

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—DUE
PROCESS CLAUSE REQUIRES THAT A STATE PROVIDE FAIR NOTICE
OF THE MAGNITUDE OF A PUNITIVE DAMAGES AWARD ASSESSED
AGAINST A TORTFEASOR—*BMW of N. Am., Inc. v. Gore*, 116 S.
Ct. 1589 (1996).

The United States Supreme Court has long embraced punitive damages awards¹ and the idea that it is proper for a jury to assess monetary punishment against a defendant under aggravating circumstances.²

¹ See BLACK'S LAW DICTIONARY 390 (6th ed. 1990). Punitive damages are reparations of money assessed against a defendant and awarded to a plaintiff in a private civil action where a defendant is guilty of wanton misconduct. See *id.* Separate from compensatory damages, which "compensate the injured party for the injury sustained, and nothing more," punitive damages are awarded to a plaintiff "where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct." *Id.* That is, punitive damages are assessed only in instances of "very serious misconduct coupled with a bad state of mind." DAN B. DOBBS, LAW OF REMEDIES § 3.11(1) (2d ed. 1993); RESTATEMENT (SECOND) OF TORTS § 908 cmt. b (1979) (stating that punitive damages may be granted where the defendant acted maliciously or with reckless disregard to plaintiff's rights).

Punitive damages are also commonly known as "exemplary" damages. See LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 2.0 (3d ed. 1995). Although used less frequently, other terms include "vindictive," "punitive," "speculative," "imaginary," "presumptive," and "added" damages. See *id.* § 2.1(A).

² See *Day v. Woodworth*, 54 U.S. (8 How.) 363, 371 (1851). The United States Supreme Court first asserted judicial acceptance of the punitive damages doctrine in the middle of the nineteenth century. See *id.* In 1851, the Court pronounced:

It is a *well-established principle* of the common-law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff.

Id. (emphasis added); see also *Scott v. Donald*, 165 U.S. 58, 86 (1897) (asserting validity of punitive damages despite doubts of commentators); *Denver & Rio Grande Ry. v. Harris*, 122 U.S. 597, 609 (1887) (finding propriety of punitive damages "no longer an open question"); *Milwaukee & St. Paul Ry. v. Arms*, 91 U.S. 489, 492 (1875) (declaring punitive damages doctrine "too well settled now to be shaken").

The origin of punitive damages awards dates back to ancient times. See SCHLUETER & REDDEN, *supra* note 1, §§ 1.1-1.2 (discussing early systems of law that employed punitive damages, including the Code of Hammurabi (2000 B.C.), the laws of the Babylonian empire (2800 to 1000 B.C.), the Hittite Law (1400 B.C.), the Hindu Code of Manu (200 B.C.), and the Decemviral Code of Roman Law (middle of the fifth century B.C.)); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1285-86 (1993) (noting the role of punitive damages in ancient cultures); N. Todd Leishman, Note, *Juzwin v.*

Courts and scholars propose many reasons for granting punitive damages awards,³ all of which are encompassed by two principal objectives: (1) to punish defendants for their wrongful conduct; and (2) to deter defendants and others from engaging in such misconduct in the future.⁴

Although today punitive damages awards are allowed by a majority of states,⁵ they remain the subject of a long-enduring debate.⁶ Addi-

Amtorg Trading Corp.: *Toward Due Process Limitations on Multiple Awards of Punitive Damages in Mass Tort Litigation*, 1990 UTAH L. REV. 439, 439 n.2. (citing the Code of Hammurabi as one possible origin of punitive damages awards). Scholars have also noted references to punitive remedies in the Old Testament. See Leishman, *supra*, at 439 n.2; James R. May, *Fashioning Procedural and Substantive Due Process Arguments in Toxic and Other Tort Actions Involving Punitive Damages After Pacific Mutual Life Insurance Co. v. Haslip*, 22 ENVTL. L. 573, 581 n.36 (1992) (quoting Exodus 22:1, which states: "[i]f a man shall steal an ox, or a sheep, and kill it, or sell it; he shall restore five oxen for an ox, and four sheep for a sheep.").

The modern doctrine of punitive damages was first acknowledged in England in the 1700s. See Michael J. Pepek, TXO v. Alliance: *Due Process Limits and Introducing a Defendant's Wealth When Determining Punitive Damages Awards*, 25 PAC. L.J. 1191, 1196 (1994). *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763), and *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), are considered the common-law origin of present-day punitive remedies. See Pepek, *supra*, at 1196. For additional discussion of these cases, see SCHLUETER & REDDEN, *supra* note 1, § 1.3(A); David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 369 n.25 (1994); and Justice Janice L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damages Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 67-68 (1992).

³ See Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982). Professor Ellis listed seven reasons for awarding punitive damages which were assembled from various legal commentaries and judicial opinions: (1) punishing the wrongdoer; (2) discouraging the wrongdoer from repeating the misconduct; (3) deterring others from committing the misconduct; (4) maintaining the peace; (5) encouraging private law enforcement; (6) compensating plaintiffs for otherwise uncompensable losses; and (7) reimbursing the plaintiff's attorneys' fees. See *id.*; see also Owen, *supra* note 2, at 373-74 (dividing the functions of punitive damages into five categories: "(1) education, (2) retribution, (3) deterrence, (4) compensation, and (5) law enforcement") (footnotes omitted).

⁴ See Ellis, *supra* note 3, at 11. Professor Ellis condensed the seven aims of punitive damages awards into two: (1) to punish wrongdoers beyond the assessment of reparative damages; and (2) to promote efficiency by deterring defendants from loss-creating behavior. See *id.* Furthermore, the RESTATEMENT (SECOND) OF TORTS § 908 cmt. a provides: "The purposes of awarding punitive damages . . . are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future." RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (1979). These two purposes are most often cited by the courts and the laws of most states as the justifications for imposing punitive damages. See SCHLUETER & REDDEN, *supra* note 1, § 2.2(A)(1) (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)); see also *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (noting that Alabama law, consistent with the laws of the majority of states, imposes punitive damages for retribution and deterrent purposes).

⁵ See Bradley D. Toney, Note, *The Chaotic and Uncertain Due Process Challenge to Punitive Damages*, 30 WILLAMETTE L. REV. 635, 640 & n.32 (1994) (stating that only five states—Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington—do

tionally, with the drastic increase in recent years of both the size and frequency of punitive damages awards,⁷ reformers and defendants have at-

not generally permit punitive damages awards barring a state statute that provides otherwise).

⁶ See Owen, *supra* note 2, at 370. Two of the nineteenth century's most notable scholars, Simon Greenleaf and Theodore Sedgwick, vehemently disagreed with one another on the propriety of the punitive damages doctrine. See *id.* Compare 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 240 n.2 (16th ed. 1899) with 2 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 365, at 718-19 (9th ed. 1912). Greenleaf firmly rejected the notion of exemplary remedies, believing that it abandoned the compensatory purpose of tort actions and lacked any doctrinal basis in American jurisprudence. See GREENLEAF, *supra*, at 240 n. 2. Conversely, Sedgwick was an adamant supporter of punitive damages, stating that "oppression, brutality or insult in the infliction of a wrong" is justification for their allowance. See SEDGWICK, *supra*, at 718-19.

Courts have consistently voiced their views on punitive awards. See *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting). In *Smith v. Wade*, Justice Rehnquist explained that throughout the Nation's history, the judiciary has heartily criticized the doctrine of punitive remedies as incompatible with American jurisprudence. See *id.* Similarly, Justice Foster, writing for the majority of the New Hampshire Supreme Court, went so far as to declare that "[t]he idea [of punitive damages] is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law." *Fay v. Parker*, 53 N.H. 342, 382 (1872).

The doctrinal debate converges primarily upon two issues: (1) whether the aims served by punitive damages are proper; and (2) whether those purposes are fulfilled. See Toney, *supra* note 5, at 641. One of the more frequently expressed criticisms of the doctrine is that it is unjust to grant the plaintiff punitive remedies after he has already been fully compensated for his injuries. See, e.g., *Bass v. Chicago & N.W. Ry.*, 42 Wis. 654, 672 (1877). Chief Justice Ryan of the Wisconsin Supreme Court articulated this position:

It is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public in whose behalf he is punished.

Id. For a discussion of viewpoints on both sides of the controversy, see Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 7-9 (1990) and Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1176-84 (1931).

⁷ See *Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting). Both the judiciary and legal scholars have expressed concern for the "run[ning] wild" of punitive damages awards. See *id.* at 18. Concerning the size of such awards, Justice O'Connor remarked that the amounts awarded can be astonishing. See *id.* at 61 (O'Connor, J., dissenting). For example, the Justice emphasized that within the nine months following the *Browning-Ferris* decision, which upheld a \$6 million punitive award, there were at least six punitive awards exceeding \$20 million. See *id.* Moreover, a recent study conducted by the RAND Corporation Institute for Civil Justice found that the frequency in which juries award punitive damages has risen dramatically in recent decades. See *id.* at 61-62 (O'Connor, J., dissenting); see also Pepek, *supra* note 2, at 1191 (stating that over the last 25 years, courts have assessed punitive damages in an increasing number of cases and the awards have grown in size between 300 and 1500%). But see Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 24 (1989) (arguing that there is a lack of empirical evidence in

tacked these remedies on several constitutional fronts.⁸ The latest challenge to punitive damages awards involves the extent to which these awards violate the Due Process Clause of the Fourteenth Amendment.⁹

support of a dramatic growth in both size and frequency of punitive damages).

⁸ See SCHLUETER & REDDEN, *supra* note 1, §§ 3.3-3.12. Both reformers and defendants in actions involving punitive remedies have challenged punitive damages awards as violating several constitutional clauses including: the First Amendment, Self Incrimination, Double Jeopardy, Confrontation, Excessive Fines, Contract, and the Cruel and Unusual Punishment Clauses. See *id.* For further discussion on the relation of punitive damages awards to these constitutional clauses, see generally Bruce J. Ennis, *Punitive Damages and the U.S. Constitution*, 25 TORT & INS. L.J. 587 (1990) (discussing constitutional challenges to punitive damages awards with emphasis on the Excessive Fines Clause, the Contract Clause, and the First Amendment); Victor E. Schwartz & Liberty Magarian, *Challenging the Constitutionality of Punitive Damages: Putting Rules of Reason on an Unbounded Legal Remedy*, 28 AM. BUS. L.J. 485 (1990) (providing a general look at the constitutional problems of punitive damages and their consequences on society); and Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983) (addressing punitive damages in light of the particular criminal procedural safeguards of the Fourth, Fifth, and Sixth Amendments).

⁹ See John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 139 (1986). The Due Process Clause of the Fourteenth Amendment provides that a person's life, liberty, and property shall not be denied without due process of law. U.S. CONST. amend. XIV, § 1. Due process entails the concepts of both procedural and substantive due process. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-7, at 664 n.4 (2d ed. 1988).

Procedural due process establishes constitutional limits on the enforcement of laws or other governmental action. See *id.* at 664. This concept stands for the safeguards that ensure that a person is given fair notice and a reasonable hearing prior to any loss of life, liberty, or property. See *id.*; see, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974) (holding that an accused is entitled to a hearing before being deprived of property); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (maintaining that the opportunity to be heard is a fundamental right of due process).

Substantive due process determines the constitutional limits on the content (or substance) of laws. See TRIBE, *supra*, § 10-7, at 664 n.4. This due process concept was first utilized to challenge state economic legislation that encroached upon a person's liberty to contract. See *Lochner v. New York*, 198 U.S. 45, 53 (1905) (invalidating a New York statute that set a limit on the number of hours bakery employees could work as an infringement on the freedom to contract); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (signifying the Court's willingness to strike down a state law for imposing on a person's due process rights). More recently, substantive due process has been employed to uphold various fundamental rights, like the right to privacy, which also fall under the protection of the Due Process Clause. See *Zablocki v. Redhail*, 434 U.S. 374, 383-85 (1978) (using strict scrutiny in protecting the fundamental right to marry); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (invalidating a Connecticut law prohibiting use of contraceptives—a liberty right included in the right to privacy).

Both due process concepts are employed in challenging punitive damages awards. See, e.g., *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1604 (1996) (finding a punitive award to be "grossly excessive" and violative of a defendant's substantive due process rights); *Haslip*, 499 U.S. at 23, 24 (holding that the common-law system of determining punitive awards did not violate the procedural component of the Due Process Clause). Procedural due process is ensured by presenting the jury with sufficient instruction on the purpose and nature of punitive awards, by employing judicial review of the award amount to assure the reasonableness of the award, and by using the appropriate standard of proof.

Most recently, in *BMW of North America, Inc. v. Gore*,¹⁰ the Supreme Court found that "grossly excessive" punitive damages awards violate one's constitutional right to due process.¹¹ In *BMW*, the Court held that a punitive damages award is grossly excessive and, thus, unconstitutional under the Fourteenth Amendment's Due Process Clause, when a person is not given fair notice of its magnitude.¹²

After purchasing a new BMW automobile,¹³ Dr. Ira Gore learned that the seemingly undamaged automobile had been partially repainted.¹⁴ Gore filed a complaint against BMW of North America (BMW), the American distributor of BMW automobiles,¹⁵ alleging that the failure of BMW to inform him of the repair at the time of purchase amounted to suppression of a material fact.¹⁶

At trial, considering both the actual damages sustained¹⁷ and BMW's history of selling refinished vehicles as new,¹⁸ Gore contended that \$4 million was an appropriate punitive award for selling cars worth less than their value.¹⁹ Accordingly, the jury, in addition to awarding

See May, supra note 2, at 574. Substantive due process is preserved when the punitive damages award is neither excessive in amount nor in frequency. *See id.*

¹⁰ 116 S. Ct. 1589 (1996).

¹¹ *See id.* at 1595; *see also* *TXO Prod. Co. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993) (discussing the circumstances in which an award is so "grossly excessive" that it violates the Due Process Clause of the Fourteenth Amendment).

¹² *See BMW*, 116 S. Ct. at 1598, 1604.

¹³ *See id.* at 1593. Gore purchased a black BMW sports sedan for the price of \$40,750.88 in January 1990 from a dealer in Birmingham, Alabama. *See id.*

¹⁴ *See id.* About nine months after he purchased the car, Gore took it to an independent detailer who informed Gore that the car had been partially repainted. *See id.* It was later discovered that damage had occurred to the vehicle during transit from Germany—presumably from acid rain—and the hood, top, quarter panels, and trunk were repainted at BMW of North America's preparation center in Georgia before the car was shipped to the Alabama dealership. *See id.* n.1.

¹⁵ *See id.* at 1593. In the complaint, Gore asked for \$500,000 in damages (both compensatory and punitive) and costs. *See id.* He also named the Alabama dealership and the German manufacturer as defendants. *See id.* n.2.

¹⁶ *See id.* at 1593. Alabama law provides that suppression of a material fact, which the party has a duty to disclose, constitutes fraud. *See* ALA. CODE § 6-5-102 (1993).

¹⁷ *See BMW*, 116 S. Ct. at 1593. Gore maintained that actual damages amounted to \$4000. *See id.* In support of this claim, Gore introduced the statement of a former BMW salesman that a repainted BMW was valued at 10% less than the price of a new BMW that had never been repainted. *See id.*

¹⁸ *See id.* BMW acknowledged that its failure to inform Gore of the repairs made to his car was pursuant to its nationwide nondisclosure policy. *See id.* Since 1983, BMW had embraced the practice of not disclosing repairs to automobiles damaged in transit where the cost to repair the vehicle did not exceed three percent of its suggested retail price. *See id.* Because the cost to repair Gore's vehicle was only \$601.37, about 1.5% of the car's suggested retail price, the damage and repair were never communicated to the dealer, and the car was sold as new. *See id.*

¹⁹ *See id.* To support a \$4 million punitive damages award, Gore introduced evi-

Gore \$4000 in compensatory damages, assessed a punitive damages award of \$4 million against BMW for violating Alabama's fraud statutes.²⁰ The trial court entered its judgment on the verdict²¹ and, relying on the standards set out in *Hammond v. City of Gadsden*²² and *Green Oil Co. v. Hornsby*,²³ denied BMW's post-trial motion to set aside the punitive award as constitutionally excessive.²⁴

dence that since the adoption of the nondisclosure policy, BMW had sold 983 repainted automobiles nationwide as new, without disclosing the prior damage. *See id.* Each car, he argued, was repainted prior to sale at a cost of over \$300 per automobile. *See id.* & n.5 (stating that Gore offered no explanation for the \$300 cut-off). Using the \$4000 in actual damages as the estimate for each of the nearly 1000 other repainted vehicles sold, Gore determined that an appropriate punitive award was \$4 million. *See id.*

²⁰ *See id.* at 1593-94. The jury found that BMW's nondisclosure practices constituted "gross, oppressive or malicious" fraud." *See id.* at 1594 (citing ALA. CODE §§ 6-11-20, 6-11-21 (1993)). Moreover, the jury found the Alabama dealership and the German manufacturer liable for the compensatory damages, and the German manufacturer additionally liable for the punitive damages. *See id.* n.6. The dealership was not involved in the appeal, and the Alabama Supreme Court subsequently reversed the trial court's judgment as to the German manufacturer for lack of personal jurisdiction. *See id.*

²¹ *See BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619, 622 (Ala. 1994), *rev'd*, 116 S. Ct. 1589 (1996).

²² 493 So. 2d 1374 (Ala. 1986). The court in *Hammond* established two bases for concluding that a damages award was the result of a flawed jury verdict: first, if the award does not properly account for a sum that is clearly recoverable (or not) as a matter of law where the damages are mathematically ascertainable; and second, if the verdict results from "bias, passion, prejudice, corruption, or other improper motive." *See id.* at 1378.

²³ 539 So. 2d 218 (Ala. 1989). In *Green Oil*, the Supreme Court of Alabama listed the following seven factors that the trial court could consider in determining whether a punitive damages award is excessive or inadequate: (1) the relationship of the punitive damages to the actual harm caused and the harm likely to occur as a result of the defendant's conduct—the size of the award should be proportional to the severity of the actual or likely harm; (2) the level of reprehensibility of the conduct—to be determined by the duration of the conduct, whether the defendant was aware of the conduct's risk of creating a hazard, any intentional concealment of that hazard, and any prior episodes of similar conduct; (3) the profitability of the conduct to the defendant—punitive damages should be large enough to cause the defendant to recognize a loss; (4) the defendant's financial position; (5) the costs of litigation—the award should be large enough to encourage plaintiffs to initiate suits against wrongdoers; (6) if the defendant has been subjected to criminal sanctions, these should be considered in mitigation of the damages; and (7) if the defendant has had other civil actions against him, these should be considered in mitigation as well. *See id.* at 223-24 (citing *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring)).

²⁴ *See BMW*, 646 So. 2d at 622. In its motion, BMW made several arguments for the setting-aside of the jury verdict. *See BMW*, 116 S. Ct. at 1594. First, BMW provided evidence establishing that its conduct pursuant to its nondisclosure policy was lawful in approximately 25 states that had defined the disclosure duties of manufacturers, distributors, and dealers of automobiles. *See id.* Accordingly, BMW argued that its nondisclosure practices in these states could not be used as a basis for assessing a punitive award. *See id.* Second, BMW informed the court that its conduct pursuant to the nondisclosure policy had never been deemed unlawful prior to the filing of the present action. *See id.* Furthermore, subsequent to Gore's filing of the action, BMW altered its policy in a way

Subsequently, the Supreme Court of Alabama, relying on Alabama and United States Supreme Court precedent,²⁵ affirmed the trial court's ruling that the award was not excessive.²⁶ Holding that the jury had improperly considered BMW's out-of-state sales in the calculation of the award amount,²⁷ however, the court determined that the appropriate punitive award was \$2 million.²⁸

The United States Supreme Court granted certiorari²⁹ to clarify the standard that applies in determining whether a punitive damages award exceeds the constitutional limits established by the Due Process Clause.³⁰ Relying on a number of recent cases confronting the issue of due process limitations on punitive damages awards,³¹ the Court held that a \$2 million punitive damages award exceeded the constitutional limit where the

that would avoid the sale of any repainted cars in three states, including Alabama. *See id.*

Gore, in response, contended that the disclosure statutes of the 25 states were irrelevant as there was no evidence introduced that demonstrated that they eliminated existent causes of action for common-law fraud. *See id.* at 1594. Additionally, Gore drew the court's attention to the fact that while the nondisclosure policy had not previously been ruled unlawful, some customers had lodged complaints concerning undisclosed repairs and BMW had settled a number of lawsuits. *See id.* & n.9. Lastly, Gore maintained that BMW's most recent nationwide policy change, instituted after the judgment and requiring the full disclosure of every repair, was indicative of the efficacy of the jury's punitive award. *See id.* at 1594.

²⁵ *See BMW*, 646 So. 2d at 624-29. In addressing the excessiveness inquiry, the court reviewed the verdict in light of the principles addressed in *Green Oil*. *See id.* For a review of these principles, see *supra* note 23. *See also* *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991) (endorsing the principles considered in *Green Oil*). For a discussion of *Haslip*, see *infra* notes 54-58 and accompanying text.

²⁶ *See BMW*, 646 So. 2d at 629. The affirmation was based on the condition that Gore file with the court a remittitur of damages of the sum of \$2 million within 21 days from the holding. *See id.* If he failed to meet this condition, the judgment of the trial court was to be reversed and the case remanded for a new trial. *See id.*

²⁷ *See id.* at 627. The court declared that, while evidence of similar conduct in other jurisdictions may be admitted to demonstrate a pattern and practice of such conduct, a jury may not use that evidence as a multiplier in its calculation of the dollar amount to be awarded as punitive damages. *See id.* Thus, the court found that it was improper for the jury to multiply Gore's actual damages by the number of similar sales in other states. *See id.*

²⁸ *See id.* at 629. In fixing the remitted award at \$2 million, the court explained that it utilized an "enhanced comparative analysis," in which it examined similar cases in Alabama and other states in addition to applying the *Green Oil* factors. *See id.* at 628; *see also BMW*, 116 S. Ct. at 1595 & nn.10-11 (discussing the comparative analysis used by the Alabama Supreme Court and the vagueness in the court's explanation of how it arrived at the \$2 million award).

²⁹ *See BMW of N. Am., Inc. v. Gore*, 115 S. Ct. 932 (1995).

³⁰ *See BMW*, 116 S. Ct. at 1595.

³¹ *See id.*; *see, e.g., TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453 (1993) (discussing whether a \$10 million punitive award violated both substantive and procedural due process rights); *Haslip*, 499 U.S. at 24 (holding that punitive damages assessed against the insurer, although large in proportion to cost of actual damages, did not violate due process).

defendant did not receive adequate notice of the magnitude of the penalty.³²

The Supreme Court has for many years indicated a concern for the often arbitrary, standardless, and unconstrained character of state-law punitive damages schemes.³³ In *Aetna Life Insurance Co. v. Lavoie*,³⁴ the Court considered the validity of a \$3.5 million punitive award assessed against Aetna Life Insurance Company for its bad-faith refusal to pay a legitimate insurance claim of \$1400.³⁵ Although recognizing for the first time that federal constitutional challenges to punitive awards raised important issues that needed to be addressed,³⁶ the Court grounded its decision on judicial bias³⁷ and never reached the constitutional questions posed by the Due Process and Excessive Fines Clauses.³⁸

Two years later, in *Bankers Life & Casualty Co. v. Crenshaw*,³⁹ the Court returned to the constitutional issues surrounding punitive awards.⁴⁰ Bankers Life contended that a \$1.6 million punitive award, for a bad-faith refusal to pay an insurance claim where actual damages were set at \$20,000, violated the Excessive Fines Clause,⁴¹ the Contract Clause,⁴²

³² See *BMW*, 116 S. Ct. at 1604.

³³ See SCHLUETER & REDDEN, *supra* note 1, §§ 3.3-3.4 (discussing the Court's history in addressing punitive damages awards as a violation of due process); Theodore B. Olson & Theodore J. Boutrous, Jr., *The Supreme Court's Developing Punitive Damage Jurisprudence*, 1994 PUB. INT. L. REV. 17, 18 (1994) (providing a history of the Court's recent jurisprudence on the constitutional limits of punitive damages awards); 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, 465 (1992) (discussing the line of cases, beginning with *Aetna*, in which the Court addressed the constitutionality of punitive damages).

³⁴ 475 U.S. 813 (1986).

³⁵ See *id.* at 816.

³⁶ See *id.* at 828-29. Two of the arguments made by Aetna that raised constitutional issues were that: (1) the Excessive Fines Clause of the Eighth Amendment prohibited an award of \$3.5 million in punitive damages; and (2) Alabama's failure to provide adequate standards for governing punitive damages awards violated the Due Process Clause of the Fourteenth Amendment. See *id.* at 828.

³⁷ See *id.* at 829. Although Aetna argued that the award violated the Excessive Fines and the Due Process Clauses, the Court focused its decision to vacate the lower court's judgment on the fact that the Alabama Supreme Court justice, who authored the majority opinion, was himself seeking punitive damages as a plaintiff in two suits against insurance companies for alleged bad-faith refusal to pay claims. See *id.* at 823-24.

³⁸ See *id.* at 828. The Court stated that the issues raised by due process and excessive fines questions were left to be resolved in an appropriate setting. See *id.*

³⁹ 486 U.S. 71 (1988).

⁴⁰ See *id.* at 76.

⁴¹ See U.S. CONST. amend. VIII. The Eighth Amendment to the Federal Constitution, in addition to the constitutions of the individual states, forbids excessive fines or penalties. See *id.*; BLACK'S LAW DICTIONARY 561 (6th ed. 1990).

⁴² See U.S. CONST. art. I, § 10, cl. 1. Article one of the United States Constitution

and the Due Process Clause of the Federal Constitution.⁴³ Finding that these issues had not been properly preserved in the state courts, however, the Court refused to entertain the merits of the constitutional arguments.⁴⁴ Nonetheless, Justice O'Connor, joined by Justice Scalia, in a separate concurrence expressed particular interest in the due process challenge to limitless jury discretion for imposing punitive damages awards and asserted that such latitude given to the jury may be unconstitutional.⁴⁵

In *Browning-Ferris Industries v. Kelco Disposal, Inc.*,⁴⁶ the Court for the first time confronted a constitutional challenge to a punitive damages award.⁴⁷ The United States District Court for the District of Vermont found Browning-Ferris Industries (BFI), the operator of a commercial waste-collection and disposal business, liable to Kelco for violating federal antitrust law and Vermont tort law.⁴⁸ In addition to assessing \$51,146 in compensatory damages, the jury awarded Kelco \$6 million in punitive damages.⁴⁹ Affirming the court of appeals decision,⁵⁰ the Court concluded that the Excessive Fines Clause of the Eighth Amendment did not limit a damages award in a civil action between private parties.⁵¹ The Court briefly discussed the due process claim made by BFI, finding that past rulings supported the position that the Due Process Clause

provides that no state shall establish a law that impairs the obligation of contract. *See id.*; BLACK'S LAW DICTIONARY 325 (6th ed. 1990).

⁴³ *See Pacific Mut. Life Ins. Co. v. Haslip*, 486 U.S. 1, 75 (1991). For additional discussion on the Due Process Clause, *see supra* note 9.

⁴⁴ *See Haslip*, 486 U.S. at 76. The Court did not address the constitutional claims made by Bankers Life, noting that these claims had not been specifically raised and considered in the state court. *See id.*

⁴⁵ *See id.* at 87 (O'Connor, J., concurring). Noting that vague sentencing provisions in criminal statutes may infringe upon a person's due process rights, Justice O'Connor opined that allowing juries the unfettered discretion to award punitive damages may similarly violate one's right to due process. *See id.* at 88 (O'Connor, J., concurring).

⁴⁶ 492 U.S. 257 (1989).

⁴⁷ *See id.* at 259.

⁴⁸ *See id.* at 261.

⁴⁹ *See id.* at 262.

⁵⁰ *See id.* at 280. The district court denied BFI's motions for judgment notwithstanding the verdict, a new trial, or remittitur. *See id.* at 262. The United States Court of Appeals for the Second Circuit affirmed the district court's decision, stating that even if the Excessive Fines Clause was applicable, the award was not constitutionally excessive. *See id.*

⁵¹ *See Browning-Ferris*, 492 U.S. at 263-64. Specifically, the Court determined that the Excessive Fines Clause did not apply to a civil action in which the government was neither a party to the action nor had any claim in the damages awarded. *See id.* *But see* Jeffries, *supra* note 9, at 148 (proclaiming that whether punitive damages are awarded to private plaintiffs as opposed to the government is irrelevant, "for the [E]ighth [A]mendment was plainly designed to forbid excessive punishment, not government self-enrichment").

placed limits on the amount of punitive damages that a jury may assess.⁵² Noting that BFI failed to properly preserve the issue, however, the Court declined to consider the effect of due process.⁵³

It was not until 1991, in *Pacific Mutual Life Insurance Co. v. Haslip*,⁵⁴ that the Court directly addressed the due process issues.⁵⁵ Haslip was awarded \$1,040,000, \$840,000 of which was regarded as punitive compensation, for damages resulting from the fraudulent misappropriation of insurance premiums by one of Pacific Mutual's agents.⁵⁶ Although upholding the punitive award,⁵⁷ a majority of the Court none-

⁵² See *Browning-Ferris*, 492 U.S. at 276; see, e.g., *St. Louis, Iron Mountain & S. Ry. v. Williams*, 251 U.S. 63, 66-67 (1919) (holding that the Due Process Clause prohibits states from prescribing penalties that are entirely disproportionate to the wrongdoing and clearly unreasonable).

⁵³ See *Browning-Ferris*, 492 U.S. at 277. While this ruling essentially laid to rest any punitive damages challenge based on excessive fines, the Court expressly left open the issue of whether due process operates as a check on juries who exercise undue discretion in the absence of clear limits. See *id.*; see also Ennis, *supra* note 8, at 587 (declaring that "[a]lthough the Excessive Fines Clause has been the flagship leading the opposition to punitive damage awards, that ship is dead in the water, and rightly so.").

Justice Brennan, joined by Justice Marshall, concurred with the majority's holding with the understanding that the Due Process Clause constrained punitive damages in cases between private parties. See *Browning-Ferris*, 492 U.S. at 280 (Brennan, J., concurring). Justice Brennan recognized that the Due Process Clause may be invoked even where the size of the award was within the legislature's statutory limits. See *id.* at 280-81 (Brennan, J., concurring). Moreover, the Justice opined that the judiciary should apply a more exacting due process review in the absence of statutory guidelines. See *id.* at 281 (Brennan, J., concurring).

⁵⁴ 499 U.S. 1 (1991).

⁵⁵ See *id.* at 18-19. For additional discussion on *Haslip*, see Mark A. Dombroff et al., *Constitutional Limitations on Punitive Damages Revisited*, 11 CALIF. L. REV. 147, 150-55 (1995), and see generally Douglas T. Miracle, *Punitive Damages, Jury Discretion and the "Outer Limits" of the Fourteenth Amendment in Civil Cases*, 13 MISS. C. L. REV. 221 (1992).

⁵⁶ See *Haslip*, 499 U.S. at 7 & n.2. Pacific Mutual was found liable for the fraudulent misappropriation of insurance premiums by one of its agents under a theory of respondeat superior. See *id.* at 6. Following a hospital stay, Haslip discovered that her health insurance policy had expired on account of her insurance agent's failure to remit her insurance premiums to Pacific Mutual. See *id.* at 5. When Haslip's physician did not receive payment, a collection agency secured a judgment against Haslip on behalf of the physician, and Haslip's credit rating was adversely affected. See *id.*

⁵⁷ See *id.* at 24. Before the United States Supreme Court, Pacific Mutual maintained that the extent of the jury's discretion in imposing the award and establishing its size violated the company's due process rights. See *id.* at 7. In an opinion authored by Justice Blackmun, the Court ruled that because the punitive award was based upon objective criteria, it did not infringe on Pacific Mutual's due process rights. See *id.* at 23-24. Upon examining the past cases of *Aetna Life*, *Bankers Life*, and *Browning-Ferris*, Justice Blackmun commented on the contours of the due process inquiry:

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

theless agreed that the protections of the Due Process Clause constrain the ability of juries to award punitive damages.⁵⁸

The Court, in *TXO Production Corp. v. Alliance Resources Corp.*,⁵⁹ turned its focus toward substantive due process limits on punitive damages awards.⁶⁰ In *TXO*, the Court considered a \$10 million punitive damages award imposed against TXO Production Corporation for committing a "slander of title,"⁶¹ resulting in \$19,000 in actual damages to Alliance Resources Corporation.⁶² While upholding the award at issue, the Court concluded that the disparity between the actual damages and the punitive damages was not dispositive in resolving whether a punitive

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.

Id. at 18 (citations omitted). Upon rejecting any bright-line test, the Court considered the jury instructions, the trial court's scrutiny of the verdict, and the Alabama Supreme Court's review of the award in determining that the state's procedures placed substantial constraints on the Alabama jury when awarding the punitive damages. *See id.* at 22.

⁵⁸ *See id.* at 20 (stating that due process is satisfied when the jury exercises its discretion within reasonable constraints). Scholars have asserted that although the Court failed to decisively answer the question of when punitive awards violate the Due Process Clause, the *Haslip* decision nonetheless represented the Court's acceptance that the imposition of punitive damages could violate procedural due process guarantees. *See* Dombroff, *supra* note 55, at 155 (noting that the *Haslip* decision only offers minimal guidance as to what is required to render a punitive damages system unconstitutional); Miracle, *supra* note 55, at 243 (explaining the need for the Court to further articulate guidelines for constitutional procedures when juries impose devastating awards); Olson & Boutrous, *supra* note 33, at 21-22 (analyzing the *Haslip* decision as it pertains to procedural due process review of punitive damages); *Remedies*, 8 No. 6 FED. LITIGATOR, 177, 178 (1993) (noting that the *Haslip* decision was primarily concerned with procedural due process, and that the issue of when a "grossly excessive" award violates substantive due process was in need of clarification for both the bench and the bar).

⁵⁹ 509 U.S. 443 (1993).

⁶⁰ *See id.* at 453. The Court recognized that the Due Process Clause imposed substantive limits on punitive awards. *See id.* at 453-54.

⁶¹ *See id.* at 450; BLACK'S LAW DICTIONARY 1388 (6th ed. 1990). A "slander of title" is an oral or written statement that falsely and maliciously disparages a person's title to property, either real or personal, or some other right resulting in exceptional damage. *See id.*

⁶² *See TXO*, 509 U.S. at 451. The trial court found that TXO, a joint venturer in gas and oil development, maliciously endeavored to defraud Alliance of seemingly profitable gas and oil development rights in West Virginia. *See id.* at 450-51. As part of an alleged widespread practice of similar corruption in its business operations throughout the country, TXO knowingly advanced a frivolous declaratory judgment action that alleged a cloud on Alliance's title to the gas and oil development rights. *See id.* at 449. In addition, TXO purportedly sought to secure false testimony to bolster its assault on Alliance's title and attempted to renegotiate the royalty agreement with Alliance in order to increase its own interest in the gas and oil rights at Alliance's expense. *See id.*

award exceeded the limits of due process.⁶³ The Court based its decision on a "general concern of reasonableness"⁶⁴ and, thus, avoided adopting a bright-line test for substantive due process review.⁶⁵

Less than one year later, in *Honda Motor Co. v. Oberg*,⁶⁶ the Court held that an Oregon constitutional provision prohibiting judicial review of the amount of a punitive damages award violated the Due Process Clause.⁶⁷ Authoring the decision, Justice Stevens restated the Court's findings in *Haslip* and *TXO* by reiterating that due process places sub-

⁶³ See *id.* at 462. The Court considered TXO's bad faith, wealth, past fraudulent actions, and the amount of potential harm to Alliance. See *id.* The Court also noted that the award was subjected to meaningful review and observed that the West Virginia Supreme Court of Appeal's opinion was unanimous and honored relevant precedents. See *id.* at 465. The plurality maintained that where proper procedures were followed, jury deliberations were presumptively valid. See *id.* at 457.

⁶⁴ See *id.* at 458 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)). Both TXO and Alliance proposed different tests for the Court to adopt in ascertaining whether an award exceeded due process limits; these were a heightened scrutiny analysis and a rational basis standard, respectively. See *id.* at 455-56. Rejecting both tests, the Court returned to its decision in *Haslip* and concluded that it should review the award with reasonableness in mind. See *id.* at 458.

⁶⁵ See *id.* Justice O'Connor pointed out that although the Court in *TXO* did not retreat from its prior statements in *Haslip* regarding the due process limits on punitive damages awards, it nonetheless "abandon[ed] all pretense of providing instruction and mov[ed] directly into the specifics of the case." *Id.* at 480 (O'Connor, J., dissenting).

While the Justice acknowledged that the Court should not adopt a strict formula for ascertaining the constitutionality of punitive awards, Justice O'Connor declared that the Court should at least provide "a clue" on the proper approach. See *id.*; see also *The Supreme Court, 1992 Term—Leading Cases*, 107 HARV. L. REV. 185, 189 (1993) (explaining that the Court's standard in *TXO* "lacks clarity, when applied is too easily manipulated and too unpredictable, provides little guidance to lower courts or parties, and may represent an added burden on the judiciary"); *Remedies*, *supra* note 58, at 178 (stating that *TXO* provides little guidance, placing the burden on the state courts and legislatures to furnish the specifics); David F. Cutter, Note, *TXO Production Corp. v. Alliance Resources Corp.: A Failure to Create True Constitutional Protection Against Excessive Punitive Damages*, 44 CATH. U. L. REV. 631, 639 (1995) (suggesting that although the Court has established a framework of due process protection from excessive punitive damages, it has not supplied any clear standards for implementing that framework).

⁶⁶ 512 U.S. 415 (1994).

⁶⁷ See *id.* at 420. In *Honda*, a products liability case, the Court reviewed the verdict of an Oregon jury, which assessed a \$5 million punitive damages award where actual damages were measured at \$735,512.31. See *id.* at 418. An amendment to Oregon's constitution prohibited the State's trial and appellate courts from engaging in an excessiveness review of the award amount "unless the court can affirmatively say there is no evidence to support the verdict." *Id.* (quoting OR. CONST. art. 7, § 3). The Oregon Supreme Court rejected Honda's argument that the Oregon system defied the principles of procedural due process dictated in *Haslip*. See *id.* at 418-19. Rather, the majority concluded that Oregon's requirement of "clear and convincing evidence" to impose punitive damages and the relatively detailed jury instructions were adequate in the absence of post-verdict judicial scrutiny. See *id.*

stantive limits on the amounts of punitive awards.⁶⁸ Furthermore, the Court acknowledged that these prior decisions have strongly emphasized the significance of the procedural element of due process.⁶⁹ Despite the attention to these findings, however, the Court did not endeavor to clarify the test required to assess the constitutionality of punitive damages awards.⁷⁰ Instead, the Court concluded that the Oregon punitive damage scheme was unconstitutional because Oregon's procedures substantially departed from the traditional common-law approach, which allowed at least some level of excessiveness review.⁷¹

Building upon this framework of due process limitations of punitive damages awards, the Court recently decided *BMW of North America, Inc. v. Gore*.⁷² Justice Stevens, writing for the majority, addressed the question of when, if ever, a punitive damages award violates the Due Process Clause of the Fourteenth Amendment.⁷³ The Court explained that only when an award is grossly excessive, with respect to a state's interests in deterrence and punishment, does it fall within the zone of arbitrariness that transgresses the due process rights guaranteed by the Constitution.⁷⁴

The majority began its excessiveness analysis with a discussion of the state interests that a punitive award was intended to advance.⁷⁵ Upon recognizing that protecting consumers from deceptive trade practices is a

⁶⁸ See *id.* at 420. Justice Stevens recognized that in light of the Court's recent decisions, the concept of substantive limits on punitive damages is well established. See *id.*

⁶⁹ See *id.* The Court referred to the *Haslip* and *TXO* decisions in noting the importance placed on the traditional common-law procedures for assessing punitive damages, which include meaningful review by the courts at both the trial and appellate levels. See *id.*

⁷⁰ See *id.* at 432 n.10 (explaining that the Court's decision does not provide the standard of review required by the Constitution).

⁷¹ See *Honda*, 512 U.S. at 429 (stating that the Oregon statute, unlike the common law, fails to provide assurance that a defendant will not be subjected to punitive awards of arbitrary magnitudes). The Court maintained that Oregon's abrogation of a traditional common-law safeguard against the arbitrary deprivation of property established a presumption that its system violated the Due Process Clause. See *id.* at 430. In the absence of adequate substitute procedures and with no evidence that the threat of arbitrary awards had decreased, the Court held that Oregon's punitive damages system offended the right to due process. See *id.*

Because the Court focused almost entirely on Oregon's unique prohibition, commentators have questioned the impact that *Honda* has had on the broad inquiry of due process limitations on punitive awards. See Dombroff, *supra* note 55, at 159. Legal scholars have suggested that the decision nonetheless indicates the Court's uneasiness with the condition of the law following *Haslip* and *TXO*. See *id.*

⁷² 116 S. Ct. 1589 (1996).

⁷³ See *id.* at 1592-93. Specifically, Justice Stevens presented the question of whether a \$2 million punitive award violated the constitutional limit. See *id.*

⁷⁴ See *id.* at 1595.

⁷⁵ See *id.*

legitimate state interest,⁷⁶ Justice Stevens noted that with respect to disclosure requirements, there were many different ways in which the states provide such protection.⁷⁷ The Court asserted that such diversity was indicative not only of the varying value that each state placed on disclosure requirements, but of the rationale behind why one state may not legislate on the behalf of another.⁷⁸ Justice Stevens further reasoned that such principles of state sovereignty also prohibit a state from imposing sanctions on those who violate its laws for the purpose of altering the tortfeasor's lawful behavior in a different state.⁷⁹ Accordingly, the Court stipulated that the proper excessiveness inquiry is limited to the punishment and deterrence interests of Alabama alone.⁸⁰

In light of these interests, the majority concluded that the punitive award was grossly excessive because BMW did not receive fair notice of the magnitude of the penalty that the state might impose for adhering to the distributor's nondisclosure policy.⁸¹ The Justice discussed three fac-

⁷⁶ See *id.* at 1595. The Court asserted that protecting consumers by mandating that automobile distributors disclose presale repairs, which alter the value of a new automobile, is within the powers of the states. See *id.* at 1595-96.

⁷⁷ See *BMW*, 116 S. Ct. at 1596. Justice Stevens acknowledged that the states do not, and need not, provide for the protection of its consumers in the same manner. See *id.* The Justice then discussed a list of laws from different states, illustrating the many different ways in which the states have addressed the issue of disclosure of presale repairs. See *id.* n.13; see, e.g., ARIZ. REV. STAT. ANN. § 28-1304.03 (West 1989) (requiring disclosure when the cost of repair is more than three percent of the suggested retail price); KY. REV. STAT. ANN. § 190.0491(5) (Banks-Baldwin 1988) (imposing a six percent disclosure threshold); VT. STAT. ANN. tit. 9, § 4087(d) (1993) (mandating disclosure of vehicle repairs exceeding five percent of the retail price for the initial \$10,000 in repairs and two percent thereafter).

⁷⁸ See *BMW*, 116 S. Ct. at 1596. Essentially, Justice Stevens determined that what was right for one state was not necessarily right for another. See *id.* With this as the underlying principle, the Court asserted that no state could legislate with reference to jurisdictions outside of its own. See *id.* at 1597 (citing *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881)).

⁷⁹ See *id.* The Justice stated that the federal power to control interstate commerce, along with the necessity to honor the interests of other states, limits a state's ability to impose burdens on the interstate automobile market. See *id.*; see also *Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989) (explaining that the Constitution is concerned both with the preservation of a unified national economy unencumbered by state-imposed restrictions on interstate commerce and the sovereignty of the states within their respective jurisdictions); *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) (noting that any attempt by a state to maintain extraterritorial jurisdiction over property or persons exceeds the limits of the state's authority); *Gibbons v. Ogden*, 22 U.S. (4 Wheat.) 1, 196-97 (1824) (maintaining that Congress has the exclusive power to regulate commerce among the states).

⁸⁰ See *BMW*, 116 S. Ct. at 1598. The Court held that the Alabama Supreme Court properly concluded that BMW's conduct in other states should not be used as a multiplier in fixing the dollar amount to be awarded as punitive damages. See *id.*; *supra* note 27 and accompanying text.

⁸¹ See *BMW*, 116 S. Ct. at 1598. Upon citing several Supreme Court cases that held

tors upon which the Court based its conclusion: (1) the reprehensibility of BMW's conduct; (2) the relationship between the punitive damages award and the actual or potential harm caused by the conduct; and (3) the difference between the punitive damages award and criminal or civil sanctions that courts may impose for similar misconduct.⁸²

Emphasizing that the reprehensibility of the tortfeasor's conduct is an important criterion for judging whether a punitive award is reasonable, the Court first compared the punitive award to the flagrancy of BMW's conduct.⁸³ The majority rejected Gore's contention that BMW had established a nationwide practice of tortious conduct and that its behavior was particularly condemnable.⁸⁴ Noting that BMW lacked the

unconstitutional the imposition of penalties on criminal defendants without adequate notice, Justice Stevens relied on *Shaffer* and asserted that the fundamental due process protection against judgments without advance notice is implicated by civil sanctions. *See id.* n.22; *see also* *Lankford v. Idaho*, 500 U.S. 110, 128 (1991) (finding the Due Process Clause violated where the defendant and his counsel were not provided with fair notice that the judge might impose the death penalty); *Miller v. Florida*, 482 U.S. 423, 435 (1987) (holding that the retroactive application of a revised sentencing law, which provided a longer sentence for the defendant's crime, violated the Ex Post Facto Clause); *Shaffer*, 433 U.S. at 217 (Stevens, J., concurring) (stating that the Due Process Clause prohibits "judgments without notice"); *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964) (asserting that the retroactive imposition of a new construction of a statute violated the Due Process Clause). In support of this proposition, Justice Stevens commented: "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." *BMW*, 116 S. Ct. at 1598. Furthermore, the majority noted that simply because the defendant is a large company and not a needy individual does not lessen its right to reasonable notice of the constraints that a state may place on the conduct of its operations. *See id.* at 1604.

⁸² *See BMW*, 116 S. Ct. at 1598-99.

⁸³ *See id.* at 1599. Relying on *Day v. Woodworth*, Justice Stevens explained that the size of a punitive damages award should embody the enormity of the wrongdoing. *See id.* In *Day*, a case involving an action of trespass for the tearing down of a mill-dam, the Court remarked that the severity of the punishment is dependent upon the degree of malice or outrage of the defendant's malfeasance. *See Day v. Woodworth*, 54 U.S. (8 How.) 363, 371 (1851).

Espousing the view "that some wrongs are more blameworthy than others," the Court noted that the flagrancy of a defendant's conduct is the most important factor in deciding the size of a punitive award. *See BMW*, 116 S. Ct. at 1599 & n.23; RESTATEMENT (SECOND) OF TORTS § 908(2) (1979); Owen, *supra* note 2, at 387.

⁸⁴ *See BMW*, 116 S. Ct. at 1600. With reference to prior holdings, Justice Stevens acknowledged that repeated wrongdoing is more reprehensible than a single instance of misconduct, and that the Court has held that recidivists may be sanctioned more severely than first-time offenders. *See id.* (citing *Gryger v. Burke*, 334 U.S. 728, 732 (1948) (upholding a more severe penalty for a repeated offense)). The Justice reasoned, however, that no nationwide practice of malfeasance was formed in this case because there was no evidence that the nondisclosure policy practiced by BMW violated the laws of other states, as many state disclosure statutes could reasonably be construed as exempting from liability the nondisclosure of repairs that cost less than the statutory threshold. *See id.*

high level of culpability that generally gives rise to substantial punitive awards⁸⁵ and that BMW's conduct resulted in only economic harm,⁸⁶ the majority found that the conduct did not involve any of the elements typically encountered with egregiously improper behavior.⁸⁷ Consequently, the Court held that BMW's conduct, pursuant to the nondisclosure policy, did not exhibit the high degree of reprehensibility that warranted a punitive damages award of \$2 million.⁸⁸

The majority next compared the punitive damages award to the actual harm that resulted from the defendant's conduct, as well as to the harm that was likely to occur.⁸⁹ Upon providing a historical backdrop for the principle that punitive damages must be reasonably related to compensatory damages,⁹⁰ the Court reiterated its earlier rejection of a categorical approach for determining at what point the punitive award is constitutionally excessive compared to the compensatory award and the

Furthermore, the Court recognized that where there was no evidence that BMW acted in bad faith when it established its policy, or no evidence that BMW's conduct had ever been adjudged unlawful prior to this action, there was no reason to believe that BMW anticipated the resulting liability. *See id.* at 1600-01. Justice Stevens noted that such apparent good-faith belief in the lawfulness of the conduct is significant in taking into account the reprehensibility of the defendant's conduct. *See id.* at 1601; *see also* *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1915) (holding a punitive damages award unconstitutional where "[t]here was no intentional wrongdoing; no departure from any prescribed or known standard of action, and no reckless conduct.").

⁸⁵ *See BMW*, 116 S. Ct. at 1601. The Court considered the absence of intentional false statements, affirmative acts of misconduct, and hiding of evidence linked to improper motive in finding that BMW was not especially blameworthy for the harm caused by its conduct. *See id.* Although accepting the jury's conclusion that BMW unlawfully suppressed a material fact, the majority intimated that such an omission is less reprehensible than an intentional false statement, especially when there are good-faith grounds for believing that an obligation to disclose does not exist. *See id.*

⁸⁶ *See id.* at 1599. Justice Stevens relied on *Solem* in asserting that violent crimes or crimes involving the threat of violence are more serious than nonviolent crimes. *See id.*; *Solem v. Helm*, 463 U.S. 277, 292-93 (1983). Observing that BMW's conduct was not marked by reckless disregard for or indifference to the safety and well-being of others, the Justice determined that purely economic injury, though warranting substantial penalties in certain extreme circumstances, typically did not justify a severe punitive sanction. *See BMW*, 116 S. Ct. at 1599.

⁸⁷ *See BMW*, 116 S. Ct. at 1599.

⁸⁸ *See id.* at 1601.

⁸⁹ *See id.*

⁹⁰ *See id.* The majority recounted the history of the "reasonable relationship" principle, reaching as far back as the year 1275. *See id.* (citing Owen, *supra* note 2, at 368). Moreover, the Court noted that the *Haslip* and *TXO* decisions both supported the proposition that the disparity between the punitive award and the compensatory award is an important factor. *See id.* at 1602. (citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991)). *But see* *St. Louis, Iron Mountain & S. Ry. v. Williams*, 251 U.S. 63, 66 (1919) (holding that a punitive damages award was not required to be "confined or proportioned" to the loss sustained).

possible injury.⁹¹ Drawing from Justice Blackmun's majority opinion in *Haslip*, Justice Stevens stipulated that the inquiry involved "[a] general concern[] of reasonableness."⁹² Because the ratio of the punitive damages award to the actual damages in this case was 500 to 1, the Court intimated that the constitutionality of the punitive award was dubious.⁹³

Next, as a third measure of excessiveness, the Court compared the punitive award with the civil and criminal sanctions that could be imposed for similar misconduct.⁹⁴ Noting that the acts of legislatures were worthy of substantial deference,⁹⁵ Justice Stevens observed that the most severe penalty authorized by Alabama's legislature for the type of misconduct at issue was \$2000,⁹⁶ while the maximum penalties in other states were between \$5000 and \$10,000.⁹⁷ The Justice asserted that neither the Alabama statute, nor the statutes of the other states, provided fair notice that the violation of its provisions could result in a multimillion-dollar fine.⁹⁸ The majority further explained that the \$2 million penalty imposed was not justifiable on the basis that the penalty was required to deter future misconduct, because there was no consideration as to whether a lesser penalty would have served the deterrent function equally as well.⁹⁹

Finally, convinced that BMW did not receive fair notice of the size of the penalty, the majority concluded that the \$2 million award was "grossly excessive" in relation to Alabama's punitive damages interests

⁹¹ See *BMW*, 116 S. Ct. at 1602. The Court restated what it asserted in *Haslip*: "'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.'" *Id.* (quoting *Haslip*, 499 U.S. at 18).

⁹² See *id.* (alteration in the original) (quoting *Haslip*, 499 U.S. at 18).

⁹³ See *id.* at 1603. Justice Stevens commented that although the ratio will most often fall within the constitutional range, "[w]hen the ratio is a breathtaking 500 to 1 . . . the award must surely 'raise a suspicious judicial eyebrow.'" See *id.* (quoting *TXO*, 509 U.S. at 482 (O'Connor, J., dissenting)).

⁹⁴ See *id.*

⁹⁵ See *id.* The Justice asserted that a court that determines whether a punitive award is excessive should "accord 'substantial deference' to legislative decisions on the appropriate sanctions for particular misconduct. See *id.*; *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part).

⁹⁶ See *BMW*, 116 S. Ct. at 1603; ALA. CODE § 8-19-11(b) (1993) (stating that any person who knowingly engages in an unlawful act shall pay a civil penalty, which may not exceed \$2000).

⁹⁷ See *BMW*, 116 S. Ct. at 1603.

⁹⁸ See *id.* The Court also considered the fact that at the time this action commenced, there had been no judicial decision rendered in Alabama or in any other state that would indicate that BMW's conduct pursuant to its policy might subject BMW to such a drastic penalty. See *id.*

⁹⁹ See *id.*

and, thus, violated the Due Process Clause of the Fourteenth Amendment.¹⁰⁰ Accordingly, the Court reversed the judgment of the Alabama Supreme Court and remanded the case for further proceedings.¹⁰¹

In a concurring opinion, Justice Breyer, joined by Justice O'Connor and Justice Souter, agreed with the Court's holding that the punitive award was "grossly excessive" in relation to the objectives of Alabama's punitive damages scheme and, therefore, incompatible with the Due Process Clause.¹⁰² Justice Breyer wrote separately, however, to emphasize that the presumption of validity, which accompanies a judgment based on fair procedures,¹⁰³ was overcome in this case.¹⁰⁴ Most importantly, the Justice asserted that the discretion afforded to the jury in determining the punishment lacked the reasonable constraints required to protect against arbitrary and capricious treatment.¹⁰⁵

Upon discussing the importance of legal standards in limiting a jury's discretion,¹⁰⁶ Justice Breyer explained the reasons why Alabama's

¹⁰⁰ See *id.* at 1604.

¹⁰¹ See *id.* The Court commented that the appropriate remedy, whether it involved a new trial or an independent assessment by the Alabama Supreme Court of the punitive award needed to vindicate the rights of Alabama consumers, was a determination best left to the State court. See *id.*

¹⁰² See *BMW*, 116 S. Ct. at 1604 (Breyer, J., concurring).

¹⁰³ See *id.* Justice Breyer relied on *TXO* and *Haslip* as support for the proposition that punitive damages awards are entitled to a presumption of validity where proper procedures are followed. See *id.* (citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 40-42 (1991) (Kennedy, J., concurring)); see also *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) (stating:

[A] verdict will not be set aside in a case of tort for excessive damages 'unless the court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated,'—that is, 'unless the verdict is so excessive or outrageous,' with reference to all the circumstances of the case, 'as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them.')

(citation omitted).

¹⁰⁴ See *BMW*, 116 S. Ct. at 1604 (Breyer, J., concurring). Justice Breyer explained that because the Court in *Haslip* found that the procedures for determining punitive damages were presumptively valid, it was important to note why the presumption of validity was overcome in this instance where procedures similar to those endorsed in *Haslip* were followed. See *id.* (citing *Haslip*, 499 U.S. at 15-24).

¹⁰⁵ See *id.* at 1605 (Breyer, J., concurring).

¹⁰⁶ See *id.* Relying on Justice Blackmun's majority opinion in *Haslip*, Justice Breyer asserted that both reasonable constraints on the discretion of the jury and meaningful review by the courts are needed checks on the punitive damages process. See *id.*; *Haslip*, 499 U.S. at 20-21. Broad discretion has traditionally been accorded to juries in imposing punitive damages awards. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247,

procedures failed to provide the necessary guidance in this instance.¹⁰⁷ First, Justice Breyer criticized Alabama's punitive damages statute for being too broad and lacking specific guidelines for determining whether the wrongdoing warranted a small or a large penalty.¹⁰⁸ Second, Justice Breyer asserted that the Alabama courts, in their review of the award, applied the *Green Oil* factors in a way that provided little meaningful constraint.¹⁰⁹ Third, the Justice observed that, outside the statute and the

270 (1981); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974). Strong deference to jury awards becomes "troubling" where the procedures allow such discretion to go unguided. See *Haslip*, 499 U.S. at 57 (O'Connor, J., dissenting). In accordance with Justice O'Connor's dissent in *TXO*, Justice Breyer explained that in the absence of clear guidance, the risk is increased that a jury may submit to passion, bias, or arbitrariness in formulating an award. See *BMW*, 116 S. Ct. at 1605 (Breyer, J., concurring).

For further discussion on the consequences associated with unfettered jury discretion, see *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring) (explaining the importance of standards for guiding juries); *Miracle*, *supra* note 55, at 244 (describing the effect of limitless jury discretion in *Haslip*); Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L.J. 859, 893 (1991) (providing a detailed look at jury discretion in the wake of *Haslip*).

¹⁰⁷ See *BMW*, 116 S. Ct. at 1605 (Breyer, J., concurring).

¹⁰⁸ See *id.* The Justice observed that the Alabama statute allowed punitive awards in any case involving "oppression, fraud, wantonness, or malice." *Id.*; see ALA. CODE § 6-11-20(a), (b)(1), (b)(2), (b)(5) (1993).

¹⁰⁹ See *BMW*, 116 S. Ct. at 1606 (Breyer, J., concurring) (citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223 (Ala. 1989)). Noting that the sixth and seventh *Green Oil* factors—requiring the consideration of criminal sanctions and other civil actions, respectively—were not relevant in this case, Justice Breyer discussed the Alabama Supreme Court's application of the first five *Green Oil* factors. See *id.*; see also *supra* note 23 and accompanying text (addressing the *Green Oil* factors).

The Justice first assessed the State court's interpretation of the "reasonable relationship" test, the "degree of reprehensibility" test, and the "in excess of the profit" standard. See *BMW*, 116 S. Ct. at 1606 (Breyer, J., concurring). Taking into account the lower court's ruling that only the 14 Alabama instances should be considered in calculating the punitive award, see *supra* note 27 and accompanying text, and that the actual damages were \$4000, Justice Breyer realized that the \$2 million punitive award was extremely disproportional to the resulting economic harm, or profit to BMW, of \$56,000. See *BMW*, 116 S. Ct. at 1606 (Breyer, J., concurring). Consequently, the Justice maintained that, in light of the relatively insubstantial \$56,000, the finding that the \$2 million satisfied all three of these *Green Oil* factors was unreasonable and a misuse of the concept of reprehensibility—"depriv[ing] the concept of its constraining power to protect against serious and capricious deprivations." *Id.*

Justice Breyer also evaluated the state court's use of the fourth *Green Oil* factor, the defendant's financial position. See *id.* Explaining that this factor serves as a basis for inflating awards rather than as a means of restricting them, Justice Breyer asserted that the consideration of the defendant's wealth does not offset the insufficiency of the other factors in constraining a punitive award. See *id.* at 1607 (Breyer, J., concurring).

Lastly, the Justice reviewed the application of the fifth *Green Oil* factor, litigation costs and the State's interest in encouraging plaintiffs to bring suit against wrongdoers. See *id.* Justice Breyer remarked that this standard fails as a constraint in instances in which other factors result in an award much in excess of the actual costs. See *id.* Addi-

Green Oil factors, the Alabama courts did not indicate a reliance on any other standards that might have furnished the needed check on the jury's discretion.¹¹⁰ Fourth, Justice Breyer recognized that the large disparity between the punitive award and the cost of the resulting injury was not supported by any apparent historic practice or community standard.¹¹¹ Finally, the Justice noted that in the absence of effective constraints, the Alabama legislature had not enacted any additional measures to resolve the problem of unlimited jury discretion.¹¹²

Justice Breyer posited that because the jury lacked the proper guidance in determining the award¹¹³ and because the award was severely disproportionate to the state's punitive damages objectives,¹¹⁴ the presumption of validity that accompanies a jury verdict was overcome in the

tionally, the Justice noted that the purpose of encouraging others to bring suit against wrongdoers actually enhances the discretionary power of juries, especially when no evidence exists of an exceptional need to encourage litigation. *See id.*

¹¹⁰ *See BMW*, 116 S. Ct. at 1607 (Breyer, J., concurring). Justice Breyer remarked that some economic theories of recovery may serve as an effective constraint on the jury's discretion by limiting the amount of the award to the total cost of the injury caused by the defendant's conduct. *See id.* The Justice opined, however, that such schemes would not deter defendants where only small damages were involved and would "over-deter" in cases involving larger damages, as potential defendants would spend more to deter the conduct that caused the economic injury than the cost of the injury itself. *See id.* at 1607-08 (Breyer, J., concurring).

Nonetheless, the Justice ultimately did not consider the possibility that the State court may have relied on an economic theory as the justification for the \$2 million award, noting that the Alabama Supreme Court record mentioned no such theory. *See id.* at 1608 (Breyer, J., concurring). Justice Breyer maintained that because courts must review the reasoning behind judicial actions in light of the justifications and facts that were presented, an economic theory not appearing in the record does not prescribe more deferential review by the Court. *See id.*

¹¹¹ *See id.* Justice Breyer explained that calculations based on the appropriate historical rates of valuation, although imprecise, indicated that extraordinary awards assessed long ago for similarly culpable conduct were small in comparison to the \$2 million at issue in this case. *See id.*

¹¹² *See id.* Justice Breyer listed several statutes from states that had taken measures to limit jury discretion in the awarding of punitive damages. *See BMW*, 116 S. Ct. at 1608-09 (Breyer, J., concurring); *see, e.g.*, CONN. GEN. STAT. § 52-240b (1995) (specifying that punitive damages in product liability actions may not exceed twice the actual damages); FLA. STAT. ANN. § 768.73(1) (West Supp. 1997) (capping punitive damages in certain actions at treble compensatory damages); GA. CODE ANN. § 51-12-5.1(g) (Supp. 1996) (limiting punitive damages to no more than \$250,000 in certain tort actions).

¹¹³ *See BMW*, 116 S. Ct. at 1609 (Breyer, J., concurring). Justice Breyer noted the dangers of allowing juries the unbounded discretion to impose punitive awards, emphasizing in particular the "real" threat of awards so arbitrary that they overstep the protections afforded by the Constitution. *See id.*

¹¹⁴ *See id.* Justice Breyer contended that even though there is no clear constitutional line for determining whether the award amount is excessive in relation to the State's legitimate interests, the \$2 million awarded in this case "lies on the line's far side" and is "grossly excessive." *See id.*

instant matter.¹¹⁵ For these reasons, Justice Breyer concluded that the \$2 million award violated Gore's due process right to nonarbitrary governmental action.¹¹⁶

In dissent, Justice Scalia, joined by Justice Thomas, rejected the Court's finding that the punitive award of \$2 million was unconstitutional.¹¹⁷ Justice Scalia explained that the Court's review of punitive damages awards for reasonableness represented a baseless intrusion upon the jurisdiction of state governments.¹¹⁸ Unlike the majority, Justice Scalia emphasized that there is no substantive due process guarantee that a punitive damages award be reasonable.¹¹⁹ Consequently, the Justice asserted that the Court's review of the reasonableness of the \$2 million award was improper.¹²⁰

Justice Scalia discussed several points in support of the belief that the Court's substantive review of the punitive damages award was inappropriate.¹²¹ First, explaining that neither traditional practice¹²² nor case precedent¹²³ supported the idea of a constitutional right to reasonable

¹¹⁵ *See id.*

¹¹⁶ *See id.*

¹¹⁷ *See id.* at 1610 (Scalia, J., dissenting).

¹¹⁸ *See BMW*, 116 S. Ct. at 1610 (Scalia, J., dissenting).

¹¹⁹ *See id.* Justice Scalia essentially reiterated his position in past cases, determining that although the Fourteenth Amendment guarantees an opportunity to challenge the reasonableness of a damage award in state court, there was no constitutional assurance that the amount of the award actually be reasonable. *See id.*; *see also* *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 470 (1993) (Scalia, J., concurring) (asserting that due process mandates only a reasonableness review of a punitive award); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 24 (1991) (Scalia, J., concurring) (stating that because punitive damages have traditionally been left to the discretion of the jury, a punitive damages system that accords with that tradition does not violate the Due Process Clause).

¹²⁰ *See BMW*, 116 S. Ct. at 1610 (Scalia, J., dissenting).

¹²¹ *See id.* at 1611 (Scalia, J., dissenting).

¹²² *See id.* Justice Scalia explained that the traditional approach to awarding punitive damages did not involve replacing the jury's and the state court's judgment with that of this Court. *See id.*; *see also* *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) (declaring that it is the "peculiar function of the jury" to determine the amount of recoverable damages); *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885) (stating that the jury is given unhindered discretion in actions of tort); *Day v. Woodworth*, 54 U.S. (8 How.) 363, 371 (1851) (noting that the setting of punitive damages has always been left to the jury's discretion, as the extent of punishment depends upon the particulars of each case).

¹²³ *See BMW*, 116 S. Ct. at 1611 (Scalia, J., dissenting). Justice Scalia contended that the only basis for the Court's recent holdings that due process protects against excessive awards was a "handful of errant federal cases" decided in the era of the highly criticized *Lochner* decision. *See id.* (citing *St. Louis, Iron Mountain & S. Ry. v. Williams*, 251 U.S. 63, 66-67 (1919); *Standard Oil Co. v. Missouri*, 224 U.S. 270, 286, 290 (1912); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111-12 (1909); *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 78 (1907)); *see also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL

punitive damages awards, Justice Scalia concluded that the Court lacked the authority to rule in this area.¹²⁴ Next, the Justice argued that the majority, rather than providing needed guidance to the lower courts and states on the subject of excessive damages, engaged in an extensive and misguided analysis on an issue that was not presented for resolution.¹²⁵ Additionally, Justice Scalia determined that the "three guideposts,"¹²⁶ adopted by the Court to determine the reasonableness of the award amount, actually resulted in little more than the Court's subjective assessment of the fairness of the award in relation to the wrong committed.¹²⁷

LAW 796-804 (Richard A. Epstein et al. eds., 2d ed. 1991) (discussing the controversy surrounding the *Lochner* decision). Arguing that these cases "simply fabricated" the substantive due process right, Justice Scalia asserted that they are "too shallowly rooted" to sustain the Court's decision. See *BMW*, 116 S. Ct. at 1611-12 (Scalia, J., dissenting).

¹²⁴ See *BMW*, 116 S. Ct. at 1612 (Scalia, J., dissenting).

¹²⁵ See *id.* at 1612, 1613 (Scalia, J., dissenting). Justice Scalia first commented on the majority's assertion that, in assessing the remitted award, the Supreme Court of Alabama had rightly disregarded BMW's out-of-state conduct. See *id.* Noting that the majority had earlier acknowledged that courts may consider relevant lawful conduct for setting the award amount, Justice Scalia questioned the reasoning behind the suggestion that the courts may consider only the lawful ("but disreputable") conduct inside Alabama, as opposed to that outside Alabama, in determining the actual extent of BMW's corruption. See *id.* at 1612-13 (Scalia, J., dissenting).

Furthermore, Justice Scalia observed that the Court's proposition, that Alabama may not attempt to deter activity that is legal in other jurisdictions, was without any true support. See *id.* at 1613 (Scalia, J., dissenting).

Lastly, the Justice noted that the consideration of out-of-state conduct in the calculation of damages was never a factor of the remitted decision before the Court, as the Alabama Supreme Court had expressly abandoned any reliance on BMW's activities in other jurisdictions. See *id.*; *supra* note 27 and accompanying text (noting the Alabama Supreme Court's decision not to include out-of-state conduct in the computation of the punitive award). Accordingly, Justice Scalia stressed that the Court's remarks about the relationship of punitive damages awards to lawful or unlawful out-of-state acts were pure dicta. See *BMW*, 116 S. Ct. at 1613 (Scalia, J., dissenting).

¹²⁶ See *id.* For a discussion of the three guideposts relied upon by the majority, see *supra* notes 82-99 and accompanying text.

¹²⁷ See *id.* at 1613-14 (Scalia, J., dissenting). Justice Scalia, noting that the Court had once again restated its rejection of a categorical approach, contended that the guideposts adopted by the majority did not provide the direction needed by state legislatures and courts to determine whether a particular amount of punitive damages is constitutionally acceptable. See *id.* at 1614 (Scalia, J., dissenting).

First, Justice Scalia explained that courts or legislatures may override the guideposts to deter future misconduct—a loophole, the Justice argued, which will invite state reviewing courts to "concoct rationalizations" as necessary for the upholding of awards. See *id.* at 1613 (Scalia, J., dissenting). Additionally, Justice Scalia maintained that the states will have difficulty in complying with the Court's decision, as the guideposts "mark a road to nowhere," providing "no real guidance at all." *Id.* Moreover, observing that the Court did not limit consideration to only the three guideposts, Justice Scalia asserted that the ability to dismiss the guideposts for other unspecified factors contributed to the "artificial air of doctrinal analysis" that surrounded the Court's decision. See *id.* at 1614 (Scalia,

Furthermore, recognizing that judicial application of the majority's guideposts may extend to a determination of whether the jury should have awarded damages in the first instance, Justice Scalia maintained that the effect of the Court's approach is the establishment of a constitutional protection from unreasonably imposed awards, as well as from unreasonable award amounts.¹²⁸ The Justice therefore concluded that as a consequence of establishing a substantive due process right against unreasonable punitive awards, the Court had essentially bestowed constitutional import on any claim that a jury's determination was unreasonable.¹²⁹

Justice Ginsburg, joined by Chief Justice Rehnquist, also dissented from the Court's holding.¹³⁰ Justice Ginsburg, like Justice Scalia, observed that the majority's holding represented an imprudent incursion into a province traditionally held by state governments.¹³¹ First, concerning the issue about the jury's improper use of out-of-state events as a multiplier in assessing the award amount, Justice Ginsburg explained that the Alabama Supreme Court's judgment did not require correction and that the circumstances giving rise to the erroneous calculation were unlikely to recur.¹³² Next, Justice Ginsburg maintained that the Court must

J., dissenting).

¹²⁸ See *id.* Justice Scalia asserted that the justification for disregarding the jury's determination concerning how much the defendant deserves to be punished is no greater than that for disregarding the jury's assessment that the defendant should be punished at all. See *id.* The Justice illustrated this proposition by noting the Court's apparent rejection of the jury's findings that BMW's conduct constituted "gross, oppressive, or malicious" fraud. See *id.* (citing ALA. CODE § 6-11-20(b)(1) (1996) (defining fraud as "[a]n intentional misrepresentation, deceit, or concealment of a material fact the concealing party had a duty to disclose, which was gross, oppressive, or malicious")).

¹²⁹ See *BMW*, 116 S. Ct. at 1614 (Scalia, J., dissenting). Justice Scalia explained that the logic behind the majority's approach extended beyond punitive damages assessments, and established a Fourteenth Amendment right to reasonable determinations of compensatory awards and liability. See *id.* Justice Scalia referred to this result as "a stupefying proposition." *Id.*

¹³⁰ See *id.* (Ginsburg, J., dissenting).

¹³¹ See *id.*

¹³² See *id.* at 1615 (Ginsburg, J., dissenting). Justice Ginsburg noted that the Alabama Supreme Court had expressly recognized that a jury could not consider the out-of-state conduct of a defendant as a multiplier in calculating the punitive award amount. See *id.* The Justice further observed that no Alabama authority—"no statute, judicial decision, or trial judge instruction"—ever endorsed such a use of BMW's out-of-state conduct. See *id.* The Justice explained that Gore's attorney had proffered the multiplication suggestion to the jury and BMW's counsel failed to object. See *id.* Furthermore, Justice Ginsburg noted that counsel for BMW never requested a charge instructing the jury to exclude the out-of-state sales from the award calculation. See *id.* Justice Ginsburg concluded that the peculiarity of these circumstances—coupled with the fact that since the Alabama Supreme Court decision, Alabama law has expressly prohibited the use of out-of-state conduct not shown to be unlawful as an award multiplier—made it highly unlikely that a similar situation would ever recur and did not require error correction. See *id.* at 1615-16 (Ginsburg, J., dissenting).

regard the well-reasoned decision of the Alabama Supreme Court with a presumption of legitimacy.¹³³ Furthermore, the Justice contended that the Court was not ready to take over the traditionally state-entrusted task of overseeing state punitive damages awards, as the Court possessed only an abstract notion of substantive due process review.¹³⁴ The Justice also emphasized the Court's recurrent unwillingness to review the size of jury verdicts from federal district court proceedings¹³⁵ and noted that such review by the Court of state punitive awards was unjustified in light of recent legislative activity by the states themselves.¹³⁶

The *BMW* Court accomplished little headway on the road to clarifying the standard by which courts may measure the constitutionality of a punitive damages award. Consistent with its past decisions in *Haslip*, *TXO*, and *Honda*, the Court recognized that the Due Process Clause places limits on the awarding of punitive damages.¹³⁷ Like its precedents, however, *BMW* has not provided the courts with any meaningful instruction on how or to what extent these limits are to be applied.¹³⁸

The majority's unwillingness to adopt a definitive due process standard for reviewing punitive awards indicates a hesitancy on the part of the Court to thoroughly commit jury-imposed damage awards to federal constitutional scrutiny. The possible reasons for such reluctance are both

¹³³ See *id.* at 1616 (Ginsburg, J., dissenting). The Justice noted that the Alabama Supreme Court had "thoroughly and painstakingly" reviewed the award, considering several factors—such as the reprehensibility of the conduct—which this Court has held to provide sufficient constraints on the jury's discretion. See *id.* (citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 n.28 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991)). While stating that the Alabama court could have been more thorough in recording its "labor pains," Justice Ginsburg maintained that its determination nonetheless deserved a presumption of legitimacy. See *id.*; see also *Rowan v. Runnels*, 46 U.S. (5 How.) 134, 139 (1847) (maintaining that the Court will always accord substantial deference to the decisions of state courts and hold them conclusive with respect to interpretation of their own laws). Justice Ginsburg further remarked that the majority, having acknowledged that Alabama's highest court applied the State's law correctly as it pertained to punitive damages, should not "be quick to find a constitutional infirmity" where the State court endeavored to remedy the errors of counsel with the purpose of complying with the procedures of this Court adopted in *Haslip* and *TXO*. See *BMW*, 116 S. Ct. at 1616 (Ginsburg, J., dissenting).

¹³⁴ See *BMW*, 116 S. Ct. at 1617 (Ginsburg, J., dissenting). Justice Ginsburg asserted that "[the Court] has only a vague concept of substantive due process, a 'raised eyebrow' test . . . as its ultimate guide." *Id.*

¹³⁵ See *id.* (citing 11 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2820 (2d ed. 1995)).

¹³⁶ See *id.*; see also *infra* notes 152-53 and accompanying text (discussing recent legislative developments at the state level involving punitive damages reform).

¹³⁷ See *BMW*, 116 S. Ct. at 1595.

¹³⁸ See *The Supreme Court, 1996 Term—Leading Cases*, 110 HARV. L. REV. 135, 150 (1996) [hereinafter *Leading Cases*] (discussing the problems with the *BMW* Court's substantive due process analysis).

numerous and compelling.¹³⁹ Whatever the reason, however, the Court has decided to move cautiously with respect to due process review, refraining from pronouncing clear, exact due process standards that precisely limit punitive damages.¹⁴⁰

The result is uncertainty for future litigants, whose success hinges on the essentially subjective assessments of the reviewing court.¹⁴¹ Without clear predictable limits, parties are more likely to be embroiled in long-term litigation as large awards will less likely be sustained on appeal.¹⁴² Years may pass before a final determination is made.¹⁴³ If there were clearly defined guidelines on the awarding of punitive damages, the awards of lower courts would more likely be sustained and needless litigation over the award amounts would be reduced.¹⁴⁴ The "three guideposts" framework, as discussed by the majority, is a step in this direction, but it is a small step, made less significant by the Court's broad and flexible interpretations.¹⁴⁵

In addition to furnishing little guidance for future due process review, the majority's broad substantive due process analysis failed to ad-

¹³⁹ See *BMW*, 116 S. Ct. at 1592-1604; see also *supra* notes 117-24, 130-36 and accompanying text. In separate dissents, both Justices Scalia and Ginsburg discussed the impropriety of the Court's involvement in *BMW*. See *BMW*, 116 S. Ct. at 1610-20 (Scalia, J., dissenting) (Ginsburg, J., dissenting). Because of the unsettled nature of substantive due process review of punitive damage awards, the Court may have been hesitant to conclusively establish a constitutional limit on punitive award amounts. See *Supreme Court Sets Limits on Picking "Deep Pockets,"* DENV. POST, May 24, 1996, at B06; *How Much Is Too Much?[] Punitive Damages: High Court Issues Guidelines for Juries*, BALTIMORE SUN, May 25, 1996, at 12A. Moreover, as some commentators have noted, the Court may have intended to leave the task of writing definitive standards to Congress and the state legislatures. See *id.*

¹⁴⁰ See Victor E. Schwartz, *BMW v. Gore: What Does it Mean for the Future?*, 15 PROD. LIAB. L. & STRATEGY 1 (1996) (explaining the vagueness in the Court's approach for determining when a punitive award is "grossly excessive" and violates the defendant's due process rights).

¹⁴¹ See *supra* note 127 and accompanying text.

¹⁴² See Schwartz, *supra* note 140, at 4. Where the guidelines for awarding punitive damages are ambiguous, logic suggests that an appeals court will be more inclined to mistrust the legitimacy of the award than if the lower court had followed a clearly defined formula. See *Right Ruling, But What Next?*, BOSTON HERALD, May 23, 1996, at O32 (predicting that *BMW*'s "murky" standards will create more "litigational wheel-spinning").

¹⁴³ See *Court Is Right, and Wrong, on Punitive Damages*, NEWSDAY, May 23, 1996, at A60 [hereinafter *Court is Right*]. One commentator pointed out that the original *BMW* award of \$4 million was litigated for three years before the Alabama Supreme Court cut it to \$2 million. See *id.*

¹⁴⁴ See Schwartz, *supra* note 140, at 4.

¹⁴⁵ See *supra* note 127 and accompanying text; see also *Leading Cases, supra* note 138, at 150 (exploring the inadequacies of the "three guideposts" in providing instruction for future due process review).

dress the federalism concerns accompanying the Court's intervention into an area of law that has been traditionally governed by the states.¹⁴⁶ Although the Court rejected the idea that "the constitutional line is marked by a simple mathematical formula,"¹⁴⁷ a number of states have employed such formulas in limiting punitive awards.¹⁴⁸ Accordingly, an award that complies with state law could nonetheless violate substantive due process if, for instance, a court holds that the reprehensibility of the misconduct does not warrant such an award.¹⁴⁹ This holding would be incompatible with the state legislature's finding that a punitive damages award that conformed to the adopted formula is not excessive.¹⁵⁰ Thus, the unrestrained judicial activism embraced by *BMW* could potentially threaten punitive damages policies initiated by the states themselves.¹⁵¹

In striking down the \$2 million award as excessive, the *BMW* decision marks the first time that the Court has invalidated a punitive damages award on substantive due process grounds. Unfortunately, the Court failed to provide any meaningful guidance for future due process review. Moreover, the majority disregarded important federalism concerns with respect to the Court's role in the review of punitive awards. Thus, while the Court's decision in *BMW* appears to mandate a more orderly system for assessing punitive awards, it falls short of establishing such a system itself.

Reform, however, is presently underway at the state level. For instance, in seeking to abolish the perceived windfall to plaintiffs when courts award large punitive damages, a growing number of states have adopted systems whereby a portion of the punitive damages are allocated

¹⁴⁶ See *Leading Cases*, *supra* note 138, at 150 (explaining that the Court elevated a state matter to a constitutional level, thus implicating significant federalism concerns); see also *Court is Right*, *supra* note 143, at A60 (remarking that in making the magnitude of a punitive award a constitutional issue, the Court usurped authority belonging to the states, establishing itself "as the arbiter of what is fair, which is far different from what is constitutional").

¹⁴⁷ See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1602 (1996); *supra* note 91 and accompanying text.

¹⁴⁸ See *supra* note 112 (listing the statutes of several states, including Connecticut and Florida, which use precise formulas for limiting punitive award amounts).

¹⁴⁹ See *Leading Cases*, *supra* note 138, at 154.

¹⁵⁰ See *id.*

¹⁵¹ See *id.* For additional perspectives on the conflict between the *BMW* decision and the principles of federalism, see George Will, *How Irksome that We Allow Judges to Make Our Laws*, SUN-SENTINEL, June 2, 1996, at 5G (stating that the Court, in monitoring punitive awards, has trespassed on the responsibility of the states); James Kilpatrick, *Cap Punitive Damage Awards by Law, Not by Eyebrow*, ST. J. REG., June 4, 1996, at 4 (emphasizing that if punitive damage awards are to be capped, they should be capped by statutes and not by the Court).

to the state.¹⁵² Other systems simply establish statutory caps on these awards.¹⁵³ With state legislatures playing a larger role in the punitive damages arena, the importance of the Court in establishing a more principled basis for constitutional evaluation diminishes, and the possibility of the Court readdressing this issue in the near future appears unlikely.

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¹⁵² See Nathan C. Prater, Comment, *Punitive Damages in Alabama: A Proposal for Reform*, 26 CUMB. L. REV. 1005, 1040 (1995-96) (discussing the allocation of punitive awards as one proposal for punitive damages reform); see, e.g., FLA. STAT. ANN. §§ 768.73(2)(a)-(b) (West Supp. 1997) (allocating 35% of punitive damages award 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 award, less a proportionate share of the litigation expenses, including reasonable counsel fees, to the state treasury); IOWA CODE § 668A.1(2)(b) (1987) (apportioning 75% of punitive award, after payment of counsel fees and costs, to a civil reparations trust fund); MO. REV. STAT. § 537.675 (1994) (allocating 50% of a punitive damages award, less attorney's fees and cost, to Tort Victims' Compensation Fund); UTAH CODE ANN. § 78-18-1(3) (1996) (allotting 50% of punitive award in excess of \$20,000 to State treasury's General Fund).

¹⁵³ See *supra* note 112; see also COLO. REV. STAT. §§ 13-21-102(1)(a) and (3) (1989) (stating that, as a general rule, punitive damages shall not exceed actual damages); N.D. CENT. CODE § 32-03.2-11(4) (1996) (capping punitive damages at the greater of \$250,000, or twice compensatory damages); GA. CODE ANN. § 51-12-5.1 (Supp. 1996) (limiting punitive damages to \$250,000 in some tort actions, and prohibiting multiple punitive awards originating from the same predicate act in products liability suits).