.*,[142]

134. *See infra* Part III.
135. Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 72-76 (1889).
136. *Id.* at 76.
137. 237 U.S. 648 (1915).
138. *Id.* at 653-54.
139. *Id.* at 661.
140. *Id.*
141. *Id.*
142. 518 U.S. 415 (1996).

the Court considered the proper role of federal trial and appellate courts sitting in diversity in applying a New York statute authorizing state appellate courts "to review the size of jury verdicts and to order new trials when the jury's award 'deviates materially from what would be reasonable compensation.'"[143] The case involved an action for loss of photographic transparencies in which the defendant conceded liability and the sole issue at trial was damages. The jury awarded the plaintiff $450,000 in compensatory economic damages, representing $1,500 each for 300 slides. The district court denied without comment the defendant's motion for a new trial on the basis of excessiveness, and the court of appeals vacated the judgment.[144] Applying the New York statute, the court of appeals surveyed New York appellate decisions involving awards for lost transparencies, as a New York appellate court applying the statute would do, and concluded that the $450,000 verdict "materially deviates from what is reasonable compensation."[145] The court of appeals set aside the verdict and ordered a new trial unless the plaintiff agreed to a verdict of $100,000.[146]

In the Supreme Court, the plaintiff argued that the court of appeals violated the Reexamination Clause. Justice Ginsburg, writing for five members of the Court, began by concluding that New York's statute was a rule of substantive law that federal courts sitting in diversity were required to follow.[147] Turning to the Seventh Amendment question, the Court stated that the amendment, "which governs proceedings in federal court, but not in state court, bears not only on the allocation of trial functions between judge and jury . . . it also controls the allocation of authority to review verdicts."[148] Justice Ginsburg observed that "the Reexamination Clause does not inhibit the authority of trial judges to grant new trials 'for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States,'" and that in this respect a federal trial court's "authority is large."[149] The district court's "discretion includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to

143. *Id.* at 418 (quoting N.Y. C.P.L.R. 5501(c) (McKinney 1995)).
144. *Id.* at 419-20.
145. *Id.* at 420 (quotation omitted).
146. *Id.*
147. *Id.* at 426-31 (applying Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)).
148. *Id.* at 432 (footnote omitted).
149. *Id.* at 433 (quoting FED. R. CIV. P. 59(a)).

agree to a reduction (remittitur)."[150] The Court then contrasted this power with the authority of appellate courts: "[A]ppellate 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. Such review was once deemed inconsonant with the . . . Reexamination Clause."[151] Justice Ginsburg noted that "[b]efore today, we have not 'expressly [held] that the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an award as excessive.'"[152]

The Court concluded that "appellate review for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice," because although "[w]e must give the benefit of every doubt to the judgment of the trial judge . . . surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law."[153] In a footnote, the Court pointed out that the meaning of the Seventh Amendment is not necessarily "fixed at 1791," citing numerous modifications to jury practice that the Court has approved since the adoption of the Seventh Amendment.[154] Balancing the interest of the federal system in maintaining the customary relationship between federal trial and appellate courts, as well as the requirements of the Reexamination Clause, against New York's interest in having its substantive law applied in diversity actions, the Court determined that the best accommodation was "to lodge in the district court, not the court of appeals, primary responsibility for application of § 5501(c)'s 'deviates materially' check."[155] Thus, "District court applications of the 'deviates materially' standard would be subject to appellate review under the standard the Circuits now employ when inadequacy or excessiveness is asserted on appeal: abuse of discretion."[156] Because the district court had denied the motion for a new trial without comment and apparently did not attempt to apply the New York

150. *Id.*

151. *Id.* at 434.

152. *Id.* (second alteration in original) (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S 257, 279 n. 25 (1989)).

153. *Id.* at 435 (quotation omitted).

154. *Id.* at 436 n.20 (noting that juries now include women and may involve six rather than twelve members, that trial courts may now order new trials limited to the issue of damages and may award judgment as a matter of law, and that issue preclusion no longer requires mutuality of parties).

155. *Id.* at 438 (quoting N.Y. C.P.L.R. 5501(c)).

156. *Id.*

excessiveness standard, the Supreme Court vacated the judgment and remanded for reconsideration of the new trial ruling under the proper standard.[157]

Two Terms after the Court decided *Gasperini*, it addressed the Seventh Amendment implications of judicial reduction of damages. In *Hetzel v. Prince William County*,[158] the plaintiff brought suit under federal discrimination law, and the jury returned a $750,000 verdict in her favor.[159] The district court reduced the judgment to $500,000 after determining that one of the bases for the award was legally insufficient, and the court of appeals affirmed the liability determination but concluded that the damages were excessive.[160] That court remanded the case to the district court to recalculate damages for emotional distress, and on remand the district court awarded the plaintiff $50,000.[161] The plaintiff moved for a new trial, contending that, under the Seventh Amendment's guarantee of a jury trial, the district court was required to provide her the option of a new trial if she did not wish to accept the reduced judgment, and the district court granted that motion.[162] The court of appeals, however, thereafter

157. *Id.* at 439. Justice Stevens dissented, arguing that there was no need for a remand because the court of appeals had already conducted the necessary analysis under state law and because in his view the Seventh Amendment presents no obstacle to appellate review of excessive jury awards, given the inherently legal nature of the excessiveness inquiry. *Id.* at 440-42 (Stevens, J., dissenting). Justice Stevens stated that under English common law, even though orders denying new trials were not technically subject to appellate review, the procedure was more akin to having an appellate court rule on the motion for a new trial in the first instance, because the judges ruling on the motion generally did not participate in the trial. *Id.* at 443.

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented from the opposite direction. Whereas Justice Stevens viewed the majority as unduly restricting the authority of the federal appellate courts, Justice Scalia lamented what he viewed as the overruling of "a longstanding and well-reasoned line of precedent that has for years prohibited federal appellate courts from reviewing refusals by district courts to set aside civil jury awards as contrary to the weight of the evidence." *Id.* at 448-49 (Scalia, J., dissenting). Unlike Justice Stevens, who viewed the inquiry regarding the appropriate range of acceptable verdicts under state law as predominantly an issue of law, Justice Scalia considered this inquiry primarily factual in nature. Citing, among other cases, *St. Louis, Iron Mountain & Southern Railway Co. v. Craft, Inc.*, 237 U.S. 648 (1915), Justice Scalia argued that "[n]o less than the existence of liability, the proper measure of damages 'involves only a question of fact,' as does a 'motio[n] for a new trial based on the ground that the damages . . . are excessive." *Gasperini*, 518 U.S. at 453 (Scalia, J., dissenting) (first quoting *St. Louis, Iron Mountain & S. Ry. Co.*, 237 U.S. at 661) (second quoting Metro. R. Co. v. Moore, 121 U.S. 558, 574 (1887)). "As appeals from denial of such motions necessarily pose a factual question," his dissent continued, "courts of the United States are constitutionally forbidden to entertain them." *Id.*

158. 523 U.S. 208 (1998).

159. *Id.* at 208-09.

160. *Id.* at 209-10.

161. *Id.*

162. *Id.*

issued a writ of mandamus staying the new trial and directing the district court to determine the proper damages award.[163] In a short per curiam opinion, the Supreme Court held that the Seventh Amendment requires that, where a verdict has been determined to be excessive, a court that imposes a remittitur must afford the affected party the option of rejecting the reduced award and proceeding with a new trial. The Court concluded, "The Court of Appeals' writ of mandamus, requiring the District Court to enter judgment for a lesser amount than that determined by the jury without allowing petitioner the option of a new trial, cannot be squared with the Seventh Amendment."[164]

II. THE INADEQUACY OF TRADITIONAL PROCEDURES FOR AWARDING NONECONOMIC COMPENSATORY DAMAGES AND REVIEWING VERDICTS

Courts have long recognized the challenges posed by noneconomic damages, particularly with respect to reviewing those damages for excessiveness. Unlike economic damages, for which all information required to enable the jury to reach a just, meaningful, and informed decision will be contained in the trial record, noneconomic damages necessarily involve considerations beyond the facts of a given case. Juries are therefore left without any real guidance, aside from their own personal sensibilities and experiences, regarding how to value intangible harms. Trial courts reviewing noneconomic compensatory damages awards all too often restrict their analysis to whether the verdict appears so large as to demonstrate that the jury was swayed by bias or passion. Trial court rulings on new trial motions based on excessiveness are often unprincipled and unpredictable, and appellate courts reviewing trial court decisions regarding excessiveness frequently are no less arbitrary. In the end, defendants arguing excessiveness find themselves facing the uncomfortable reality of knowing that the court presumably has some number in mind regarding how much would be "too" much in a given case, but where the award lies in relation to that magic number will not be revealed until the court issues its decision. Courts have increasingly affirmed large awards of noneconomic compensatory damages without hesitation, in the process demonstrating that traditional procedures no longer provide adequate protection from arbitrary deprivation of property.

163. *Id.*
164. *Id.* at 211.

A. Jurors Receive Inadequate Guidance or Evidence to Enable Them to Render an Informed Verdict

A brief examination of the process by which jurors are typically asked to assess noneconomic compensatory damages demonstrates just how little guidance jurors receive. Litigants seeking noneconomic compensatory damages generally ask the jury to award a certain number for one or more types of injuries. A plaintiff's counsel might ask the jury to grant her client $100,000 for emotional distress, or $2 million for pain and suffering, or $10 million for loss of consortium, without presenting any evidence or analysis to justify the number. For example, in one recent case now pending before the Michigan Supreme Court, in which punitive damages were not recoverable under the governing law, the plaintiff's counsel simply asked the jury to award the plaintiff $140 million.[165] Another approach is to use a small dollar number per unit of time multiplied by a long time period, such as arguing $25 per hour for every hour of paralysis, multiplied by twenty years of suffering, for a total award of $4.4 million. A variant of that approach is to argue for an even smaller amount per hour, multiplied by not only the total number of hours but also the number of various types of noneconomic injury deemed compensable in the jurisdiction, such as arguing for $10 per hour for each of ten types of intangible injury, multiplied by thirty years, yielding a request for $26.3 million. Defendants opposing such awards will likely prefer not to present rebuttal testimony regarding noneconomic compensatory damages. Putting on a damages case under these circumstances would be awkward at best, because no litigant wants to stand in front of a jury denigrating an injured plaintiff's suffering or, worse, appearing to belittle the worth of a plaintiff's deceased loved one. In addition, when a plaintiff casts the argument in terms of how much compensation would be fair per hour of suffering, it would be a strange and dangerous endeavor for a defendant to argue against $10, $15, or $20 in favor of whatever figure might yield a verdict that the defendant could accept, such as $0.50, $1, or $2 per hour. As a result, defendants often forego a damages case with respect to intangible injuries and focus on the liability case, including any defenses such as comparative fault, that do not necessarily put the defendant in the

165. The jury awarded $21 million, $20 million of which reflected noneconomic compensatory damages. Gilbert v. DaimlerChrysler Corp., No. 94-409216-NH (Mich. Cir. Ct. Oct. 8, 1999).

position of potentially being seen by the jury as minimizing an injury that the defendant itself caused.

What the jury typically hears from the parties, therefore, tends to be the plaintiff's very large number and the defendant's argument that the number should be substantially lower, and perhaps zero, based on the liability issues alone. The court then informs the jurors that if they find the defendant liable, they are to award an amount that they believe will fairly compensate the plaintiff for the injury at issue. If punitive damages are not part of the case, there may be an instruction that the jury is not to attempt to punish the defendant, but rather that the award is limited to compensating the plaintiff. With that set of information and instructions, the jury retires to the deliberation room and, if it finds liability, does the best that it can to come up with a number. The fundamental problem at that point in the process is that the jury has essentially been asked to conjure a damages figure from thin air. The mechanism for producing a jury verdict in an informational vacuum is entirely arbitrary, and if the jury returns a verdict that is not outrageously large, that is only because the defendant has been lucky.

For economic injuries, by contrast, parties virtually always present damages evidence. No prudent attorney would dream of relying solely on the common sense and experience of jurors to arrive at a reasonable estimation of the value of a 15-year-old 700,000 square foot warehouse, or a 1993 Winnebago, or the lost wages of a 28-year-old steel worker rendered forty percent disabled on a permanent basis, or contract damages where an electronics supplier delivers 60,000 computer chips two months past the agreed-upon date. Yet we expect jurors to "know" how to value an amputated arm, or permanent blindness, or 35 years of future severe lower back pain, or 11 months of sexual harassment, or 20 years of lost consortium, or the death of a spouse or child or other loved one. In effect, the law assumes that jurors do not bring to the courtroom sufficient experience and common sense with respect to the worth of items that can be valued with a reasonable degree of certainty, while at the same time assuming that the value of intangible harms is within the jurors' collective wisdom. In addition, the evidence concerning economic harm will virtually always contain its own internal limit, thereby serving as a readily identifiable check on excessiveness. Assuming that the jury finds liability, the valuation proposed by the plaintiff will represent the maximum amount that the jury can rationally award. If the jury awards economic damages above that amount, courts will

have ample grounds to find the verdict excessive. If, for example, the case involves the loss of a two-year-old automobile, the plaintiff may argue that a new vehicle of the same type would cost $30,000, and that a two-year-old model in excellent condition is worth $22,000. In response, the defendant might argue that the car was actually not well maintained and that a comparable replacement would be worth only $14,000. If the jury returned a verdict in excess of $30,000, or perhaps even in excess of $22,000, that verdict would likely be deemed excessive and unsupported by the evidence.[166]

In the area of noneconomic damages, however, the evidence at trial does not contain a clear upper boundary for damages. Particularly where an individual has suffered death or horrible physical pain, there is no principled basis within the trial record for arguing that the maximum appropriate recovery should be $50,000, or $1 million, or $5 billion. The amorphous nature of intangible injuries exposes defendants to open-ended liability.[167] At least as far back as *Hewlett v.*

166. *See, e.g.*, Fitzgerald v. Mountain States Tel. & Tel. Co., 68 F.3d 1257, 1264-65 (10th Cir. 1995) (reversing and ordering new trial where jury awarded plaintiffs $310,000 and $225,000 for lost business opportunities, where evidence supported, at most, $81,000 per plaintiff); Jones v. Pineda, 22 F.3d 391, 397 (1st Cir. 1994) (affirming remittitur where jury miscalculated plaintiff's contract damages by failing to deduct contract revenue received before breach as well as subsequent income received from other sources); Kolb v. Goldring, Inc., 694 F.2d 869, 874 (1st Cir. 1982) (reversing $45,000 compensatory damages award as excessive where non-speculative items of lost compensation supported award no greater than $24,650); Jamison Co. v. Westvaco Corp., 526 F.2d 922, 930-32 (5th Cir. 1976) (reversing denial of new trial where no plausible set of assumed findings by the jury could justify the $607,000 breach of contract award, and the largest figure that plaintiff could justify was $143,000 lower than the verdict); Glazer v. Glazer, 374 F.2d 390, 413 (5th Cir. 1967) (reversing denial of new trial based on excessiveness where jury awarded contract plaintiff full estimated value of business as damages, rather than value of lost salary and bonuses to which plaintiff claimed entitlement); Virginian Ry. Co. v. Armentrout, 166 F.2d 400, 407-08 (4th Cir. 1948) (reversing denial of new trial based on excessiveness where $160,000 award for lost wages would purchase an annuity that provided for greater wage replacement than the evidence supported); Slade v. Whitco Corp., 811 F. Supp. 71, 74-77 (N.D.N.Y. 1993) (ordering new trial unless plaintiff accepts remittitur of $14.5 million award of economic damages to $9 million); Rose v. Des Moines Valley R.R. Co., 39 Iowa 246, 257 (1874) (remitting $10,000 award for lost wages to $5000, where evidence showed that the plaintiff's decedent had annual net earnings of $253.11 at the time of his death and a life expectancy of 38.39 years, and $5000 invested at six percent interest would yield annual income somewhat above what the decedent had been earning); Anderson v. A.P.I. Co. of Minn., 559 N.W.2d 204, 210 (N.D. 1997) (reducing $25,000 award for past economic damages to $17,453.09, where only evidence concerning economic loss consisted of medical bills totaling that lesser amount); Brown v. Paxton, 2 A.2d 729, 730-31 (Pa. 1938) (reducing $6500 award to $3500 where the only proved economic losses were $294, the evidence did not support award of lost wages, and the remainder of award was for pain and suffering).

167. *See, e.g.*, 2 DOBBS, *supra* note 1, § 377 ("[I]t is difficult to set rational limitations on awards. The claim of pain is therefore a serious threat to the defendant, since, lacking any highly objective components, it permits juries to roam through their biases in setting an award."); Randall R. Bovbjerg et al., Valuing Life and Limb in Tort: Scheduling "Pain and Suffering", 83 NW. U. L. REV. 908, 917-19 (1989).

Cruchley[168] in 1813, some judges have plainly conceived of the nature of the excessiveness inquiry as examining whether the sum awarded was more than the amount of money it would take to induce a willing individual ex ante to experience the harm at issue.[169] Under that conception of excessiveness, at least where serious physical or emotional injury or death is involved, arguably no amount of damages could ever be unlawful. In a very real sense, the presence of a claim for intangible injury can turn any case involving at least moderately serious injuries into bet-the-company litigation.

Indeed, it is not at all clear what the court is even asking the jury to do when it instructs jurors to compensate a plaintiff for intangible injuries. Most courts accept the notion that noneconomic compensatory damages are designed to make an injured party "whole" and to put that party in the position she would have occupied had the injury not occurred.[170] Nearly all commentators, however, acknowledge the impossibility of restoring the plaintiff to the position she occupied before the injury.[171] As one writer has aptly noted, a noneconomic compensatory damages award "is the jury's way of telling the victim, 'We're sorry you had to go through that, and we hope this helps out.'"[172]

In the end, all that an award of noneconomic compensatory damages is, and all that it can be under current practice, is a dollar

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168. 5 Taunt. 277, 281, 128 Eng. Rep. 696, 698 (C.P. 1813).

169. Indeed, it is unlawful to make such a "golden rule" argument directly to a jury because of the danger of inciting passion or prejudice. That some courts would elect to use a principle for review deemed too dangerous for juries to consider underscores the weakness of the present system.

170. *See, e.g.*, Preston v. DuPont, 35 P.3d 433, 441 (Colo. 2001); Samsel v. Wheeler Transp. Serv., Inc., 789 P.2d 541, 552 (Kan. 1990).

171. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS, § 903 cmt. a (1979) ("When . . . the tort causes bodily harm or emotional distress, the law cannot restore the injured person to his previous position. . . . [A] sum of money is not the equivalent of peace of mind. Nevertheless, damages given for pain and humiliation are called compensatory."); Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1579 (1997) ("Whatever the judicial gloss, making the victim whole is clearly a metaphorical aspiration, not a literal one. A plaintiff who receives damages for a tortiously amputated arm does not actually regain the lost limb."); Leonard E. Gross, *Time and Tide Wait for No Man: Should Lost Personal Time be Compensable?*, 33 RUTGERS L.J. 683, 695 (2002) ("We recognize that an award of damages cannot ease the victim's pain . . . .").

172. Todd M. Kossow, Note, Fein v. Permanente Medical Group: *Future Trends in Damage Litigation Adjudication*, 80 NW. U. L. REV. 1643, 1671 (1986); *see also* Gross, *supra* note 171, at 695 (suggesting that an award of noneconomic damages "may be the best that our legal system can do to provide some solace and to demonstrate the extent to which we recognize the victim's suffering"); Ingber, *supra* note 1, at 781-82 ("Although money damages may not be an equivalent to the injury experienced, they can serve as an important symbolic means of preserving the entitlement of personal security and autonomy against infringement.").

amount agreed to by a sufficient number of jurors, through a secret process, based on undisclosed considerations largely divorced from the evidence presented in the case. Certainly the jury is in the best position to assess whether and to what extent the plaintiff has suffered injury and whether, pursuant to the law contained in the court's instructions, the defendant is liable for all, some, or none of that injury. Such evaluations are patently factual, and they depend exclusively on the evidence in the record. Assigning a dollar value to the noneconomic injuries allegedly caused by the defendant's actions, however, does not involve a determination of any issue of historical fact, in the sense of rendering a decision that can be evaluated as correct or incorrect. Instead, determining noneconomic compensatory damages is inherently a subjective inquiry involving jurors' personal, emotional, and philosophical reactions to the case, leading to an individualized assessment of what level of monetary award best comports with each juror's overall sense of justice and fairness. The jurors debate the matter and arrive at a figure with which the requisite number of jurors can agree. This is the very definition of arbitrariness, and commentators have frequently criticized the variability of awards of noneconomic compensatory damages.[173]

Finally, there is also reason to believe that jurors may fail to keep separate the issues of compensation and punishment.[174] As some courts and legislatures have begun to consider caps and other limits with respect to punitive damages, such as narrowing the range of cases in which punitive damages may be awarded, commentators have noted the likelihood that juries will simply inflate awards of noneconomic damages to reach their desired net outcome.[175] This

173. *See* James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171, 173-76 (1991); Bovbjerg et al., *supra* note 167, at 911-14; Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 783-89 (1995); Marcus L. Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200, 207 (1958); Roselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 754-55 (1999); Frederick S. Levin, Note, *Pain and Suffering Guidelines: A Cure for Damages Measurement "Anomie"*, 22 U. MICH. J.L. REFORM 303, 304-10 (1989).

174. *See, e.g.*, Michelle Chernikoff Anderson & Robert J. MacCoun, *Goal Conflict in Juror Assessments of Compensatory and Punitive Damages*, 23 LAW & HUM. BEHAV. 313, 317-321 (1999) (describing study in which respondents were provided a personal injury case summary and were asked to award damages; one group of respondents was given a punitive damages instruction and the other was not and was expressly instructed not to factor the defendant's culpability into the award; the respondents who were not permitted to award punitive damages awarded more in compensatory damages, particularly for pain and suffering, than did the respondents who were allowed to award punitive damages).

175. *See* Robert J. MacCoun, *The Costs and Benefits of Letting Juries Punish*

concern may be particularly acute where the defendant has allegedly engaged in conduct that, while perhaps not meeting the threshold for punitive damages, may nonetheless cause the jury to view the defendant in a negative light. Where a trial involves evidence suggesting that the defendant caused the plaintiff's injury through conduct more culpable than simple negligence, jurors acting in good faith may nonetheless find themselves incapable of preventing a punitive element from entering the nominally compensatory award.[176]

When jurors are instructed that upon finding liability they are to "compensate" the plaintiff or to make the plaintiff "whole" for intangible harms, with no meaningful guidance regarding how to value those harms, the result is nothing more than an arbitrary guess. A defendant may hope that the jury exercises restraint and returns a verdict roughly in line with the dollar amounts with which the jurors are familiar in their day-to-day lives, given the reality that few multi-millionaires or billionaires sit on juries. But when the jury returns a very large verdict, the defendant's only protection from a capricious deprivation of its property is a robust mechanism for judicial review.

B. Judicial Review of Awards of Noneconomic Compensatory Damages for Excessiveness Generally Lacks Principle or Predictability

Before the middle of the seventeenth century, the sole remedy for an unsuccessful litigant contending that a damages award was excessive was a further proceeding in attaint to determine whether the jury had engaged in an impermissible form of misconduct that would render the verdict void. That historical focus on misconduct by the jury plainly influenced English judges as the concept of the new trial based on excessiveness developed, leading to the rhetorical emphasis on evaluating whether the jury acted with passion or prejudice. As the standards for courts reviewing jury verdicts for excessiveness have evolved, however, it has become clear that the only real data for a court's analysis, barring unusual circumstances such as discovery of

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Corporations: Comment on Viscusi, 52 STAN. L. REV. 1821, 1827-28 (2000) ("If jurors are prevented altogether from awarding punitive damages, it is likely that they will 'hydraulically' inflate non-economic compensatory damages instead."); Christian E. Schlegel, *Is a Federal Cap on Punitive Damages in Our Best Interest? A Consideration of H.R. 956 in Light of Tennessee's Experience*, 69 TENN. L. REV. 677, 682 (2002) ("Thus, even if the award were to be eliminated completely, the spirit of punitive damages will continue through these non-economic damages."); Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment"*, 54 S.C. L. REV. 47, 49 (2002).

176. *See* Schwartz & Lorber, *supra* note 175, at 59-60.

direct evidence of juror misconduct, consist of the size of the verdict and the evidence in the case. The rubric of juror misconduct thus provides a convenient stalking horse for the analysis the court actually undertakes: a subjective inquiry into whether the verdict strikes the court as too large in light of the evidence.

In any event, focusing on inferred juror misconduct seems to ask the wrong question. If a jury is provided with no guidance regarding how to value an intangible injury, other than perhaps the plaintiff's request for $50 million and the defendant's argument that it is not liable in the first place, it is easy to see how juries could return a verdict that is far in excess of what ought to be affirmed, but through no form of misconduct at all. It is certainly possible for jurors to be swept away by emotion or to inject a punitive element into their verdicts. But it is also quite natural that juries that are in effect blindfolded and asked to play a guessing game will, from time to time, generate some surprising results.

Just as it is unclear exactly what a jury ought to do in awarding damages for intangible injuries, it is nearly as unclear just what a court ought to do in reviewing such awards. There seems to be general acceptance of the view that at some point, a verdict for noneconomic compensatory damages exceeds the range permitted by law as applied to a particular set of facts. It is further accepted that in those circumstances a court should identify the permissible range, or at least the upper boundary of that range, in order to evaluate the jury's damages verdict. Beyond that, however, the law has provided surprisingly little guidance to judges with respect to how to identify the line beyond which a jury's verdict ceases to be legitimately compensatory.

Courts that attempt to anchor their analysis in objective criteria, such as the size of awards in factually comparable cases, may reduce significantly the subjectivity of the process and lend a degree of predictability and perceived fairness to their analysis. Whether a court will be willing to engage in a review of comparable cases is itself often a matter of doubt until the court actually issues its decision. Decisions that make a good-faith effort to employ a comparative analysis lend an air of principle and objectivity to the excessiveness review.

The nature of intangible harms is that their value can be fairly determined only in reference to awards in other factually comparable

cases.[177] In the realm of noneconomic damages, there are rarely new claims for injuries that have never previously occurred. People have been suing based on all kinds of injuries for as long as the law has afforded relief. Law libraries are full of cases involving damages awarded for lost limbs, loss of consortium, emotional distress, pain and suffering, wrongful death, and more. Although it is often impossible to find a precedent that is factually identical in every respect, there is a massive body of case law reporting the results of innumerable trials involving the full panoply of harms. Past juries have assigned dollar amounts to mild slights and excruciating physical and mental injuries alike, and some courts will have reviewed those decisions expressly for excessiveness. In almost no instance would there be a total absence of reasonably analogous precedent reflecting a comparable injury. For courts that do not accept a comparative analysis, however, the process of judicial examination of excessiveness amounts to nothing more illuminating than "I know it when I see it."[178] History shows, however, that one court's excess may well be another court's idea of dispassionate juror deliberation.[179] In addition, there has been a rapid proliferation in recent years of ever-increasing awards of noneconomic compensatory damages that are surviving judicial review. Before 1985, there were only a handful of reported decisions upholding noneconomic compensatory damages awards of $1 million or more, and the largest such award appears to be less than $6 million.[180] In the late 1980s and early 1990s, however,

177. It is possible that legislative or administrative determinations could also shed light on appropriate valuations. For example, workers' compensation programs may provide compensation guidelines for particular types of injuries. To the extent that such determinations are designed primarily to address lost wages, however, they may not constitute the most appropriate objective comparison.

178. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

179. *See supra* Part I.D.

180. *See* Shaw v. United States, 741 F.2d 1202, 1208-09 (9th Cir. 1984) (reducing $5 million award to parents of child with brain damage to $1 million); Blevins v. Cessna Aircraft Co., 728 F.2d 1576, 1579-80 (10th Cir. 1984) (affirming $1.3 million award in products liability case); Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 703 F.2d 1152, 1170-71 (10th Cir. 1981) (affirming $1 million award based on alleged fraud); Marks v. Mobil Oil Corp., 562 F. Supp. 759, 773 (E.D. Pa. 1983) (upholding $3.5 million award for pain and suffering in automobile accident case), *aff'd*, 727 F.2d 1100 (3d Cir. 1984); Hasson v. Ford Motor Co., 650 P.2d 1171, 1190-91 (Cal. 1982) (affirming $5.85 million award in products liability case); O'Brien v. Delta Gas, Inc., 426 So. 2d 262, 271-75 (La. Ct. App. 1983) (affirming two $1.5 million awards for children injured in gas explosion, but reducing $50,000 award for injured adult to $15,000); May v. City of Grosse Pointe Park, 332 N.W.2d 411, 411-12 (Mich. Ct. App. 1982) (affirming $1.145 million award in wrongful death case); Smith v. Archbishop of St. Louis, 632 S.W.2d 516, 525 (Mo. Ct. App. 1982) (affirming $1.25 million award to burn victim); Steinauer v. Sarpy County, 353 N.W.2d 715, 723-24 (Neb. 1984) (affirming $3.9 million award to automobile accident plaintiff, where it appeared that $2.6 million of the award reflected

courts began to see, and to approve, eight-figure verdicts for noneconomic compensatory damages, including a $13 million award upheld in 1987,[181] a $14.3 million award (reduced from $27 million) upheld in 1992,[182] a $12 million award upheld in 1993,[183] an $11 million award upheld in 1998,[184] and a $20 million award upheld in 1999.[185] Courts today rarely seem to find large verdicts shocking. Since January 2000, for example, courts have affirmed no fewer than thirty-two verdicts above $1 million,[186] including one decision

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pain and suffering); Stackiewicz v. Nissan Motor Corp. in U.S.A., 686 P.2d 925, 931-32 (Nev. 1984) (restoring $3.1 million award for products liability plaintiff, which trial court had reduced to $1.55 million on basis of excessiveness); Novell v. Carney Elec. Constr. Corp., 476 N.Y.S.2d 241, 247-48 (App. Div. 1984) (reducing $7 million award for pain and suffering based on injured leg to $1.9 million); Terwilliger v. State, 466 N.Y.S.2d 792, 794 (App. Div. 1983) (affirming $1.5 million award to automobile accident plaintiff); Warmsley v. City of New York, 454 N.Y.S.2d 144, 146 (App. Div. 1982) (affirming $2 million award to automobile accident victim); Gulf States Util. Co. v. Reed, 659 S.W.2d 849, 855 (Tex. App. 1983) (affirming $1 million award based on death of child).

181. Harrigan v. Ford Motor Co., 406 N.W.2d 917, 924-25 (Mich. Ct. App. 1987).

182. Harvey v. Mazal Am. Partners, 581 N.Y.S.2d 748, 750 (App. Div. 1992).

183. Gen. Chem. Corp. v. De La Lastra, 852 S.W.2d 916, 919-21 (Tex. 1993).

184. Watkins v. Cleveland Clinic Found., 719 N.E.2d 1052, 1068-70 (Ohio Ct. App. 1998).

185. Va. Elec. & Power Co. v. Dungee, 520 S.E.2d 164, 179-80 (Va. 1999).

186. *See* Trull v. Volkswagen of Am., Inc., 320 F.3d 1, 9-10 (1st Cir. 2003) (affirming $3.6 million pain and suffering award in automobile products liability case); Smith v. Ingersoll-Rand Co., 214 F.3d 1235, 1251-52 (10th Cir. 2000) (affirming $8 million award to injured worker and his wife); Hechinger Co. v. Johnson, 761 A.2d 15, 26 (D.C. 2000) (affirming $2 million award based on brain damage resulting from assault by defendant's employee); Hendry v. Zelaya, 841 So. 2d 572, 575-76 (Fla. Dist. Ct. App. 2003) (affirming $4.5 million award for plaintiff with brain damage); Beam v. Kingsley, 566 S.E.2d 437, 439 (Ga. Ct. App. 2002) (affirming $2.5 million for widow of drunk driving accident); Jones v. Chicago Osteopathic Hosp., 738 N.E.2d 542, 556 (Ill. App. Ct. 2000) (affirming $6.2 million survival and wrongful death verdict); Kresin v. Sears, Roebuck & Co., 736 N.E.2d 171, 177-78 (Ill. App. Ct. 2000) (affirming $15 million verdict for plaintiff struck by defendant's van); Duncan v. Kansas City S. Ry. Co., 773 So. 2d 670, 683 (La. 2000) (reducing $8 million award to $6 million in automobile accident case); Coleman v. Deno, 832 So. 2d 1016, 1026 (La. Ct. App. 2002) (affirming $4.4 million award in medical malpractice case); Hall v. Brookshire Bros., Ltd., 831 So. 2d 1010, 1026 (La. Ct. App. 2002) (affirming $1.5 million award in medical malpractice case); Squibb v. Century Group, Inc., 824 So. 2d 361, 369-70 (La. Ct. App. 2002) (affirming $1.59 million award to injured motorcyclist); Schiro v. State, 808 So. 2d 500, 510-12 (La. Ct. App. 2001) (affirming $1 million award in automobile accident case); Hicks v. State, 802 So. 2d 1005, 1013 (La. Ct. App. 2001) (affirming $1 million award in automobile accident case); Thornton v. Nat'l R.R. Passenger Corp., 802 So. 2d 816, 824 (La. Ct. App. 2001) (affirming $1.5 million award to injured employee); Simon v. Am. Crescent Elevator Co., 767 So. 2d 64, 75 (La. Ct. App. 2000) (affirming $8.55 million award to quadriplegic and his family); Fleming v. Am. Auto. Ass'n, Inc., 764 So. 2d 274, 280-81 (La. Ct. App. 2000) (affirming $1 million award in faulty medical evacuation); Irion v. State, 760 So. 2d 1220, 1232-34 (La. Ct. App. 2000) (affirming $1 million in automobile accident case); Meek v. Dep't of Transp., 610 N.W.2d 250, 259 (Mich. Ct. App. 2000) (affirming $3 million award in survival and wrongful death action); McRae v. St. Michael's Med. Ctr., 794 A.2d 219, 230 (N.J. Super. Ct. App. Div. 2002) (restoring $1.175 million medical malpractice award, which trial court had reduced to $500,000); Davis v. City of New York, 741 N.Y.S.2d 108, 109-10 (App. Div. 2002) (reducing $6 million award to $2 million in automobile accident

affirming a verdict of more than $52 million[187] and two verdicts in excess of $20 million that were affirmed in opinions that the courts did not even deem noteworthy enough to merit publication.[188] Although inflation can be expected to account for some measure of increase in verdicts over time, it does not explain the rapid emergence of decisions affirming awards that would have been regarded as outrageous just a few years ago.

As has become increasingly clear, the "passion or prejudice" and "shocks the conscience" standards for evaluating excessiveness are simply no standards at all. The lack of objective criteria for evaluating awards of noneconomic compensatory damages, aside from considering awards in factually comparable cases, leads to both arbitrary results and the perception that the process is unprincipled. A defendant against whom a jury has returned a seven- or eight-figure verdict, or larger,[189] should be able to trust that the court considering its excessiveness challenge will apply a standard more exacting than personal whim and subjective sensibility. Nor, for that matter, should a plaintiff be subjected to a process that fosters the perception that whether the plaintiff will be allowed to retain some or all of a gigantic verdict depends primarily on the political or ideological inclinations of judges. Where the focus of judicial review for excessiveness is within the four corners of the trial record, courts are in no better position than juries to draw principled distinctions between awards of $50,000 or $1 million or $5 billion. The current standards courts use

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case); Rappold v. Snorac, Inc., 735 N.Y.S.2d 687, 690-91 (App. Div. 2001) (reducing $15 million award in automobile accident case to $7 million); Martelly v. New York City Health & Hosp. Corp., 714 N.Y.S.2d 64, 66 (App. Div. 2000) (affirming $4 million in medical malpractice action); Brown v. City of New York, 713 N.Y.S.2d 223, 225 (App. Div. 2000) (affirming $4 million to each of two brothers injured while diving); Cabrera v. New York City Health & Hosp. Corp., 708 N.Y.S.2d 429, 429-30 (App. Div. 2000) (affirming $1.15 million award in medical malpractice case); Keefe v. E & D Specialty Stands, Inc., 708 N.Y.S.2d 214, 215 (App. Div. 2000) (affirming $1 million for injured employee); Lind v. City of New York, 705 N.Y.S.2d 59, 61 (App. Div. 2000) (reducing $12.5 million award to bicyclist injured by bus to $2.75 million); Rodgers v. 72nd St. Assocs., 703 N.Y.S.2d 456, 458 (App. Div. 2000) (reducing $2.6 million pain and suffering and loss of consortium award for injured worker and his spouse to $1,075,000); Welch v. Epstein, 536 S.E.2d 408, 421 (S.C. Ct. App. 2000) (affirming $3 million in wrongful death case); Haselden v. Davis, 534 S.E.2d 295, 300-01 (S.C. Ct. App. 2000) (affirming $2 million in survival and wrongful death action); Scott v. Porter, 530 S.E.2d 389, 394-96 (S.C. Ct. App. 2000) (affirming $2.1 million award in wrongful death and survival action).

187. Ritter v. Stanton, 745 N.E.2d 828, 843-58 (Ind. Ct. App. 2001).

188. Raimondi v. Ford Motor Co., No. A091865 (Cal. Ct. App. May 31, 2001); Gilbert v. DaimlerChrysler Corp., No. 227392, 2002 WL 1767672 (Mich. Ct. App. July 30, 2002), *leave to appeal granted*, 661 N.W.2d 232 (Mich. 2003) (No. 122457).

189. In the area of punitive damages, juries have already begun to return verdicts in excess of $1 billion. To date, such awards have not survived full judicial review.

for evaluating excessiveness of noneconomic compensatory damages do not adequately protect defendants from arbitrary deprivation of property.

The infirmities in the current processes for guiding juries and reviewing verdicts for excessiveness are even more apparent when one considers the Supreme Court's punitive damages jurisprudence. As discussed in the next section, the Court has recently found it necessary to depart from historical practice in order to prevent common-law procedures from denying litigants due process protection from capricious confiscation of their assets. The Court has been particularly concerned about inadequate guidance to jurors, insufficiently objective bases for judicial review, and excessive deference to flawed procedures in the trial court. Those concerns resonate with just as much force in the context of noneconomic compensatory damages.

III. THE SUPREME COURT'S PUNITIVE DAMAGES JURISPRUDENCE

In a series of cases beginning in 1991, the Supreme Court of the United States has adopted as a matter of federal due process numerous substantive and procedural limitations on punitive damages awards to guard against excessiveness. Over the course of twelve years, the Supreme Court's approach to punitive damages shifted from an essentially hands-off approval of common-law practice for awarding and reviewing punitive damages to an express recognition of a right not to be subjected to grossly excessive punitive awards. Increasingly concerned by the inadequacy of common-law standards for reviewing punitive damages verdicts, the Supreme Court now requires that courts apply three "guideposts"—the degree of reprehensibility of the defendant's conduct, the ratio of punitive to compensatory damages, and comparable civil or criminal penalties—in evaluating whether punitive awards are excessive. Appellate courts must apply these guideposts de novo, and the Supreme Court has indicated that a ratio of punitive to compensatory damages of nine-to-one may be the constitutional limit in most cases and that where compensatory damages themselves are large, one-to-one may be the limit.

A. Pacific Mutual Life Insurance Co. v. Haslip: *The Court's First Procedural Due Process Evaluation of Punitive Damages*

In *Pacific Mutual Life Insurance Co. v. Haslip*,[190] the Court considered what it interpreted as a general challenge to the common-law procedures for awarding punitive damages. The plaintiffs alleged that their insurance agent misappropriated the plaintiffs' health insurance premiums rather than remitting those payments to the insurer, thereby causing the plaintiffs' health insurance to lapse.[191] The plaintiffs sued the agent, along with one of the insurance companies for which he worked, for fraud, and *inter alia* the jury returned a verdict in favor of plaintiff Cleopatra Haslip in the amount of $1,040,000.[192] The Court described that award as probably reflecting punitive damages of at least $840,000 and compensatory damages of $200,000, based on the request by Haslip's attorney to the jury for $200,000 in compensatory damages.[193] The trial judge entered judgment accordingly, and a divided Alabama Supreme Court affirmed.[194]

1. The Majority Upholds Common-Law Punitive Damages Procedures

Justice Blackmun's majority opinion prefaced its analysis by noting that "[s]o far as we have been able to determine, every state and federal court that has considered the question has ruled that the common law method for assessing punitive damages does not in itself violate due process."[195] In light of this consistent history, the Court concluded, "[W]e cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional."[196] The Court also observed that "the common-law method for assessing punitive damages was well established before the Fourteenth Amendment was enacted. Nothing in that Amendment's text or history indicates an intention on the part of its drafters to overturn the prevailing method."[197]

Historical practice was not necessarily dispositive of the matter,

190. 499 U.S. 1 (1991).
191. *Id.* at 4-5.
192. *Id.* at 6-7.
193. *Id.* at 7 n.2.
194. *Id.* at 7.
195. *Id.* at 17.
196. *Id.*
197. *Id.* at 17-18.

however. Justice Blackmun remarked that "[i]t would be . . . inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional. We note once again our concern about punitive damages that 'run wild.'"[198] "One must concede," Justice Blackmun continued, "that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."[199] He concluded, "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case,"[200] but "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus."[201]

Turning to the specific circumstances of the case before it, the Court upheld the award on three grounds. First, the Court examined the jury instructions, concluding that "[t]he discretion allowed under Alabama law in determining punitive damages is no greater than that pursued in many familiar areas of the law as, for example, deciding . . . appropriate compensation for pain and suffering or mental anguish. As long as the discretion is exercised within reasonable constraints, due process is satisfied."[202] Second, the Court noted that Alabama "had established post-trial procedures for scrutinizing punitive awards," including review by the trial court of "the 'culpability of the defendant's conduct,' the 'desirability of discouraging others from similar conduct,' the 'impact upon the parties,' and 'other factors, such as the impact on innocent third parties.'"[203] In the Court's view, this post-trial examination of a punitive damages verdict "ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages."[204] Third, the Court saw the

198. *Id.* at 18 (citation omitted).

199. *Id.*

200. *Id.*

201. *Id.* Although Justice Blackmun's opinion relies predominantly on notions of procedural due process by focusing on the procedures employed, this reference to "reasonableness," coupled with the Court's later suggestion that the size of the award may have some bearing on constitutionality, *see id.* at 23-24, has led some to suggest that *Haslip* involves both procedural and substantive due process considerations. *See, e.g.*, TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 470 (1993) (Scalia, J., concurring) ("I do not, however, join the plurality opinion, since it makes explicit what was implicit in *Haslip*: the existence of a so-called 'substantive due process' right that punitive damages be reasonable." (citation omitted)).

202. *Haslip*, 499 U.S. at 20 (footnote omitted).

203. *Id.* (quoting Hammond v. Gadsden, 493 So. 2d 1374, 1379 (Ala. 1986)).

204. *Id.*

possibility of review by the Alabama Supreme Court as "an additional check on the jury's or trial court's discretion," noting that the state's highest court "first undertakes a comparative analysis [and] then applies the detailed substantive standards it has developed for evaluating punitive awards."[205] The Court concluded that "[t]his appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition."[206]

The Court also noted that it is "aware that the punitive damages award in this case is more than 4 times the amount of compensatory damages . . . and, of course, is much in excess of the fine that could be imposed for insurance fraud under [Alabama law]."[207] Nevertheless, "[w]hile the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety."[208]

2. Justice O'Connor's Dissent

Justice O'Connor dissented vigorously, noting that "[s]tates routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so. Rarely

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205. *Id.* at 20-21.

206. *Id.* at 21. This statement may have been unduly optimistic because, as discussed below, *see infra* Part III.D, just five years later the Court reversed as excessive a punitive damages award affirmed by the Alabama Supreme Court. BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

207. *Haslip*, 499 U.S. at 23.

208. *Id.* at 23-24. Justice Scalia concurred in the judgment, taking the position that "it has been the traditional practice of American courts to leave punitive damages . . . to the discretion of the jury . . . and . . . a process that accords with such a tradition and does not violate the Bill of Rights necessarily constitutes 'due' process." *Id.* at 24-25 (Scalia, J., concurring). In Justice Scalia's view, there was thus no need to inquire into the "fairness" or "reasonableness" of the procedures used. *Id.* at 25.

Justice Kennedy also concurred but disagreed with Justice Scalia's view "that widespread adherence to a historical practice always forecloses further inquiry when a party challenges an ancient institution or procedure as violative of due process." *Id.* at 40 (Kennedy, J., concurring). Justice Kennedy further noted that "[a] verdict returned by a biased or prejudiced jury no doubt violates due process, and the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case." *Id.* at 41. Justice Kennedy criticized the majority opinion for "seeming to approve the common-law method for assessing punitive damages, [but] nevertheless undertak[ing] a detailed examination of that method as applied in the case before us." *Id.* at 42. Justice Kennedy observed—presciently, as it turns out—that "[i]t is difficult to comprehend on what basis the majority believes the common-law method might violate due process in a particular case after it has approved that method as a general matter, and this tension in its analysis now must be resolved in some later case." *Id.*

is a jury told anything more specific than 'do what you think best.'"[209] In her view, "[s]uch instructions are so fraught with uncertainty that they defy rational implementation. Instead, they encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections."[210] She continued, "Multimillion dollar losses are inflicted on a whim. . . . I see a strong need to provide juries with standards to constrain their discretion so that they may exercise their power wisely, not capriciously or maliciously."[211]

For Justice O'Connor, the jury instructions "provided no meaningful standards to guide the jury's decision" and thus "were void for vagueness."[212] In her view, "Alabama's common-law scheme is so lacking in fundamental fairness that the propriety of any specific award is irrelevant. *Any* award of punitive damages rendered under these procedures, no matter how small the amount, is constitutionally infirm."[213] Justice O'Connor criticized the Alabama procedures for "provid[ing] no information to the jury about criminal fines for comparable conduct or the range of punitive damages awards in similar cases."[214] "In short," she argued, "the trial court's instruction identified the ultimate destination, but did not tell the jury how to get there. Due process may not require a detailed roadmap, but it certainly requires directions of some sort."[215] Invoking the Court's procedural due process jurisprudence, including *Mathews v. Eldridge*,[216] Justice O'Connor noted that "[w]hether or not the Court

209. *Id.* at 42 (O'Connor, J., dissenting) (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan, J., concurring)).

210. *Id.* at 43.

211. *Id.*

212. *Id.*

213. *Id.* at 43-44.

214. *Id.* at 48.

215. *Id.* at 49.

216. 424 U.S. 319 (1976) (upholding procedure for terminating social security disability benefits). In two parallel lines of cases beginning in the 1960s, the Court addressed the requirements of procedural due process with respect to pre-judgment deprivations of property during litigation between private parties, *see* N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (invalidating state ex parte garnishment statute); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (upholding state ex parte sequestration statute); Fuentes v. Shevin, 407 U.S. 67 (1972) (invalidating two state ex parte replevin statutes); Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337 (1969) (invalidating state ex parte wage garnishment statute), and denial of government benefits to private parties, *see* Arnett v. Kennedy, 416 U.S. 134 (1974) (upholding procedure for terminating federal employee for cause); Bell v. Burson, 402 U.S. 535 (1971) (invalidating state procedure for suspending drivers' licenses); Goldberg v. Kelly, 397 U.S. 254 (1970) (invalidating state procedure for terminating welfare benefits). At the time the Court issued its decision in *Haslip*, *Mathews* was the leading procedural due process case, and it established that "identification of the specific dictates of due process generally requires

agrees that the jury instructions were so vague as to be unconstitutional, there can be no doubt that they offered substantially less guidance than is possible," and therefore "more guidance was required."[217] This is because "[m]odest safeguards would make the process significantly more rational without impairing any legitimate governmental interest."[218] "Applying the *Mathews* test to Alabama's common law punitive damages scheme," Justice O'Connor concluded, "it is clear that the state procedures deprive defendants of property without due process of law. . . . Without imposing any legislative or common-law limits, Alabama authorizes juries to levy civil fines ranging from zero to tens of millions of dollars."[219] "Unlike compensatory damages, which are tied to an actual injury, there is no objective standard that limits the amount of punitive damages."[220] Responding to Justice Scalia's concurring opinion, which would have upheld Alabama's procedures on the basis of historical practice alone, Justice O'Connor pointed out that in the past punitive damages were "rarely assessed and likely to be small in amount . . . reserved for the most reprehensible, outrageous, or insulting acts . . . [and] came at a time when compensatory damages were not available for pain, humiliation, and other forms of intangible injury."[221] For Justice O'Connor, "[t]he explosion in the frequency and size of punitive damages awards has exposed the constitutional defects that inhere in the common-law system. . . . Circumstances today are different than they were 200 years ago, and nothing in the Fourteenth Amendment requires us to blind ourselves to this fact."[222]

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consideration of three distinct factors." 424 U.S. at 334-35. To determine whether a particular practice satisfied due process, the Court would consider (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Id.* at 335. Three months after the court decided *Haslip*, it issued its decision in *Connecticut v. Doehr*, 501 U.S. 1 (1991), adapting the *Mathews* standard for use in disputes between private parties. Under *Doehr*, the procedural due process inquiry requires (1) "consideration of the private interest that will be affected by the prejudgment measure;" (2) "examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards;" and (3) "principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or foregoing the added burden of providing greater protections." *Id.* at 11.

217. *Haslip*, 499 U.S. at 53 (O'Connor, J., dissenting).

218. *Id.*

219. *Id.* at 54.

220. *Id.*

221. *Id.* at 61 (citation omitted).

222. *Id.* at 62-63.

B. TXO Production Corp. v. Alliance Resources Corp.: *A Plurality Recognizes a Substantive Due Process Prohibition of Grossly Excessive Punitive Damages*

In *TXO Production Corp. v. Alliance Resources Corp.*,[223] the Court addressed a substantive and procedural due process challenge to a punitive damages award. Alliance Resources Corp. alleged that TXO Productions Corp. had agreed to purchase Alliance's interest in oil and gas rights in a large tract of land according to a per-acre cash payment and a royalty on oil and gas revenues from the tract, but that TXO subsequently attempted to fabricate a cloud on Alliance's oil and gas rights in order to renegotiate the royalty arrangement.[224] TXO filed a declaratory judgment action to remove a cloud on the title, and Alliance counterclaimed for slander of title.[225] The trial court ruled against TXO on the declaratory judgment action, and on the slander of title counterclaim the jury returned a verdict in favor of Alliance in the amount of $19,000 in compensatory damages, reflecting Alliance's cost of defending the declaratory relief action, and $10 million in punitive damages.[226] The trial court denied TXO's post-trial motions, and the West Virginia Supreme Court of Appeals affirmed.[227]

1. The Plurality Upholds the Verdict Under Substantive and Procedural Due Process Standards

Justice Stevens authored the plurality opinion joined in full by Chief Justice Rehnquist and Justice Blackmun and joined by Justice Kennedy as to only the procedural due process holding but not the substantive due process holding.[228] Justice Stevens framed TXO's substantive due process challenge as whether "a $10 million punitive damages award—an award 526 times greater than the actual damages awarded by the jury—is so excessive that it must be deemed an arbitrary deprivation of property without due process of law."[229] He cited several early twentieth-century cases for the proposition that due process "imposes substantive limits 'beyond which penalties may not

223. 509 U.S. 443 (1993).
224. *Id.* at 447-49.
225. *Id.* at 447.
226. *Id.* at 449-51.
227. *Id.* at 451-53.
228. *Id.* at 446.
229. *Id.* at 453.

go.'"[230] Justice Stevens considered it noteworthy that Alliance did "not dispute the proposition that the Fourteenth Amendment imposes a substantive limit on the amount of a punitive damages award."[231]

Turning to the award at issue, the plurality opinion considered the procedures used to be appropriate. "The members of the jury were determined to be impartial before they were allowed to sit," Justice Stevens noted, and "their assessment of damages was the product of collective deliberation based on evidence and the arguments of adversaries, their award was reviewed and upheld by the trial judge who also heard the testimony, and it was affirmed by a unanimous decision of the State Supreme Court of Appeals."[232] In the view of the plurality, "a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable, or virtually so."[233] Justice Stevens noted that it is difficult to compare punitive damages verdicts in different cases, because "[s]uch awards are the product of numerous, and sometimes intangible, factors . . . based on a host of facts and circumstances unique to the particular case before it" and "no two cases are truly identical."[234] Therefore, although the plurality did not "rule out the possibility that the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations," it was "not prepared to enshrine" a "comparative approach in a 'test' for assessing the constitutionality of punitive damages awards."[235]

Justice Stevens described the inquiry as whether "the punitive award . . . was so 'grossly excessive' as to violate the substantive component of the Due Process Clause,"[236] an inquiry that depends in part on a "general concern for reasonableness."[237] The plurality concluded that the verdict was not unconstitutionally excessive, despite the 526-to-1 ratio of punitive to compensatory damages, in light of "the magnitude of the *potential harm* that [TXO]'s conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might

230. *Id.* at 453-54 (quoting Seaboard Air Line Ry. v. Seegers, 207 U.S. 73, 78 (1907)).
231. *Id.* at 455.
232. *Id.* at 456-57.
233. *Id.* at 457 (citations omitted).
234. *Id.* at 458.
235. *Id.*
236. *Id.*
237. *Id.* (quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991)).

have resulted if similar future behavior were not deterred."[238] Because a realistic estimate of the "potential" harm that TXO could have caused if it had succeeded in undermining Alliance's leasehold rights was in the neighborhood of $1 million to $4 million, as against a $10 million punitive damages award, "the disparity . . . does not, in our view, 'jar one's constitutional sensibilities.'"[239]

In the procedural due process portion of the plurality opinion, joined by Justice Kennedy, Justice Stevens considered TXO's challenges to the judgment based on the jury instructions, which allowed consideration of TXO's wealth and stated that one purpose of punitive damages was to provide further compensation.[240] The plurality "agree[d] with TXO that the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident," and did "not understand the [instruction's] reference . . . to 'additional compensation,'" but they considered these arguments waived by failure to present them in the lower court proceedings.[241] The plurality then considered and rejected TXO's arguments that the trial court impermissibly failed to articulate its reasons for upholding the award, that the state appellate court purported to divide defendants into "really mean" and "really stupid" classes, and that West Virginia's procedure was "unconstitutionally vague" because it failed to provide adequate notice of the potential award.[242] The plurality therefore affirmed the judgment.[243]

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238. *Id.* at 460.

239. *Id.* at 462 (quoting *Haslip*, 499 U.S. at 18).

240. *Id.* at 463-64.

241. *Id.* at 464.

242. *Id.* at 464-66.

243. Justice Kennedy wrote separately, criticizing the plurality's focus on "reasonableness" and whether an award is "grossly excessive." *Id.* at 466 (Kennedy, J., concurring). In his opinion, "a more manageable constitutional inquiry focuses not on the amount of money a jury awards in a particular case but on its reasons for doing so." *Id.* at 467. "The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards; it does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions," Justice Kennedy wrote, but instead provides the "fundamental guarantee . . . that the individual citizen may rest secure against arbitrary or irrational deprivations of property. When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated." *Id.* at 467. Of course, "courts have often looked to the size of the award as one indication that it resulted from bias, passion, or prejudice, but that is not the sole, or even necessarily the most important, sign." *Id.* (citation omitted).

Justice Scalia, joined by Justice Thomas, concurred in the judgment only, writing separately because the procedures used were, in their view, fair, and because they rejected

2. Justice O'Connor's Dissent

In a lengthy dissent joined by Justice White and joined in part by Justice Souter, Justice O'Connor argued that "neither this award's size nor the procedures that produced it are consistent with the principles this Court articulated in *Haslip*."[244] "[R]arely," Justice O'Connor observed, are juries "instructed on how to effectuate" the punitive and deterrent goals of punitive damages "or whether any limiting principles exist. . . . [I]t cannot be denied that the lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict."[245] In her view, "[i]nfluences such as caprice, passion, bias, and prejudice are antithetical to the rule of law. If there is a fixture of due process, it is that a verdict based on such influences cannot stand."[246] "[F]undamental fairness requires that impermissible influences such as bias and prejudice be discovered," Justice O'Connor wrote, and thus "courts at common law in England traditionally would strike any award that appeared so grossly disproportionate as to evidence caprice, passion, or bias," a "practice . . . long . . . followed in this Nation as well."[247] Justice O'Connor acknowledged the plurality's recognition "that an award may be so excessive as to violate due process" but criticized the plurality for "erect[ing] not a single guidepost to help other courts find their way through this area."[248] She commented that "[w]ithout objective criteria on which to rely, almost any decision regarding proportionality will be a matter of personal preference. One judge's excess very well may be another's moderation."[249] "To avoid that element of subjectivity," Justice O'Connor continued, "our 'judgment[s] should be informed by objective factors to the maximum possible extent.'"[250]

According to Justice O'Connor, "due process at least requires

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outright the position that due process "contains the substantive right not to be subjected to excessive punitive damages." *Id.* at 470-71 (Scalia, J., concurring in judgment). In Justice Scalia's view, procedural due process "requires judicial review of punitive damages awards for reasonableness," but not a "substantively correct 'reasonableness' determination." *Id.* at 471. "*Judicial* assessment of their reasonableness is a federal right, but a *correct* assessment of their reasonableness is not." *Id.*

244. *Id.* at 473 (O'Connor, J., dissenting).

245. *Id.* at 475.

246. *Id.* at 475-76.

247. *Id.* at 476-77.

248. *Id.* at 480.

249. *Id.* at 480-81.

250. *Id.* at 481 (alteration in original) (quoting Rummel v. Estelle, 445 U.S. 263, 274-75 (1980)).

judges to engage in searching review where the verdict discloses such great disproportions as to suggest the possibility of bias, caprice, or passion."[251] She pointed out that the punitive award was "over 500 times actual damages," "20 times larger than the highest punitive damages award *ever* upheld in West Virginia," "10 times greater than the largest punitive damages award for the same tort in any jurisdiction," and "orders of magnitude larger than authorized civil and criminal penalties for similar offenses."[252] Moreover, the conduct at issue involved not "grave physical injury imposed on a helpless citizen by a callous malefactor," but rather "a business dispute between two companies in the oil and gas industry."[253] Justice O'Connor could "see no reason why this Court or any other would wish to disregard such probative evidence," given that "jury awards in similar cases and the civil and criminal penalties created by the legislature for like conduct can give us some idea of the limits on retribution."[254] Justice O'Connor continued, "I do not see what can be gained by blinding ourselves to the few clear guideposts in an area so painfully bereft of objective criteria. . . . Moreover, courts at common law engaged in similar comparisons."[255] In Justice O'Connor's view, "[t]his award cannot be justified as a reasoned retributive response, for it is notably out of line with the punishment previously imposed by juries or established by statute for similar conduct."[256]

C. Honda Motor Co. v. Oberg: *Procedural Due Process Mandates Judicial Review of the Amount of Punitive Damages Awards for Excessiveness*

In *Honda Motor Co. v. Oberg*,[257] the Court sustained a due process challenge to an amendment to the Oregon Constitution prohibiting judicial review of the amount of a punitive damages jury verdict "unless the court can affirmatively say there is no evidence to support the verdict."[258] An owner of an all-terrain vehicle negligently caused the vehicle to overturn, resulting in serious physical injuries. In the ensuing product liability suit against the manufacturer, the jury awarded the injured rider $919,390.39 in compensatory damages,

251. *Id.*
252. *Id.* at 481-82.
253. *Id.* at 482.
254. *Id.* at 483.
255. *Id.*
256. *Id.* at 484.
257. 512 U.S. 415 (1994).
258. *Id.* at 418 (quoting OR. CONST. art. VII, § 3).

subsequently reduced to $735,512.31 based on comparative fault, and $5 million in punitive damages. The Oregon courts affirmed.[259]

Writing for seven justices, Justice Stevens began the Court's analysis by noting that "[o]ur recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damages awards."[260] He continued, "Although they fail to 'draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable,' a majority of the Justices agreed that the Due Process Clause imposes a limit on punitive damages awards."[261] Justice Stevens framed the question presented as "whether the Due Process Clause *requires* judicial review of the amount of punitive damages awards."[262]

Justice Stevens observed that "[j]udicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded."[263] He observed further, "Subsequent English cases, while generally deferring to the jury's determination of damages, steadfastly upheld the court's power to order new trials solely on the basis that the damages were too high."[264] In a footnote to the discussion of the first of several early English cases the Court cites, Justice Stevens remarked that "[a]s in many early cases, it is unclear whether this case specifically concerns punitive damages or merely ordinary compensatory damages," and "[s]ince there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the 20th century, no effort has been made to separate out the two classes of cases."[265]

Turning to American practice, the Court remarked that "[i]n the 19th century, both before and after the ratification of the Fourteenth Amendment, many American courts reviewed damages for 'partiality' or 'passion and prejudice.'"[266] Due to "the difficulty of probing juror reasoning," however, "passion and prejudice review was, in fact, review of the amount of awards. Judges would infer passion, prejudice, or partiality from the size of the award."[267] Justice Stevens

259. *Id.*
260. *Id.* at 420.
261. *Id.* (citations omitted).
262. *Id.* (emphasis added).
263. *Id.* at 421.
264. *Id.* at 422.
265. *Id.* at 423 n.2.
266. *Id.* at 425.
267. *Id.*

noted that "[m]odern practice is consistent with these earlier authorities. In the federal courts and in every State, except Oregon, judges review the size of damages awards."[268]

Justice Stevens concluded that "[t]here is a dramatic difference between the judicial review of punitive damages awards under the common law and the scope of review available in Oregon," because "if the defendant's only basis for relief is the *amount* of punitive damages the jury awarded, Oregon provides no procedure for reducing or setting aside that award."[269] The standard of review provided by Oregon courts "ensures only that there is evidence to support *some* punitive damages, not that there is evidence to support the amount actually awarded."[270] Thus, "Oregon, unlike the common law, provides no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts."[271] "What we are concerned with," Justice Stevens emphasized, "is the possibility that a culpable defendant may be unjustly punished; evidence of culpability warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing."[272]

The Court also noted that "[p]unitive damages pose an acute danger of arbitrary deprivation of property," due largely to the reality that "[j]ury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences."[273] Indeed, "[j]udicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger."[274] Because "Oregon has removed that safeguard without providing any substitute procedure," the Court "h[e]ld that Oregon's denial of judicial review of the size of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment."[275]

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268. *Id.* at 426.
269. *Id.* at 426-27.
270. *Id.* at 429.
271. *Id.*
272. *Id.*
273. *Id.* at 432.
274. *Id.*
275. *Id.* Justice Scalia joined the Court's opinion and also wrote a short separate concurring opinion arguing that "[t]he deprivation of property without observing (or providing a reasonable substitute for) an important traditional procedure for enforcing

D. BMW of North America, Inc. v. Gore: *The Court Provides Substantive Due Process "Guideposts" to Determine Excessiveness*

In *BMW of North America, Inc. v. Gore*,[276] the Court engaged in substantive due process review of a state punitive damages verdict for excessiveness. Nine months after purchasing a "new" BMW automobile for nearly $41,000, the owner learned that the vehicle had been repainted before sale. He sued BMW's American distributor and learned that the distributor had adopted a nationwide policy of not disclosing repairs to new vehicles damaged in the course of manufacture or transportation where the cost of repair did not exceed three percent of the suggested retail price. Because the cost of repainting the vehicle at issue was $601.37, approximately 1.5 percent of the vehicle's suggested retail price, the distributor did not disclose the damage or the repair to the dealership that sold the vehicle.[277]

The owner sued the distributor for "suppression of a material fact," a statutory codification of Alabama's common-law cause of action for fraud, contending that his vehicle was worth less than an automobile that had not been repainted. At trial, the owner asserted actual damages of $4000 based on testimony that a repainted car was worth ten percent less than an undamaged and unrepaired car. He also presented evidence that since the adoption of the nondisclosure policy, the distributor had sold 983 refinished cars as new, including 14 in Alabama, without disclosing the repainting. Therefore, the owner sought punitive damages of $4 million, based on a penalty of $4000 for each of the approximately 1000 refinished cars sold nationwide without disclosure.[278] The jury awarded the owner $4000 in compensatory damages and $4 million in punitive damages. On appeal, the Alabama Supreme Court upheld the compensatory award

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state-prescribed limits upon such deprivation violates the Due Process Clause." *Id.* at 436 (Scalia, J., concurring).

Justice Ginsburg, joined by Chief Justice Rehnquist, dissented based on the perceived adequacy of Oregon's pre-verdict procedures to safeguard due process rights. In particular, in the dissent's view Oregon's requirement of "clear and convincing evidence" to support punitive damages, as well as the detailed jury instructions encompassing seven factors similar in nature to the factors used by the Alabama courts in *reviewing* punitive damages verdicts and upheld in *Haslip*, sufficiently channeled jury discretion. *Id.* at 439-43 (Ginsburg, J., dissenting).

On remand, the Oregon Supreme Court reviewed the amount of the punitive damages award and upheld the entire $5 million verdict as "within the range that a rational juror would be entitled to award in light of the record as a whole." Oberg v. Honda Motor Co., 888 P.2d 8, 12 (Or. 1995).

276. 517 U.S. 559 (1996).

277. *Id.* at 562-64.

278. *Id.* at 563-64.

but reduced the punitive award to $2 million, purportedly to eliminate any reliance on "acts that occurred in other jurisdictions."[279]

The five-justice majority, in an opinion written by Justice Stevens, began by noting that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[280] Indeed, "[o]nly when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."[281] After determining that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States," and thus that the state court "properly eschewed reliance on BMW's out-of-state conduct," the Court stated that "[t]he award must be analyzed in the light of" the "conduct that occurred within Alabama" and "with consideration given only to the interests of Alabama consumers, rather than those of the entire Nation."[282]

In analyzing the punitive damages award for excessiveness, the Court observed that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[283] The Court identified three guideposts relevant to the notice inquiry, "each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the nondisclosure policy."[284] These guideposts included the degree of reprehensibility of the nondisclosure, the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award, and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.[285]

Applying these factors, the Court noted that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[286] The distributor's conduct was not "particularly reprehensible," because the harm "was purely economic in nature" and the "conduct

279. *Id.* at 565-67.
280. *Id.* at 568.
281. *Id.*
282. *Id.* at 572-74.
283. *Id.* at 574.
284. *Id.*
285. *Id.* at 575.
286. *Id.*

evinced no indifference to or reckless disregard for the health and safety of others."[287] Moving to the second guidepost, the Court remarked that "[t]he second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff."[288] The $2 million award upheld by the state court was 500 times the size of the compensatory damages award, and even though "[i]n most cases, the ratio will be within a constitutionally acceptable range," the Court stated that "[w]hen the ratio is a breathtaking 500 to 1, . . . the award must surely 'raise a suspicious judicial eyebrow.'"[289] Finally, "[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness."[290] The Court commented that the maximum civil penalty authorized by the Alabama Legislature for comparable conduct was $2000 and no more than $10,000 in other states, far less than the punitive award at issue.[291]

The Court further pointed out that "[t]he fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business."[292] "Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce."[293] The Court concluded that "[a]s in *Haslip*, we are not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award. Unlike that case, however, we are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit."[294]

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287. *Id.* at 576.

288. *Id.* at 580.

289. *Id.* at 582-83 (quoting TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 481 (1992) (O'Connor, J., dissenting)).

290. *Id.* at 583.

291. *See id.* at 584.

292. *Id.* at 585.

293. *Id.*

294. *Id.* at 585-86. Justice Breyer, joined by Justices O'Connor and Souter, joined the Court's opinion but also wrote a separate concurrence underscoring the concerns that led to the invalidation of the punitive damages award. "Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself." *Id.* at 587 (Breyer, J., concurring). In Justice Breyer's view, "[t]he standards the Alabama courts applied here are vague and open ended to the point where they risk arbitrary results," because they "provided no significant constraints or protection against arbitrary results." *Id.* at 588.

Justice Scalia, joined by Justice Thomas, dissented, based on the view that "a state trial

E. Cooper Industries, Inc. v. Leatherman Tool Group, Inc.: *The Court Requires De Novo Appellate Review of Excessiveness Analysis*

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[295] the Court faced the issue of the appropriate standard of review that a federal court of appeals should use in evaluating a district court's decision regarding whether an award of punitive damages is excessive under *BMW*. In a proceeding in federal district court, the jury found Cooper Industries guilty of unfair competition in the design and marketing of a multi-function tool with similarities to a product marketed by Leatherman Tool Group, and the jury awarded Leatherman $50,000 in compensatory damages and $4.5 million in punitive damages. The district court determined that the award did not violate due process, and the United States Court of Appeals for the Ninth Circuit held that the district court did not abuse its discretion in declining to reduce the punitive award.[296]

Writing for the seven-justice majority, Justice Stevens began by noting that "[a] jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation."[297] Justice Stevens continued, "The Due Process Clause of its own force . . . prohibits the States from imposing 'grossly excessive' punishments

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procedure that commits the decision whether to impose punitive damages, and the amount, to the discretion of the jury, subject to some judicial review for 'reasonableness,' furnishes a defendant with all the process that is 'due.'" *Id.* at 598 (Scalia, J., dissenting). "What the Fourteenth Amendment's procedural guarantee assures is an opportunity to contest the reasonableness of a damages judgment in state court; but there is no federal guarantee a damages award actually *be* reasonable." *Id.* at 599. Justice Scalia stated that "[w]hen . . . a constitutional doctrine adopted by the Court is not only mistaken but also insusceptible of principled application, I do not feel bound to give it *stare decisis* effect—indeed, I do not feel justified in doing so," and "the application of the Court's new rule of constitutional law is constrained by no principle other than the Justices' subjective assessment of the 'reasonableness' of the award in relation to the conduct for which it was assessed." *Id.*

Justice Ginsburg, joined by Chief Justice Rehnquist, dissented because, among other things, the majority opinion "has only a vague concept of substantive due process, a 'raised eyebrow' test as its ultimate guide." *Id.* at 612 (Ginsburg, J., dissenting) (citation omitted). Justice Ginsburg asked, rhetorically: "What is the Court's measure of too big? Not a cap of the kind a legislature could order, or a mathematical test this Court can divine and impose. Too big is, in the end, the amount at which five Members of the Court bridle." *Id.* at 613 n.5.

On remand, the Alabama Supreme Court conditionally affirmed the trial court's denial of BMW's motion for a new trial, ordering a new trial unless the automobile owner consented to a remitted judgment of $50,000. BMW of N. Am., Inc. v. Gore, 701 So. 2d 507, 515 (Ala. 1997).

295. 532 U.S. 424 (2001).

296. *Id.* at 426.

297. *Id.* at 432.

on tortfeasors."[298] The Court cited a number of decisions involving the concept of "proportionality" under the Cruel and Unusual Punishments Clause of the Eighth Amendment,[299] as well as the guideposts analysis under *BMW*, noting that "in each of these cases we have engaged in an independent examination of the relevant criteria."[300] Justice Stevens remarked that in *United States v. Bajakajian*,[301] "we expressly noted that the courts of appeals must review the proportionality determination '*de novo*' and specifically rejected the suggestion . . . that the trial judge's determination of excessiveness should be reviewed only for an abuse of discretion."[302]

Justice Stevens also discussed *Ornelas v. United States*,[303] in which the Court had held "that trial judges' determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."[304] According to Justice Stevens, "[t]he reasons we gave in support of that holding are equally applicable in this case."[305] First, "the precise meaning of concepts like 'reasonable suspicion' and 'probable cause' cannot be articulated with precision; they are 'fluid concepts that take their substantive content from the particular contexts in which the standards are being addressed.' That is, of course, also a characteristic of the concept of 'gross excessiveness.'"[306] Second, "the legal rules for probable cause and reasonable suspicion acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles," which is "also true of the general criteria set forth in" *BMW*.[307] Third, "'*de novo* review tends to unify precedent' and 'stabilize the law.'"[308] The Court concluded that "[o]ur decisions in analogous cases, together with the reasoning that produced those decisions, thus convince us that courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of

298. *Id.* at 434.

299. "Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

300. 532 U.S. at 434-35.

301. 524 U.S. 321 (1998) (invalidating forfeiture of $357,144 as "grossly disproportional" to gravity of offense).

302. 532 U.S. at 435.

303. 517 U.S. 690 (1996).

304. 532 U.S. at 436 (discussing *Ornelas*, 517 U.S. at 696).

305. *Id.*

306. *Id.* (citation omitted).

307. *Id.*

308. *Id.* (citation omitted).

punitive damages awards."[309]

Justice Stevens remarked that "[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury."[310] "Because the jury's award of punitive damages does not constitute a finding of 'fact,' appellate review of the district court's determination that an award is consistent with due process does not implicate the Seventh Amendment . . . ."[311] Moreover, "[d]ifferences in the institutional competence of trial judges and appellate judges are consistent with our conclusion."[312] "Only with respect to the first" *BMW* guidepost "do the district courts have a somewhat superior vantage over courts of appeals, and even then the advantage exists primarily with respect to issues turning on witness credibility and demeanor. Trial courts and appellate courts seem equally capable of analyzing the second factor."[313] The third *BMW* guidepost, "which calls for a broad legal comparison, seems more suited to the expertise of appellate courts. Considerations of institutional competence therefore fail to tip the balance in favor of deferential appellate review."[314] The Court therefore vacated the judgment and remanded the case for evaluation under a de novo standard of review.[315]

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309. *Id.*

310. *Id.* at 437 (citation omitted) (quoting Gasperini v. Center for Humanities, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)).

311. *Id.*

312. *Id.* at 440.

313. *Id.* (footnote omitted).

314. *Id.*

315. *Id.* at 443. Justice Thomas joined in the majority opinion and also wrote a separate concurrence reiterating his "belie[f] that the Constitution does not constrain the size of punitive damages awards" and stating that "given the opportunity, I would vote to overrule *BMW*." *Id.* (Thomas, J., concurring). Justice Scalia concurred in the judgment only, writing separately to note his disagreement with the Court's decisions reviewing punitive damages for excessiveness and requiring de novo review of determinations of reasonable suspicion, probable cause, and excessiveness of fines. *Id.* at 443-44 (Scalia, J., concurring). "Given these precedents, I agree that *de novo* review of the question of excessive punitive damages best accords with our jurisprudence." *Id.* at 444.

Justice Ginsburg dissented, rejecting the distinction the majority drew between compensatory and punitive damages for Seventh Amendment purposes. "Punitive damages are thus not '[u]nlike the measure of actual damages suffered,' in cases of intangible, noneconomic injury. One 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." *Id.* at 446 (Ginsburg, J., dissenting) (citation omitted). "Both 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 (citation omitted).

On remand, the Ninth Circuit reduced the punitive award from $4.5 million to $500,000. Leatherman Tool Group, Inc. v. Cooper Indus., Inc., 285 F.3d 1146, 1152 (9th Cir. 2002).

F. State Farm Mutual Automobile Insurance Co. v. Campbell: *The Court Suggests a Constitutional Limiting Ratio of Nine-To-One*

In *State Farm Mutual Automobile Insurance Co. v. Campbell*,[316] the Court once again addressed a substantive due process challenge to a state court punitive damages verdict. While driving with his wife, Curtis Campbell attempted to pass six vans on a two-lane highway. Todd Ospital, who was driving in the opposite direction, swerved to avoid a head-on collision with the Campbells, who, in their attempt to pass the vans, were driving on the wrong side of the road. Ospital lost control of his vehicle and collided with a vehicle driven by Robert Slusher. Ospital was killed, Slusher was disabled permanently, and the Campbells avoided injury.[317]

Slusher and the estate of Ospital sued Curtis Campbell. The investigators looking into the accident reached a consensus early on that Campbell's unsafe pass had caused the injuries. Campbell's insurance company, State Farm, contested liability and declined offers by Slusher and Ospital's estate to settle the claims for the policy limits of $25,000 each, or a total of $50,000. State Farm allegedly assured the Campbells that "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel."[318] The jury, however, determined that Campbell was entirely at fault and returned a judgment for $185,849.[319]

State Farm initially refused to pay the $135,849 in liability above the policy limits, with its counsel allegedly informing the Campbells that "[y]ou may want to put for sale signs on your property to get things moving."[320] State Farm did not post a supersedeas bond to enable Campbell to appeal the judgment; therefore, Campbell obtained his own counsel to handle the appeal. While the appeal was pending, Slusher and the estate of Ospital entered into an agreement with Campbell not to collect on their claims against him in return for his agreement to hire their counsel in order to pursue a bad faith action against State Farm, where Slusher and Ospital's estate would receive 90 percent of any recovery against State Farm.[321]

After the Utah courts affirmed the trial court's judgment against

316. 123 S. Ct. 1513 (2003).
317. *Id.* at 1517.
318. *Id.* at 1517-18.
319. *Id.* at 1518.
320. *Id.*
321. *Id.*

Campbell, State Farm paid the entire judgment. The Campbells then sued State Farm alleging bad faith, fraud, and intentional infliction of emotional distress. In a bifurcated proceeding, the first jury concluded that State Farm's decision not to settle was unreasonable in light of the substantial likelihood of a verdict in excess of the Campbells' policy limits. The second jury heard evidence regarding State Farm's settlement practices extending over 20 years in numerous states. That jury awarded the Campbells $2.6 million in compensatory damages, subsequently reduced by the trial judge to $1 million, and $145 million in punitive damages, which the trial judge reduced to $25 million. On appeal, the Utah Supreme Court reinstated the full $145 million punitive damages award.[322]

Justice Kennedy's majority opinion, joined by five other justices, regarded it as "well established that there are procedural and substantive constitutional limitations" on awards of punitive damages.[323] He reiterated that "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. . . . To the extent that an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property."[324]

Justice Kennedy emphasized that "[v]ague instructions, or those that merely inform the jury to avoid 'passion or prejudice' do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory."[325] He noted that "[e]xacting appellate review ensures that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'"[326] According to the Court, "[u]nder the principles outlined in *BMW of North America, Inc. v. Gore*, this case is neither close nor difficult. It was error to reinstate the jury's $145 million punitive damages award."[327]

Turning to the *BMW* guideposts, the Court concluded that State Farm's conduct was not particularly reprehensible, that "a more modest punishment . . . could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further."[328] The Court also noted, "The Utah Supreme Court's opinion makes explicit

322. *Id.* at 1518-19.
323. *Id.* at 1519.
324. *Id.* at 1519-20.
325. *Id.* (citation omitted).
326. *Id.* at 1520-21.
327. *Id.* at 1521.
328. *Id.*

that State Farm was being condemned for its nationwide policies rather than for the conduct directed toward the Campbells."[329] A state may not, however, "punish a defendant for conduct that may have been lawful where it occurred," nor does a state ordinarily "have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the state's jurisdiction."[330] In addition, the Utah courts "awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm."[331] The Court concluded, "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt that the Utah Supreme Court did that here."[332]

On the issue of the ratio of punitive to compensatory damages, the Court "decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[333] Justice Kennedy observed that "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1 or, in this case, of 145 to 1."[334] "Nonetheless," the Court noted, "because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'"[335] The Court also noted that "[t]he converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[336] In the Court's view, "[t]he compensatory award in this case was substantial; the Campbells were awarded $1 million for a year and a half of emotional

329. *Id.*
330. *Id.* at 1522.
331. *Id.* at 1523.
332. *Id.*
333. *Id.* at 1524.
334. *Id.* (citation omitted).
335. *Id.* (citation omitted).
336. *Id.*

distress."[337]

Finally, the Court decided that it "need not dwell long" on the third *BMW* guidepost, comparable penalties.[338] "The most relevant civil sanction under Utah state law for the wrong done to the Campbells," Justice Kennedy noted, "appears to be a $10,000 fine for an act of fraud, an amount dwarfed by the $145 million punitive damages award."[339]

Applying the *BMW* guideposts, "especially in light of the substantial compensatory damages awarded . . . likely would justify a punitive damages award at or near the amount of compensatory damages."[340] "The punitive award of $145 million," the Court concluded, "was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant."[341]

IV. DUE PROCESS REQUIRES MEANINGFUL GUIDANCE TO JURIES AND MEANINGFUL JUDICIAL REVIEW OF NONECONOMIC COMPENSATORY DAMAGES AWARDS

Under current Seventh Amendment jurisprudence, the amount of compensatory damages awarded for intangible injuries is regarded as a matter of fact committed to the jury.[342] Under the Supreme Court's recent punitive damages due process decisions, however, the amount of punitive damages awarded by a jury is not treated as a fact under the Seventh Amendment, and courts engage in "exacting" review to ensure that the award is not grossly excessive and thus unconstitutional.[343] Furthermore, the close parallel between punitive damages and noneconomic compensatory damages has not gone

337. *Id.*

338. *Id.* at 1526.

339. *Id.* (citation omitted).

340. *Id.*

341. *Id.* Justice Scalia wrote a brief dissent, arguing that "the Due Process Clause provides no substantive protections against 'excessive' or 'unreasonable' awards of punitive damages" and that "the punitive damages jurisprudence which has sprung forth from *BMW* . . . is insusceptible of principled application; accordingly I do not feel justified in giving the case *stare decisis* effect." *Id.* (Scalia, J., dissenting) (citation omitted). Justice Thomas also dissented, noting his continuing "belie[f] that the Constitution does not constrain the size of punitive damages awards." *Id.* (Thomas, J., dissenting) (quotation omitted). Justice Ginsburg dissented, disagreeing with the majority's position that much of the conduct upon which the verdict was based bore no nexus to the Campbells. *Id.* at 1527-31 (Ginsburg, J., dissenting).

342. *See* St. Louis, Iron Mountain & S. Ry. v. Craft, Inc., 237 U.S. 648 (1915); *cf.* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996) (limiting federal appellate review of compensatory damages to "abuse of discretion").

343. *See State Farm*, 123 S. Ct. at 1520-21.

unnoticed, prompting the observation that "[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" and that "[i]f one exercise in quantification is properly regarded as factfinding, . . . the other should be so regarded as well."[344]

The Seventh Amendment and due process concerns are thus in tension. The similarities between punitive damages and noneconomic compensatory damages—including their common history and treatment, the inadequate guidance available to juries, the amorphous nature of the jury's task, the absence of objective criteria to safeguard against consideration of improper factors, and the lack of clear standards to facilitate meaningful judicial review of verdicts—logically call for comparable treatment for purposes of procedural due process. The reality is that jury translation of noneconomic injury into a dollar amount is not an exercise in fact-finding. To be sure, the inquiry is highly fact-dependent, but no more so than the judicial inquiry into probable cause or reasonable suspicion under the Fourth Amendment, proportionality of criminal punishments under the Eighth Amendment, or excessiveness of punitive damages under the Fourteenth Amendment, each of which is regarded as a question of law for the court.[345] Courts should recognize that the Seventh Amendment's Reexamination Clause does not preclude careful judicial scrutiny of noneconomic compensatory damages verdicts any more than it prevents scrutiny of punitive damages awards. Indeed, history demonstrates that English common-law courts accepted the notion of reviewing noneconomic damages awards before the adoption of the Seventh Amendment,[346] and early American cases frequently relied on analyzing comparable cases to determine excessiveness.[347]

Until Seventh Amendment case law catches up in all respects with the due process implications of the Court's punitive damages decisions, however, courts will need to proceed from the premise that jury verdicts for intangible injuries are entitled to Seventh Amendment respect. So long as such verdicts remain entitled to any

344. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 446-47 (2001) (Ginsburg, J., dissenting) (advocating deference to punitive damages awards in light of deference afforded to noneconomic compensatory damages awards); *see also* Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L.J. 859, 907-08 (1991) (arguing that noneconomic compensatory damages and punitive damages are so similar that they "cannot be analytically distinguished").

345. *See Cooper Indus.*, 532 U.S. at 434-36.

346. *See supra* Parts I.A, I.D.

347. *See supra* Part I.C.

judicial deference at all, it is incumbent upon the judicial system to take all reasonable measures to reduce the arbitrariness that currently infects the trial process. If verdicts for noneconomic compensatory damages are to be treated with respect, then due process requires that courts provide the juries with far more information to enable them to return a number that is less a product of guesswork and more the end result of a measured weighing of relevant data.

Three proposed reforms to current practice regarding noneconomic compensatory damages would accommodate the Court's recent due process pronouncements without undermining core Seventh Amendment concerns. First, trial courts should inform jurors of the range of noneconomic compensatory damages that prior juries have awarded in factually comparable cases. Second, trial courts should exercise a two-tiered review of verdicts for intangible harms, deferring to verdicts that fall within the range of prior awards, but reviewing de novo verdicts that exceed that range. Third, appellate courts should exercise a similar two-tiered review of trial court rulings regarding excessiveness of noneconomic damages awards, reviewing awards within the prior range for an abuse of discretion, but applying de novo scrutiny where a trial court has approved a verdict that exceeds the range of prior comparable awards.

A. Trial Courts Should Inform Jurors of a Range of Noneconomic Compensatory Damages Awards in Factually Comparable Cases

The first necessary step in reducing arbitrariness of noneconomic damages awards is to give greater guidance to the jury. Unbridled jury discretion to award noneconomic damages without any objective criteria is simply not consistent with due process.[348] To the extent that the Seventh Amendment continues to require that the amount of noneconomic damages be treated as a fact, juries should be provided with evidence to permit a reasoned valuation of the harms at issue.

Aside from the facts presented at trial regarding the nature and extent of the plaintiff's claimed injuries, the jury needs to know how to assign a dollar amount. The only meaningful guide that a jury can have in this regard is to be informed of the range of awards for injuries factually comparable to the harms that the plaintiff claims to have suffered. Indeed, other commentators have made similar

348. *Cf. State Farm*, 123 S. Ct. at 1520-21 (discussing punitive damages); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 475-81 (1993) (O'Connor, J., dissenting) (same); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42-43 (1991) (O'Connor, J., dissenting) (same).

suggestions in the past.[349] In light of the Supreme Court's recent emphasis on the problem of arbitrariness resulting from damages awards rendered by inadequately advised juries, however, such proposals merit further consideration.

The mechanism for providing this information to the jury would start with the parties, who would brief the court before trial regarding the cases they believe establish the appropriate range. All other things being equal, the parties should focus on appellate cases closest in time and factual circumstance to the allegations in their dispute, and from the relevant jurisdiction. If the relevant jurisdiction does not have a sufficient body of recent appropriate appellate precedent, which might mean something in the neighborhood of ten comparable cases, then counsel should look to trial court rulings and cases from other jurisdictions for recent cases, as well as to older cases within the jurisdiction. One would expect plaintiffs to emphasize the cases with the highest awards for given types of injury and defendants to focus on the awards on the lower end of the range. The court would then determine as a matter of law which cases are most closely analogous to the set of facts that the plaintiff asserts will be proved at trial, thereby arriving at a presumptively permissible range for noneconomic compensatory damages. To the extent that the comparable awards exhibit any sort of clustering around a particular value, the court will have a basis for discarding as outliers awards that are either well above or well below that value. This inquiry does not involve any factual determinations by the court, nor does it take factual issues from the jury. Instead, after engaging in the relevant comparative analysis, the court would be answering only questions of law.

Once the court has determined the numbers that reasonably establish the range of past awards, the court should, perhaps with the assistance of the parties, adjust those figures for inflation so that older verdicts do not unduly depress the range. At trial, the court should instruct the jury that in factually similar cases, where the plaintiff was successful, the verdicts, adjusted to current dollars, have ranged from X to Y.[350] Where a plaintiff is seeking recovery for multiple forms of intangible injury, the instruction might address each alleged harm

349. *See, e.g.*, Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 777 (1995); Wissler et al., *supra* note 172, at 817.

350. This function in determining the range reflected in appropriate precedent is akin to ruling on the relevance and admissibility of evidence. Thus, the court should have the role of informing the jury in this regard, rather than having counsel argue to the jury regarding which cases establish an appropriate benchmark.

separately or, particularly where the injuries appear to overlap, might advise the jury as to the total recoveries that plaintiffs alleging these types of injuries have recovered. The court would then instruct the jury that this information is meant only as a guide to inform the jury's deliberation and that they are not bound by the prior decisions. In argument, counsel would have an opportunity to contend that the record points toward a verdict at one point or another along that range, or perhaps above or below the range entirely.

Obviously, care should be taken to ensure that the counsel in the case do not side-track the proceeding by getting into the details of the comparable cases. Jurors are generally not appellate court justices, and they are not ordinarily trained or interested in engaging in fine parsing of precedents to discern minor points of similarity and difference. The main purpose of providing the range is not to draw jurors into a close analysis of precedents, but rather to give them a sense of how jurors tend to value injuries of the general type at issue. The range provides an objective benchmark against which jurors can make rational and informed decisions regarding how to translate their assessment of the extent of the plaintiff's harm into dollars. For example, telling jurors that awards for a given kind of injury have tended to range between $50,000 and $600,000 provides the jurors with a great deal more context than they currently have, and it reduces the risk of arbitrariness inherent when a juror is asked to make a completely uninformed evaluation of an intangible harm. This guidance is required by the Supreme Court's recent punitive damages decisions as well as the Court's general procedural due process case law.[351]

B. Trial Courts Should Exercise a Two-Tiered Review of Noneconomic Compensatory Damages Awards for Excessiveness

Where the jury returns a verdict that is within the range established by comparable cases identified by the court, there is a strong basis for inferring that the jury's decision was rational, based on objective factors, and reasonably calibrated to the facts of the case. Under those circumstances, there is little risk that the verdict is excessive, and traditional deference to the jury's verdict is warranted. Because the due process concern for arbitrary deprivation of property is least pressing in that instance, there is no need for close judicial scrutiny of

351. *See supra* note 216.

the verdict. This situation is analogous to a verdict for economic damages in which the award is within the bounds permitted by the evidence, and in neither situation should the verdict be disturbed by the trial court.

Where, however, the jury has returned a verdict that exceeds the range established by comparable cases, the court should exercise de novo review of the verdict for excessiveness. Because the award has exceeded the objective guideposts, the concern for arbitrary deprivation of property moves to the forefront. At that point, there is a heightened risk that the verdict is unconstitutionally excessive, and the court's scrutiny is needed. This bifurcated standard of review is akin to the Supreme Court's recognition that the amount of punitive damages is largely a factual matter, but that beyond a certain point it becomes a court's duty to declare that the award exceeds what the law will allow. In the punitive damages context, the bases for review are the three *BMW* guideposts, as interpreted in *State Farm*. In the realm of noneconomic compensatory damages, the relevant objective yardstick is the body of factually comparable precedents.

In reviewing the verdict de novo for excessiveness, the court should presume that the award is excessive and that it must be remitted to the upper bound of the range of comparable cases unless objective, identifiable factors in the record warrant an upward departure from that range. Factual variations between the case at issue and the precedents that gave rise to the range could well justify some variance, although substantial deviations from prior cases without correspondingly substantial differences in the facts should be met with judicial skepticism, and a remittitur should be considered where appropriate. The court should also ensure that an award above the range provided by the relevant precedents has not been rendered for a comparatively less serious injury than those involved in cases toward the high end of the range. At this stage of the proceeding, emphasis should be given to objective factors such as prior awards and specific key factors in the case under review that might weigh in favor of or against an award higher than those that came before it. Where such factors are present, the court should indicate them in its order to facilitate appellate review. Where such objective indicia are lacking, the award should be remitted. If the jury appears to have strayed far from the figures suggested by comparable cases without any reasonable basis for doing so, a new trial should be ordered outright without a remittitur, because in that event there is an added concern that the jury was actually swayed by impermissible factors such as

passion or prejudice and thus that the liability finding itself is suspect.

C. Appellate Courts Should Exercise a Two-Tiered Review of Trial Court Rulings Regarding Excessiveness

The parties may wish to dispute the trial court's determination of the relevant range of awards based on the precedents submitted by the parties. Although the trial court's role in discerning the range is largely a matter of law, the process is highly fact-dependent, as it involves comparing the plaintiff's proposed presentation of proof with a body of case law in order to identify a range of reasonably similar cases and the damages awards in those cases. Because this inquiry does not appear to implicate litigants' substantial constitutional rights, there is no need for the appellate courts to consider the matter de novo on appeal. The task for the trial court is not necessarily to ensure that the "correct" precedents are definitively located and analyzed, but rather to identify a body of roughly comparable cases that will provide the jury with a reasonable range in light of the anticipated evidence. That function is inherently discretionary, and it calls for review under an abuse of discretion standard. Indeed, it would make little sense for appellate courts to devote their attention to figuring out de novo which specific precedents constitute the closest fit. Deferential review regarding the determination of the presumptive damages range comports with sound judicial administration.

In cases where the jury has returned a verdict within the range established by comparable cases, and the trial court has upheld that award, an appellate court should review the trial court's ruling only for an abuse of discretion. Under those circumstances, the risk of an arbitrary deprivation of property is low, and there is a reasonable basis for inferring that the jury acted properly on the basis of objective criteria. The need for the court to perform its law-declaring function is minimal, and traditional deference to a trial court ruling regarding a factual matter is warranted. This mode of review is consistent with current practice, and it affords a wide berth to a jury finding that may be presumed in that instance to be permissibly factual in nature and lacking in a punitive or otherwise unauthorized element.

That same deferential review should be afforded to a trial court's decision reducing an award that exceeds the applicable range to a figure within the range. Again, there would appear to be no need for the appellate court to scrutinize such a ruling closely, because it can be presumed, based on the result, that the trial court has adequately

protected the due process rights of the defendant. If the judgment does not exceed the presumptively reasonable range of prior awards and thus is not inherently suspect, then it is appropriate for the appellate court to presume that the result is roughly in line with the evidence, thereby meriting the type of deference ordinarily afforded to essentially factual rulings for which the trial court is best suited to render a decision.

In cases where a trial court has entered judgment on an award of noneconomic compensatory damages that exceeds the range that the trial court itself found to be presumptively reasonable, the need for exacting appellate review to guard against an arbitrary deprivation of property is most acute. An award beyond the range delimited by precedent should be presumed to be excessive, and an appellate court should reverse such an award unless the record clearly contains objective bases warranting a departure from the previously recognized valuations for comparable injuries. Such a standard need not be particularly difficult to satisfy, as there may be many reasons justifying an upward variance from past jury results, but the key is to focus appellate review on those objective bases to permit meaningful and principled comparisons to other decisions. Emphasizing the objective factors in the record minimizes the influence of subjective considerations on judicial review, thereby enhancing the actual and perceived fairness of the process as well as the quality and predictability of the result.

CONCLUSION

Noneconomic compensatory damages have long confounded judicial attempts to determine whether verdicts are excessive. Now, in light of the change in the Supreme Court's due process jurisprudence in the area of punitive damages, courts need to take a closer look at whether the common-law methods for producing and reviewing awards for intangible injuries meet the requirements of due process. The Court's recent focus on providing better guidance for juries, eliminating opportunities for jurors to act arbitrarily or improperly, and establishing objective criteria for judging damages awards demonstrates that changes are needed. The proposals set forth in this article, if adopted, will reduce juror confusion, facilitate the rendition of appropriate and lawful verdicts, enhance the fairness of judicial review, protect defendants from arbitrary deprivations of property, and provide plaintiffs with greater assurance that the verdicts they do receive will stand up on appeal. Due process requires no less.