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Jane Mallor

Barry S. Roberts

Punitive Damages: On the Path to A Principled Approach?

by
JANE MALLOR* *and* BARRY S. ROBERTS**

We are very pleased that Hastings Law Journal has chosen an article on punitive damages to appear in this Fiftieth Anniversary issue. In the twenty years since *Punitive Damages: Toward a Principled Approach*[1] was first published, punitive damages remain a significant issue of law and public policy. In fact, judicial, legislative, and scholarly interest in punitive damages has surged in the intervening period. Written at the beginning of the tort and civil justice reform era, our article suggested practices and standards designed to ensure that punitive damages were applied in a way that used but did not abuse their significant power to punish and deter reprehensible conduct.[2]

Today the debate over punitive damages has generally, although not completely,[3] shifted from the historical question whether punitive damages should be allowed at all to the question whether they are being abused. It has been argued that there is a punitive damages crisis and that the amounts of punitive damages verdicts are out of control.[4] As a result, two important categories of developments have

* Professor of Business Law, Kelley School of Business, Indiana University. B.A., Indiana University, 1972; J.D., Indiana University School of Law, 1976.

** Professor of Business Law, University of North Carolina at Chapel Hill. B.S. Pennsylvania State University; J.D. University of Pennsylvania; LL.M. Harvard Law School.

1. Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639 (1980).

2. *See id.* at 663-69.

3. *See* W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285 (1998). This article was strongly rebutted in Theodore Eisenberg, *Measuring The Deterrent Effect of Punitive Damages*, 87 GEO. L.J. 347 (1998), and David Luban, *A Flawed Case Against Punitive Damages*, 87 GEO. L.J. 359 (1998). All but four states allow punitive damages, and one of those four states does allow exemplary damages. *See* Viscusi, *supra*, at 288; Eisenberg, *supra*, at 348.

4. *See generally* Viscusi, *supra* note 3. *See also* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42-64 (1991) (O'Connor, J., dissenting). Probably in response to the debate

affected punitive damages. First, punitive damages have been subjected to a variety of legislative reforms that are designed to remove the incentive for plaintiffs to press for punitive damages and suppress the opportunity for abusive awards. Second, the U.S. Supreme Court has planted its flag on punitive damages jurisprudence in a series of cases that analyze the constitutional implications of punitive damages awards. This line of cases admonishes judges to provide not just meaningful, but rigorous review of punitive damages awards.[5]

To what extent have these developments placed us on the path to a principled approach to punitive damages? This essay sketches the current state of punitive damages law and practice. It examines the relationship of the developments mentioned above to the principled approach that we suggested twenty years ago, and asks, where have we progressed, where have we strayed and what remains to be done?

A. The Demonizing of Punitive Damages

Punitive damages are designed to "aid courts in enforcing established norms of conduct."[6] They are directed at behavior that intentionally or callously flouts the law and the interests of others and warrants more than the accountability of compensating the plaintiff. Through the mechanism of an award of damages that is by its nature excessive—exceeding the amount necessary to compensate the plaintiff for the harm caused by the defendants[7] and exceeding other awards for similar harms so as to make the defendant and others like him take notice—punitive damages seeks to affirm the social order and discourage the defendant and others who are similarly situated from committing the behavior. It stands to reason that this brand of punishment and deterrence is *most* valuable where the law would otherwise provide little other disincentive for the objectionable

about the role of punitive damages in the tort "crisis," scholars have undertaken empirical studies that revealed much more information about the practice and effect of punitive damages than was available in 1980. *See, e.g.*, Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15 (1998).

5. *See* Bruce J. McKee, *The Implications of* BMW v. Gore *for Future Punitive Damages Litigation: Observations from a Participant*, 48 ALA. L. REV. 175, 225 (1996)("Perhaps the primary purpose of the BMW majority was just to send a general 'signal' to lower courts to tighten the reins on punitive awards.").

6. Mallor & Roberts, *supra* note 1, at 647.

7. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873-74 (1998)(noting that "a crucial question for consideration is whether injurers sometimes escape liability for harms for which they are responsible. If they do, the level of liability imposed on them when they *are* found liable needs to exceed compensatory damages so that, on average, they will pay for the harm that they cause.").

conduct.[8] An example of this type of situation would be one in which a vast economic disparity between the defendant and the plaintiff—such as between a large corporate defendant and a consumer plaintiff—would otherwise make it safe for the defendant to ignore the plaintiff's interests.[9] The strength of the punitive award lies in a measure of unpredictability. If a punitive damages award can be known with certainty in advance of the conduct, the very sort of callousness that is to be corrected by a punitive award would be facilitated; the defendant would be able to calculate his maximum exposure to liability and determine whether to disregard the interests of the plaintiff.[10] The punitive award provides an incentive to individuals to act as "private attorney[s] general" and bring cases warranting such awards to the courts.[11] New opportunities for the imposition of punitive damages, such as the inclusion of a possible punitive damages remedy in the 1991 amendments to the Civil Rights Act, indicate that the legal system still considers punitive damages a useful complement to other forms of enforcement.[12]

However, the doctrine's strengths are potentially its weaknesses. The imprecision of standards for punitive damages, the windfall received by the plaintiff, and the imposition of large, sometimes "breathtaking,"[13] awards against corporate defendants have permitted tort reformers to portray punitive damages as being weapon of abuse wielded by greedy plaintiffs and poorly superintended by ineffectual trial courts. It has been stated that "punitive damages are out of control.... The widespread dissatisfaction with the role of punitive damages in the liability system is well established."[14] Justice Sandra Day O'Connor appears to have

8. *See* Mallor & Roberts, *supra* note 1, at 648.

9. *See* Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1276-77 (1993)(arguing that the award of punitive damages is a "necessary remedy against the abuse of power by economic elites" and stating that "[t]he doctrine of punitive damages is one of the few remedies that can constrain a giant corporation that is willing and able to take advantage of its less powerful 'adversaries'").

10. *See id.* at 1277.

11. Mallor & Roberts, *supra* note 1, at 649-50.

12. *See* 42 U.S.C. § 1981(a)-(b) (1994). The Supreme Court recently reviewed the standards for imposing punitive damages in employment discrimination claims. *See* Kolstad v. American Dental Ass'n, ___ U.S. ___, 119 S. Ct. 2118 (1999)(holding, *inter alia*, that in a Title VII employment discrimination claim, an employer's conduct need not be independently "egregious" to satisfy 1981's requirements for a punitive damages award).

13. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 583 (1996)(describing the award against BMW in an Alabama state court).

14. Viscusi, *supra* note 3, at 333-334. *See also* Polinsky & Shavell, *supra* note 7, at 870 ("One of the more controversial features of the American legal system is the imposition of punitive damages.").

adopted this view, as she has said that "[o]ur cases attest to the wildly unpredictable results and glaring unfairness that characterize common-law punitive damage procedures."[15] Former Vice President Dan Quayle stated that "the current approach to punitive damages . . . generate[s] disproportionately high awards in a random and capricious manner."[16]

In his comprehensive review of punitive damages, however, Professor Michael Rustad presents convincing data that such claims are horror stories and are not supported by the evidence.[17] Professor Rustad reviewed nine empirical studies[18] on punitive damages trends

15. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 49 (1991)(O'Conner,J., dissenting).

16. Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 564 (1992).

17. *See* Rustad, *supra* note 4, at 17-18.

18. *See id.* Prof. Rustad lists the nine empirical studies reviewed in his article as follows:

> 1) The RAND Institute for Civil Justice study of jury verdicts in two counties . . . MARK PETERSON ET AL., INSTITUTE FOR CIVIL JUSTICE, PUNITIVE DAMAGES: EMPIRICAL FINDINGS (1987) (R-3311-ICJ) . . . ; 2) The American Bar Foundation study of jury verdicts in eleven states . . . Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990) . . . ; 3) The GAO report on verdicts in five states in 1983-1985 . . . U.S. GEN., ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SUBCOMM. ON COMMERCE, CONSUMER PROTECTION, AND COMPETITIVENESS, COMM. ON ENERGY AND COMMERCE, HOUSE OF REPRESENTATIVES, PRODUCT LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES, GAO/HRD-89-99, at 2-3 (1989) . . . ; 4) Landes and Posner's study of federal and state appellate cases published in West reporters . . . WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987) . . . William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, REGULATION, Sept.-Oct. 1986, at 33 . . . ; 5) Rustad and Koenig's study of three decades of punitive damages awards in products liability . . . Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data,* 78 IOWA L. REV. 1 (1992) . . . ; 6) Rustad and Koenig's study of twenty-five years of punitive damage awards in medical malpractice, . . . Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, not "Moral Monsters,"* 47 RUTGERS L. REV. 975 (1995) . . . ; 7) The Department of Justice, National Center for State Courts, and Cornell University Civil Justice survey of 1992 verdicts . . . CAROL DEFRANCES ET AL., U.S. DEPT. OF JUSTICE, CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES (1995); Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997)[herinafter Eisenberg et al., *Predictability*] . . . ; 8) The RAND Institute of Civil Justice's follow-up study of punitive damages . . . DEBORAH HENSLER & ERIK MOLLER, INSTITUTE FOR CIVIL JUSTICE, TRENDS IN PUNITIVE DAMAGES: PRELIMINARY DATA FROM COOK COUNTY, ILLINOIS AND SAN FRANCISCO CALIFORNIA (1995) (DRU-1014-ICJ) . . . ERIK MOLLER,

and concluded that "[e]very empirical study of punitive damages demonstrates that there is no nationwide punitive damages crisis."[19] In fact, he stated that the clear convergence of findings is that the "overall rate and level of punitive damages [are] low."[20] Professor Theodore Eisenberg adds that "[a]ll credible sources suggest that punitive damage awards are rare,"[21] and that concerns are greatly exaggerated.[22] Finally, Professor Luban adds,

> it is difficult to make the case that punitive damages are out of control. You would never know it from the voluminous tort reform literature . . . but study after study confirms that punitive damages are awarded in only a minuscule proportion of accident cases—somewhere in the vicinity of 2-4% of plaintiffs' victories.[23]

In fact, the research also reveals that punitive damages are most frequently imposed in business tort and intentional tort cases and not in personal injury cases[24] and that they are substantially and significantly correlated to the size of the compensatory damages awarded.[25]

Nevertheless, the popular perception that punitive damages were out of control led nearly all of the state legislatures to enact some form of limitation on the imposition and award of punitive damages.[26]

B. Legislatively Imposed Limits Upon Punitive Damages

There have been an array of legislative strategies designed to control or limit the imposition or award of punitive damages. These measures include:

INSTITUTE FOR CIVIL JUSTICE, TRENDS IN CIVIL JURY VERDICTS SINCE 1985 (1996) . . . ; 9) The American Bar Foundation follow-up study of punitive damages . . . STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM (1995).

Id. (footnotes included).

19. Rustad, *supra* note 4, at 69.

20. *Id.* at 20.

21. Eisenberg, *supra* note 3, at 348.

22. *See id.* at 348.

23. Luban, *supra* note 3, at 360. *See also* Eisenberg et al., *Predictability*, *supra* note 18, at 629.

24. *See* Rustad, *supra* note 4, at 69.

25. *See id.* at 31 (citing Eisenberg et al., *Predictability, supra* note 18, at 637-639).

26. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 614-19(1996)(Ginsburg, J., dissenting); Eisenberg et al., *Predictability, supra* note 18, at 624; Lisa M. Sharkey, *Judge or Jury: Who Should Assess Punitive Damages?*, 64 U. CIN. L. REV. 1089, 1089 (1996); Note, BMW of North America, Inc. v. Gore and Life Insurance Co. of Georgia v. Johnson: *Blazing the Judicial Trails in Punitive Damage Reform*, 28 U. TOL. L. REV. 401, 448-457 (1997) [hereinafter *Toledo Note*].

(1) Caps on Punitive Damage Awards

To prevent excessive and uncontrolled punitive damages, a number of states have enacted statutory caps on punitive damages awards. These statutes establish a maximum punitive award, generally ranging from $50,000 to $5,000,000.[27]

(2) State Recovery of Punitive Damages Awards

Presumably to reduce the incentive for plaintiffs to press for punitive awards, several states have enacted legislation either giving the state a share of punitive damages awards or permitting state agencies to seek punitive damages.[28] These statutes provide for a proportion of the punitive damage award ranging from thirty-five to 100 percent to be turned over to the state.[29]

(3) Bifurcated Trials

To prevent inappropriate awards of punitive damages that might result if the jury had access to financial information about the defendant during the liability phase of a trial, a number of states, as well as many federal courts, have adopted the practice of bifurcating trials to have separate hearings for the determination of liability and punitive damages.[30] In some states the bifurcation is automatic, while in others it is dependent upon the request by one of the parties.[31] The states also vary as to whether the amount of punitive damages award is in the discretion of the judge or the jury.[32]

(4) Heightened Burden of Proof

Another popular device for reigning in the frivolous imposition of punitive damages is to require a heightened burden of proof for the recovery of punitive damages.[33] Most of the states that have enacted such a rule provide for "clear and convincing" evidence, although at

27. Examples of these statutes are presented in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 615-16 (Ginsberg, J., dissenting). *See also*, Sharkey, *supra* note 26, at 1089 n.1; *Toledo Note*, *supra* note 26, at 405, 451-52.

28. For a discussion of these statutes, see James R. McKown, *Punitive Damages: State Trends and Developments*, 14 REV. LITIG. 419, 436-43 (1995).

29. *See BMW*, 517 U.S. at 616-18 (Ginsberg, J., dissenting); *Toledo Note, supra* note 26, at 405, 453-56.

30. *See* McKown, *supra* note 28, at 446-53.

31. *See BMW*, 517 U.S. at 618-19; *Toledo Note*, *supra* note 26, at 450-51.

32. Sharkey, *supra* note 26, at 1089 n.4.

33. See McKown, *supra* note 28, at 453-58 for a discussion of requirement of an elevated burden of proof for punitive damages. The author reports that twenty state legislatures and a number of state courts now require a standard of proof higher than the preponderance of the evidence. *See id.* at 455.

least one state requires proof "beyond a reasonable doubt."[34]

(5) Required Proportionality Between Compensatory and Punitive Damages Awards

A further limit on punitive damages is a required proportionality between the compensatory award and the punitive award. This is sometimes expressed as a ratio provided in legislation or by a standard applied by state courts.[35]

These statutory reforms generally make punitive damages harder to recover, reduce the maximum exposure of defendants and make that exposure more predictable, and reduce the incentive that plaintiffs have to expend resources pursuing punitive damages. This makes life easier for defendants, but it seems likely that it does so at the cost of the deterrent function of punitive damages.

C. Constitutional Limits on Punitive Damages Awards

In three decisions in the 1990s, the United States Supreme Court addressed itself to the limits that the Due Process Clause places on the amounts of punitive damages awards.[36] Judging from the lack of continuity among the cases and the sometimes splintered decisions, achieving consensus on this issue has been difficult.

In *Pacific Mutual Life Insurance Co. v. Haslip*,[37] the Court considered a punitive damages award of four times compensatory damages and 200 times the out-of-pocket expenses incurred by the plaintiff in a case from Alabama,[38] a punitive damages "hot spot."[39] In *Haslip*, the Court focused on the *procedures* used to arrive at the punitive damages award, finding the defendant's Due Process interests to have been adequately served by a process in which the jury's discretion was limited by standards given at trial and by post-trial judicial review that applied standards that the court found to impose "sufficiently definite and meaningful constraint."[40]

In *TXO Production Corp. v. Alliance Resources Corp.*,[41] the Supreme Court shifted its focus from scrutinizing the *process* used for determining punitive damages to scrutinizing the *product* of such a process, the amount of the punitive damages award. In *TXO*, the

34. *Id.*, at 455.
35. *See id.* at 445-46.
36. *See BMW*, 517 U.S. 559; TXO Prod. Corp. v. Alliance Resources Corp. 509 U.S. 443 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).
37. 499 U.S. 1 (1991).
38. *See id.* at 23.
39. Rustad, *supra* note 4, at 35.
40. *Haslip*, 499 U.S. at 20-21.
41. 509 U.S. 443 (1993).

Court established that the Due Process Clause prohibits a state from imposing a grossly excessive punishment on a tortfeasor,[42] but it did not find that punitive damages were excessive under the facts of the case.[43]

The Court's most recent and most detailed analysis of the constitutionality of punitive damages awards was made in *BMW of North America, Inc. v. Gore*,[44] another case from Alabama. *BMW* involved the imposition of a $4,000 compensatory damages and $4 million punitive damages award on the American distributor of BMW automobiles for its nondisclosure of predelivery repainting of new cars.[45] In its review of the original $4 million punitive damages award, the Supreme Court of Alabama had applied a seven-factor review standard referred to as the "*Green Oil* standards,"[46] after the Alabama case that had first adopted those standards of post-trial judicial review of punitive damages.[47] The *Green Oil* standards base review of punitive awards on the following considerations:

> The relationship between the harm that is likely to occur from the defendant's conduct as well as the harm that has actually occurred;
>
> The degree of reprehensibility of the defendant's conduct;
>
> The profitability of the defendant's conduct;
>
> The financial position of the defendant;
>
> The costs of the litigation;
>
> Any criminal sanctions that have been imposed on the defendant, which should operate in mitigation of the award;
>
> Other civil actions against the defendant based on the same conduct, which should operate in mitigation of the award.[48]

These post-trial review standards are very similar to the ones we identified with a principled approach in our original article,[49] and, in fact, are the exact standards that the U.S. Supreme Court, in *Haslip*, had found to provide a "sufficiently definite and meaningful constraint" on a jury's discretion to award punitive damages and to have "real effect when applied by the Alabama Supreme Court to jury awards."[50] In the Alabama review of *BMW*, the Alabama

42. *See id.* at 453-54.
43. *See id.* at 462.
44. 517 U.S. 559 (1996).
45. *See id.* at 563-67.
46. BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 622 (Ala. 1994).
47. *See* Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989).
48. BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 624 (Ala. 1994)(quoting Aetna Life Ins. v. Lavoie, 505 So. 2d 1050, 1062 (Ala. 1987)).
49. *See* Mallor & Roberts, *supra* note 1, at 667-69.
50. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991)(O'Conner, J. dissenting).

Supreme Court reduced the amount of the verdict that reflected losses suffered in other states,[51] but after a review of the application of the *Green Oil* standards, still found that a punitive award of $2 million was justified.[52]

In its decision in *BMW*, the U.S. Supreme Court held that a punitive damages award not only *could be* so large that it violates the Due Process Clause, but that the award under review *was*, in fact, unconstitutionally excessive.[53] The *BMW* case represents the first time the Supreme Court has found a state punitive damages award to be unconstitutional under the federal Due Process Clause.[54] According to the Court, the "elementary notions of fairness" imbedded in the Due Process Clause require that a defendant receive notice of both the conduct that will subject him to punishment and the severity of that punishment.[55] The Court identified three "guideposts" for determining the magnitude of punitive damages of which a defendant might have notice.[56] All three guideposts militate for a proportionality between the defendant's conduct and the punitive award.

The first guidepost, which the Court indicated was perhaps the most important, is the degree of reprehensibility of the defendant's conduct.[57] The Court provided a brief taxonomy of reprehensibility and indicated that the amount of a punitive award should be in proportion to both the wrongfulness of the defendant's conduct and the plaintiff's interest that the conduct implicated.[58] In this taxonomy, conduct that threatens the health and safety of others is more serious than that which affects only economic interests,[59] conduct that harms the economic interests of financially vulnerable people is more serious than conduct that harms the economic interests of the prosperous,[60] "trickery and deceit" are more serious than negligence,[61] and repeated, conscious wrongdoing is more serious

51. *See* BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 627-29 (Ala. 1994).

52. *See id.* at 629.

53. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996).

54. Sabrina C. Turner, *The Shadow of* BMW of North America, Inc. v. Gore, 1998 WIS. L. REV. 427, 427.

55. *BMW*, 517 U.S. at 574.

56. *See id.* at 574-75. The Court did not specify what the relationship is between the three guideposts and the concept of notice to the defendant, but it stated that "each of the [three guideposts]... indicates that BMW did not receive adequate notice of the magnitude of the sanction... lead us to the conclusion that the $2 million award against BMW is grossly excessive...." *Id.*

57. *See id.* at 575.

58. *See id.* at 575-580.

59. *See id.* at 576 (quoting Solem v. Helm, 463 U.S. 277, 292-93 (1983)).

60. *See id.* at 576.

61. *Id.*(quoting TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 462

than arguably legal conduct that stops when the wrongfulness becomes known.[62]

The second guidepost is the reasonableness of the ratio between punitive damages and the actual harm suffered by the plaintiff.[63] The ratio is measured as the relationship between the punitive damages award and "the harm *likely to result* from the defendant's conduct as well as the harm that actually has occurred."[64] The Court rejected the application of a simple formula for the ratio, noting that there would be times when a high ratio was warranted to punish and deter egregious conduct, such as where the defendant's conduct results in small economic damages or where the injury is noneconomic in nature or otherwise difficult to detect.[65] However, the 500 to one relationship between the punitive award and the actual harm done to the plaintiff in the *BMW* case was "breathtaking," while not supported by any of the rationales for such a disproportionate ratio.[66]

The third guidepost used to determine constitutionally excessive awards is a comparison of the punitive damages to "the civil or criminal penalties that could be imposed for comparable misconduct."[67] That is, the punitive award should be commensurate with criminal and civil sanctions imposed by legislatures for comparable conduct.[68] The point of this comparison is to give the potential defendant notice as to the magnitude of the penalty that might be exacted for committing the objectionable act.[69] After examining the application of the three guideposts to the facts of the case, the Court held that the damages were grossly excessive and transcended the constitutional limit.[70] It reversed the case and remanded it to the Alabama Supreme Court.[71]

D. Post-Trial Review of Punitive Damages after BMW

The *BMW* case did not make clear whether the Court's objection was to the standards used by the Alabama courts or to the way in

(1993)).

62. *See id.* at 577, 579.

63. *See id.* at 580-81.

64. *Id.* at 581(quoting TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 460 (1993)).

65. *See id.* at 582.

66. *Id.* at 580-84.

67. *Id.*

68. *See id.*

69. *See id.* at 584 (stating that "[n]one of these statutes would provide an out-of-state distributor with fair notice that the first violation—or, indeed the first 14 violations—of its provisions might subject an offender to a multimillion dollar penalty").

70. *See id.* at 585-86.

71. *See id.* at 586.

which the Alabama court had applied its standards. Two of the Supreme Court's guideposts, reprehensibility and ratio,[72] are also two of the *Green Oil* standards.[73] The third guidepost, sanctions for comparable misconduct, is also contemplated in the *Green Oil* standards, although under *Green Oil*, other sanctions are to be considered in *mitigation* of the punitive damages,[74] whereas in the Supreme Court's scheme, the function of considering sanctions for comparable misconduct is to provide a standard of proportionality for the punitive award.[75] Did the Supreme Court intend to foreclose the use of standards other than the three guideposts in post-trial review of punitive awards or did it intend to convey that the lower court had not adequately weighed the three guideposts?

On remand, the Supreme Court of Alabama interpreted the Supreme Court's *BMW* opinion as not excluding the consideration of other factors that might bear on the question of excessiveness and concluded that the Court had objected to the way in which the Alabama court had applied the factors, rather than to the *Green Oil* standards themselves.[76] The Alabama court drew the conclusion that the Supreme Court wanted lower courts to be more rigorous in their application of the reprehensibility, ratio, and comparable sanctions standards,[77] and it proceeded to do just that, reducing Gore's punitive damages award to $50,000.[78]

E. The Current State of the Law and a Principled Approach

The practice and standards of punitive damages need to be calibrated in a way that balances the interests of the defendant and society: protecting the defendant's interests by ensuring that punishment is warranted and appropriate, and protecting society's interest by assuring that the punitive remedy retains its deterrent effect. Our original article suggested that this balance be struck by a combination of substantive review standards and procedural reforms.[79]

Statutory tort reforms of punitive damages that arbitrarily make such damages more difficult to recover (elevated standards of proof), specify a maximum amount of punitive damages (damage caps), or make punitive damages calculable in advance (required ratio between

72. *See supra* notes 57-66 and accompanying text.
73. *See* Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989).
74. *See id.* at 224.
75. *See id.* at 583-85.
76. *See* BMW of North America, Inc. v. Gore, 701 So. 2d 507, 509 (Ala. 1997).
77. *See id.* at 510.
78. *See id.* at 515.
79. *See* Mallor & Roberts, *supra* note 1, at 663-69.

compensatory and punitive awards) fail to strike this balance because they weaken the deterrent effect of punitive damages. Statutory measures allowing the state to collect some or all of a punitive award reduce or remove the plaintiff's incentive to act as a private attorney general, and thus weaken the possibility that punitive damages will be used to accomplish deterrence.

Statutory provisions for bifurcated trials are, however, a positive step toward a principled approach in that they help to avoid compromise on the liability decision and overly harsh penalties that might result from passion or prejudice. We remain persuaded, however, that principled results would be more likely to result if the *judge* rather than the jury, assessed punitive damages. A study on bifurcation indicates that larger punitive damages awards tended to result from bifurcated trials in the federal system than unified trials, resulting possibly from the psychology of having all the bad news presented at once.[80] It seems unlikely that this inflationary effect would occur if the judge, rather than the jury, were assessing the damages.[81] Certainly, it would seem a more efficient process than the procedure of charging the jury with one group of standards, then providing post-trial review of the jury's award using another group of standards, followed perhaps by a meta-review by a higher appellate court of the standards used during post-trial review. The proposed scheme has constitutional implications as a potential violation of state and federal right to jury trial,[82] but the outcome of such a challenge has not been fully developed at this point and is one of the issues regarding punitive damages that remains to be clarified.

The Supreme Court has made some helpful contributions to the principled approach to punitive damages. Its taxonomy of reprehensibility bolsters a principled approach in that it provides useful standards for lower courts to use in considering whether punitive damages are warranted, and if so, to what extent. Its rejection of a precise, mathematical approach to determining the ratio of punitive damages to actual and threatened losses[83] is to be

80. *See* Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297, 335-36.

81. We can probably expect that judges would be somewhat more restrained in the assessment of punitive awards, because they frequently reduce the amount of punitive damages awards. *See* Mark Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1408-09, 1409 nn.75 and 79 (1993).

82. *See* Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 401 (Ohio 1994)(holding such a statute to be unconstitutional under Ohio's Constitution); *but see* Smith v. Printup, 866 P.2d 994 (Kan. 1993)(upholding Kansas' statute). For an excellent overall discussion of this issue, which is beyond the scope of this article, see Sharkey, *supra* note 26.

83. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996)("[W]e have consistently rejected the notion that the constitutional line is marked by a simple

applauded, because it permits punitive damages to remain something of a "wild card" preventing a defendant from making a certain, advance calculation of profit and cost.[84] In fact, in some instances where the compensatory damages may be extremely low, but the conduct so evil and the potential of harm to society is great, punitive damages should be disproportionately high in order to encourage the plaintiff to act as a private attorney general.[85] Additionally, if the underlying message of *BMW* is to encourage trial and appellate court judges to "ride herd" on punitive damages awards and provide meaningful judicial review of such awards,[86] that, too, is a step on the path of the principled approach.

On the negative side, however, the Court's new requirement of proportionality between the punitive award and civil and criminal sanctions for comparable conduct threatens to substantially dilute the deterrent effect of punitive damages, both because it makes the amount of possible punitive damages more predictable than is desirable for striking the balance between the defendant's and society's interests, and because punitive damages are useful in many situations precisely because other civil and criminal penalties are inadequate to deter the defendant's conduct.

In addition, the *BMW* opinion's lack of clarity about whether the three guideposts supplant other standards for excessiveness or are standards to be emphasized in excessiveness reviews creates the danger that lower courts might under-assess punitive damages. For example, three *Green Oil* standards not mentioned by the court in *BMW*—profitability of the conduct, defendant's financial position, and costs of litigation—are standards that check whether the award of punitive damages is *adequate* to deter a particular defendant and incent a particular plaintiff. The only one of these standards discussed in *BMW* was referred to obliquely when the Court stated 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. Indeed, its status as an active participant in the national economy implicates the federal

mathematical formula, even one that compares actual and potential damages to the punitive award.").

84. *See* Mallor & Roberts, *supra* note 1, at 666. Almost all the courts that have considered the notion of a precise mathematical formula have rejected it. *See, e.g.*, *BMW* 517 U.S. at 582; Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1990); Denesha v. Farmers Ins. Exch., 161 F.3d 491, 504 (8th Cir. 1998); Crookston v. Fire Ins. Exch., 817 P.2d 789, 809 (Utah 1991).

85. *See* Wahba v. H & N Prescription Ctr., Inc. 539 F. Supp. 352, 358 (E.D.N.Y. 1982); Dyna-Med, Inc. v. Fair Employment and Hous. Comm'n., 743 P.2d 1323, 1338 (Cal. 1987); Schmidt v. Pine Tree Land Dev. Co., 631 P.2d 1373, 1374-75 (Or. 1981).

86. *See* McKee, *supra* note 5, at 225.

> interest in preventing individual States from imposing undue burdens on interstate commerce."[87]

The deterrent power of punitive damages would indeed be weakened if lower courts interpreted *BMW* to mean that they should no longer attempt to ensure that a punitive damages award was adequate to arouse the defendant's attention and to require him to disgorge any profits realized by its reprehensible conduct.

Conclusion

It remains our belief that the criteria proposed in our original article along with a bifurcated trial in which the judge awards punitive damages would result in a principled outcome in cases in which punitive damages are sought. Of course, as seen in *BMW*, the criteria can be misapplied or at least are capable of divergent applications. Still, the criteria balance the interests of the defendant and society, and if coupled with the kind of judicial supervision demanded by *BMW*, the standards should provide the opportunity for meaningful review. Better still would be to remove the jury from the assessment of the punitive award. A bifurcated procedure in which the jury decides whether punitive damages are appropriate and the judge assesses the amount of punitive damages can engage the judge's experience in imposing sanctions, balancing competing interests, and making public policy judgments while engaging the jury's authority to speak for the community about the necessity for a punitive remedy.[88]

The composite effect of statutory reforms and the Supreme Court's line of cases ending with *BMW* seems to us likely to suppress punitive damages awards and weaken the remedy. Much work has been done in the past twenty years to ensure that punitive damages are not awarded in an arbitrary or casual manner. Today it seems that the balance of concern has shifted to the side of the defendant's interests, and that greater attention to standards and practices that accommodate *both* society's and defendants' interests are needed to retain punitive damages as a valuable partner in enforcing society's norms.

87. *BMW*, 517 U.S. at 585.

88. *See* Sharkey, *supra* note 26, at 1129; Richard Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 96 (1985); Griffen B. Bell & Perry E. Pearce, *Punitive Damages and the Tort System*, 22 U. RICH. L. REV. 1 (1987); Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. Rev. 975, 1003-07 (1989).