Marking a Road to Nowhere-Supreme Court Sets Punitive Damages Guideposts in BMW v. Gore

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One might think that the debate over punitive damages, which has a history dating back thousands of years,[1] would have been settled long ago. Nothing could be further from the truth. Though during the nineteenth and twentieth centuries the debate steadily smoldered and at times flared up,[2] it has been positively raging during the past several decades.[3] This increased attention to punitive damages appears to have been ignited by unprecedented monetary

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1. *See, e.g.*, *Exodus* 22:4 (requiring double restitution for the crime of theft); 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES 1-3 (3d ed. 1995) (noting the existence of punitive damages in the Code of Hammurabi in 2000 B.C., in Hittite Law in 1400 B.C., in ancient Greek and Roman law, and in England since the thirteenth century); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 12-20 (1982) (discussing the origins of punitive damages in the Anglo-American law); Michael Rustad & Thomas Koenig, *Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1284-1304 (1993) (tracing the evolution of punitive damages from the ancient to the English and American judicial systems). On punitive damages generally, see GERALD W. BOSTON, PUNITIVE DAMAGES IN TORT LAW (1993); JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE (1996); SCHLUETER & REDDEN, *supra;* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363 (1994).

2. *See* Rustad & Koenig, *supra* note 1, at 1298-1301 (describing the sometimes emotionally charged eighteenth century debates between Simon Greenleaf of Harvard Law School, who argued that punitive damages were without doctrinal basis in Anglo-American law, and Thomas Sedgwick, a practitioner and commentator, who advocated punitive damages on their practical usefulness and historical acceptance). *Compare* Fay v. Parker, 53 N.H. 342, 397 (1872) ("[T]his heresy [punitive damages] should be taken in hand without favor, firmly and fearlessly.... [N]ot reluctantly should we apply the knife to this deformity, concerning which every true member of the sound and healthy body of the law may well exclaim,—'I have no need of thee.' "), *with* Luther v. Shaw, 147 N.W. 17, 20 (Wis. 1914) ("The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, ... restrains the strong, influential and unscrupulous, vindicates the right of the weak, and encourages recourse to, and confidence in, the courts of law....").

3. There have been three law review symposia dedicated to punitive damages in recent years. *See* Symposium, *Punitive Damages Awards in Products Liability Litigation: Strong Medicine or Poison Pill?*, 39 VILL. L. REV. 353 (1994); Symposium, *Punitive Damages*, 40 ALA. L. REV. 687 (1989); Symposium, *Punitive Damages,* 56 S. CAL. L. REV. 1 (1982). In addition to the symposia, see George C. Christie, *Current Trends in the American Law of Punitive Damages*, 20 ANGLO-AM. L. REV. 349 (1991); William H. Volz & Michael C. Fayz, *Punitive Damages and the Due Process Clause: The Search for Constitutional Standards*, 69 U. DET. MERCY L. REV. 459 (1992); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983).

damage awards,[4] which by the late 1980s resulted in a perception among legal scholars and the public alike that punitive damages were "out of control."[5]

Punitive damages, as the name suggests, are penal rather than compensatory in nature and introduce a quasi-criminal element into civil law proceedings.[6] The most frequently cited purposes for punitive damages are twofold: (1) to punish the wrongdoer for his actions and (2) to deter such conduct by others in the future.[7] Without the

4. *See, e.g.*, BE & K Constr. Co. v. United Bhd. of Carpenters & Joiners of America, AFL-CIO, 90 F.3d 1318, 1321, 1331-32 (8th Cir. 1996) (partially reversing verdict and ordering retrial because of introduction of prejudicial evidence where jury had returned verdict including $20 million in punitive damages); O'Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1446-47 (10th Cir. 1987) (upholding jury verdict of $10 million of punitive damages to single plaintiff); Central Telecomm., Inc. v. TCI Cablevision, Inc., 800 F.2d 711, 732 (2d Cir. 1986) (upholding $25 million verdict of punitive damages); Continental Trend Resources, Inc. v. OXY USA, Inc., 810 F. Supp. 1520, 1528-37 (W.D. Okla. 1992) (denying motion for remittitur and upholding jury award of $30 million in punitive damages as reasonable); Burke v. Deere & Co., 780 F. Supp. 1225, 1238 (S.D. Iowa 1991) (remitting $50 million punitive damages award to $28 million); Amoco Chem. Co. v. Certain Underwriters at Lloyds of London, No. B083904, 1996 WL 407855, at *1 (Cal. App. June 4, 1996) (reversing judgment and ordering retrial where improperly instructed jury awarded $386 million in punitive damages); Sprague v. Walter, 656 A.2d 890, 930 (Pa. Super. 1995) (remitting $31.5 million punitive damages award for libel to $21.5 million); Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 866 (Tex. Ct. App. 1987) (reducing $3 billion punitive damages assessment to $1 billion).

5. *See* John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 139 (1986) ("In my view, punitive damages are out of control."); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1154 (1984) ("[T]he amount of punitive damages awarded in recent years, as if feeding upon itself, has escalated to astronomical figures that boggle the mind."); Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 919 (1989) (noting that prior to 1976, only three reported appellate product liability decisions upheld punitive damages awards, none of which exceeded $250,000, while "[t]oday, hardly a month goes by without a multimillion-dollar punitive damages verdict in products liability case." (citations omitted)). *But see* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 35-62 (1990) (presenting empirical evidence undermining critics' claims about the incidence, size, and effects of punitive damages); Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 23 (1989) ("Every empirical study of punitive damages awards concludes that there is simply no evidence that punitive damages are routinely awarded."); *id.* at 87 (reviewing studies and concluding that "punitive damages are being appropriately applied."); Rustad & Koenig, *supra* note 1, at 1307 (stating that empirical evidence shows that "punitive damages are neither routine nor staggering").

6. *See* Owen, *supra* note 1, at 365.

7. *See id.*; *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("[Punitive damages] are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."); 1 SCHLUETER & REDDEN, *supra* note 1, at 21 ("[T]he most widely accepted purposes [of punitive damages] have been punishment and deterrence.");

procedural safeguards provided by the criminal system, the standards applicable to punitive damages have been unclear.[8] Consequently, defendants assessed with such penalties recently have challenged punitive damages on various constitutional grounds.[9]

It was just such a challenge, brought under the umbrella of due process, that gave rise to the recent case *BMW of North America, Inc. v. Gore*.[10] In a five-four decision, the Supreme Court for the first time in history reversed a punitive damages award from a state court.[11] The Court determined that a two million dollar punitive damages award assessed against BMW for not disclosing it had repainted the plaintiff's car prior to sale violated the Constitution.[12]

Rustad & Koenig, *supra* note 1, at 1309-26 (discussing the contemporary functions of punitive damages and noting that the punishment and deterrent functions are the most frequently cited rationales for punitive damages). Additional purposes for punitive damages include assisting the plaintiff in recovering litigation expenses and providing an incentive for a person who has incurred only minimal injuries to bring suit. *See* 1 SCHLUETER & REDDEN, *supra* note 1, at 33-36.

8. *See* Owen, *supra* note 1, at 365 (pointing out that the beyond-a-reasonable-doubt burden of proof and prohibitions against double jeopardy, excessive fines, and compulsory self-incrimination do not apply in the civil arena of punitive damages); *id.* at 384-88 (accepting as well-founded the criticism that the standards for awarding punitive damages, such as "malice," "fraud," or "oppression," as well as the standards for setting the amount of punitive damages, are vague and lead to unprincipled and excessive awards). This lack of clarity in the standards applicable to punitive damages is witnessed by the cases reviewed in this Note, which challenge punitive damages on both procedural and substantive due process grounds. *See infra* notes 82-145 and accompanying text.

9. *See* Honda Motor Co. v. Oberg, 512 U.S. 415, 418 (1994) (procedural due process challenge); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 446 (1993) (procedural and substantive due process challenge); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 7 (1990) (procedural due process challenge); Browning-Ferris Ind. of Vermont v. Kelco Disposal, Inc., 492 U.S. 257, 260, 276-77 (1989) (excessive fines and due process challenge); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 76-80 (1988) (due process challenge); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828-29 (1986) (excessive fines and due process challenges); *see also* Gertz, 418 U.S. at 349 (limiting availability of punitive damages in defamation suits because of competing interests of First Amendment freedoms); Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 988-1007 (1989) (arguing that a higher evidentiary standard, the bifurcation of the liability and damages phases of trial, and the determination of the punitive damages by the judge are necessary to accord defendants procedural due process); Volz & Fayz, *supra* note 3, at 462-81 (reviewing the Supreme Court's recent decisions concerning the constitutionality of punitive damages); Wheeler, *supra* note 3, at 272 (arguing for increased procedural safeguards to bring punitive damages into compliance with due process and for the application of the criminal safeguards of the Fourth, Fifth, and Sixth Amendments to punitive damages actions).

10. 116 S. Ct. 1589 (1996).

11. *See id.* at 1604 (stating that the punitive damages award violates the Constitution); *id.* at 1611 (Scalia, J., dissenting) (noting that the majority's decision is "the first instance of this Court's invalidation of a state-court punitive assessment as simply unreasonably large").

12. *See infra* text accompanying note 55 (discussing the Supreme Court's holding that

This Note first reviews the majority,[13] concurring,[14] and dissenting[15] opinions in *BMW*. The Note then traces the Supreme Court's inclusion of punitive damages in its due process jurisprudence,[16] a move which left as many questions as answers. Next, *BMW* is analyzed in terms of its attempt to reconcile competing viewpoints from previous decisions and set forth a substantive due process standard for punitive damages, an attempt which this Note argues was not entirely successful.[17] Finally, this Note concludes that while the Supreme Court's reversal of a state-court punitive damages award is significant in itself, the unavoidable subjectivity that pervades nearly all aspects of the Court's decision suggests that a definitive answer to the punitive damages debate, if one exists, may lie elsewhere.

In January 1990, Dr. Ira Gore, Jr. purchased what he thought was a new BMW sports sedan.[18] Approximately nine months later, he took the car to a detailer who told him it had been repainted.[19] Dr. Gore sued BMW of North America (BMW), alleging that BMW's failure to disclose the car's repainting was the "suppression of a material fact," constituting fraud in Alabama.[20] In not disclosing it had repainted the car, BMW acted in accordance with its nationwide policy, adopted in 1983, pertaining to the damage of cars in manufacture or transit.[21] This policy provided that BMW could sell as new a car that had been damaged and subsequently repaired, so long as the repair cost did not exceed three percent of the car's retail price; such repairs were not disclosed to the dealer.[22] Because the cost of re-

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the punitive damages award in *BMW* was unconstitutional).

13. *See infra* notes 33-55 and accompanying text.

14. *See infra* notes 56-65 and accompanying text.

15. *See infra* notes 66-81 and accompanying text.

16. *See infra* notes 82-145 and accompanying text.

17. *See infra* notes 146-86 and accompanying text.

18. *See BMW*, 116 S. Ct. at 1593. Dr. Gore purchased the automobile from an authorized BMW dealer in Birmingham, Alabama. *See id.*

19. *See id.* Dr. Gore did not notice any imperfections in the car's appearance prior to taking it to the detailer. *See id.* He took his BMW to a local detailer, Slick Finish, to make it "look 'snazzier than it normally would appear.' " *Id.* (citation omitted).

20. *See id.* at 1593 n.3. Fraud is defined by statute in Alabama: "Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." ALA. CODE § 6-5-102 (1993).

21. *See BMW*, 116 S. Ct. at 1593. There was no Alabama law on nondisclosure when BMW enacted this policy, and, indeed, Alabama did not pass such a law until after this trial. *See* ALA. CODE § 8-19-5(22)(c) (1993) (requiring disclosure only if the repair cost exceeds the greater of five hundred dollars or three percent of the value of the car). Had the statute been in effect when Dr. Gore purchased his car, presumably BMW's nondisclosure would have been lawful.

22. *See BMW*, 116 S. Ct. at 1593. If the repair cost exceeded three percent of the

painting Dr. Gore's car was less than three percent of its value, the Birmingham dealer was not told that BMW had repainted the car.[23]

At trial,[24] the jury awarded Dr. Gore four thousand dollars in compensatory damages and four million dollars in punitive damages.[25] After an unsuccessful post-trial motion to set aside the punitive damages award, BMW appealed to the Alabama Supreme Court.[26] The court reviewed the jury award in light of the factors that it previously had articulated in *Green Oil Co. v. Hornsby*,[27] which had

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car's retail price, the car would be placed into company service to be sold as used at a later date. *See id.*

23. *See id.* Dr. Gore paid $40,750.88 for his BMW. *See id.* The $601.37 cost of repainting the car was 1.5% of that value. *See id.*

24. Dr. Gore did not attempt to settle the dispute before resorting to litigation. *See* BMW of North America, Inc. v. Gore, 646 So. 2d 619, 624 (Ala. 1994), *rev'd*, 116 S. Ct. 1589 (1996).

25. *See BMW*, 116 S. Ct. at 1593-94. At trial, the former owner of the dealership that sold the car to Dr. Gore testified that Dr. Gore's car was worth approximately ten percent less than a BMW that had not been repainted. *See id.* at 1593. In addition, the plaintiff's attorney introduced evidence of 983 refinished cars, each with a repair cost exceeding $300, sold as new by BMW since 1983. *See id.* Accordingly, he urged the jury to return a verdict of $4 million to account for the profits BMW had wrongfully taken from people acting under this policy. *See id.* Under Alabama law, in order for the jury to award punitive damages, it must have found that the defendant's behavior constituted "gross, oppressive or malicious" fraud. *See* ALA. CODE §§ 6-11-20, 6-11-21 (1993).

26. *See BMW*, 116 S. Ct. at 1594. BMW based its nondisclosure policy on the strictest state statute regarding nondisclosure on record in 1983. *See id.* at 1600. Because its action in this case was consistent with all of the approximately twenty-five states that had statutes on such nondisclosure, BMW argued that its lawful conduct in those states could not be used in calculating punitive damages. *See id.* at 1594. In addition, BMW emphasized the disparity between the instant action and *Yates v. BMW of North America, Inc.*, 642 So. 2d 937 (Ala. 1993), a case in which the plaintiff on remarkably similar facts was denied punitive damages. *See BMW*, 116 S. Ct. at 1594 n.8.

> Justice Houston of the Alabama Supreme Court described this disparity as follows: The *Yates* case and this case are almost identical. The same excellent lawyers represented Yates that represent Gore; the same excellent lawyers represented BMW NA in both cases. Excellent trial judges, in the same judicial circuit, conducted as nearly perfect trials as can be conducted. Each plaintiff was a member of a respected profession; each was a physician. BMW NA was the defendant in each case. How does Gore get $2,000,000 in punitive damages and Yates get nothing in punitive damages? Different juries.

BMW, 646 So. 2d at 630-31 (Ala. 1994) (Houston, J., concurring).

27. 539 So. 2d 218 (Ala. 1989). These factors include (1) a reasonable relationship between the punitive damages and the harm caused or likely to occur from the defendant's conduct; (2) the " 'degree of reprehensibility of the defendant's conduct' "; (3) the removal of any profit from the defendant attributable to the wrongful conduct, plus some amount in excess of the profit; (4) the " 'financial position of the defendant' "; (5) " '[a]ll the costs of litigation . . . so as to encourage plaintiffs to bring wrongdoers to trial' "; (6) mitigation for criminal sanctions imposed on the defendant for this conduct; (7) mitigation for civil actions against the defendant for this conduct. *See id.* at 223-24 (quoting Aetna Life Ins. Co. v. LaJoie, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring)).

been expressly approved by the United States Supreme Court.[28] The Alabama Supreme Court found BMW's conduct "reprehensible" and partially upheld the verdict.[29] The court held that the jury had improperly relied on actions in other jurisdictions as a multiplier in computing the verdict and ordered a remittitur for two million dollars in punitive damages.[30] In setting this amount, the Alabama court stated it was "not consider[ing] those acts that occurred in other jurisdictions" and held the two million dollar remittitur "constitutionally reasonable."[31] BMW appealed to the United States Supreme Court, claiming the remitted punitive damages award violated its due process rights under the Fourteenth Amendment.

Justice Stevens, writing for the majority, first stated the constitutional limitation underlying the case: "The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a ' "grossly excessive" ' punishment on a tortfeasor."[32] After reviewing the facts, Justice Stevens began his analysis by considering the states' legitimate interests in punitive damages, punishment and deterrence, and the effect of punitive damages on interstate commerce and state sovereignty.[33] He observed that while every state has an interest in protecting its citizens from deceptive trade practices, no single state may impose its policies on other states.[34] Accordingly, Alabama's penalties against BMW must be commensurate with its own interests

28. *See* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991); *see also infra* notes 93-108 and accompanying text (discussing *Haslip*).

29. *See BMW*, 116 S. Ct. at 1594-95.

30. *See id.* at 1595.

31. *BMW*, 646 So. 2d 619, 628-29 (Ala. 1994). The United States Supreme Court observed that while the Alabama court claimed it engaged in a "comparative analysis" that considered Alabama and cases in other jurisdictions with similar facts, it cited no such cases. *See BMW*, 116 S. Ct. at 1595 & n.11. Justice Houston of the Alabama Supreme Court, in his special concurrence, noted that "punitive damages awards in the Alabama cases involving fraud in the sale of automobiles range from a low of $11,800 to a high of $162,637" and that the range in other jurisdictions was "similar to, although slightly wider than, the range in Alabama." *BMW*, 646 So. 2d at 629 (Houston, J., concurring). Whether the Alabama Supreme Court concluded that $2 million is comparable to $162,637 is unclear.

32. *BMW*, 116 S. Ct. at 1592 (quoting TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 454 (1993)). The Fourteenth Amendment provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law...." U.S. CONST. amend. XIV, § 1.

33. *See BMW*, 116 S. Ct. at 1595-98; *see also supra* note 7 and accompanying text (discussing the purposes of punitive damages).

34. *See BMW*, 116 S. Ct. at 1596-97 (citing Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction.")). Such an imposition would infringe not only upon the rights of sister states, but also on the federal government's power to regulate interstate commerce. *See id.* at 1597.

and not punish or deter conduct lawful elsewhere.[35] When Alabama's interests are thus limited, the Court concluded, it becomes "apparent . . . that this award is grossly excessive."[36]

Next, Justice Stevens moved to a due process analysis and declared 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."[37] In determining that such notice had not been given and thus, that the award was grossly excessive, the Court set forth and analyzed three "guideposts": (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio between the actual or potential harm and the punitive damages award; and (3) sanctions for similar misconduct.[38]

The Court considered the degree of reprehensibility of the defendant's conduct, with its long historical pedigree, as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award."[39] Discussing reprehensible conduct from previous cases, the Court highlighted such factors as the presence of violence, trickery and deceit, malice, reckless disregard of others' safety, deliberate false statements, concealment of improper motive, and repeated engagement in conduct known to be prohibited.[40] The Court found that such aggravating factors not only were absent from BMW's conduct,[41] but also that BMW, relying on the law of other jurisdictions, possessed a "good-faith basis" to believe it had no duty to disclose in this case.[42]

The Court next considered its second guidepost: the ratio between actual and potential harm to the plaintiff and the punitive damages award.[43] As with the degree of reprehensibility, the Court pointed out the historical acceptance of "[t]he principle that [punitive] damages must bear a 'reasonable relationship' to compen-

35. *See id.* at 1597-98.

36. *Id.* at 1598.

37. *Id.*

38. *See id.* at 1598-99.

39. *Id.* at 1599 (citing Day v. Woodworth, 55 U.S. (13 How.) 363, 371 (1851) (stating that exemplary damages should reflect "the enormity of the offense")).

40. *See id.* at 1599-1601.

41. *See id.* at 1599.

42. *See id.* at 1600, 1601 ("We may simply emphasize that the record contains no evidence that BMW's decision to follow a disclosure policy that coincided with the strictest extant state statute was sufficiently reprehensible to justify a $2 million award of punitive damages.").

43. *See id.* at 1601-03.

satory damages."[44] Rather than relying on historical standards, however, the Court emphasized its recent decisions of *Pacific Mutual Life Insurance Co. v. Haslip*[45] and *TXO Production Corp. v. Alliance Resources Corp.*,[46] where it found ratios of four to one and ten to one " 'close to the line . . . of constitutional impropriety.' "[47] The Court then noted that Dr. Gore's two million dollar award, five hundred times his actual harm, was "dramatically greater" than the awards upheld in *Haslip* and *TXO*.[48] As it had done in the previous cases, the Court unequivocally rejected the existence of a simple mathematical formula: " ' "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s], into the constitutional calculus." ' "[49]

The third guidepost used by the Court to determine excessiveness was the comparison of the punitive damages award with the civil and criminal penalties for similar misconduct.[50] A survey of state statutes on deceptive trade practices revealed no fine greater than ten thousand dollars; in addition, there had been no judicial decision to put BMW on notice that such a severe fine could be imposed for its policy.[51] The Court concluded that "[i]n the absence of a history of

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44. *Id.* at 1601.

45. 499 U.S. 1 (1991); *see also infra* notes 93-108 and accompanying text (discussing *Haslip*).

46. 509 U.S. 443 (1993); *see also infra* notes 109-31 and accompanying text (discussing *TXO*).

47. *BMW*, 116 S. Ct. at 1602 (quoting *Haslip*, 499 U.S. at 23-24). In *TXO*, the Court considered the amount of harm which potentially would have been inflicted on the plaintiff had the defendant succeeded in its tortious scheme determinative in finding the punitive damages award constitutionally acceptable. *See TXO*, 509 U.S. at 460-61. When this potential harm was taken into account, a ratio which otherwise would have been 526 to 1 became 10 to 1. *See BMW*, 116 S. Ct. at 1602; *see also infra* notes 118-19 and accompanying text (discussing this potential harm factor).

48. *See BMW*, 116 S. Ct. at 1602. The Court noted that neither Dr. Gore, nor any other BMW customer, would be subject to additional potential harm from BMW's nondisclosure policy. *See id.* The Court went on to call this five hundred to one ratio a "breathtaking [one that] must surely 'raise a suspicious judicial eyebrow.' " *Id.* at 1603 (quoting *TXO*, 509 U.S. at 482 (O'Connor, J., dissenting)).

49. *Id.* at 1602 (quoting *TXO*, 509 U.S. at 458 (quoting *Haslip*, 499 U.S. at 18)).

50. *See id.* at 1603.

51. *See id.* The applicable statute in Alabama, the Deceptive Trade Practices Act, authorized a maximum civil penalty of two thousand dollars for BMW's conduct. *See* ALA. CODE § 8-19-11(b) (1993); *see also* ARK. CODE ANN. § 23-112-309(b) (Michie 1992) (authorizing five thousand dollar and ten thousand dollar fines for violation of the state's Motor Vehicle Commission Act); FLA. STAT. ANN. § 320.27(12) (West Supp. 1997) (authorizing up to a one thousand dollar fine); GA. CODE ANN. § 40-1-5(g) (1994)

noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance with the disclosure requirement imposed by the Alabama Supreme Court in this case."[52]

Justice Stevens summarized the majority opinion by highlighting the competing interests at issue: Alabama's interest in protecting its citizens from deceptive trade practices, BMW's entitlement to fair notice of the consequences of its actions, and the limitations on each state from imposing its regulatory policies on its neighbors and unduly burdening interstate commerce.[53] Finally, he stated, "We are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit."[54]

Justice Breyer wrote a separate concurrence to explain why the "strong presumption of validity" generally accorded a judgment resulting from fair procedures was overcome in Dr. Gore's case.[55] Justice Breyer expressed a concern that law and legal processes, rather than "arbitrary coercion" or the "decisionmaker's caprice," govern our legal system.[56] Indeed, such "application of law . . . helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself."[57]

Justice Breyer discussed five areas in which Alabama's legal process failed to provide the necessary constraint on the jury and the courts.[58] First, he observed that the applicable Alabama statute gave no guidance regarding the size of a punitive damages award appro-

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(authorizing an administrator to assess a maximum penalty of two thousand dollars); *id.* § 10-1-397(a) (Supp. 1996) (authorizing a superior court to assess a maximum penalty of five thousand dollars); IND. CODE ANN. § 9-23-6-4 (Michie 1991) (authorizing from fifty to one thousand dollars); N.H. REV. STAT. ANN. §§ 357-C:15, 651:2(IV)(b) (1995 & Supp. 1996) (authorizing a corporate fine up to twenty thousand dollars); N.Y. GEN. BUS. LAW § 396-p(6) (McKinney Supp. 1996) (authorizing maximum penalties of fifty dollars for the first offense and two hundred fifty dollars for subsequent offenses).

52. *BMW*, 116 S. Ct. at 1603.

53. *See id.* at 1604.

54. *Id.*

55. *See id.* (Breyer, J., concurring). Justice Breyer was joined by Justices O'Connor and Souter. *See id.* (Breyer, J., concurring). Because the Court in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1990), found that the procedures of imposing punitive damages used by Alabama were not unconstitutional per se and imposed definite and meaningful constraints upon the jury in its imposition of punitive damages, *see infra* notes 102, 105 and accompanying text, Justice Breyer practically had no choice but to start his analysis with the assumption that these very same procedures, as used in *BMW*, were fair.

56. *BMW*, 116 S. Ct. at 1605 (Breyer, J., concurring).

57. *Id.* (Breyer, J., concurring).

58. *See id.* at 1605-09 (Breyer, J., concurring).

priate for different types of conduct.[59] Second, the Alabama courts' application of their own *Green Oil* factors, which were intended to constrain punitive damages awards, failed to effect that purpose.[60] Third, the state courts in no way made use of an alternative standard or theory, such as some economic justification for the award, that could provide the constraining legal force otherwise absent.[61] Fourth, the punitive damages award did not conform to "any community understanding or historic practice ... which ... would provide background standards constraining arbitrary behavior and excessive awards."[62] Finally, no legislative enactments classifying or quantitatively limiting punitive damages awards constrained the otherwise

59. *See id.* at 1605-06 (Breyer, J. concurring); *see also* ALA. CODE § 6-11-20(a) (1993) (authorizing punitive damages in cases of "oppression, fraud, wantonness, or malice"); *id.* § 6-11-20(b) (defining fraud to include the "intentional ... concealment of a material fact the concealing party had a duty to disclose, which was gross, oppressive, or malicious"); *id.* § 6-11-20(b)(2) (defining malice to include any "wrongful act without just cause or excuse ... [w]ith an intent to injure the ... property of another"); *id.* § 6-11-20(b)(5) (defining oppression to include "[s]ubjecting a person to ... unjust hardship in conscious disregard of that person's rights"). Justice Breyer read these statutes to authorize punitive damages for a "vast range of conduct," from the truly egregious to the "less serious," such as the conduct in this case. *BMW*, 116 S. Ct. at 1605-06 (Breyer, J., concurring).

60. *See BMW*, 116 S. Ct. at 1606-07 (Breyer, J., concurring); *see also supra* note 28 (listing the *Green Oil* factors).

61. *See BMW*, 116 S. Ct. at 1607-08 (Breyer, J., concurring); *see also* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 160-62 (1987) (noting that deliberate torts, the subject matter of most punitive damages awards, are more likely to be concealed and accordingly require a larger punishment when detected, and that punishment above actual damage may protect against accidental underdeterrence due to court errors); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 162 (1987) (arguing that "[i]f liability equals losses caused ... [divided by] the probability of suit, injurers will act optimally under liability rules despite the chance that they will escape suit"); Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1149-59 (1989) (presenting economic models for "binary choice" and "continuous choice" behavior to effect the deterrent function of punitive damages). *See generally* Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79 (1982) (outlining first a mathematical, and then a general legal assessment of the interaction of punitive damages and economics); David Friedman, *An Economic Explanation of Punitive Damages*, 40 ALA. L. REV. 1125 (1989) (exploring the economic validity of punitive damages and concluding that they are "consistent with the predictions of economic efficiency").

62. *BMW*, 116 S. Ct. at 1608 (Breyer, J., concurring). Justice Breyer rejected as inaccurate various inflation-adjusted estimates of large awards for similarly culpable conduct from eighteenth and nineteenth century English cases. *See id.* (Breyer, J., concurring). These cases were offered by *amici* for Dr. Gore and attempted to provide some historical analogue for the two million dollar award in this case. *See id.* (Breyer, J., concurring). Apparently, to remove any lingering doubt as to his historical accuracy, Justice Breyer attached an entire appendix dedicated to rebutting the *amici's* brief by demonstrating that the *amici* used incorrect measures of inflation in converting the early punitive damages awards to present-day dollars. *See id.* at 1609-10 (Breyer, J., concurring).

unbounded discretion in this case.[63] Justice Breyer found this lack of significant legal constraint on both the court and the jury's discretion, when combined with the grossly excessive amount of the award, sufficient to overcome the strong presumption of validity accorded such decisions, thus violating "the basic guarantee of nonarbitrary governmental behavior that the Due Process Clause provides."[64]

In a dissenting opinion, Justice Scalia fundamentally disagreed with the majority not only in its analysis of the facts but also in the very existence of a constitutional prohibition against excessive punitive damages awards.[65] According to Justice Scalia, "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."[66] He criticized the majority's action in overturning the state court's award of punitive damages as lacking precedential support and pointed out that no previous case had done so. Further, he argued that those cases on which the majority relied, *TXO* and *Haslip*, were "shallowly rooted" in the dicta of "a handful of errant federal cases."[67]

In addition, Justice Scalia sharply denounced the majority's analysis:

> One might understand the Court's eagerness to enter this field, rather than leave it with the state legislatures, if it had something useful to say. In fact, however, its opinion provides virtually no guidance to legislatures, and to state and federal courts, as to what a "constitutionally proper" level of punitive damages might be.[68]

He further disagreed with the Court's use of a states' interests

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63. *See id.* at 1608-09 (Breyer, J., concurring); *cf.* statutes cited *infra* note 79 (constraining punitive damages by capping the amount, providing for some portion of the award to go to state, or requiring bifurcation of liability and punitive damages determinations).

64. *BMW*, 116 S. Ct. at 1609 (Breyer, J., concurring).

65. *See id.* at 1610 (Scalia, J., dissenting). Justice Thomas joined in the dissent. *See id.* (Scalia, J., dissenting). Justice Scalia stated that " 'concern about punitive damages that "run wild" ' " is none of the Court's business and, consequentially, intrudes upon states' rights. *Id.* (Scalia, J., dissenting) (quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991)). Justice Ginsburg, joined by Chief Justice Rehnquist, expressed essentially the same concern in her dissent, though in a more subdued tone. *See id.* at 1616-17 (Ginsburg, J., dissenting).

66. *BMW*, 116 S. Ct. at 1610 (Scalia, J., dissenting).

67. *Id.* at 1611 (Scalia, J., dissenting); *see infra* notes 84-91 and accompanying text (discussing the early twentieth century cases cited in *TXO* and *Haslip*).

68. *BMW*, 116 S. Ct. at 1612 (Scalia, J., dissenting).

analysis, emphasizing that a similar analysis had a disparaging effect on the field of conflicts of law.[69] He noted that the majority discussed at length which *acts* could be punished, lawful or unlawful, in-state or out-of-state, rather than the issue before the Court, which was how much *punishment* for a particular act is excessive.[70] From Justice Scalia's perspective, this discussion was moot because the Alabama Supreme Court had expressly disclaimed reliance on BMW's out-of-state actions in remitting the punitive damages award, reducing the majority's statements regarding state sovereignty and interstate commerce to "the purest dicta."[71]

Furthermore, Justice Scalia stated that the Court's three guideposts "mark a road to nowhere [and] provide no real guidance at all."[72] He criticized the examples of reprehensible conduct given by the majority[73] and the legal standards it set forth as amounting to nothing more than "criss-crossing platitudes."[74] Moreover, he noted that the majority did not attempt to limit the constitutional test of excessiveness to the three guideposts, but rather expressly acknowledged that the guideposts may in certain circumstances give way to additional factors or unnamed considerations.[75] Such a framework, he concluded, does not adequately constrain or inform the state legislatures and lower courts as to when a punitive damages award is constitutionally proper.[76]

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69. *See id.* (Scalia, J., dissenting). This "sort of 'interest analysis' . . . has laid waste the formerly comprehensible field of conflict of laws." *Id.* (Scalia, J., dissenting).

70. *See id.* (Scalia, J., dissenting). Justice Scalia observed that there was no reason the jury could not consider BMW's out-of-state conduct, lawful or unlawful, in computing the degree of punishment, once it determined BMW was liable for its in-state conduct. *See id.* He compared this rationale to that of criminal sentences, which the Court allows to "be computed . . . on the basis of 'information concerning every aspect of a defendant's life.' " *Id.* (Scalia, J., dissenting) (quoting Williams v. New York, 337 U.S. 241, 250-52 (1949)).

71. *Id.* at 1613 (Scalia, J., dissenting).

72. *Id.* (Scalia, J., dissenting).

73. *See id.* at 1613-14 (Scalia, J., dissenting); *see also supra* text accompanying note 41 (listing conduct the Court found reprehensible in previous cases).

74. *BMW*, 116 S. Ct. at 1613-14 (Scalia, J., dissenting). Justice Scalia criticized standards offered by the majority such as a "general concern of reasonableness," that the award not be "breathtaking" nor "raise a suspicious judicial eyebrow," and that legislative sanctions for comparable misconduct be given "substantial deference." *See id.* (Scalia, J., dissenting).

75. *See id.* at 1614 (Scalia, J., dissenting).

76. *See id.* (Scalia, J., dissenting). The Court's framework, Justice Scalia stated, "does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not 'fair.' " *Id.* (Scalia, J., dissenting).

Finally, Justice Scalia interpreted the majority's opinion to cast a constitutional shadow over the sufficiency of all evidentiary findings in state civil suits:

> That the issue has been framed in terms of a constitutional right against unreasonably *excessive* awards should not obscure the fact that the logical and necessary consequence of the Court's approach is the recognition of a constitutional right against unreasonably *imposed* awards as well.... That is a stupefying proposition.[77]

Justice Ginsburg, dissenting separately and joined by Chief Justice Rehnquist, expressed concerns similar to those of Justice Scalia regarding federal intrusion into an area traditionally belonging to the states, which she pointed out was the subject of recent and ongoing reform by the state legislatures.[78] She agreed that the Alabama Supreme Court's disclaimer of reliance on out-of-state conduct made

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77. *Id.* (Scalia, J., dissenting).

78. *See id.* (Ginsburg, J., dissenting). In an appendix to her opinion, Justice Ginsburg catalogued the states' judicial and legislative attempts to reform punitive damages. *See id.* at 1618-20 (Ginsburg, J., dissenting). She sorted the actions into those capping punitive damages, those allocating punitive damages to state agencies, and those requiring bifurcation of liability and punitive damages determinations. *See id.* (Ginsburg, J., dissenting).

For a sampling of statutes imposing caps, see COLO. REV. STAT. §§ 13-21-102(1)(a), (3) (1987) (restricting punitive damages to the amount of actual damages, with some exceptions); CONN. GEN. STAT. § 52-240b (1996) (capping punitive damages in products liability actions at twice compensatory damages); GA. CODE ANN. § 51-12-5.1 (Supp. 1995) (capping punitive damages at $250,000 for specific tort actions and prohibiting multiple awards based on the same tortious conduct in products liability actions); OKLA. STAT. tit. 23, §§ 9.1(B)-(D) (Supp. 1996) (capping punitive damages at the greater of $100,000 or actual damages, if the defendant is found guilty of reckless disregard; and at a maximum of $500,000, twice the actual damages, or the defendant's gain from the conduct, if the defendant is found to have acted intentionally and maliciously); VA. CODE ANN. § 8.01-38.1 (Michie 1992) (capping punitive damages at $350,000).

For a sampling of statutes allocating punitive damages to state agencies, see FLA. STAT. ch. 768.73(2)(a)-(b) (Supp. 1992) (allocating 35% of punitive damages to General Revenue Fund or Public Medical Assistance Trust Fund); GA. CODE ANN. § 51-12-5.1(e)(2) (Supp. 1996) (allocating 75% of punitive damages, after litigation costs and attorney's fees, to the state treasury); UTAH CODE ANN. § 78-18-1(3) (1992) (allocating 50% of punitive damages exceeding $20,000 to the state treasury).

For a sampling of statutes requiring mandatory bifurcation of liability and punitive damages determinations, see CAL. CIV. CODE. § 3295(d) (West Supp. 1996) (requiring bifurcation, on defendant's request, of liability and punitive damages phases of trials when the plaintiff seeks punitive damages); KAN. STAT. ANN. § 60-3701(a)-(b) (1994) (providing for trier of fact determining defendant's liability for punitive damages with the court setting the amount); N.J. STAT. ANN. §§ 2A:58C-5(b), (d) (West 1987) (mandating separate proceedings for determining compensatory and actual damages).

In addition, New Hampshire bars punitive damages unless explicitly provided by statute. *See* N.H. REV. STAT. ANN. § 507:16 (Supp. 1996).

the "excessiveness of the award... the sole issue genuinely presented"[79] and went on to emphasize the lack of a sufficient legal standard in both the majority and Justice Breyer's opinions:

> The exercise is engaging, but ultimately tells us only this: too big will be judged unfair. 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.[80]

At their most fundamental level, the issues in *BMW* stem from the Constitution's guarantee that the government will not deprive citizens of their property without due process of law.[81] The Court first hinted that this guarantee extended to the assessment of punitive damages in several cases from the first part of this century, and it is in these cases that *BMW* finds its roots.[82] In *Seaboard Air Line Railway v. Seegers*,[83] the Court reviewed the constitutionality of a South Carolina law that imposed a fifty dollar penalty against a common carrier for actual damages of less than two dollars.[84] The Court rejected the carrier's principal claim that the statute denied it equal protection

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79. *BMW*, 116 S. Ct. at 1615 (Ginsburg, J., dissenting). Justice Ginsburg noted that the Alabama Supreme Court complied with the United States Supreme Court in admitting evidence of out-of-state actions as proper means of showing the pervasiveness of the defendant's policy, and the Alabama court's denouncement of using the number of such actions as a multiplier was already being followed in that state. *See id.* (Ginsburg, J., dissenting).

80. *Id.* at 1617 n.5 (Ginsburg, J., dissenting). In addition, Justice Ginsburg expressed concern that the Supreme Court will be "the *only* federal court policing" state court punitive damages awards, which, she stated, is "all the more puzzling in view of the Court's long standing reluctance to countenance review, even by courts of appeals, of the size of verdicts returned by juries in federal district court proceedings." *Id.* (Ginsburg, J., dissenting) (citing 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2820 (2d ed. 1995)).

81. *See* U.S. CONST. amend. XIV, § 1. Even an overview of this nation's due process jurisprudence would be beyond the scope of this Note. For a general treatment of due process, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 11.1-11.14 (5th ed. 1995) and LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7 (2d ed. 1988).

82. *But see BMW*, 116 S. Ct. at 1611 (Scalia, J., dissenting) ("Although [these cases] are our precedents, they are themselves too shallowly rooted to justify the Court's recent undertaking.").

83. 207 U.S. 73 (1907).

84. *See id.* at 75-76. The statute required that common carriers pay claims for damaged or lost property within forty days; in the event the carrier failed to pay the claim, it was penalized the fifty dollars only if a court of competent jurisdiction found the claimant entitled to the entire claim. *See id.* If the claimant was entitled to any lesser amount, it received only actual damages. *See id.*

under the Fourteenth Amendment.[85] Noting the significant difference between the size of the penalty and the actual damages, the Court remarked that "there are limits beyond which penalties may not go," but found that the limit had not been reached in that case.[86]

Two years later in *Waters-Pierce Oil Co. v. Texas*,[87] the Court addressed a $1,623,500 fine assessed against Waters-Pierce in accordance with Texas antitrust statutes.[88] Recognizing the legitimacy of the fines under the police power of the state, the Court concluded that it could "only interfere with such legislation and judicial action of the States enforcing it if the fines imposed are so *grossly excessive* as to amount to a deprivation of property without due process of law."[89] Thus, *Seegers, Waters-Pierce*, and several cases a few years after them,[90] planted the seed for the Court's striking down of the punitive damages award in *BMW* some eighty years later.

This seed lay dormant during most of those eighty years, until unprecedented jury verdicts[91] brought defendants to the Court seek-

85. *See id.* at 76-77. The Equal Protection Clause of the Fourteenth Amendment prohibits any state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

86. *Seegers*, 207 U.S. at 78-79.

87. 212 U.S. 86 (1909).

88. *See id.* at 96-97. Under one statute, Waters-Pierce was fined $1500 per day for 1033 days; under another, $50 per day for 1480 days. *See id.* at 97.

89. *Id.* at 111 (emphasis added) (citing Coffey v. County of Harlan, 204 U.S. 659 (1907)).

90. *See* St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 66-67 (1919) (stating that state law violates the Fourteenth Amendment when it imposes penalties "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable"); Standard Oil Co. v. Missouri, 224 U.S. 270, 286-87 (1912) (stating that state supreme courts are limited by their duty to avoid imposing excessive fines and damages).

Justice Scalia has criticized these cases as the product of *Lochner*-era judicial activism. *See* TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 470 (1993) (Scalia, J., concurring in the judgment) (rejecting the proposition that the Fourteenth Amendment provides, among "other, unenumerated, substantive rights," a substantive due process right that punitive damages be reasonable, "however fashionable that proposition may have been (even as to economic rights of the sort involved here) at the time of the *Lochner*-era cases the plurality relies upon"). *But see id.* at 455 (Stevens, J., plurality) (pointing out that the dissenters from *Lochner v. New York*, 198 U.S. 45 (1905), joined in these opinions); *id.* at 479-80 (O'Connor, J., dissenting) ("[The plurality] reaffirms [these cases] once again, properly rebuffing respondents' attempt to denigrate them as *Lochner*-era aberrations."). As one commentator explained: "Put simply, the *Lochner* era has been so thoroughly discredited as improper judicial activism that serious discussion of the appropriate role of economic rights in our constitutional jurisprudence is virtually precluded." Richard E. Levy, *Escaping* Lochner's *Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 332 (1995).

91. *See supra* note 4 (citing cases involving numerous multi-million dollar jury verdicts for punitive damages).

ing constitutional relief from their punitive damages awards; however, until *Pacific Mutual Life Insurance Co. v. Haslip*,[92] none were successful in properly presenting the due process issue to the Court.[93] Despite concerns over punitive damages expressed by several Justices in the earlier opinions,[94] the *Haslip* Court upheld an Alabama jury's large award of punitive damages against a constitutional attack under the Due Process Clause.[95] The defendant's agent was found liable for insurance fraud, and the jury returned a general verdict of over one million dollars, with at least $840,000 of this amount representing punitive damages.[96] After the Alabama Supreme Court

92. 499 U.S. 1 (1991).

93. *See* Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 76-80 (1988) (refusing to hear Fourteenth Amendment claims because they had not been raised in the state court below); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828-29 (1986) (declining to hear appellant's Eighth and Fourteenth Amendment arguments because the Court's disposition of the case on other grounds made it unnecessary to decide the constitutional claims).

Likewise, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), the Court refused to address Browning-Ferris's claim of excessiveness under the Fourteenth Amendment since it had not raised the argument in the state proceedings. *See id.* at 276-77. More importantly, however, the Court held in *Browning-Ferris* that the Eighth Amendment's Excessive Fines Clause does not apply to punitive damages awards in cases between private parties, foreclosing one avenue of constitutional attack. *See id.* at 259-60. The Court left open the question of whether the Excessive Fines Clause is implicated when a governmental entity shares in the award of the punitive damages. *See id.* at 275 n.21.

94. In *Browning-Ferris*, Justice Brennan, joined by Justice Marshall, expressed his opinion on punitive damages in no uncertain terms:

> I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties....
>
> ....
>
> Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating decision.

Id. at 280-81 (Brennan, J., concurring). Current Members of the Court agreed:

> I share Justice Brennan's view ... that nothing in the Court's opinion forecloses a due process challenge to awards of punitive damages or the method by which they are imposed, and I adhere to my comments in *Bankers Life & Casualty Co. v. Crenshaw*, ... regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages.

Id. at 283 (O'Connor, J., joined by Justice Stevens, concurring in part and dissenting in part); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.").

95. *See Haslip*, 499 U.S. at 23-24. Justice Blackmun wrote for the majority, in which Chief Justice Rehnquist and Justices White, Marshall, and Stevens joined. *See id.* at 2.

96. *See id.* at 6-7 & n.2. It appears from the record that $200,000 of the $1,040,000 verdict were most likely compensatory damages, leaving the remainder as punitive dam-

affirmed the award, Pacific Mutual challenged it "as the product of unbridled jury discretion and as violative of its due process rights."[97]

The Court responded with a procedural analysis of Alabama's method of imposing punitive damages.[98] The Alabama courts employed the common-law method of assessing punitive damages, which consists of assessing an award by a properly instructed jury followed by judicial review at the trial and appellate levels.[99] After an historical review of this approach,[100] the Court found it not to be "so inherently unfair as to deny due process and be *per se* unconstitutional."[101] Despite the historical acceptance of the common-law procedure, however, the Court expressed "concern about punitive damages that 'run wild' "[102] and acknowledged limits on the procedure's constitutionality:

> One must concede 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. 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. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.[103]

With this standard in mind, the Court reviewed the Alabama procedures specifically at issue in the case and concluded that they provided constitutionally adequate safeguards of Pacific Mutual's due process rights.[104] The Court noted that the punitive damages

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ages. *See id.* at 7 n.2.

97. *Id.* at 7.

98. *See id.* at 7-8, 15-24.

99. *See id.* at 15. The jury should be instructed "to consider the gravity of the wrong and the need to deter similar wrongful conduct." *Id.*

100. *See id.* at 15-18.

101. *Id.* at 17.

102. *Id.* at 18. As noted earlier, the Supreme Court is not alone in expressing such concern. *See, e.g.*, Ellis, *supra* note 9, at 976 ("With few exceptions, [scholarly papers on punitive damages] have ... been critical of the expansion of the punitive damages remedy. Professor Jeffries's stark conclusion that 'punitive damages are out of control' accords with the general sentiment reflected in the pages of the law reviews."); *see also supra* note 5 (citing law review articles supporting the view that punitive damages are out of control as well as those denouncing this view).

103. *Haslip*, 499 U.S. at 18 (citations omitted).

104. *See id.* at 19-24. First, the Court found that the trial judge adequately instructed the jury regarding punitive damages. *See id.* at 19-20. Though these instructions left the jury with significant discretion, "[a]s long as the discretion is exercised within reasonable

award was more than four times the amount of the compensatory damages and far exceeded the statutory fine for comparable misconduct under Alabama law.[105] While these "monetary comparisons" were "close to the line" of constitutional impropriety, they were offset by the fact that the criminal law authorized imprisonment for this conduct.[106] Rejecting Pacific Mutual's due process challenge, the Court concluded that because Pacific Mutual received all of Alabama's procedural protections and the award did not lack "objective criteria," the punitive damages award was not constitutionally excessive.[107]

Just two Terms later in *TXO Production Corp. v. Alliance Re-*

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constraints, due process is satisfied." *Id.* at 20. Second, the Court concluded that Alabama's post-trial procedures for reviewing a jury's punitive damages award were "meaningful and adequate." *See id.* These procedures essentially required the trial judge to state in the record why a jury verdict was or was not upheld on grounds of excessiveness, considering "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.' " *Id.* (quoting Hammond v. Gadsden, 493 So. 2d 1374, 1379 (Ala. 1986)). Finally, the Court expressly endorsed the Alabama Supreme Court's *Green Oil* factors, calling them "detailed substantive standards." *See id.* at 21. The *Green Oil* factors are listed *supra* in note 28.

105. *See Haslip*, 499 U.S. at 23. Pacific Mutual was found liable for insurance fraud because its agent collected premiums from the plaintiffs but did not remit them to the company, thus allowing their policies to lapse. *See id.* at 5-6; *see also* ALA. CODE § 27-12-17 (1986) (prohibiting the collection of premiums for insurance which is not then or soon to be provided); *id.* § 27-12-23 (1986) (prohibiting false or fraudulent statements in connection with an insurance application). The maximum fine authorized by statute was $1000, *see* ALA. CODE § 27-1-12 (1986), while the award in this case was not less than $840,000. *See Haslip*, 499 U.S. at 7 & n.2; *see also supra* note 97 (discussing the compensatory and punitive damages in this case).

106. *See Haslip*, 499 U.S. at 23.

107. *See id.* at 23-24. The decision, however, was not unanimous, with Justices Scalia and Kennedy each filing opinions concurring only in the judgment and Justice O'Connor dissenting at length. *See id.* at 24-40 (Scalia, J., concurring in the judgment); *id.* at 40-42 (Kennedy, J., concurring in the judgment); *id.* at 42-64 (O'Connor, J., dissenting).

For Justice Scalia, the long historical acceptance of the common law method of assessing punitive damages was absolutely dispositive of its providing due process of law. *See id.* at 24-25 (Scalia, J., concurring in the judgment); *id.* at 31-32 (Scalia, J., concurring in the judgment) ("If the government chooses to *follow* a historically approved procedure, it necessarily *provides* due process, but if it chooses to *depart* from historical practice, it does not necessarily *deny* due process."). Justice Kennedy generally agreed with Justice Scalia's historical approach, especially as applied to this case, but was not convinced that every historical practice is insulated from a due process challenge. *See id.* at 40 (Kennedy, J., concurring in the judgment).

Justice O'Connor dissented in the strongest terms. She argued that Alabama's procedures, "so fraught with uncertainty that they defy rational implementation," were void for vagueness. *Id.* at 43-44 (O'Connor, J., dissenting) ("*Any* award of punitive damages rendered under these procedures, no matter how small the amount, is constitutionally infirm.").

sources Corp.,[108] Justice Stevens, writing for the plurality of a fractured Court,[109] upheld another sizable award of punitive damages; his holding was based largely on the potential harm that would have been inflicted on the plaintiff had the defendant succeeded in its scheme.[110] In a common-law action for slander of title, a West Virginia jury awarded the plaintiffs nineteen thousand dollars in compensatory damages and ten million dollars in punitive damages.[111] Justice Stevens accepted TXO's argument that a punitive damages award in and of itself might be so excessive as to violate due process, declaring that "the Due Process Clause of the Fourteenth Amendment imposes *substantive* limits 'beyond which penalties may not go.' "[112] After rejecting the parties' proposed tests for these substantive limits,[113] Justice Stevens returned to the Court's language from

108. 509 U.S. 443 (1993) (plurality opinion).

109. Chief Justice Rehnquist and Justice Blackmun joined Justice Stevens in his analysis. *See id.* at 445. Justice Kennedy joined only in the statement of case and the judgment, filing a separate opinion. *See id.* at 465 (Kennedy, J., concurring in part and concurring in the judgment); *infra* notes 121-24 and accompanying text (reviewing Justice Kennedy's opinion). Disagreeing with the plurality's reasoning, Justice Scalia, joined by Justice Thomas, concurred in the judgment only. *See TXO*, 509 U.S. at 470 (Scalia, J., concurring in the judgment); *infra* note 131 (summarizing Justice Scalia's concurrence). Finally, Justice O'Connor, joined by Justice White and joined in part by Justice Souter, filed a dissenting opinion. *See TXO*, 509 U.S. at 472 (O'Connor, J., dissenting); *infra* notes 125-29 and accompanying text (reviewing Justice O'Connor's dissent). Justice O'Connor had an equal number of Justices supporting her dissenting analysis as Justice Stevens had supporting his analysis.

110. *See TXO*, 509 U.S. at 460-62.

111. *See id.* at 446. TXO approached Alliance with an extremely generous offer of a cash payment, royalties, and other costs in exchange for assignments of the mineral rights in a particular property, subject to Alliance holding perfect title on the property. *See id.* at 447-48. TXO subsequently attempted to artificially create a cloud on the title, and "knowingly and intentionally brought a frivolous declaratory judgment action" on the title to force Alliance to reduce the payments and royalties. *Id.* at 448-49 (quoting TXO Prod. Corp. v. Alliance Resources, 419 S.E.2d 870, 875 (W. Va. 1992)). Alliance successfully counterclaimed for slander of title, with the jury returning a ten million dollar verdict. *See id.* at 450-51. The West Virginia Supreme Court of Appeals affirmed the judgment. *See id.* at 452.

112. *Id.* at 453-54 (emphasis added) (quoting Seaboard Air Line R. Co. v. Seegers, 207 U.S. 73, 78 (1907)). The Court also relied on the early twentieth century cases discussed *supra* at notes 84-91 and accompanying text. *See TXO*, 509 U.S. at 454. In both *TXO* and *BMW*, the petitioners challenged the award's excessiveness itself as substantively violating due process, while in *Haslip*, the petitioner challenged the award's excessiveness as indicative of a process that procedurally violated due process.

113. *See id.* at 455-58. The Court rejected Alliance's proposed "rational basis" test as allowing any award, "no matter how large," that would further the legitimate state interests of punishment and deterrence as constitutionally acceptable. *Id.* at 456. TXO offered "objective criteria," such as the comparison of the award at issue to other awards in the same jurisdiction, to awards for similar conduct in other jurisdictions, to legislative penalties for comparable misconduct, and to past ratios between compensatory and puni-

Haslip, refusing to " 'draw a mathematical bright line' " while maintaining " 'that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus.' "[114]

TXO argued that in light of the Court's statements in *Haslip* that a 4-to-1 ratio of punitive to compensatory damages was "close to the line,"[115] the 526-to-1 ratio of this award was surely " 'grossly excessive.' "[116] In response, Justice Stevens explained that the jury was instructed to consider the harm likely to occur from the defendant's conduct, which in this case was estimated conservatively to be at least one million dollars.[117] Considering this figure, "the disparity between the punitive award and the potential harm does not, in [the plurality's] view, 'jar one's constitutional sensibilities.' "[118] Moreover, Justice Stevens did not find the ratio of punitive to actual damages controlling and concluded:

> The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of [TXO], the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.[119]

The concurring and dissenting opinions in *TXO* reveal just how complex the punitive damages issue had become. Justice Kennedy did not agree "with the plurality's discussion of the substantive requirements" of due process in terms of whether an award was " 'grossly excessive.' "[120] Rather, he felt the constitutional inquiry should "focus[] not on the amount of money a jury awards in a par-

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tive damages. *See id.* The Court conceded that these criteria were fair considerations, but rejected them as insufficient to constitute a "test." *See id.* at 456-58; *cf. BMW*, 116 S. Ct. at 1598-1603 (adopting three guideposts to determine if punitive damages are constitutionally acceptable: the reprehensibility of the defendant's conduct, the ratio of actual to punitive damages, and legislative sanctions for similar misconduct); *see also supra* notes 38-53 and accompanying text (discussing same).

114. *TXO*, 509 U.S. at 458 (quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991)).

115. *See Haslip*, 499 U.S. at 23; *see also supra* notes 106-07 and accompanying text (discussing the Court's finding the four-to-one ratio "close to the line" in *Haslip*).

116. *See TXO*, 509 U.S. at 459.

117. *See id.* at 459-62.

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

119. *Id.* (footnote omitted). TXO also challenged the award on various procedural grounds, which the Court did not address because they were improperly raised or meritless. *See id.* at 462-63.

120. *Id.* at 466 (Kennedy, J., concurring in part and concurring in the judgment).

ticular case but on its reasons for doing so."[121] Under Justice Kennedy's analysis, the Due Process Clause is violated if the "award reflects bias, passion, or prejudice," rather than reason, "no matter what the absolute or relative size of the award."[122] Because he found the jury properly based its award on TXO's malice, he concurred in the judgment, though he "confess[ed] to feeling a certain degree of disquiet in affirming [the] award."[123]

In dissent, Justice O'Connor agreed with the plurality that the Fourteenth Amendment limits the amount of a punitive damages award,[124] but went further to find the Constitution violated in this case.[125] She did not adopt the plurality's potential harm factor[126] and accordingly found the verdict "dramatically irregular, if not shocking . . . by any measure."[127] Alternatively, Justice O'Connor would have overturned the verdict entirely on the basis of undue jury prejudice against TXO as a large out-of-state corporate defendant.[128]

Hence, with the concurring and dissenting Justices freely ex-

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121. *Id.* at 467 (Kennedy, J., concurring in part and concurring in the judgment).

122. *Id.* at 469 (Kennedy, J., concurring in part and concurring in the judgment).

123. *Id.* (Kennedy, J., concurring in part and concurring in the judgment).

124. *See id.* at 480 (O'Connor, J., dissenting) ("It is thus common ground that an award may be so excessive as to violate due process." (citing *id.* at 455 (plurality opinion))).

125. *See id.* at 473 (O'Connor, J., dissenting).

126. *See id.* at 460-62; *see also supra* notes 118-19 and accompanying text (discussing the plurality's potential harm factor). Justice O'Connor pointed out that the potential loss to Alliance had TXO succeeded in its plan did not appear in the trial record and thus could not have been a basis for the jury's decision, *see id.* at 484-89 (O'Connor, J., dissenting), and concluded it was "an after-the-fact rationalization invented by appellate counsel who could not otherwise explain this disproportionate award." *Id.* at 489 (O'Connor, J., dissenting).

127. *Id.* at 481 (O'Connor, J., dissenting).

128. *See id.* at 493, 495 (O'Connor, J., dissenting) ("Counsels' arguments . . . converted that grave risk of prejudice into a near certainty. Repeatedly they reminded the jury that TXO was from another State. Repeatedly they told the jury about TXO's massive wealth. And repeatedly they told the jury it could do anything it thought 'fair.' "). Thus, Justice O'Connor essentially applied an analysis similar to that favored by Justice Kennedy, that is, an analysis not of the amount of the award but the jury's reasons for awarding it. *See id.* at 467 (Kennedy, J., concurring in part and concurring in the judgment); *see also supra* at notes 121-24 and accompanying text (reviewing Justice Kennedy's analysis). However, Justice O'Connor came to the opposite result.

If the sentiments expressed by the trial judge in his own book are any indication, Alliance's lawyers probably had little trouble in getting undue evidence of TXO's wealth before the jury. *See* RICHARD NEELY, THE PRODUCT LIABILITY MESS 4 (1988) ("As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will re-elect me.").

pressing their differing viewpoints, the Court did not adopt a true constitutional standard for substantive due process in the context of punitive damages. However, a majority of the Justices—three joining Justice Stevens' plurality opinion, three joining Justice O'Connor's dissent, and Justice Kennedy concurring in part—agreed in the basic theory that due process places substantive limits on a punitive damages award; they did not agree in its application.[129] Therefore, while the Court upheld the punitive damages award in *TXO*, it did not go so far as to foreclose the possibility that an award which was the product of a constitutionally sound procedure could nevertheless violate substantive due process.[130]

Most recently, the Court refined its *Haslip* procedural analysis in *Honda Motor Co. v. Oberg*,[131] where it struck down as unconstitutional Oregon's method of assessing punitive damages without post-trial judicial review.[132] The Court noted it was not "concerned with the character of the standard that will identify unconstitutionally excessive awards," but rather "what procedures are necessary to ensure that punitive damages are not imposed in an arbitrary manner."[133] Reviewing both historical and present procedures of imposing punitive damages,[134] the Court held judicial review to be an essential

129. *See TXO*, 509 U.S. at 453-54 (plurality opinion); *id.* at 466-67 (Kennedy, J., concurring in part and concurring in the judgment); *id* at 480 (O'Connor, J., dissenting); *see also supra* notes 109-29 and accompanying text (reviewing the *TXO* decision).

130. *But see TXO*, 509 U.S. at 470-72 (Scalia, J., concurring in the judgment). Justice Scalia found no such substantive due process right in the Fourteenth Amendment, *see id.* at 470 (Scalia, J., concurring in the judgment), and would have "shut the door the plurality [left] slightly ajar." *Id.* at 472 (Scalia, J., concurring in the judgment). Echoing his opinion from *Haslip*, *see supra* note 108, he stated that "the Constitution gives federal courts no business in this area, except to assure that due process (*i.e.*, traditional procedure) has been observed." *TXO*, 509 U.S. at 472 (Scalia, J., concurring in the judgment) (citing Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 27-28 (1991) (Scalia, J., concurring in the judgment)).

131. 512 U.S. 415 (1994).

132. *See id.* at 2334. Oregon's lack of judicial review was mandated by its constitution: "[N]o fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." OR. CONST. art. VII (A), § 3. Some commentators have criticized the Court for granting certiorari to *Honda*, because its resolution was implicit in *Haslip*. *See* Owen, *supra* note 1, at 405 ("Why the Supreme Court squandered its limited resources hearing the case and preparing a full opinion on a clear and narrow punitive damages judicial review issue—one that was plainly and strongly implicit in *Haslip* and applicable only to a single state—is difficult to understand.").

133. *Honda*, 512 U.S. at 420.

134. *See id.* at 421-32. Oregon was the only jurisdiction in the nation, either federal or state, that did not provide judicial review of the size of punitive damages. *See id.* at 426-27.

element of due process.[135] In deciding this purely procedural question, the Court did not fail to comment on the more substantive issue of excessiveness, setting the stage for its decision in *BMW v. Gore*:

> Punitive damages pose an acute danger of arbitrary deprivation of property. Jury 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.[136]

Thus, the pre-*BMW* jurisprudence indicates that while the Court's attitude toward punitive damages prior to *BMW* was apparent, the law was not. *Haslip* announced procedural limitations on the assessment of punitive damages under the Due Process Clause.[137] Though the Court did expressly *approve* Alabama's procedures in *Haslip*, its opinion seemed to *require* only two things: first, that juries exercise their discretion within "reasonable constraints";[138] and second, that the award not entirely lack "objective criteria."[139] Whether other requirements lurked within the Due Process Clause remained uncertain.[140] *Honda* served only to add judicial review to *Haslip's* procedural necessities.[141] *TXO*, in addressing the size of an award as a substantive violation of due process, may be the most important case in understanding the Court's decision in *BMW*. The plurality expanded the scope of the Court's *Haslip* standard to apply to sub-

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135. *See id.* at 432.

136. *Id.*

137. *See* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991); *see also supra* text accompanying note 104 (quoting the *Haslip* standard for procedural limitations on the assessment of punitive damages).

138. *See Haslip*, 499 U.S. at 20; *see also supra* note 105 and accompanying text (summarizing the Court's review of Alabama's procedures).

139. *See Haslip*, 499 U.S. at 23; *see also supra* note 105 (summarizing the Court's review of Alabama's procedures).

140. Justice Scalia was especially critical of the Court's vagueness:

> [T]he Court chooses to decide only that the jury discretion in the present case was not undue. It says that Alabama's particular procedures (*at least as applied here*) are not so "unreasonable" as to "cross the line into the area of constitutional impropriety." This jury-like verdict provides no guidance as to whether any *other* procedures are sufficiently "reasonable," and thus perpetuates the uncertainty that our grant of certiorari in this case was intended to resolve.

Haslip, 499 U.S. at 24 (Scalia, J., concurring in the judgment) (citation omitted) (first emphasis added).

141. *See Honda*, 512 U.S. at 432-33; *see also supra* text accompanying note 136 (reviewing the *Honda* Court's holding that judicial review is an essential element of due process).

stantive as well as procedural due process challenges,[142] while both the plurality and the dissenters agreed that a "grossly excessive" award would violate the Constitution. But, as Justice Kennedy aptly pointed out, "To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what?"[143] He acknowledged that the Constitution requires "standards of rationality and fairness" to prevent arbitrary results, but suggested that more objective criteria would be helpful in the determination.[144]

It was in *BMW*, then, that the Court sought to reconcile these competing viewpoints and to provide the objective criteria that Justice Kennedy felt were missing. Apparently acknowledging that such guidance was lacking in its former opinions, the Court granted certiorari "[b]ecause [it] believed that a review of this case would help to illuminate 'the character of the standard that will identify [un]constitutionally excessive awards' of punitive damages."[145] At the very least, the opinion sets forth a balancing test: The reviewing judge must weigh the size of an award, as justified by the properly limited interests of the state in punishing and deterring the conduct, against the extent to which the defendant was afforded notice of such an award, as measured by the three guideposts of reprehensibility, ratio, and similar sanctions.[146] This test does illuminate the character of the standard to identify unconstitutionally excessive awards; however, because the Court framed the test in terms of historically accepted but subjective indicia, the test falls short of providing a workable, progressive standard that may be readily adopted and applied by the lower courts.[147]

The first part of the Court's test involves weighing the state's legitimate interests of punishment and deterrence.[148] That these interests are the goals of punitive damages is nothing new and hardly a source of debate.[149] However, as Justice Scalia notes, if these inter-

142. *See TXO*, 509 U.S. at 459-62 (plurality opinion).

143. *Id.* at 466 (Kennedy, J., concurring in part and concurring in the judgment).

144. *Id.* at 467 (Kennedy, J., concurring in part and concurring in the judgment).

145. *BMW*, 116 S. Ct. at 1595 (quoting *Honda*, 512 U.S. at 420).

146. *See supra* notes 38-53 and accompanying text (discussing the *BMW* standard for the constitutionality of punitive damages).

147. This statement assumes that such a standard would be in some way different from the lower courts' current tools for evaluating punitive damages, which allow large and controversial awards such as that at issue in *BMW* in the first place.

148. *See BMW*, 116 S. Ct. at 1595-96; *see also supra* notes 34-36 and accompanying text (discussing the states' interests analysis).

149. *See supra* note 7 and accompanying text (discussing purposes of punitive damages).

ests are so critical in evaluating the amount of a punitive damages award, one would expect the jury to be instructed on them.[150] Unfortunately, such instruction certainly would require precise statements or measurements of a state's interests in a particular case; otherwise, the jury would be left to determine that which is more suitable to the consideration of the court, if not the legislature.[151] Regardless of these difficulties, the Alabama Supreme Court in *BMW* recognized that the jury overstepped its bounds—and thus, the legitimate interests of Alabama—in using BMW's out-of-state conduct as a multiplier in computing punitive damages.[152] But as Justice Ginsburg pointed out, the jury did so not because of some existing statutory or common-law rule, but as a result of the plaintiff's counsel's closing argument, which explicitly requested damages for every instance of misconduct, whether in Alabama or not.[153] Thus, the verdict's failure to reflect Alabama's interests was compounded, first, by Gore's counsel's own suggestions of what the jury should consider and, second, by BMW and the court's failure to correct the situation by either objecting or instructing the jury on the proper scope of the state's interests.[154] By leaving the state's interest analysis to post-verdict review, the Court's decision does not appear to remedy this particular problem.

The second part of the Court's test requires notice to the defendant of the magnitude of the penalty that might be levied against it.[155] Through its three guideposts, the Court intended to quantify this notice in the specific context of punitive damages and thereby provide lower courts guidance as to when an award is unconstitutionally ex-

150. *See BMW*, 116 S. Ct. at 1612 (Scalia, J., dissenting).

151. *Cf. id.* at 1609 (Breyer, J., concurring) ("[H]ere Alabama expects jurors to act, at least a little, like legislators or judges, for it permits them, to a certain extent, to create public policy and to apply that policy . . . to achieve a policy-related objective outside the confines of the particular case.").

152. *See* BMW v. Gore, 646 So. 2d 619, 627 (Ala. 1994); *see also supra* text accompanying note 31 (discussing the Alabama Supreme Court's decision).

153. *See BMW*, 116 S. Ct. at 1615 (Ginsburg, J., dissenting). Justice Ginsburg observed:

> The sole prompt to the jury to use nationwide sales as a multiplier came from Gore's lawyer during summation. Notably, counsel for BMW failed to object to Gore's multiplication suggestion . . . [n]or did BMW's counsel request a charge instructing the jury not to consider out-of-state sales in calculating the punitive damages award.

Id. (Ginsburg, J., dissenting) (citations omitted).

154. *See id.*

155. *See id.* at 1598-99.

cessive.[156] However, the success with which the Court's intentions will be realized is questionable for several reasons. Because the Court largely justified its guideposts on the basis of their historical acceptance and continued use, the guideposts necessarily *reflect* current practice instead of *shaping* it.[157] In addition, the subjectivity with which the Court applied the guideposts, coupled with its acknowledgment that there may be other relevant considerations in the analysis, prevent the opinion from providing a standard sufficiently definite to add objectivity and predictability to punitive damages awards.[158]

The Court's first guidepost, the reprehensibility of the defendant's conduct, is the primary basis for imposing punitive damages.[159] Because the reprehensibility of the defendant's conduct has always been a basis for awarding punitive damages,[160] this guidepost tells lower courts nothing new and provides them little guidance toward the appropriate constitutional standard. While the examples of reprehensible behavior offered by the Court may be of some help in *identifying* offensive conduct,[161] the determination of the *degree* of

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156. *See id.* at 1595, 1598.

157. *See id.* at 1599, 1601.

158. In *Haslip*, the plaintiff's attorneys posed an interesting, albeit questionable, argument against predictability in punitive damages awards. *See* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 58-59 (1990) (O'Connor, J., dissenting). They contended that with predictability in the amount of punitive damages, wrongdoers would simply factor the probability and costs of such awards into the cost of doing business, thereby undermining the state's interest in deterring wrongful conduct. *See id.* (O'Connor, J., dissenting) (rejecting this argument as "go[ing] too far" and responding that reforms necessary to remove the arbitrary nature of punitive damages will not "straitjacket[] [the jury] into performing a particular calculus").

159. *See BMW*, 116 S. Ct. at 1599; *see also* Owen, *supra* note 1, at 387 ("The flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages.").

160. *See BMW*, 116 S. Ct. at 1599 ("As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect 'the enormity of his offense.' " (quoting Day v. Woodworth, 55 U.S. (13 How.) 363, 371 (1852))); *see also id.* at 1599 n.24 ("The principle that punishment should fit the crime 'is deeply rooted and frequently repeated in common-law jurisprudence.' " (quoting Solem v. Helm, 463 U.S. 277, 284 (1983))).

161. The Court's examples of particularly reprehensible conduct included violence, trickery and deceit, and malice. *See BMW*, 116 S. Ct. at 1599-1601; *see also supra* text accompanying note 41 (discussing same). While these examples are quite obvious and would seem to provide little guidance for that reason, it was precisely the presence of malice that swayed Justice Kennedy to concur in the judgment upholding the punitive damages award in *TXO*. *See* TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 468 (1993) (Kennedy, J., concurring in part and concurring in the judgment) ("On its facts, this case is close and difficult.... There is ... [an] explanation for the jury verdict, one supported by the record and relied upon by the state courts, that persuades me that I

reprehensibility in a given case remains an inherently subjective inquiry, as the Court's fact-specific opinion confirms.[162] Moreover, the majority's endorsement of this guidepost raises a concern as to the extent to which a court's determination of reprehensibility displaces the jury as the finder of fact. Unfortunately, the *BMW* majority failed to address this concern.[163]

The Court's second guidepost, the ratio of the punitive damages to actual or potential harm, grows out of the traditional requirement that punitive damages "must bear a 'reasonable relationship' to compensatory damages."[164] As the Court points out, this factor is nothing new and has long been used by lower courts.[165] As a simple mathematical formula, this factor is potentially the most objective of the three guideposts. However, the Court refused to adopt a bright line test and therefore failed to take advantage of this objectivity.[166] Rather, the Court recalled *TXO* and its potential loss factor[167] and "suggested that the relevant ratio was not more than 10 to 1," only to

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cannot say with sufficient confidence that the award was unjustified or improper on this record: TXO acted with malice.").

162. *See BMW*, 116 S. Ct. at 1599-1601 (analyzing the reprehensibility of BMW's conduct in this case); *id.* at 1609 (Breyer, J., concurring) (acknowledging that the decision "reflects a judgment about a matter of degree"); *id.* at 1611 (Scalia, J., dissenting) (criticizing the decision for "reflect[ing] not merely... 'a judgment about a matter of degree'; but a judgment about the appropriate degree of indignation or outrage, which is hardly an analytical determination" (citation omitted)).

163. Justice Scalia was critical of this omission:

> The Court distinguishes today's result from *Haslip* and *TXO* partly on the ground that "the record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive, such as were present in *Haslip* and *TXO*." This seemingly rejects the findings necessarily made by the jury—that [BMW] had committed a fraud that was "gross, oppressive, or malicious." Perhaps that rejection is intentional; the Court does not say.

BMW, 116 S. Ct. at 1614 (Scalia, J., dissenting) (quoting *id.* at 1601) (internal citation omitted).

164. *Id.* at 1601.

165. *See id.* at 1601 & n.32 (citing nineteenth century cases endorsing the principal that punitive damages should be proportionate to the actual damages sustained). *But see* Ellis, *supra note* 1, at 58 ("[F]rom the standpoint of fairness, the adverse effects of [the 'reasonable relationship'] approach outweigh its advantages. The actual harm that occurred is at best a crude measure of the moral egregiousness of a defendant's conduct and, hence, of the punishment deserved.").

166. *See BMW*, 116 S. Ct. at 1602; *see also supra* text accompanying notes 50, 104 (discussing the Court's refusal to adopt bright line test).

167. *See* TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 460-62 (1993); *supra* text accompanying notes 118-19 (discussing same). While the potential harm factor was endorsed by only a plurality in *TXO* and sharply criticized by Justice O'Connor in her dissent, *see TXO*, 509 U.S. at 485-89 (O'Connor, J., dissenting), *BMW's* majority opinion officially makes this factor a legitimate consideration. *See BMW*, 116 S. Ct. at 1602.

retreat from this position by reciting instances in which such a ratio would be inappropriate.[168] The subjectivity of this inquiry is heightened and other complex problems are introduced when one considers the difficult question of *whose* harm on which to base the ratio. This question is closely related to the states' interest analysis,[169] and there is no simple answer; while the extent to which a state may consider acts outside its borders is not clear,[170] the harm to persons in the state other than the plaintiff apparently is an entirely appropriate consideration.[171] If this is the case, one must wonder whether an award of punitive damages based on harm to all others in the state precludes those other individuals from collecting punitive damages as well.[172] Unfortunately, the Court again does not address this concern.

Unlike the other guideposts, the third guidepost, which compares the punitive damages award with civil or criminal sanctions for

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168. *See BMW*, 116 S. Ct. at 1602. The instances in which a ratio would not apply include where especially egregious conduct results in a small amount of pecuniary harm, where the injury is difficult to detect, or where the "monetary value of a noneconomic harm" defies quantification. *Id.*

169. *See id.* at 1595-98; *see also supra* notes 34-36 and accompanying text (discussing states' interest analysis).

170. *Compare BMW*, 116 S. Ct. at 1597 ("Alabama does not have the power ... to punish BMW for conduct that was lawful where it occurred ...."), *with id.* at 1599 (citing favorably language from *TXO* stating that it is settled law that evidence of a defendant's conduct in other parts of the country may be properly considered in assessing punitive damages).

171. *See id.* at 1598 (requiring the award to be analyzed according to the interests of Alabama consumers); *id.* at 1606 (Breyer, J., concurring) (finding the relevant economic harm to include all harm inflicted in Alabama).

172. The issue of multiple punitive damages assessments has attracted much attention in the past several years in products liability litigation. *See, e.g.*, Owen, *supra* note 1, at 406 ("Surely the most momentous question as yet unresolved by the [Supreme] Court is whether the Constitution imposes any restraints on the repetitive imposition of punitive damages in mass disaster litigation, such as the litigation that has confronted the asbestos industry for many years."). *See generally* Dunn v. HOVIC, 1 F.3d 1371, 1379, 1385-86 (3d Cir.) (collecting federal and state cases and concluding the assessment of multiple punitive damages against a single defendant does not violate due process), *modified in part*, 13 F.3d 58 (3d Cir.), *cert. denied sub nom.* Owens-Corning Fiberglass Corp. v. Dunn, 510 U.S. 1031 (1993); David H. Bernstein, *Punitive Damages in Mass Products Liability*, 1 PROD. LIAB. L.J. 327 (1990); Jerry J. Phillips, *Multiple Punitive Damage Awards*, 39 VILL. L. REV. 433 (1994) (discussing punitive damages "based on the premise that there is no inherent due process problem arising out of multiple punitive damage awards for the same course of conduct"); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37 (1983) (discussing proposals for changing the methods of awarding punitive damages in mass tort litigation); Barbara J. Shander, Note, *Punitive Damages—Addressing the Constitutionality of Punitive Damages in the Third Circuit*, 39 VILL. L. REV. 1105 (1994) (examining the constitutional arguments against multiple punitive damages and the Third Circuit's position in *Dunn*).

similar misconduct, was not adopted by the Court on the basis of its historical acceptance and use.[173] Accordingly, this guidepost adds a new tool to the toolchests of lower courts. Unfortunately, the Court fails to give much instruction in how to use it, noting only that in *BMW* the punitive damages award was "substantially greater than the statutory fines available"[174] and that "a reviewing court . . . should 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.' "[175] Had the Court suggested an appropriate punitive damages award in this case, the relation between the award and the legislative sanctions would be quite clear, providing significant guidance to lower courts. In addition, it appears from *Haslip* that the possibility of imprisonment for the defendant's conduct will justify a significant award,[176] though no dollar amount is affixed to jail time. Undoubtedly, the Court will be asked in some future case to clarify the weight accorded statutory penalties and imprisonment.

Apart from the practical implications of the Court's decision, *BMW* will likely have an impact on the theoretical distinction between substantive and procedural due process in the context of punitive damages. The Court expressly engaged in procedural inquiries in both *Haslip*[177] and *Honda*,[178] and while both procedural and substantive challenges were issued in *TXO*, the members of the Court were careful to distinguish between the two in their opinions.[179]

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173. Indeed, its adoption is quite interesting. In *BMW*, the Court cited several relatively recent opinions where its Members remarked on the ratio between a punitive damages award and the applicable statutory fines. *See BMW*, 116 S. Ct. at 1603; *see also* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 263 (1984) (Blackmun, J., dissenting) (commenting that the punitive award was one hundred times the maximum fine authorized by federal (civil) standards); New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964) (observing the punitive damages award for libel was one thousand times greater than the maximum fine authorized by an Alabama criminal statute). However, in *TXO*, the most recent case on point, both the plurality and the dissenting Justices rejected just such a comparison. *See* TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 456-58 (1993) (plurality opinion); *id.* at 480 (O'Connor, J., dissenting).

174. *BMW*, 116 S. Ct. at 1603.

175. *Id.* (quoting Browning-Ferris Ind. of Vermont v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)).

176. *See* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1990); *see also supra* text accompanying note 107 (discussing same).

177. *See Haslip*, 499 U.S. at 15-24.

178. *See* Honda Motor Co. v. Oberg, 512 U.S. 415, 420-35 (1994).

179. *See* TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 453-62, 462-66 (1993) (plurality opinion) (engaging in a substantive due process determination in Parts II and III of the plurality opinion and dismissing TXO's procedural due process arguments in Part IV of the opinion); *id.* at 479-95, 495-500 (O'Connor, J., dissenting) (arguing for reversal of the punitive damages award on a substantive due process basis in Part II of her

However, in *BMW* the distinction is not so clear. From a precedential viewpoint, *BMW* must be a substantive inquiry, or the Court's decision would implicitly overrule its unequivocal endorsement of Alabama's procedures in *Haslip*.[180] Notwithstanding the necessarily substantive nature of the inquiry, the Court framed its analysis in terms of notice to the defendant,[181] a concept traditionally associated with procedural due process.[182] Having declared notice as the gravamen of its test, the Court sets forth three substantive guideposts to determine if such notice has been effected.[183] Justice Breyer reinforced this fusion of procedural and substantive due process in his concurring opinion,[184] in which he found the award invalid on both procedural and substantive grounds: "[T]he award in this case was both (a) the product of a *system of standards* that did not significantly constrain a court's, and hence a jury's, discretion in making that award; and (b) was *grossly excessive* in light of the State's legitimate punitive damages objectives."[185] With Justice Breyer explicitly stating what the majority left implicit, the fusion was complete.

Despite these shortcomings, the Court's decision to strike down a state court award of punitive damages is unquestionably significant. Though it left the assessment of punitive damages subject to the same processes that produced the *BMW* award in the first place, the Court now has placed a constitutional requirement on lower courts to actually exercise these processes properly. No longer will mere lip service to the rule of law be tolerated;[186] courts must engage in a serious post-

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opinion and for reversal on an independent procedural due process basis in Part III of her opinion).

180. *See Haslip*, 499 U.S. at 19-23 ("The application of [Alabama's process for assessing punitive damages] ... imposes a sufficiently *definite and meaningful constraint* on the discretion of Alabama factfinders in awarding punitive damages.... These standards have *real effect* when applied by the Alabama Supreme Court to jury awards." (emphasis added)); *see also supra* notes 102, 105 and accompanying text (discussing same).

181. *See BMW*, 116 S. Ct. at 1598 ("Elementary 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."); *see also supra* text accompanying notes 38-39 (discussing the same language).

182. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 80 (1972) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified.' " (quoting Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863))).

183. *See BMW*, 116 S. Ct. at 1598.

184. *See id.* at 1604-10 (Breyer, J., concurring).

185. *Id.* at 1609 (Breyer, J., concurring). The first reason, a system of standards, rings of procedure, while the second, the award being grossly excessive, rings of substance.

186. Justice O'Connor, fearing such lip service had taken place in the lower courts in *TXO*, quoted unsettling language from the West Virginia Supreme Court of Appeals:

verdict review of a questionable award lest they be overturned on appeal.

However, because the *BMW* standard is in many ways subjective and requires an ad hoc determination of constitutionality, the application of the standard will consume tremendous judicial resources at both the trial and appellate levels.[187] Such expenditures risk overshadowing the standard itself, its effectiveness diluted in the wells of ink spilled in its application. Justice Ginsburg's conclusion that "[t]he Court is not well equipped for this mission"[188] rings true, especially, as she points out, in light of recent state judicial and legislative activity in this area.[189] While not all agree that such "tort reform" is necessary,[190] *BMW* fails to provide the guidance lower courts need. So whether the solution to the punitive damages issue lies in a future Supreme Court case or in the state legislatures, one thing seems cer-

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> "We understand as well as the next court how to ... articulate the correct legal principle, and then perversely fit into that principle a set of facts to which the principle obviously does not apply. [All judges] know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences."

TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) (quoting Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 907 (W. Va. 1991) (footnote omitted)).

187. Yet even this tremendous dedication of resources pales in comparison to that which will be required if Justice Scalia's ominous prediction—a constitutional guarantee of the reasonableness of the imposition of punitive damages as well as all other court findings—comes true. *See BMW*, 116 S. Ct. at 1614 (Scalia, J., dissenting).

188. *Id.* at 1617 (Ginsburg, J., dissenting).

189. *See id.* at 1617-18 (Ginsburg, J., dissenting); *see also* Brian Timothy Beasley, Note, *North Carolina's New Punitive Damages Statute: Who's Being Punished Anyway?*, 74 N.C. L. REV. 2174, 2202-13 app. A (1996) (categorizing punitive damages reform in each state); *supra* note 79 (citing state statutes reforming the assessment of punitive damages).

190. *See e.g.*, Daniels & Martin, *supra* note 5, at 63 ("The [empirical] findings presented in this Article provide a good reason to be skeptical of the veracity of the reformers' characterization [of the civil justice system]."); Rustad, *supra* note 5, at 87 ("There is certainly no crisis justifying immediate revamping of the [punitive damages] remedy.").

According to those skeptical of tort reform, the vast majority of juries either do not award punitive damages or award them properly. *See* Daniels & Martin, *supra* note 5, at 31 (presenting tabular data representing 25,627 cases from 1981-85, and concluding that "in general, juries do not award punitive damages in a large percentage of money damages cases"); Rustad, *supra* note 5, at 37 ("Punitive damages awards are a teaspoon-sized drop in an ocean of civil litigation."); Rustad & Koenig, *supra* note 1, at 1307 (examining empirical data and concluding "judges and juries award punitive damages with striking rarity to individuals in suits against manufacturers"). It would seem, then, that legislative action restricting punitive damages would affect assessments in only the rare, outrageous cases, thereby grounding those cases hovering on the line of constitutional impropriety and foreclosing the constitutional basis for those seeking to abolish punitive damages, while appeasing those advocating their legitimate functions.

tain: The centuries-old debate over punitive damages will rage on.

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