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BMW of North America, Inc. v. Gore: Elevating Reasonableness in Punitive Damages to a Doctrine of Substantive Due Process

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Note

BMW OF NORTH AMERICA, INC. v. GORE: ELEVATING REASONABLENESS IN PUNITIVE DAMAGES TO A DOCTRINE OF SUBSTANTIVE DUE PROCESS

In *BMW of North America, Inc. v. Gore*,[1] the United States Supreme Court considered whether a $2 million punitive-damages award against an automobile distributor for failing to disclose the presale repainting of a new car was so grossly excessive as to exceed constitutional limits.[2] The Court answered affirmatively, holding that the Due Process Clause of the Fourteenth Amendment[3] imposes a substantive limit on the size of punitive damages.[4] The Court reached this conclusion by reasoning that under due process, a tortfeasor is entitled to both fair notice of the magnitude of the punishment and adequate safeguards against arbitrary decisions.[5] In so ruling, the Court has elevated reasonableness in civil penalties to a doctrine of substantive due process, thereby extending recent Supreme Court precedent.[6] Moreover, the Court has provided specific, practical guidelines for scrutinizing punitive damages.

I. THE CASE

In January 1990, German Auto, Inc., an automobile dealer in Birmingham, Alabama, sold a black BMW sports sedan to Dr. Ira Gore, Jr. (Gore) for $40,750.88.[7] At that time, BMW of North America (BMW NA), the American distributor, had adopted a nationwide policy of not disclosing to its dealers and customers any presale repairs to

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1. 116 S. Ct. 1589 (1996), *rev'g* 646 So. 2d 619 (Ala. 1994) (per curiam).

2. *Id.* at 1592-93.

3. Section 1 of the Fourteenth Amendment provides in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

4. *BMW*, 116 S. Ct. at 1592, 1604.

5. *Id.* at 1598.

6. *See id.* at 1614 (Scalia, J., dissenting) (disapproving "[the Court's] elevation of 'fairness' in punishment to a principle of 'substantive due process'"); *see also infra* Part IV (discussing extension of precedent).

7. BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 621 (Ala. 1994) (per curiam), *rev'd*, 116 S. Ct. 1589 (1996).

new cars if the cost of repairs did not exceed three percent[8] of the car's suggested retail price.[9] BMW NA did not reveal that Gore's automobile had been repainted, because the cost of repainting the automobile was $601.37, less than three percent of the retail price.[10] Gore learned that the car "had been partially refinished" when he took his car to Slick Finish, a detailing shop, "to make the car look 'snazzier than it normally would appear.'"[11] Gore then sued German Auto, BMW NA, and the manufacturer, Bayerische Motoren Werke, Aktiengesellschaft (BMW AG).[12] Gore's suit alleged, *inter alia*, that the failure to disclose the presale repainting "constituted suppression of a material fact."[13] At trial, Gore presented evidence that the refinishing devalued his car by $4000 and that, since 1983, BMW NA had sold 983 similarly repainted automobiles as new in the United States without disclosing the repainting.[14]

The jury returned a verdict for Gore, awarding him $4000 in compensatory damages.[15] Moreover, after determining that the BMW defendants "had been guilty of gross, malicious, intentional, and wanton fraud," the jury added $4 million in punitive damages against the defendants jointly.[16] The trial court reviewed the jury verdict under existing precedent[17] and entered a judgment on the

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8. This three percent standard was in compliance with the most stringent of the disclosure statutes in 25 states. *BMW*, 116 S. Ct. at 1594; *see also infra* note 27 and accompanying text.

9. *BMW*, 116 S. Ct. at 1593.

10. *Id.* The parties assumed that acid rain had damaged the exterior paint of Gore's car during the trip from Germany to North America. *Id.* at 1593 n.1. The distributor repainted "[t]he top, hood, trunk, and quarter panels of Dr. Gore's car . . . at BMW's vehicle preparation center in Brunswick, Georgia." *Id.*

11. *BMW*, 646 So. 2d at 621. Although Gore's car had been repainted, the car had no flaws in its appearance during the months preceding the lawsuit, and there was no noticeable exterior damage. *BMW*, 116 S. Ct. at 1593.

12. *BMW*, 646 So. 2d at 622.

13. *BMW*, 116 S. Ct. at 1593. Alabama law provides: "Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." ALA. CODE § 6-5-102 (1993).

14. *BMW*, 116 S. Ct. at 1593.

15. *Id.*

16. *BMW*, 646 So. 2d at 622. During summation at trial, Gore's counsel suggested that punitive damages against BMW NA should be calculated by multiplying the total number of nationwide sales of repainted BMW cars by the amount of compensatory damages. *BMW*, 116 S. Ct. at 1593. Apparently, the jury followed this suggestion in computing the $4 million punitive-damages award. *Id.* at 1615-16 (Ginsburg, J., dissenting).

17. *BMW*, 646 So. 2d at 622. The court applied the *"Green Oil"* factors, which include: (1) whether the punitive-damages award reasonably relates to the actual harm; (2) the "degree of reprehensibility" of the defendant's conduct; (3) the profit derived from the misconduct; (4) the defendant's financial position; (5) whether inclusion of the costs of

verdict.[18] The court denied the defendants' motions to set aside the verdict.[19] BMW NA and BMW AG appealed.[20]

On appeal, in a *per curiam* opinion, the Alabama Supreme Court first found that it lacked personal jurisdiction over BMW AG.[21] BMW AG argued that the court lacked jurisdiction because BMW AG was a "foreign corporation" which had neither a direct relationship with BMW NA nor sufficient contacts with Alabama.[22] Also, BMW AG pointed out that Gore's automobile had been in BMW NA's possession before any refinishing was done.[23] The Alabama Supreme Court found these arguments persuasive and reversed the trial court's judgment with respect to BMW AG, thereby releasing the manufacturer from liability.[24]

Second, the court rejected BMW NA's contention that Gore had failed to present evidence sufficient to show under Alabama law that the distributor "consciously or deliberately engaged in oppression, fraud, wantonness or malice with regard to [Gore]."[25] BMW NA argued that it had acted in "a good faith belief" that the refinished vehicles would not depreciate in value.[26] Also, BMW NA asserted that its policy of not disclosing minor repairs was "customary in the automobile manufacturing industry" and that it had adopted the three-percent standard to comply with various consumer protection laws which defined the types of damage to a new car that require disclosure.[27]

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litigation would encourage plaintiffs to vindicate their rights; (6) whether criminal sanctions have been imposed on the defendant for his misconduct (as a mitigation factor); and (7) whether there have been other civil actions against the same defendant for the same misconduct (as a mitigation factor). *Id.* at 624 (citing Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989)). Based on the analysis of these factors, the trial court concluded: (1) BMW's conduct was "reprehensible"; (2) the nondisclosure policy was profitable to BMW; (3) the judgment "would not have a substantial impact upon [BMW's] financial position"; (4) the litigation had been expensive; and (5) the punitive award reasonably related to the actual and potential harm. *Id.* at 625-27.

18. *Id.* at 622.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 622-23.

26. *Id.*

27. *Id.* at 623. BMW NA introduced evidence that its nondisclosure policy was consistent with the disclosure statutes of 25 other states. *BMW*, 116 S. Ct. at 1594. The strictest of these statutes mandated disclosure of presale repairs costing more than three percent of the suggested retail price. *Id.* The remaining statutes did not require disclosure of less costly repairs. *Id.*

Arizona, North Carolina, South Carolina, and Virginia require written disclosure of presale repairs costing more than three percent of the suggested retail price. ARIZ. REV.

The court found these arguments unconvincing, reasoning that, at the time BMW NA adopted its nondisclosure policy, Alabama did not have any statute allowing nondisclosure if repairs were below three percent of the automobile's suggested retail price.[28]

Third, the court rejected BMW NA's claim that the trial court erred in admitting evidence of BMW NA's sales of refinished cars in other states.[29] BMW NA contended that only fourteen of the 983 automobiles sold in the United States had been sold in Alabama and that there was no evidence that the out-of-state sales were fraudulent.[30] The court found this argument unpersuasive as well, reasoning that although BMW NA's out-of-state conduct might not have been fraudulent under the laws of other states, the trial court did not err in

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STAT. ANN. § 28-1304.03 (West 1989); N.C. GEN. STAT. § 20-305.1(d)(5a) (1996); S.C. CODE ANN. § 56-32-20 (Law. Co-op. Supp. 1996); VA. CODE ANN. § 46.2-1571(D) (Michie Supp. 1997). Alabama, California, and Oklahoma mandate disclosure when the cost of repairs exceeds three percent or $500, whichever is greater. ALA. CODE § 8-19-5(22)(c) (1993); CAL. VEH. CODE §§ 9990-9991 (West Supp. 1997); OKLA. STAT. ANN. tit. 47, § 1112.1 (West Supp. 1997). Indiana mandates a four-percent disclosure policy. IND. CODE ANN. §§ 9-23-4-4, 9-23-4-5 (Michie 1997). Minnesota requires disclosure of repairs costing more than four percent of suggested retail price or $500, whichever is greater. MINN. STAT. ANN. § 325F.664 (West 1995). New York requires disclosure when the cost of repairs exceeds five percent of the suggested retail price. N.Y. GEN. BUS. LAW § 396-p(5)(a), (d) (McKinney 1996). Vermont sets a five-percent disclosure threshold for the first $10,000 in repair costs and two percent thereafter. VT. STAT. ANN. tit. 9, § 4087(d) (1993). Arkansas, Idaho, Illinois, Kentucky, Louisiana, Mississippi, New Hampshire, Ohio, Rhode Island, Wisconsin, and Wyoming require disclosure of repairs costing more than six percent of retail value. ARK. CODE ANN. § 23-112-705 (Michie 1992); IDAHO CODE § 49-1624 (1994); 815 ILL. COMP. STAT. ANN. 710/5 (West Supp. 1997); KY. REV. STAT. ANN. § 190.0491(5) (Banks-Baldwin Supp. 1996); LA. REV. STAT. ANN. § 32:1260 (West Supp. 1996); MISS. MOTOR VEHICLE COMM'N, REGULATION NO. 1 (1992); N.H. REV. STAT. ANN. § 357-C:5(III)(d) (1995); OHIO REV. CODE ANN. § 4517.61 (Anderson 1997); R.I. GEN. LAWS § 31-5.1-18(d), (f) (1994); WIS. STAT. ANN. § 218.01(2d)(a) (West 1994); WYO. STAT. ANN. § 31-16-115 (Michie 1997). Iowa and North Dakota mandate disclosure of repairs costing $3000 or more. IOWA CODE ANN. § 321.69 (West Supp. 1997); N.D. ADMIN. CODE § 37-09-01-01 (1992). Georgia requires disclosure of paint damage that costs more than $500 to repair. GA. CODE ANN. § 40-1-5(b)-(c) (1997) (enacted after Gore purchased his car). Florida requires dealers to disclose paint repair which costs more than $100 and of which they have actual knowledge. FLA. STAT. ANN. § 320.27(9)(n) (West Supp. 1997). Oregon requires manufacturers to disclose all "post-manufacturing" damage and repairs. OR. REV. STAT. § 650.155 (Supp. 1994).

Many of these state statutes exclude from the calculation of repair costs the value of items such as glass, tires, wheels and bumpers if they are replaced with identical or comparable manufacturer's original equipment. *See, e.g.*, CAL. VEH. CODE §§ 9990-9991 (West Supp. 1997); GA. CODE ANN. § 40-1-5(b)-(e) (1997); 815 ILL. COMP. STAT. ANN. 710/5 (West Supp. 1997); KY. REV. STAT. ANN. § 190.0491(5) (Banks-Baldwin Supp. 1996); OKLA. STAT. ANN. tit. 47, § 1112.1 (West Supp. 1997); VA. CODE ANN. § 46.2-1571(D) (Michie Supp. 1997); VT. STAT. ANN. tit. 9, § 4087(d) (1993).

28. *BMW*, 646 So. 2d at 623.

29. *Id.* at 623-24.

30. *Id.* at 623.

admitting the evidence of out-of-state sales because the evidence showed a pattern of conduct.[31]

Fourth, and most important regarding BMW NA's claim that the punitive-damages award was constitutionally excessive in light of Alabama's precedent,[32] the court found that even though the evidence sustained the award of punitive damages, the jury had improperly used the out-of-state sales as a multiplier for the $4000 compensatory damages.[33] The court reasoned that while evidence of the out-of-state sales was admissible as to the issue of a "pattern and practice" of BMW NA's acts, Gore did not present any evidence showing in which states the defendant's conduct was wrongful.[34] Therefore, the jury should not have used the out-of-state sales to calculate the award.[35] Accordingly, the Alabama Supreme Court affirmed the judgment against BMW NA, but remitted the award to $2 million.[36] BMW NA then appealed to the United States Supreme Court on the issue of whether the punitive-damages award was constitutionally excessive.[37]

II. LEGAL BACKGROUND

At the time of the *BMW* decision, the issue of whether unfair civil penalties would violate due process was not a new concern. Earlier in this century, the United States Supreme Court had addressed the validity of civil penalties awarded pursuant to a statutory scheme.[38] The

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31. *Id.* at 623-24, 627.

32. *Id.* at 624-29. BMW NA pointed out that it had previously been sued by another plaintiff in an analogous case. *Id.* at 626. In *Yates v. BMW of North America, Inc.*, the jury awarded a similar amount of compensatory damages, but it did not award any punitive damages. 642 So. 2d 937, 937-40 (Ala. 1993). The Alabama Supreme Court viewed the disparity between *Yates* and *BMW* "as a reflection of the inherent uncertainty of the trial process and a result of the fact that the cases were tried differently to different juries and at different times." *BMW*, 646 So. 2d at 626.

33. *BMW*, 646 So. 2d at 627; *see also supra* note 16 and accompanying text.

34. *BMW*, 646 So. 2d at 623-29.

35. *Id.*

36. *Id.* at 629.

37. *BMW*, 116 S. Ct. at 1595.

38. At the turn of the twentieth century, the Supreme Court addressed the question of whether the Due Process Clause of the Fourteenth Amendment placed "outer limits" on civil penalties authorized by statutes. *See* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 276 (1989) (citation omitted). The Court, however, had not addressed the question "whether due process act[ed] as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit." *Id.* at 277 (citing Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 87 (1988)).

In *Missouri Pacific Railway Co. v. Tucker*, 230 U.S. 340, 351 (1913), the Court held that a $500 statutory penalty, in the form of liquidated damages against a common carrier for overcharging passengers $3.02, was "grossly" disproportionate to the actual damages and "so arbitrary and oppressive" that enforcement of the penalty would violate the Due Proc-

Court, however, has only recently addressed the constitutionality of large punitive damages awarded by a jury.[39] In the past decade, the Court has repeatedly struggled to determine a feasible approach for identifying excessive punitive damages.

This struggle started in 1989, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*[40] The jury, after finding Browning-Ferris in violation of federal antitrust law and Vermont tort law, awarded Kelco Disposal $51,146 in actual damages and $6 million in punitive damages.[41] Browning-Ferris asserted that the punitive award violated the Excessive Fines Clause of the Eighth Amendment, federal common law, and the Due Process Clause of the Fourteenth Amendment.[42] The 7-2 majority affirmed the award, holding that the Excessive Fines Clause of the Eighth Amendment does not apply to awards of punitive damages in civil cases between private parties "when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."[43] The Court also held that federal common law

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ess Clause of the Fourteenth Amendment. *See also* Southwestern Tel. & Tel. Co. v. Danaher, 238 U.S. 482, 485-91 (1915) (holding that a $6300 penalty imposed on a telephone company pursuant to a statutory scheme was unconstitutional because it was "so plainly arbitrary and oppressive" in light of the circumstances surrounding the telephone company's statutory violation). *But see* St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 64-67 (1919) (upholding a statutory scheme authorizing penalties ranging from $50 to $300 that passengers could recover from common carrier for overcharges).

39. *See supra* note 38 and accompanying text. Justice O'Connor noted that "[a]wards of punitive damages are skyrocketing." *Browning-Ferris*, 492 U.S. at 282 (O'Connor, J., concurring in part and dissenting in part). She explained, "As recently as a decade ago, the largest award . . . was $250,000 . . . [and now] awards more than 30 times as high have been sustained on appeal . . . [such as] $10 million . . . $8 million . . . [and] $6.2 million." *Id.* (citations omitted).

40. 492 U.S. 257 (1989).

41. *Id.* at 259-62. Browning-Ferris operated a nationwide waste-disposal business. *Id.* at 260. It attempted to monopolize a local market by driving its competitor, Kelco Disposal, out of business. *Id.* Browning-Ferris ordered its managers to "[p]ut [Kelco] out of business. Do whatever it takes. Squish [Kelco] like a bug." *Id.* During this "predatory campaign," Browning-Ferris also instructed its salespersons "that if 'it meant give the stuff away, give it away.'" *Id.* at 261.

The trial court instructed the jury that punitive damages against Browning-Ferris could be awarded if the jury found by "clear and convincing evidence" that the conduct of Browning-Ferris "revealed actual malice . . . or constituted a willful and wanton or reckless disregard of [Kelco's] rights." *Id.* (internal quotation marks omitted). The trial court also instructed that the jury could consider "the character of [Browning-Ferris], [its] financial standing, and the nature of [its] acts." *Id.* at 261-62 (internal quotation marks omitted).

42. *Id.* at 264-80 (detailing the history and application of the Eighth Amendment); *see also infra* note 43 and accompanying text. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend VIII.

43. *Id.* at 260, 264. The Court reasoned that, based on the history and language of the Constitution, the Eighth Amendment addressed bails, fines, and punishments, which had been interpreted as applicable primarily, if not exclusively, to criminal cases. *Id.* at 262.

did not apply to *Browning-Ferris*, because the issue of unfairness in punitive damages had been addressed by state common law.[44] Regarding the petitioner's due process claim, the Court hinted in dictum that Supreme Court precedent contained "some authority . . . for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme."[45] The Court observed, however, that it had not yet considered whether, absent any statutory limit, due process imposed an independent limit on jury discretion to award punitive damages.[46] Noting that Browning-Ferris had neither raised its due process argument before the courts below nor mentioned the argument in the petition for certiorari, the Court unanimously concluded that "[the due process] inquiry must await another day."[47]

Two years later, in *Pacific Mutual Life Insurance Co. v. Haslip*,[48] the Court remarked that "the Fourteenth Amendment due process challenge [to a punitive-damages award] is here once again."[49] In *Haslip*, the Court affirmed a $1.04 million award of punitive damages against the petitioner, Pacific Mutual Life Insurance Company, for fraud committed by Pacific Mutual's agent.[50] Pacific Mutual contended that the punitive award violated due process because it was "the product of unbridled jury discretion" and flawed procedures.[51] The Court rejected this contention, finding that the challenged common-law method for assessing punitive damages was not "so inherently unfair" as to violate due process and that the procedures by which the award

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The Court, however, cautioned that this interpretation was limited in that the Court did not need to go "so far as to hold that the Excessive Fines Clause applies just to criminal cases" in order to resolve the case before the Court. *Id.* at 263 & n.3.

44. *Id.* at 277-80. The Court simply stated that its review of the punitive award was limited because there was no applicable federal common law standard; the subject of an award's excessiveness based on proportionality between punitive and compensatory damages had been one of state common law. *Id.* at 279; *see also supra* note 38.

45. *Browning-Ferris*, 492 U.S. at 276 (citing St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 66-67 (1919)).

46. *Id.* at 277; *see also supra* note 38 and accompanying text.

47. *Browning-Ferris*, 492 U.S. at 277. Although the unanimous Court left open the Fourteenth Amendment due process issue because the petitioner had not properly preserved it for appeal, in two separate opinions, Justices Brennan, Marshall, Stevens, and O'Connor indicated that due process may impose procedural and substantive constraints on punitive-damages awards. *See id.* at 280 (Brennan, J., concurring); *id.* at 282 (O'Connor, J., concurring in part and dissenting in part).

48. 499 U.S. 1 (1991).

49. *Id.* at 12.

50. *Id.* at 6-8, 24. The agent defrauded clients by misappropriating their premium payments for personal use. *Id.* at 5. As a result, a client's medical bill of about $3000 went unpaid. *Id.* at 5-7.

51. *Id.* at 7-8.

had been made "impose[d] a sufficiently definite and meaningful constraint" on jury discretion.[52] While insisting that punitive-damages awards could violate due process absent procedural safeguards, the *Haslip* Court provided little guidance for determining when that violation would occur.[53] The Court simply concluded that the punitive damages against Pacific Mutual did not violate the Due Process Clause because Pacific Mutual "had the benefit of the full panoply of . . . procedural protections."[54] Ultimately, the Court refused to specify the factors for scrutinizing similarly large awards.[55]

In 1993, with ambiguous precedent, the Court continued to struggle with the constitutionality of excessive punitive damages in *TXO Production Corp. v. Alliance Resources Corp.*[56] In *TXO*, a jury found the petitioner, TXO Production Corporation, liable for slander of title[57] and awarded the respondent, Alliance Resources Corporation, $19 thousand in compensatory damages and $10 million in punitive damages.[58] TXO asserted, *inter alia*, that the award was excessive and that the procedures by which the award had been made were unfair.[59] In a plurality opinion, the Court affirmed the punitive award, which was 526 times the compensatory damages.[60] However, in spite of the

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52. *Id.* at 17, 19-24. These procedures are also known as the *Green Oil* factors, which the Alabama Supreme Court later applied in reviewing the $2 million punitive-damages award against BMW NA. *See supra note* 17 and accompanying text.

53. *See Haslip*, 499 U.S. at 12-24.

54. *See id.* at 19, 23. These protections include: (1) proper instructions to the jury regarding the purpose of punishment; (2) availability of post-trial procedures for a court to follow and specific factors to consider in scrutinizing punitive awards; (3) the trial court's power to reduce awards where appropriate; and (4) availability of appellate review. *Id.* at 19-24.

55. *See id.* at 19-24.

56. 509 U.S. 443 (1993) (plurality opinion).

57. *Id.* at 450-51. TXO planned to purchase from Alliance some tracts of land under which geologists had discovered oil and gas. *Id.* at 447. Previously, a predecessor in interest of Alliance had conveyed the mineral rights in the same land to another party, Leo J. Signaigo, Jr., but had reserved the interests in oil and gas development to Alliance. *Id.* at 448. Signaigo, in turn, conveyed the mineral rights to other parties. *Id.* In an attempt to gain substantial leverage during a negotiation with Alliance to purchase the land, TXO intentionally clouded Alliance's title to the land by purchasing the mineral rights from Signaigo's successors in interest and claiming falsely that Alliance did not have clear title because Signaigo's successors in interest also shared the oil and gas interests. *Id.* at 449-52. Thus, even though TXO knew that Alliance had clear title to the oil and gas rights, TXO fraudulently set up the scheme in an effort to reduce the royalty payments to Alliance and to increase TXO's interests in the oil and gas rights. *Id.*

58. *Id.* at 446.

59. *Id.* at 453-55, 462-63.

60. *Id.* at 453, 466.

parties' encouragement, the Court provided no further guidelines for identifying unreasonably excessive punitive damages.[61]

TXO urged the Court to apply "heightened scrutiny" in reviewing punitive damages; Alliance, by contrast, encouraged the Court to conduct a rational basis review.[62] The plurality rejected both approaches, reasoning that although heightened scrutiny would be unnecessary because of the safeguards inherent in the jury system,[63] a rational basis review would essentially give juries and judges a blank check to make large punitive awards.[64] Unable to agree on a single approach, the Justices declined to announce a "test" for determining when punitive awards are grossly excessive.[65] Consequently, while maintaining that some punitive awards could violate due process either because of their size or the procedures by which they were made, the *TXO* Court perpetuated the uncertainty by not confronting the matter squarely.[66] Refusing to "'draw a mathematical bright line,'" the Court stated vaguely that, in reviewing the size of a punitive award, a "'general [concern] of reasonableness . . . properly enter[s] into the constitutional calculus.'"[67]

Another turning point in the development of procedural due process relating to punitive damages came in 1994, when the Court again attempted to clarify the punitive-damages controversy in *Honda Motor Co. v. Oberg*.[68] In *Oberg*, a jury found the petitioner, Honda Motor Company, liable for manufacturing a defective three-wheeled all-

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61. *Id.* at 453-66. The Court justified the 526:1 ratio of punitive to compensatory damages by comparing the $10 million verdict to TXO's potential profit of $5 to $8 million had the fraudulent scheme succeeded. *Id.* at 459, 462. Justice O'Connor dissented, opining that the $10 million verdict was a "monstrous award" and that more specific constraints on a jury's ability to award punitive damages need to be developed. *Id.* at 473-75, 489-90, 496-98 (O'Connor, J., dissenting).

62. *TXO*, 509 U.S. at 456.

63. *Id.* The Court noted that the jury process itself contained the following safeguards: (1) minimization of bias through the screening of jury members before trial; (2) the jury's "collective deliberation" in reaching a verdict after it had evaluated the available evidence and the parties' adversarial arguments; (3) the trial judge's subsequent review and affirmance of the verdict; and (4) appellate review. *Id.* at 456-57. Based on this rationale, the Court concluded that "a judgment that is a product of [fair procedures] is entitled to a strong presumption of validity." *Id.* at 457.

64. *Id.* at 456.

65. *Id.* at 456-66.

66. *See id.* at 466-67 (Kennedy, J., concurring) (criticizing the plurality for failing to confront squarely the issue of excessiveness of punitive-damages awards and for not delineating clearer guidelines); *see also id.* at 473-74, 498 (O'Connor, J., dissenting) (same criticism).

67. *TXO*, 509 U.S. at 458 (quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991)) (second alteration in original).

68. 512 U.S. 415 (1994).

terrain vehicle and awarded the respondent $919,390 in compensatory damages and $5 million in punitive damages.[69] Honda claimed that the punitive award was "excessive" and that "Oregon courts lacked the power to correct excessive verdicts."[70] Finding that Oregon's judicial process lacked sufficient "traditional procedures," the Court reversed the Oregon Supreme Court's affirmance of the punitive-damages award.[71] The Court held that an amendment to the Oregon Constitution prohibiting appellate review of the amount of punitive damages awarded by a jury was inconsistent with the Due Process Clause and was thus unconstitutional.[72] In so holding, the Court imposed stricter procedural controls on jury discretion and reversed its trend of affirming large awards of punitive damages. Nonetheless, because the *Oberg* Court based its ruling on procedural grounds, the question of whether due process imposed a substantive limit on the size of punitive damages remained unanswered.

III. THE COURT'S REASONING

In *BMW of North America, Inc. v. Gore*, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment imposes a substantive limit on the size of punitive damages.[73] Writing for the majority, Justice Stevens, with whom Justices O'Connor, Kennedy, Souter, and Breyer joined, began his analysis by focusing on the relationship between Alabama's interests in punish-

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69. *Id.* at 418.

70. *Id.*

71. *Id.* at 421, 435. Writing for the majority, Justice Stevens noted that Oregon's lack of appellate review of punitive-damages awards was "[a] departure from traditional procedures" that had been an essential part of the American judicial process. *Id.* at 421. However, Justice Ginsburg, in her dissenting opinion joined by Chief Justice Rehnquist, opined that Oregon's procedures were not inconsistent with the Court's precedent on due process. *Id.* at 436-51 (Ginsburg, J., dissenting). Specifically, she pointed out the following procedural safeguards existing in Oregon's system: (1) the plaintiff was permitted to recover no more than the amounts specified in the complaint; (2) the plaintiff was not allowed to introduce evidence regarding defendant's wealth until a *prima facie* claim of punitive damages had been shown; (3) the plaintiff must prove by "clear and convincing" evidence that defendant was liable; and (4) the court must review a punitive award based on seven substantive criteria, including the seriousness and frequency of defendant's conduct, defendant's profit from the conduct, and defendant's financial condition. *Id.*

72. *Oberg*, 512 U.S. at 432. The relevant amendment to the Oregon Constitution states:

> In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this State, unless the court can affirmatively say there is no evidence to support the verdict.

OR. CONST. art. VII, § 3.

73. 116 S. Ct. at 1592, 1604.

ment and deterrence and the size of the punitive-damages award.[74] Justice Stevens noted that under the federal system Alabama, like the other states, has "considerable flexibility in determining the level of punitive damages that [it] will allow in [various cases]."[75] However, while Alabama could compel BMW NA to comply with a particular disclosure policy in that state, Alabama could not punish BMW NA for out-of-state conduct that was neither unlawful nor detrimental to Alabama's residents.[76] Thus, to preserve the states' autonomy, Alabama may not impose penalties "with the intent of changing the tortfeasors' lawful conduct in other States."[77] Applying this state-interest analysis, the Court concluded that the $2 million punitive award was "grossly excessive" in relation to Alabama's legitimate objectives.[78]

Next, the Court observed that "[e]lementary notions of fairness" dictated that a tortfeasor be given "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."[79] The Court developed three "guideposts" for determining whether adequate notice has been given: (1) the "degree of reprehensibility" of defendant's conduct; (2) the ratio between the actual or potential harm and the punitive damages; and

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74. *Id.* at 1595.

75. *Id.*

76. *Id.* at 1597. The Court found that BMW NA had attempted in good faith to comply with a "patchwork" of confusing and disparate state consumer protection laws, and thus BMW NA should not be punished so severely for misconduct in Alabama that is lawful in other states. *Id.* at 1594, 1596-98; *see also supra* note 27 (listing disclosure statutes in various states). This is true especially because Gore failed to present any evidence at trial to show that BMW NA's nondisclosure policy was unlawful in other states. *BMW*, 116 S. Ct. at 1598. Gore contended, however, that although BMW NA relied on its interpretation of the state disclosure statutes, these statutes "supplement, rather than supplant, existing remedies for breach of contract and common-law fraud." *Id.* at 1600. Thus, Gore argued, "the statutes may not properly be viewed as immunizing from liability [BMW NA's] nondisclosure of repairs costing less than the applicable statutory threshold." *Id.* Gore also asserted that BMW NA "should have anticipated that its failure to disclose similar repair work could expose it to liability for fraud." *Id.* The Court rejected Gore's arguments after a review of the applicable statutes, pointing out that, because the states had not explicitly addressed whether their disclosure statutes supplement common-law duties, corporations "could reasonably interpret the disclosure requirements as establishing safe harbors." *Id.*

77. *BMW*, 116 S. Ct. at 1597.

78. *Id.* at 1598. The Court also noted:

> The Alabama Supreme Court has held that a car may be considered "new" as a matter of law even if its finish contains minor cosmetic flaws. We note also that at trial respondent [Gore] only introduced evidence of undisclosed paint damage to new cars repaired at a cost of $300 or more. This decision suggests that respondent believed that the jury might consider some repairs too *de minimis* to warrant disclosure.

Id. at 1601 n.30 (citation omitted).

79. *Id.* at 1598.

(3) the authorized civil or criminal sanctions for comparable misconduct.[80]

Using the guideposts, the Court made three key findings. First, because BMW NA's conduct "evinced no indifference to or reckless disregard for the health and safety of others," and because the harm that Gore suffered was "purely economic in nature," BMW NA's conduct was not "sufficiently reprehensible" to justify the $2 million award.[81] Second, the punitive damages were 500 times the actual damages as determined by the jury, and there was no reasonable relationship between these two types of awards.[82] Third, the $2 million award was dramatically greater than the maximum $2000 civil penalty authorized by Alabama for a violation of its Deceptive Trade Practices Act.[83] Furthermore, there was no judicial precedent in which similarly large punitive damages were awarded for comparable misconduct when BMW NA's nondisclosure policy was first challenged.[84] Because none of the Alabama statutes provided "fair notice" that BMW NA's misconduct might "subject [BMW NA] to a multimillion dollar penalty," and because there was no judicial decision in Alabama or elsewhere indicating that BMW NA's misconduct might give rise to such a severe punishment, the Court concluded that "[t]he sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal."[85] Upon these findings, the 5-4 majority held that, because BMW NA had not

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80. *Id.* at 1598-99.

81. *Id.* at 1599. The Court pointed out that "some wrongs are more blameworthy than others. . . . '[N]onviolent crimes are less serious than crimes marked by violence or the threat of violence.' Similarly, 'trickery and deceit' are more reprehensible than negligence. [This principle derives from the notion that] punitive damages may not be 'grossly out of proportion to the severity of the offense.'" *Id.* (citations omitted). The Court then concluded that in *BMW* "none of the aggravating factors associated with reprehensible conduct [was] present." *Id.* Namely, "[t]he presale refinishing of [Gore's] car had no effect on its performance or safety features, or even its appearance for at least nine months after his purchase." *Id.* The Court warned, however, that injury which is only economic in nature is not always a mitigating factor. *Id.* That is, in some cases, "infliction of economic injury, especially when done intentionally through affirmative acts of misconduct or when the target is financially vulnerable, can warrant a substantial penalty." *Id.* (citation omitted). However, "this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages." *Id.*

82. *Id.* at 1602.

83. ALA. CODE § 8-19-11(b) (1993) (imposing a maximum of $2000 on deceptive trade practices); *see also BMW*, 116 S. Ct. at 1603. The Court did not address the issue of criminal sanctions.

84. *BMW*, 116 S. Ct. at 1603-04.

85. *Id.* at 1603.

received sufficient notice that its conduct would be subjected to a severe civil penalty,[86] the $2 million punitive-damages award was constitutionally unreasonable.[87] The Court then reversed the judgment of the Alabama Supreme Court and remanded the case for further proceedings not inconsistent with the Court's opinion.[88]

In a separate concurring opinion, Justice Breyer, joined by Justices O'Connor and Souter, noted that ordinarily a judgment which was a product of "fair procedures" would be entitled to "a strong presumption of validity."[89] He concluded, however, that in this case the presumption was overcome.[90] He based this conclusion on two key factors: (1) the judgment against BMW NA was "the product of a system of standards that did not significantly constrain a court's, and hence a jury's, discretion in making [the punitive] award," and (2) the award "was grossly excessive in light of the State's legitimate punitive damages objectives."[91]

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86. *Id.* at 1604; *see also id.* at 1604-09 (Breyer, J., concurring).

87. *BMW*, 116 S. Ct. at 1604.

88. *Id.* On remand, the Alabama Supreme Court re-applied the *Green Oil* factors in light of the three "guideposts" established by the *BMW* Court and concluded "that the $2 million award of punitive damages against BMW was grossly excessive." BMW of N. Am., Inc. v. Gore, No. 1920324, 1997 WL 233910, at *8-9 (Ala. May 9, 1997) (per curiam). The court then affirmed the trial court's order denying BMW NA's motion for a new trial "on the condition that [Gore] file with [the Alabama Supreme Court] within 21 days a remittitur of damages to the sum of $50,000." *Id.* at *9. If Gore chose to contest the ruling, the trial court's judgment would be reversed and Gore's case remanded for a new trial. *Id.*

It appears that the Alabama Supreme Court arrived at the $50,000 figure by taking the number of the BMW NA's sales of refinished cars in Alabama (14) as an approximate multiplier for the $4000 devaluation of Gore's repainted car. *Id.* at *10 (Cook, J., concurring specially). The Alabama court seems to have adopted the approach that the United States Supreme Court suggested in *BMW*:

> In light of the Alabama Supreme Court's conclusion that (1) the jury had computed its award by multiplying $4,000 by the number of refinished vehicles sold in the United States and (2) that the award should have been based on Alabama conduct, respect for the error-free portion of the jury verdict would seem to produce an award of $56,000 ($4,000 multiplied by 14, the number of repainted vehicles sold in Alabama).

BMW, 116 S. Ct. at 1595 n.11.

89. *BMW*, 116 U.S. at 1604 (Breyer, J., concurring) (internal quotation marks omitted).

90. *Id.*

91. *Id.* at 1609. Justice Breyer focused on the following findings in his concurrence. First, Alabama's statute was broad and lacked "a standard that readily distinguishes between conduct warranting very small, and conduct warranting very large, punitive damages awards." *Id.* at 1605. Second, the Alabama courts misapplied the *Green Oil* "'factors' intended to constrain punitive damages awards." *Id.* at 1606 (citing Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989)). Third, the Alabama courts "neither referred to, nor made any effort to find, nor enunciated any other standard, that either directly, or indirectly as background, might have supplied the constraining legal force that the [Alabama] statute and *Green Oil* standards (as interpreted here) lack." *Id.* at 1607. Fourth, the $2 million punitive-damages award was extraordinarily large in light of historical standards. *Id.* at

IV. ANALYSIS

The *BMW* Court has elevated reasonableness in punitive damages to a doctrine of substantive due process in two respects. First, the Court has extended its recent precedent by holding that the Due Process Clause imposes a substantive limit on the size of punitive damages.[92] In cases prior to *BMW*, the Court addressed primarily procedural limits, such as jury instructions and appellate procedures.[93] *BMW* is the first case in which the Court has confronted squarely the issue of substantive limits on punitive damages. Second, the Court has provided a specific, practical framework for determining whether a punitive-damages award exceeds its constitutional limit.[94] By adding a constitutional dimension to the reasonableness standard and providing a coherent framework for analysis, the Court has imposed additional necessary constraints on jury discretion to award punitive damages.

A. *The Relationship Between Reasonableness and Substantive Due Process*

The *BMW* Court declared that when a punitive-damages award is unreasonably large in relation to a state's legitimate interests in punishment and deterrence, the award "enter[s] the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."[95] In so declaring, the majority emphasized a close relationship between reasonableness in punitive damages and substantive due process. In a concurring opinion joined by Justices O'Connor and Souter, Justice Breyer similarly underscored this relationship by stating that, when a punitive award is "'grossly excessive'" in relation to its valid objectives, enforcement of the award is "an arbitrary deprivation of . . . property in violation of the Due Process Clause."[96] The major-

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1608. Finally, the Alabama legislature did not enact any legislation to "impose quantitative limits that would significantly [restrain] the fairly unbounded discretion created by the absence of constraining legal standards." *Id.*

92. *BMW*, 116 S. Ct. at 1592, 1604.

93. *See, e.g.*, Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (reviewing appellate procedures); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) (plurality opinion) (determining whether the procedures by which the punitive-damages award had been made were unfair); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (addressing the validity of jury instructions).

94. *See BMW*, 116 S. Ct. at 1598-1604.

95. *Id.* at 1595.

96. *Id.* at 1604 (Breyer, J., concurring) (quoting TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 453-54 (1993) (plurality opinion) (stating, in dictum, that a "grossly excessive" punitive award amounts to "a deprivation of property without due process of law")).

ity's and concurrence's equation of "reasonableness" with "substantive due process" is proper for two reasons.

First, the equation enables the Court to define effectively the outer limits on punitive damages by emphasizing the significance of fairness in civil punishment.[97] Prior to *BMW*, the Court had indicated that the Due Process Clause imposed outer limits on punitive-damages awards. In *Haslip*, for example, although the Court held that the verdict in that case did not "cross the line into the area of constitutional impropriety," it suggested that a four-to-one ratio of punitive to compensatory damages was "close to the line."[98] Likewise, in *Oberg*, while the Court did not address the issue of substantive due process as a constraint on punitive awards, it did note that the Due Process Clause "imposes a substantive limit on the size of punitive damages awards."[99] The Court insisted but never actually held that enforcement of unreasonably large punitive damages would violate due process.[100] The unique facts in *BMW* presented the Court with an opportunity to establish a doctrine that it had previously embraced. In light of the Court's dicta, the holding in *BMW* is a logical extension of recent Supreme Court precedent. If the goal now is to curb punitive damages nationwide, it is appropriate to underscore the importance of fairness in civil penalties by raising the reasonableness inquiry to one of constitutional scrutiny.

Second, the equation of reasonableness with substantive due process ensures that similarly situated tortfeasors, regardless of their identity, receive "uniform general treatment."[101] As *BMW* illustrates,

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97. *BMW*, 116 S. Ct. at 1595-98.

98. *Haslip*, 499 U.S. at 18, 23-24.

99. Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994).

100. *Id. See, e.g.*, *TXO*, 509 U.S. at 462-66 (affirming a punitive-damages award on the ground that the state court's judgment was a result of fair common law and procedures); *Haslip*, 499 U.S. at 17, 19-24 (approving state common-law method for assessing punitive damages); Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 277-80 (1989) (holding that state common-law method adequately addressed the fairness issue in punitive damages). *See also supra* notes 44 (discussing court's review of punitive-damages award), 52 (discussing *Green Oil* standards), and 63 (discussing the presumptions of validity due to safeguards in the jury process).

101. *BMW*, 116 S. Ct. at 1605 (Breyer, J., concurring) ("Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself."); *see also* Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 989 (1989) (stating a "concern . . . that similarly situated persons will be treated unequally, and capricious decisions will result"); *cf.* Dick Thornburgh, *America's Civil Justice Dilemma: The Prospects for Reform*, 55 MD. L. REV. 1074 (1996) (advocating uniform federal law for correcting the problems in our current civil justice system).

wrongdoers in different states might be punished unequally for similar misconduct, because the states might determine what was "reasonable" based on disparate state law rather than on federal due process law as interpreted by the Court.[102] Thus, in *BMW*, the Alabama court imposed $2 million in punitive damages on BMW NA for violating a broadly defined statute which, as Justice Breyer observed, "authorize[d] punitive damages for the most serious kinds of misrepresentations, [such as] tricking the elderly out of their life savings, for much less serious conduct, such as the failure to disclose repainting a car, at issue [in *BMW*], and for a vast range of conduct in between."[103] Because other states have different laws and policies,[104] however, BMW NA might not be punished at all, or not as severely, for the same misconduct outside of Alabama.[105] For example, BMW NA's conduct would be lawful in the states that had implemented what the Court

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The former United States Attorney General stated:

> National standards are essential to correcting the flaws in the existing [civil justice] system. A uniform federal law, deriving from the Commerce and Due Process Clauses of the Constitution, should replace the patchwork quilt of separate state laws. The operation of fifty laws in as many states is expensive and has led only to confusion. Tort law is fundamentally interstate in character, and thus the problem lends itself to a uniform national solution. On average, seventy percent of the goods manufactured in one state are shipped out of state and sold elsewhere. If the injury then occurs in a third state, the issue can become further confused. Businesses and manufacturers need the certainty and uniformity provided by a federal policy.
>
> A national law would not be contrary to the goal of systematically returning authority to the states. Instead, it reflects the truly interstate and international environment within which most competitive businesses operate today. A national law would help businesses to level the playing field with their foreign counterparts.

Id. at 1082 (footnotes omitted).

102. *BMW*, 116 S. Ct. at 1594-1604.

103. *Id.* at 1605-06 (Breyer, J., concurring).

104. *See supra* note 27 and accompanying text (surveying various state statutes).

105. *BMW*, 116 S. Ct. at 1595-97. The Court stated:

> That diversity [of state laws and policies] demonstrates that reasonable people may disagree about the value of a full disclosure requirement. Some legislatures may conclude that affirmative disclosure requirements are unnecessary because the self-interest of those involved in the automobile trade in developing and maintaining the goodwill of their customers will motivate them to make voluntary disclosures or to refrain from selling cars that do not comply with self-imposed standards. Those legislatures that do adopt affirmative disclosure obligations may take into account the cost of government regulation, choosing to draw a line exempting minor repairs from such a requirement. In formulating a disclosure standard, States may also consider other goals, such as providing a "safe harbor" for automobile manufacturers, distributors, and dealers against lawsuits over minor repairs.

Id. at 1596.

viewed as "safe harbor" policies.[106] In contrast with the treatment BMW NA would have received in a safe-harbor state, the dramatic unequal treatment to which BMW NA has been subjected in Alabama directly conflicts with the fundamental notions of fairness embraced by due process law.[107] By giving due process law priority over state common law, the Court has empowered the states to reform their practices so as to disallow unreasonably large deviations from the federal due process norm.[108]

In his dissenting opinion, Justice Scalia, joined by Justice Thomas, stated that the Court's holding in *BMW* was an "unjustified incursion into the province of state governments."[109] Similarly, in a separate dissenting opinion joined by Chief Justice Rehnquist, Justice Ginsburg criticized the *BMW* majority for "unnecessarily and unwisely ventur[ing] into territory traditionally within the States' domain."[110]

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106. These policies are implemented to encourage out-of-state corporations to conduct in-state business by providing them statutory protections. *See, e.g., id.* at 1600 (stating that "a corporate executive could reasonably interpret the disclosure requirements as establishing safe harbors").

107. *Id.* at 1595-1604.

108. *Id.* The *BMW* opinion will legitimize current reform efforts and provide an impetus for additional reforms. Proposed statutory reforms include (1) capping the amount of a punitive award or linking it to the award for compensatory damages, (2) requiring payment of a percentage of the award to the state, (3) increasing the burden of proof, and (4) granting bifurcated trials. *See id.* app. at 1618-20 (Ginsburg, J., dissenting) (listing state legislative activity regarding punitive damages); *see also* Sandra N. Hurd & Frances E. Zollers, *State Punitive Damages Statutes: A Proposed Alternative*, 20 J. LEGIS. 191, 195-203 (1994) (analyzing the punitive-damages statutes in various states and proposing an alternative to statutory reforms regarding punitive damages). As of this writing, at least one state legislature has eliminated common-law punitive damages altogether. *See* N.H. REV. STAT. ANN. § 507:16 (1997) (prohibiting imposition of punitive damages on tortfeasors unless explicitly provided by statute).

109. *BMW*, 116 S. Ct. at 1610 (Scalia, J., dissenting). Moreover, Justice Scalia pointed out that the Court's holding lacked "precedential warrant for giving [the Court's] judgment priority over the judgment of state courts and juries . . . ." *Id.* at 1611.

110. *Id.* at 1614 (Ginsburg, J., dissenting). Justice Ginsburg pointed out that, although the $2 million punitive-damages award might be unreasonable, the Alabama Supreme Court had, in good faith, followed the "Court's prior instructions" and "'thoroughly and painstakingly' reviewed the jury's award." *Id.* at 1614, 1616. Admittedly, the jury improperly used the out-of-state sales as a multiplier for the compensatory damages to arrive at the $4 million punitive award, but BMW NA's counsel failed to object to this method. *Id.* at 1615-16. Further, because the Alabama Supreme Court had noted this computation problem and corrected it, the problem would not recur. *Id.* Characterizing *BMW* as an "idiosyncratic" case, Justice Ginsburg stated that the Court should not interfere with a state court's decision when no major procedural flaws are noticed. *Id.* According to Justice Ginsburg, the Court's involvement is impractical because

> the Court will work at this business alone. It will not be aided by the federal district courts and courts of appeals. It will be the *only* federal court policing the area. The Court's readiness to superintend state court punitive damages awards is all the more puzzling in view of the Court's longstanding reluctance to counte-

This criticism is unsound. By its nature, the federal-state relation is a two-way street. While in some instances the states' autonomy should be respected, in other cases, as in *BMW*, federal intervention is appropriate.[111] Although the Court has observed that the states have legitimate interests in furthering their dual objectives of punishment and deterrence, the Court has also identified a "federal interest in preventing individual States from imposing undue burdens on interstate commerce."[112] Large corporations, such as BMW NA, are "active participant[s] in the national economy."[113] A state's undue imposition of punitive damages on such corporations may have the practical effect of regulating these corporations' out-of-state conduct, thus impeding interstate commerce.[114] Moreover, the Court should not neglect its duty of enforcing constitutional protections in appropriate

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nance review, even by courts of appeals, of the size of verdicts returned by juries in federal district court proceedings.

Id. at 1617.

Justice Ginsburg's concern seems to be "premature." *BMW*, 116 S. Ct. at 1604 n.41. The Court has reviewed very few punitive-damages cases in recent years, and *BMW* is the first case "in decades" in which a punitive-damages award was found to exceed constitutional limits. *Id.* Moreover, her concern does not justify the Court's shunning its "responsibility" of enforcing constitutional protections in appropriate cases. *Id.*

111. *BMW*, 116 S. Ct. at 1596-98; *see also id.* at 1604-08 (Breyer, J., concurring).

112. *BMW*, 116 S. Ct. at 1604. The Court explained that while Congress "has ample authority to enact" a nationwide policy regarding the disclosure of minor repairs to vehicles, "it is clear that no single State could do so, or even impose its own policy choice on neighboring states." *Id.* at 1596-97. The Court stated further:

> [O]ne State's power to impose burdens on the interstate market for automobiles is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States. [T]he Constitution has a "special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres."
>
> . . . [I]t follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.

Id. at 1597 (citations omitted); *see also supra* note 101 and accompanying text.

113. *BMW*, 116 S. Ct. at 1604.

114. *Id.* at 1596-98. Justice O'Connor has also observed that excessive punitive damages have "a detrimental effect on the research and development of new products. . . . [These products range from] prescription drugs . . . [to] airplanes and motor vehicles . . . ." Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part); *see also* Ellis, *supra* note 101, at 975, 981-82 (observing that experts "had come to view the [punitive-damages] doctrine as a Frankenstein's monster that required severe restraint" and stating that excessive and arbitrary punitive damages have the effect of creating uncertainty, which leads to excessive deterrence and overcompliance, and that the overall effect is a serious misallocation of resources); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1143 (1996) ("Critics attribute to the present civil justice system various deleterious effects on the nation's economy."). *But see* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 3, 9-17, 61-64 (1990) (presenting an empirical study sug-

cases where due process concerns are implicated. In light of these reasons, the Court has properly raised reasonableness in civil punishment to the level of constitutional importance this standard deserves.

B. *Development of a Coherent Framework for Scrutinizing Punitive-Damages Awards*

The *BMW* Court developed a coherent framework for determining whether a punitive award is within the constitutionally acceptable range.[115] This framework provides specific, practical guidance in two ways. First, the framework limits a court's inquiry to a particular state's interests.[116] This "state interest" standard places constraints on juries' and judges' discretion to award punitive damages that are unreasonably disproportionate to a state's legitimate interests.[117] This standard is both logical and necessary because, for the federal system to function properly, a state's discretion to award large punitive damages must be confined to cases in which the penalty both legitimately furthers the state's interests and does not interfere with the other states' policies.[118]

Second, the *BMW* framework ensures that all tortfeasors, whether they be individuals or corporations, receive adequate notice in accordance with due process.[119] The Court's "guideposts" are useful for determining whether a defendant has received sufficient notice. The first guidepost, the "degree of reprehensibility,"[120] ensures that a wrongdoer is assessed punitive damages that match the "enormity of [the] offense."[121] As such, this guidepost prevents surprise, because

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gesting that the punitive-damages problem is largely exaggerated and "highly politicized," and commenting that people should be "skeptical" of efforts to reform punitive damages).

115. *BMW*, 116 S. Ct. at 1594-1604.

116. *Id.* at 1594-98.

117. *Id.*

118. *Id.* at 1596-97.

119. *Id.* One may attempt to distinguish between an individual and a corporation for purposes of awarding punitive damages. The Court, however, has held that corporations are also entitled to due process. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 413-14, 418-19 (1984) ("The Due Process Clause of the Fourteenth Amendment operates to limit the power of a State to assert *in personam* jurisdiction over a nonresident [corporate] defendant."); *see also BMW*, 116 S. Ct. at 1604 ("The fact that BMW [NA] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business.").

120. *BMW*, 116 S. Ct. at 1598-99. This guidepost is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *Id.* at 1599.

121. *Id.* at 1599 (internal quotation marks omitted). In *BMW*, the Court reasoned that, because the harm that BMW NA inflicted on Gore "was purely economic in nature" and BMW NA's conduct was not "sufficiently reprehensible," a $2 million penalty was not appropriate. *Id.* at 1599, 1601; *see also supra* notes 77, 79, and 82 and accompanying text

tortfeasors can expect that the punishment they receive will match the degree of egregiousness of their misconduct.[122] Likewise, the second guidepost, the ratio between the punitive award and the actual harm,[123] ensures that courts observe a reasonable proportionality between the actual harm inflicted by a tortfeasor and the corresponding penalty.[124] Finally, the third guidepost, comparing the punitive damages with the authorized civil or criminal sanctions, provides a sufficient restraint on arbitrariness by compelling the lower courts to assess punitive damages within the bounds of reason.[125]

In his dissenting opinion, Justice Scalia, with whom Justice Thomas joined, asserted that the "'guideposts' mark the road to nowhere; they provide no real guidance at all."[126] This criticism lacks merit. True, the guideposts are not black-and-white. However, as the Court has repeatedly emphasized, due process is not amenable to any simple "mathematical formula."[127] Even if a specific "formula" for assessing punitive damages could be established, it would be unwise to do so, because unpredictability is an essential ingredient of the deterrence derived from punitive damages.[128] The fundamental purpose of punitive damages would be destroyed if that important ingredient were removed. Finally, Justice Breyer, in his concurring opinion joined by Justices O'Connor and Souter, keenly observed that "[l]egal standards need not be precise in order to satisfy . . . constitutional

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(explaining why BMW NA's conduct was not sufficiently egregious to justify a multimillion-dollar punitive award).

122. *See supra* note 121 and accompanying text.

123. *BMW*, 116 S. Ct. at 1601. This guidepost is "perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award . . . ." *Id.*

124. *Id.* at 1602-03.

125. *Id.* at 1603-04.

126. *Id.* at 1613 (Scalia, J., dissenting); *see also id.* at 1612-14 (asserting that "degree of reprehensibility," "trickery and deceit," "state interest analysis," and "reasonableness" are vague standards).

127. *BMW*, 116 S. Ct. at 1602.

128. *See, e.g.*, BMW of N. Am., Inc. v. Gore, No. 1920324, 1997 WL 233910, at *7 (Ala. May 9, 1997) (per curiam) (refusing to establish a ratio of punitive damages to compensatory damages "that would apply to all and would therefore give a wrongdoer precise notice of the penalty that his conduct might incur [because doing] so would frustrate the purpose of punitive damages, which is to punish and deter a defendant's misconduct"). *Id.* The Alabama court preferred to go on a "case-by-case" basis, even though it might be "difficult" to do so. *Id.* at *7, *9; *see also* Hurd & Zollers, *supra* note 108, at 203 (suggesting that, in reforming punitive-damage law, states should not set any specific ratio, because "[a]n essential element of the deterrent function is the unpredictability of the risk[, and] [i]f a business cannot determine *ex ante* the cost of engaging in misconduct, it cannot use a cost/benefit analysis to decide whether it will be profitable to so act").

concern."[129] The *BMW* guideposts for assessing punitive damages are similar to such legal standards as "reasonable care," "due diligence," and "best interests of the child."[130] Just as these broad standards have sufficiently guided the courts, so too will the guideposts.[131]

V. CONCLUSION

The Court, by elevating reasonableness in punitive damages to a principle of substantive due process, has sent a clear message that the sky is no longer the limit on punitive damages. Instead, due process imposes a substantive limit, protecting all wrongdoers from arbitrary punishment.[132] Moreover, the Court's guideposts provide a practical framework for scrutinizing punitive damages. Being mindful of the state-federal dichotomy, the Court has developed necessarily flexible yet substantive guidelines which will empower the states to experiment with various approaches within constitutional bounds.[133] In doing so, the Court has moved closer to restraining punitive damages that have "run wild."[134]

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129. *BMW*, 116 S. Ct. at 1605 (Breyer, J., concurring). Justice Breyer pointed out that punitive-damages standards are adequate so long as they provide "some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior." *Id.* Absent any constraint, the risk of arbitrary and biased jury verdicts would be heightened. *Id.*

130. *Id.*; *see also* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20 (1991).

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

132. *BMW*, 116 S. Ct. at 1598.

133. *Id.* at 1594-1604; *see also supra* note 108 and accompanying text.

134. *Haslip*, 499 U.S. at 18 (internal quotation marks omitted).