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THE FOGGY ROAD FOR EVALUATING PUNITIVE DAMAGES: LIFTING THE HAZE FROM THE *BMW/STATE FARM* GUIDEPOSTS

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In this Article, Professors Chanenson and Gotanda propose that courts treat comparable maximum criminal or civil legislative fines as a presumptive due process limit on punitive damage awards. The Article reviews the manner in which courts have implemented the three-guidepost framework for constitutional review of punitive awards laid out by the Supreme Court in BMW of North America, Inc. v. Gore *and in* State Farm Mutual Automobile Insurance Co. v. Campbell. *Finding that courts have struggled to articulate a coherent rationale and methodology for review of such awards, the authors propose a greater reliance on the third guidepost of* State Farm, *comparison with legislative fines for comparable misconduct. In particular, the authors propose that the highest comparable fine should be the presumptive constitutional limit on a punitive damage award. Such an approach would give lower courts clear and workable guidance for review of punitive damage awards, while also providing civil defendants with fair notice of potential awards and reinforcing the proposition that important lawmaking authority belongs in the hands of state legislatures.*

I. INTRODUCTION

In recent years, punitive damages awards have increased in frequency and size.[1] According to one study, between 1996 and 2001,

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1. As Justice O'Connor has pointed out:

> As little as 30 years ago, punitive damages awards were "rarely assessed" and usually "small in amount." Recently, however, the frequency and size of such awards have been skyrocketing. One commentator notes that "hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case." And it appears that the upward trajectory continues unabated.

the annual number of punitive damages awards in excess of $100 million doubled and, in 2001 alone, over $162 billion in punitive damages were awarded at trial or affirmed on appeal.[2] Indeed, the amount of some awards is staggering. For example, in *Pennzoil Company v. Texaco, Inc.*, a jury assessed $10 billion in punitive damages.[3] This phenomenon has caused the United States Supreme Court to reevaluate its jurisprudence on the constitutionality of excessive punitive damages awards.[4]

During the past decade, the Court has issued two opinions setting out guideposts for determining when punitive damages may be unconstitutionally excessive.[5] In 1996, for the first time, the Supreme Court invalidated a state court award of punitive damages on the ground that the amount violated the Due Process Clause. In *BMW of North America, Inc. v. Gore*, it articulated a test for lower courts to use in evaluating the constitutionality of such awards.[6] The Court mandated consideration of three guideposts: (1) the degree of the reprehensibility of the defendant's misconduct, (2) the ratio between the harm to the plaintiff caused by the defendant's misconduct and the punitive damages award, and (3) the sanctions imposed or that could be imposed for comparable misconduct.[7] However, in the years that followed, courts struggled to apply the guideposts in a consistent manner.[8] Indeed, as one court

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TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) (citations omitted).

2. *See* RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE 12, 17 (2003). In fact, the study reports that in 1992, there were no punitive damages awards in excess of $100 million, but in 2001, there were 16 such awards. *Id.* at 12.

3. *See* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987). The largest reported punitive damages award was in Engle v. R.J. Reynold Tobacco, No. 94-08273 CA-22 (Fla. Cir., Dade County, 2000), where the jury awarded $145 billion in punitive damages. That award, however, was later overturned on appeal. *See* Liggett Group, Inc. v. Engle, 2003 WL 21180319 (Fla. Dist. Ct. App., May 21, 2003). In November 2003, in *Alabama v. Exxon Mobile Corp.*, a jury awarded $11.8 billion in punitive damages, which was more than 180 times the compensatory damages (excluding interest) and more than plaintiff had sought. *See Jurors Hit Exxon Mobil with $11.9 Billion Verdict*, L.A. TIMES, Nov. 15, 2003, at C3.

4. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003); *see also* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 61 (1991) (O'Connor, J., dissenting) ("Punitive damages are . . . ripe for reevaluation.").

5. *See BMW*, 517 U.S. at 575; *State Farm*, 123 S. Ct. at 1520.

6. *See BMW*, 517 U.S. at 559.

7. *Id.* at 575–85.

8. *See, e.g.*, Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc., 181 F.3d 446, 450 (3d Cir. 1999); *See also* Colleen P. Murphy, *Judgment as a Matter of Law on Punitive Damages*, 75 TUL. L. REV. 459, 478 (2000) (noting that recent cases regarding punitive damages awards make it "difficult to draw any meaningful line between unconstitutionally excessive awards and

noted, "[t]he role of gatekeeper over [sizeable] punitive damages verdicts is one of the most challenging that has been placed upon appellate judges in civil cases."[9]

As a result, in 2003, the Court attempted to clarify the test in *State Farm Mutual Automobile Insurance Co. v. Campbell.*[10] Much of the Court's focus in that case was on the first two guideposts, the degree of reprehensibility and the ratio between compensatory and punitive damages. Significantly, the Court announced that with respect to the second guidepost, "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."[11] Unfortunately, *State Farm* failed to provide courts with a clear set of directions on how to apply the three guideposts. The first guidepost, concerning reprehensibility, remains amorphous. Because the Court did not provide a clear set of criteria to determine whether a defendant's conduct justifies a certain amount of punitive damages, applying this guidepost is highly subjective and can lead to inconsistent decisions. Similarly, the second guidepost is likely to lead to inconsistent results because it is easy to manipulate the ratio.[12] The third guidepost remains shrouded in fog. Indeed, *State Farm* appears to obfuscate the purpose of the third guidepost and potentially undercut its usefulness, by stating that this guidepost has "less utility" than the others in determining whether a punitive damages award violates substantive due process.[13] Some have erroneously interpreted the Court's discussion of the third guidepost to preclude *any* comparison of punitive damages awards with criminal penalties on the ground that civil proceedings lack the protections afforded in criminal prosecutions.[14]

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merely unreasonable ones"); E. Burton Spence, *Punitive Damages in Alabama after* BMW v. Gore: *Are Outcomes Any More Predictable?*, 59 ALA. LAW. 314, 315–19 (Sept. 1998) (discussing disparate appellate punitive damages review in Alabama after *BMW*); Christine D'Ambrosia, Note, *Punitive Damages in Light of* BMW of North America, Inc. v. Gore: *A Cry for State Sovereignty*, 5 J.L. & POL'Y 577, 600–21 (1997) (surveying cases after *BMW*); Peter J. Sajevic, Note, *Failing the Smell Test: Punitive Damage Awards Raise the United States Supreme Court's Suspicious Judicial Eyebrow in* BMW of North America, Inc. v. Gore, 20 HAMLINE L. REV. 507, 536–49 (1996) (discussing *BMW* guideposts and noting, "the Court's current role in the punitive damage arena [is] murky and vague"). For a further discussion of lower courts interpretations of the *BMW* guidelines, see *infra* sections IV and V.

9. *Inter Med. Supplies, Ltd.*, 181 F.3d at 450.

10. *See State Farm*, 123 S. Ct. at 1513.

11. *See id.* at 1524.

12. *See infra* notes 176–81 and accompanying text.

13. *See State Farm*, 123 S. Ct. at 1519.

14. *See, e.g.*, Cynthia T. Andreason, State Farm v. Campbell: *What Happens Next?*, 71 U.S.L.W. 2691, 2692 (U.S. May 5, 2003) ("[T]he *Campbell* Court drastically curtailed

We believe that the third guidepost, properly understood, is the guidepost best able to bring clarity to the *BMW/State Farm* test. We propose that courts apply the third guidepost by focusing on comparable criminal (or civil) legislative fines and view any such penalties as a "presumptive limit" on punitive damages awards. In other words, the highest comparable fine should be the presumptive limit on the punitive damages award. If the award provided by the jury is smaller than this presumptive limit, the third guidepost presents no bar to the imposition of the award. However, the punitive damages award must still survive the scrutiny of the first two guideposts before it can pass constitutional muster. Nevertheless, passing the third guidepost would often suggest a constitutionally permissible punitive damages award.

If, however, a punitive damages award is larger than the "presumptive limit," the third guidepost would not be satisfied. Failing the third guidepost would be a strong indication, but not a guarantee, that a punitive damages award is unconstitutionally excessive. An award that fails the third guidepost and has an unacceptably large ratio of punitive to compensatory damages would be unconstitutional in virtually all cases. If, however, a punitive damages award fails the third guidepost but has an acceptable ratio pursuant to the second guidepost, a court should concentrate on the first guidepost's reprehensibility inquiry. Because the relevant legislature has set a statutory maximum fine for the "presumptive limit," it has indicated its view of the reprehensibility of the misconduct. Therefore, it will be difficult to conclude that the misconduct is so reprehensible as to justify a punitive damages award greater than the "presumptive limit" set by the legislature. We believe that this conclusion is appropriate only in cases of overwhelming reprehensibility in which the conduct is outside all bounds of decency.

In Part II, we begin by providing an overview of punitive damages, including tracing the history and purpose of punitive damages and discussing their availability. Part III examines the Supreme Court's punitive damages cases. It finds that in less than a decade, the Court has gone from imposing no constitutional restrictions on the awarding of punitive damages to providing both procedural and substantive due process limits on the awarding of punitive damages. In Part IV, we analyze the third guidepost and determine that the Court's decisions in *BMW* and *State Farm* fail to

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consideration of potential criminal penalties on the ground that cases in which punitive damages can be awarded lack the protections that attach to criminal prosecutions.").

articulate either a coherent rationale or a workable approach for applying this factor. Part V details a new approach for evaluating whether a punitive damages award violates due process that focuses on and thus refines the third guidepost. Our approach is consistent with the Court's views on the subject, satisfies the due process need for notice, is respectful of federalism concerns, and allows for greater proportionality and nuance while evaluating punitive damages awards. Most importantly, it should be easy to apply and should result in more uniform decisions, thus providing considerable assistance to a perplexed judiciary. Part VI offers a brief conclusion.

II. FROM FOOTPATH TO THE YELLOW BRICK ROAD: SURVEYING PUNITIVE DAMAGES

Punitive damages are "sums awarded apart from any compensatory or nominal damages, usually ... because of particularly aggravated misconduct on the part of the defendant."[15] They are of ancient origin and are authorized in the documents of many cultures, including the Code of Hammurabi,[16] the Bible,[17] the laws of the Babylonians, the Hittites and ancient Greeks[18] and the Hindu Code of Manu.[19]

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15. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 204 (1973) (citing RESTATEMENT OF TORTS § 908 (1939)). *See also* CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 275 (1935). Multiple damages are a form of punitive damages. The authority to award multiple damages is typically set forth in a statute and they are calculated by multiplying the amount of the compensatory damages by a designated number. Unlike the traditional form of punitive damages, multiple damages have a fixed limit and do not hinge on the defendant's wealth. *See* DAN B. DOBBS, LAW OF REMEDIES 453–54 (2d ed. 1993). The most common form of multiple damages is treble damages, which is calculated by multiplying the compensatory damages by three. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 605, 635–36 (1985). Some courts allow recovery of both multiple damages and common law punitive damages. *Compare* Com-Tech Assoc. v. Computer Assoc. Int'l, 753 F. Supp. 1078, 1079 (E.D.N.Y. 1990), *aff'd*, 938 F.2d 1574 (2d Cir. 1991) (holding that claim for punitive damages could be asserted in civil action under RICO, even though treble damages are available) *with* Standard Chlorine of Del., Inc. v. Sinibaldi, 821 F. Supp. 232, 252–53 (D. Del. 1992) (holding that punitive damages are not proper under RICO, since statute already provides treble damages).

16. CODE OF HAMMURABI § 8, *reprinted in* 1 ALBERT KOCOUREK & JOHN WIGMORE, SOURCES OF ANCIENT AND PRIMITIVE LAW 391 (1915).

17. *See Exodus* 22:1, 9 (King James).

18. *See* H.F. Jolowicz, *The Assessment of Penalties in Primitive Law*, *in* CAMBRIDGE LEGAL ESSAYS 205–06 (1926).

19. *See* The Laws of Manu *in* 1 ALBERT KOCOUREK & JOHN WIGMORE, *supra* note 16, at 391. *See also* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 25 (1991) (Scalia, J., concurring)

The most generally accepted reasons for punitive damages are to punish and deter certain conduct,[20] particularly willful or malicious conduct.[21] Courts and commentators have asserted that these damages also serve other functions.[22] Specifically, they "vent the indignation of the victimized,"[23] discourage the injured party from engaging in self-help remedies,[24] and compensate victims for otherwise uncompensable losses,[25] including litigation expenses that are not otherwise recoverable.[26]

The authority to award punitive damages is governed both by state and federal law.[27] Most states allow punitive damages,[28] although the circumstances under which such relief may be awarded

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(providing history of punitive damages). Examples of punitive damages can also be found in the Torah. *See* Elliot Klayman & Seth Klayman, *Punitive Damages: Toward Torah-Based Reform*, 23 CARDOZO L. REV. 221, 226–40 (2001).

20. *See* Smith v. Wade, 461 U.S. 30, 54 (1983) ("Punitive damages are awarded . . . 'to punish [the defendant] for his outrageous conduct and to deter others like him from similar conduct in the future.'" (quoting RESTATEMENT (SECOND) OF TORTS § 908(1) (1979)); *see also* 1 LINDA J. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 2.2(A)(1) (4th ed. 2000) ("The most frequently stated purpose of punitive damages is to punish the defendant for his wrongdoing and to deter him and others from similar misconduct.").

21. *See* Jane Mallor & Barry Roberts, *Punitive Damages: Towards a Principled Approach*, 31 HASTINGS L.J. 639, 648 (1980); *see also* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL L. REV. 363, 373–74 (1994).

22. *See e.g.*, Robert A. Klinick, Symposium: Reforming Punitive Damages—The Punitive Damages Debate, 38 HARV. J. ON LEGIS. 469, 470–71 (2001); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1320–21 (1993); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3–9 (1982); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 520 (1957); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 61 (1991) (O'Connor, J., dissenting); Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437–38 n.11 (2001); *see also* Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163 (2003).

23. *See* Rustad & Koenig, *supra* note 22, at 1320–21.

24. *See* Ellis, *supra* note 22, at 3–9.

25. *See* Note, *Exemplary Damages in the Law of Torts*, *supra* note 22, at 520; Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 61 (1991) (O'Connor, J., dissenting); Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437–38 n.11 (2001); *see also* Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163 (2003).

26. Ellis, *supra* note 22, at 3.

27. *See generally* 1 JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES LAW & PRACTICE § 4.01 (2d ed. 2000).

28. The following states permit awards of punitive damages: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. *See* BLATT ET AL., *supra* note 2, at § 8.

varies greatly.[29] Punitive damages have been permitted in actions involving torts, contracts, property, admiralty, employment, and family law.[30]

On the federal level, a number of statutes authorize the award of punitive relief for specific violations.[31] The Fair Credit Reporting Act, for example, provides that a court may award punitive damages when a consumer reporting agency willfully fails to comply with the requirements imposed by the Act.[32] In addition, various other statutes, such as the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA")[33] and the False Claims Act,[34] provide for the recovery of treble damages.[35]

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29. *See generally* 1 KIRCHER & WISEMAN, *supra* note 27, §§ 5.15–5.31. A handful of states either prohibit awards of punitive damages altogether, or restrict their use severely. For example, Nebraska and Washington do not allow punitive damage awards. *See* Miller v. Kingsley, 230 N.W.2d 472 (Neb. 1975); Maki v. Aluminum Bldg. Prod., 436 P.2d 186 (Wash. 1968). Louisiana and Massachusetts only allow punitive damages when they are expressly authorized by statute. *See* McCoy v. Arkansas Natural Gas Co., 143 So. 383 (La. 1932), *cert. denied*, 287 U.S. 661 (1932); Karavokiros v. Indiana Motor Bus Co., 524 F. Supp. 385 (E.D. La. 1981); USM Corp. v. Marson Fastener Corp., 467 N.E.2d 1271, 1284 (Mass. 1984).

30. *See* 1 SCHLUETER & REDDEN, *supra* note 20, at 409–742 (discussing punitive damages in property and tort actions); 2 SCHLUETER & REDDEN, *supra* note 20, at 1–184 (discussing punitive damages in actions involving admiralty, employment, and family law).

31. *See* Equal Credit Opportunity Act, 15 U.S.C. § 1691e(b) (1994) ("Any creditor . . . who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for punitive damages in an amount not greater than $10,000 . . . ."); Fair Housing Act, 42 U.S.C. § 3613(c) (1994) ("The court may award to the plaintiff actual and punitive damages . . . . "); *see also* Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575, 581–82 (5th Cir. 1982) (holding that treble damages are available if plaintiff can prove violation of the antitrust laws, cognizable injury caused by violation, and approximate amount of damage caused by violation), *cert. denied*, 459 U.S. 908 (1982); Riley v. Empire Airlines, 823 F. Supp. 1016, 1023 (N.D.N.Y. 1993) (finding punitive damages available in action for wrongful discharge under Railway Labor Act on showing of deliberate and malicious conduct by employer intended to curb union activity); Woods v. New Jersey Dep't of Educ., 796 F. Supp. 767, 776 (D.N.J. 1992) (ruling that language in Individual with Disabilities Education Act permitting court to "grant such relief as [it] determines appropriate" authorizes claim for punitive damages in suit alleging that school board wrongfully denied residential placement of disabled student). Conversely, a number of federal statutes expressly preclude awards of punitive damages. *See* Federal Tort Claims Act, 28 U.S.C. § 2674 (1994) ("The United States shall be liable, respecting the provisions of this title to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable . . . for punitive damages."); Foreign Sovereign Immunities Act, 28 U.S.C. § 1606 (1994) (stating that "a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages").

32. *See* Fair Credit Reporting Act, 15 U.S.C. § 1681n (1994).

33. *See* Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9607(c)(3) (1994) (imposing treble damages for failing to properly provide removal or remedial action upon release or threat of release of hazardous substance).

34. False Claims Act, 31 U.S.C. § 3730 (1994).

35. *See supra* note 15 (discussing treble and multiple damages).

However, some statutes that provide for the awarding of treble damages have been viewed as remedial in nature.[36]

With respect to determining the amount of punitive damages, the practice has been to give the jury broad discretion.[37] Under the traditional approach, once a jury determines that the conduct justifies an award of punitive damages, it determines the amount, "consider[ing] the gravity of wrong and the need to deter similar conduct."[38] That determination is then reviewed by the trial judge and appellate courts.[39]

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36. *See* Clayton Act § 4, 15 U.S.C. § 15(a) (1994) (providing for treble damages for injury to one's business or property by reason of violation of antitrust laws); Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1964(c) (1994) (awarding treble damages for injury to one's business or property resulting from RICO violations); *see also* Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477 (1977) (stating that Clayton Act's treble damages provision is in essence remedial); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) (characterizing RICO's treble damages provision as remedial in nature).

37. *See* Missouri Pac. Ry. v. Humes, 115 U.S. 512, 521 (1885) (stating that, with respect to determining the amount of punitive damages, "[t]he discretion of the jury in such cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice"); *see also* CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 3 (2002) (finding that "the instructions presented to jurors for determination of the appropriate punitive damages verdict are extremely vague and employ terms that are largely undefined").

38. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15 (1991). Commentators also note that some states permit juries to consider, in determining the amount of punitive damages awarded: (1) the possibility of criminal punishment, (2) the amount of compensatory damages, and (3) the expense and attorneys' fees incurred by the plaintiff. *See* 1 KIRCHER & WISEMAN, *supra* note 27, §§ 5:23, 5:175–77.

39. A number of states limit the amount of punitive damages that may be awarded. *See, e.g.*, IND. CODE ANN. § 34-51-3–4 (1999) (stating that punitive damages may not be more than three times compensatory damages or $50,000, whichever is greater); TEX. CIV. PRAC & REM. CODE ANN. §41.008 (2001) (limiting punitive damages in certain actions to $200,000 or two times the economic damages plus up to $750,000 in additional non-economic damages, whichever is greater); VA. CODE ANN. § 8.01-38.1 (1987) (imposing $350,000 cap on punitive damages); *see also* NEV. REV. STAT. § 42.005(1) (1991) (limiting punitive damages, in certain cases, to three times amount of compensatory damages if compensatory damages are less than $100,000). For example, Alabama and Georgia place a specific dollar cap on all awards of punitive damages at $250,000. *See* ALA. CODE § 6-11-21 (1975); GA. CODE ANN. § 51-12-5.1(g) (1997). New Jersey limits punitive damages to five times compensatory damages or $350,000, whichever is greater. *See* N.J. STAT. ANN. § 2A: 15-5.14 (1995).

III. PUNITIVE DAMAGES AND THE CONSTITUTION: LEAVING CRUISE CONTROL TO STEER THE ULTIMATE DRIVING MACHINE

For over 200 years, the Supreme Court declined to place any constitutional limits on jury awards of punitive damages.[40] The Court based this hands-off policy on the historical recognition of punitive damages as falling within the discretionary province of common law courts in the United States and England.[41]

The first modern case to note that the Constitution may limit excessive awards of punitive damages was *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*[42] In *Browning-Ferris*, a jury awarded $51,146 in compensatory damages and $6 million in punitive damages against a defendant whose predatory pricing campaign violated the Sherman Act[43] and state tort law.[44] The defendant argued that the punitive damages award violated the Excessive Fines Clause of the Eighth Amendment.[45] The Supreme Court disagreed, ruling that the clause applied only to government actions, particularly criminal prosecutions and punishments.[46] The Supreme Court

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40. *See, e.g.*, St. Louis, Iron Mountain & S. Ry. v. Williams, 251 U.S. 63 (1919) (affirming award of $75 punitive damages and $25 in attorneys' fees against railroad that collected sixty-six cents more than normal fare from two passengers); Beckwith v. Bean, 98 U.S. 266, 305 (1878) (upholding punitive damage award in false imprisonment action); Day v. Woodworth, 54 U.S. (13 How.) 363 (1852) (affirming punitive damage award against defendants in trespass action).

41. *See* Missouri Pac. Ry. v. Humes, 115 U.S. 512, 521 (1885) ("[I]n England and in this country, [damages] have been allowed in excess of compensation, whenever malice, gross neglect, or oppression has caused or accompanied the commission of the injury complained of."); *Day*, 54 U.S. at 371 ("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 . . . .").

42. 492 U.S. 257 (1989). *See also Williams*, 251 U.S. at 66–67 (noting that states are permitted wide latitude in discretion but due process limits excessive awards); Standard Oil Co. of Ind. v. Missouri, 224 U.S. 270, 286 (1911) (upholding contested penalty award and noting that court's discretion was limited to its obligation of administering justice); Seaboard Airline Ry. v. Seegers, 207 U.S. 73, 76 (1907) (finding that there must be substantial foundation and basis for punitive damage awards).

43. 15 U.S.C. § 2 (1997).

44. *See generally Browning-Ferris*, 492 U.S. at 261–62. Browning-Ferris (BFI) was the sole provider of trash-collection services in Burlington, Vermont, until Jacob Kelley, a former BFI district manager, started Kelco Disposal. *Id.* at 261. BFI attempted to force Kelco out of business by reducing prices by over 40%. *Id.* BFI's regional vice president ordered BFI to "[s]quish [Kelley] like a bug." *Id.*

45. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

46. *See Browning-Ferris*, 492 U.S. at 262, 266. The Court found that the Eighth Amendment only applies to government actions, and therefore does not limit damage awards in

did not address the question whether the punitive damages award violated the Due Process Clause[47] because the issue was not properly preserved.[48] However, the Court left the door open, noting:

> There is some authority in our opinions 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 . . . but we have never addressed the precise question presented here: whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit. . . . That inquiry must await another day.[49]

That day came two years later in *Pacific Mutual Life Insurance Co., v. Haslip*.[50] In that case, Cleopatra Haslip sued Pacific Mutual Life Insurance Company and one of its employees, claiming that the employee misappropriated her health insurance payments, resulting in the termination of her policy, and that the company was liable for damages under the theory of *respondeat superior*.[51] Haslip sought $200,000 in compensatory damages and $3 million in puni-

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private civil cases. *See id.* at 260. However, if the damages award goes to the state, even in a private civil case, the result may well be different. *See infra* note 231.

47. U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

48. *See id.* BFI did not raise the due process issue in its petition for certiorari and did not assert that the award violated due process before either the district court or the court of appeals. *Id.* at 277. Nor did it claim that the jury was biased or the procedures were fundamentally unfair. *Id.* at 276.

49. *Id.* at 276–77 (citations omitted). *See also id.* at 280 (Brennan & Marshall, JJ., concurring) (emphasizing that Court's decision "leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties"). Justice O'Connor, joined by Justice Stevens, concurred in part and dissented in part. Justice O'Connor argued that punitive damage awards should be restricted by the Eighth Amendment Excessive Fines Clause. *Id.* at 297–98 (O'Connor, J., concurring in part and dissenting in part). She recommended remanding the case, so the lower court could conduct a proportionality analysis under the following guidelines: (1) "accord 'substantial deference' to the legislative judgments concerning appropriate sanctions for the conduct at issue," (2) "examine the gravity of the defendant's conduct and the harshness of the award," and (3) "compare the civil and criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil and criminal penalties imposed by different jurisdictions for the same or similar conduct." *Id.* at 300–01 (O'Connor, J., concurring in part and dissenting in part).

50. 499 U.S. 1 (1991).

51. *See id.* at 4–7. Because her health insurance policy was cancelled, Haslip was unable to pay for hospital and physician charges that she incurred. This resulted in a collection agency obtaining a judgment against her, which adversely affected her credit rating. Three other parties also filed suit against the defendants, claiming that their policies had been improperly terminated. *Id.* at 5.

tive damages.[52] A jury awarded Haslip a total of $1,040,000, of which $840,000 was presumably punitive damages.[53] The Alabama Supreme Court affirmed the award, and the U.S. Supreme Court granted certiorari to review the propriety of the punitive damages award.[54]

The Court began by noting that the common law method for assessing punitive damages allows the award to be determined by a jury and then reviewed by trial and appellate courts to ensure that it is reasonable. The Court declared that this method was not "so inherently unfair as to deny due process and be per se unconstitutional."[55] However, the Court noted that unlimited jury or judicial discretion in determining the amount of punitive damages "may invite extreme results that jar one's constitutional sensibilities."[56] Nevertheless, the Court declined to set forth a bright line mathematical test for determining whether awards of punitive damages were unconstitutionally excessive.[57] Instead, it focused on whether the state's procedures for determining and reviewing punitive damage awards satisfied due process.[58] The Court concluded that the jury instructions on punitive damages placed reasonable constraints on the jury's discretion and that Alabama's post-trial procedures for reviewing punitive damage awards were reasonable.[59]

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

53. *See id.* The jury also awarded the other plaintiffs approximately $38,000. *Id.* at 7. That award was not at issue before the Supreme Court.

54. *See id.* at 7–8. Pacific Mutual lost on appeal to the Supreme Court of Alabama, with two judges dissenting on the ground that the excessive damages violated the Fourteenth Amendment's Due Process Clause. *Id.* at 7.

55. *Id.* at 17. The Court noted that it, as well as every other state and federal court that had considered the issue, had upheld the common-law method by assessing punitive damages. *Id.* The Court stated, "If a thing is practiced for two hundred years by the common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Id.* at 17 (quoting Sun Oil Co. v. Wortman, 486 U.S. 717, 730 (1988)). The Court observed, however, that it would be inappropriate to say that all punitive damage awards are constitutional solely because they have been practiced for many years. *Haslip*, 499 U.S. at 18. Justice Scalia concurred in the judgment, but disagreed with this reasoning. He stated: "Since it has been the traditional practice of American courts to leave punitive damages . . . to the discretion of the jury . . . I would approve the procedure challenged here without further inquiry into its 'fairness' or 'reasonableness.'" *Id.* at 24–25.

56. *Id.* at 18.

57. *See id.* The Court noted that the four to one ratio of punitive to compensatory damages "may be close to the line" between constitutional and unconstitutional awards. *Id.* at 23–24.

58. *See id.* at 19.

59. *See id.* The Court found that, although the jury had significant discretion in determining the amount of the award, the instructions confined the award to the well-recognized

The Court also addressed the amount of the award, noting that it was greater than four times the compensatory damages, more than 200 times Haslip's out-of-pocket expenses, and well in excess of the fine that could be imposed under state law for insurance fraud.[60] The Court ruled that, "while the monetary comparisons are wide, . . . [the punitive damages did] not cross the line into an area of constitutional impropriety."[61]

Justice O'Connor dissented. She argued that in recent years there had been an explosion in the frequency and size of awards of punitive damages and that the time had come to reassess the constitutionality of the practice.[62] Due process, she asserted, "demands that we possess some degree of confidence that the procedures employed to deprive persons of life, liberty, and property are capable of producing fair and reasonable results."[63] In Justice

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dual goals of punitive damages, deterrence and retribution, therefore satisfying the procedural requirements of the Due Process Clause. *Id.*

Professors Polinsky and Shavell define general deterrence as "the effect that the prospect of having to pay damages will have on the behavior of similarly situated parties in the future (and not just on the party at hand)." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 877 (1998). Retribution "is the right that the magistrate has to inflict pain on a subject in consequence of his having committed a crime." IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 99 (1965) (discussing the right to punish). Some commentators argue that a retribution-based punitive damage award theory is unsatisfactory in most instances, especially when the defendant is a corporation. *See* Polinsky & Shavell, *supra*, at 906. However, federal and state courts generally accept these dual goals as valid. *See Haslip*, 499 U.S. at 19 (noting that "punitive damages are imposed for the purposes of deterrence and retribution"); *see also* State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1519 (2003) (explaining that punitive damages, unlike compensatory damages, are aimed at deterrence and retribution); Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001) (noting that punitive damages "operate as 'private fines,' intended to punish the defendant and to deter future wrongdoing").

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

61. *Id.* at 23–24. The Court also found Pacific Mutual liable for the punitive damage award via *respondeat superior* under Alabama law and rejected Pacific-Mutual's argument that the Court should raise the burden of persuasion above the currently used "preponderance of the evidence" standard. *Id.* at 18–19, 23.

62. *See id.* at 62. Justice O'Connor further noted:

> Punitive damages are . . . ripe for reevaluation. In the past, such awards 'merited scant attention' because they were 'rarely assessed and likely to be small in amount.' When awarded, they were reserved for the most reprehensible, outrageous or insulting acts. Even then, they came at a time when compensatory damages were not available for pain, humiliation, and other forms of intangible injury. Punitive damages filled this gap. Recent years, however, have witnessed an explosion in the frequency and size of punitive damage awards.

Id. at 61 (citations omitted).

63. *Id.* at 63.

O'Connor's view, Alabama's procedures were insufficient to constrain the discretion of juries in deciding both whether to award punitive damages and the amount of such awards.[64]

Not long thereafter, the Court again considered whether a large punitive damages award violated the Due Process Clause of the Fourteenth Amendment. In *TXO Production Corp. v. Alliance Resources Corp.*,[65] TXO filed suit contesting Alliance's title to an oil and gas interest, and Alliance counterclaimed for slander of title.[66] The jury returned a verdict for Alliance, awarding it $19,000 in compensatory and $10 million in punitive damages.[67] The Supreme Court of Appeals of West Virginia affirmed.[68]

A divided Supreme Court upheld the award. As in *Haslip*, the plurality[69] in *TXO* declined to formulate a mathematical bright line between constitutionally acceptable and unacceptable awards of

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64. *See id.* For a discussion of *Haslip*, see 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, 651 (1995) ("*Haslip* clearly established that there were due process limits to punitive damages" and "established a framework for determining whether an award satisfied the requirements of due process."); Janice Kemp, *The Continuing Appeal of Punitive Damages: An Analysis of Constitutional and Other Challenges to Punitive Damages, Post-*Haslip *and* Moriel, 26 TEX. TECH L. REV. 1, 13 (1995) (noting that "the *Haslip* impact has been more of a whisper than a bang"); Elizabeth H. Sperow, Note, *Constitutional Law:* TXO Production Corporation v. Alliance Resources Corporation *Ruling Leaves Defendants Who Assert Due Process Challenges to Punitive Damage Awards Still Searching for a Compass*, 47 OKLA. L. REV. 335, 355 (1994) (interpreting *Haslip* as "a justification for deferential review rather than any meaningful precedent"). One year after *Haslip*, few state courts changed their laws governing and reviewing punitive damage awards. *See* Sarah Stevens & Harry Lempert, *One Year After* Haslip, *State Systems for Awards Mostly Upheld*, 24 SEC. REG. & L. REP. (BNA) 347 (1993).

65. 509 U.S. 443 (1993) (plurality opinion).

66. *See id.* at 447. TXO wanted to obtain the rights to develop oil and gas on property controlled by Alliance. *Id.* TXO contracted with Alliance to develop these rights, and Alliance agreed to return the consideration paid if title failed. *Id.* at 477–78. Following the execution of a contract between the parties, TXO's attorneys discovered an earlier deed purporting to transfer the mineral rights to a third party. *Id.* at 448. However, further investigation by TXO revealed that the earlier deed only involved coal rights, and did not affect the title given to it by Alliance. *Id.* Despite these findings, TXO purchased a quitclaim deed from the current owner of the coal rights and unsuccessfully tried to persuade the original deed's grantee to execute a false affidavit saying that the earlier deed included the oil and gas rights. *Id.* at 449–50. TXO then contacted Alliance, questioning their title, and tried to renegotiate the contract. *Id.* at 449. TXO filed for a declaratory judgment after negotiations failed. *Id.*

67. *See id.* at 446. The $19,000 compensatory award was based on Alliance's costs of defending TXO's frivolous lawsuit. *Id.* at 451.

68. *See id.* at 452.

69. Justice Stevens wrote for the plurality; he was joined by Chief Justice Rehnquist and Justice Blackmun. Justice Kennedy concurred in part and concurred in the judgment. Justice Scalia and Justice Thomas concurred in the judgment. Justice O'Connor, Justice White and Justice Souter dissented.

punitive damages.[70] It noted, however, that "a general concern of reasonableness . . . properly enters into the constitutional calculus."[71] The plurality determined that, although the punitive damages were 526 times the amount of the compensatory damages awarded to Alliance, the damages did not violate substantive due process.[72] The plurality recognized that due process imposed substantive limits to damage awards, but that jury-awarded punitive damages deserved a strong presumption of validity.[73] The plurality concluded that the punitive damage award was reasonable based on TXO's malicious conduct and the potential for harm had their plan succeeded.[74]

Justice O'Connor again dissented.[75] She argued that the Court should focus on three objective criteria for determining the constitutionality of punitive damages awards: the ratio of punitive damages to compensatory damages, previous similar damage awards rendered in the same and other jurisdictions, and legislatively designated penalties for similar misconduct.[76] Justice O'Connor argued that by assessing a punitive damages award using these factors, a court can generally determine whether an award is constitutional.[77]

One year later, the Supreme Court broke with past practice and reversed a punitive damages award on the ground that the procedures for reviewing that award violated the Due Process Clause. In *Honda Motor Co. v. Oberg*,[78] Oberg sued Honda after his three-

70. *See id.* at 458.

71. *Id.* (quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 2, 18 (1991)).

72. *See TXO*, 509 U.S. at 459, 462.

73. *See id.* at 454–55, 457.

74. *See id.* at 461. TXO additionally argued that its financial resources should not have been included as a factor to determine the amount of the punitive damages award. *Id.* at 463 n.28. The plurality disagreed, noting that using the defendant's wealth to determine the appropriate amount of a punitive damages award is both historically accepted and constitutional under *Haslip*. *Id.*

TXO also argued that the award violated procedural due process because the jury was not adequately instructed, the appellate review was deficient, and TXO had no notice that the award would be so large or that the jury would use TXO's wealth to determine the award. *Id.* at 462–63. The plurality declined to address the first argument because it was not properly preserved. *Id.* at 463. It then dismissed TXO's other due process arguments, ruling that the procedures used satisfied the standards set forth in Haslip. *Id.* at 462–66.

75. Justice O'Connor's dissent was joined by Justice White and, in certain parts, by Justice Souter. *Id.* at 472 (O'Connor, J., dissenting).

76. *See id.* at 481. Justice O'Connor also mentioned these three factors in her opinion in *Browning-Ferris Indus. of Vermont v. Kelco Disposal*, 492 U.S. 257, 297–98 (1989) (O'Connor, J., concurring in part and dissenting in part).

77. *See TXO*, 509 U.S. at 481 (O'Connor, J., dissenting).

78. 512 U.S. 415 (1994).

wheeled all-terrain vehicle flipped, permanently injuring him.[79] The jury awarded Oberg $919,390.30 in compensatory damages and $5 million in punitive damages.[80] The Oregon Court of Appeals and Oregon Supreme Court upheld the award, based on an Oregon statute that prohibited judicial review of the amount of punitive damages awarded by a jury unless there was no evidence to support the verdict.[81]

The United States Supreme Court began its opinion by recognizing that "an award may be so excessive as to violate due process."[82] Nevertheless, it declined to address whether the punitive damages award against Honda was unconstitutionally excessive.[83] Instead, the Court focused on whether Oregon's procedures for reviewing punitive damages awards ensured that they were not imposed by juries in an arbitrary manner.[84] The Court held that Oregon's failure to provide defendants with a meaningful way to obtain postverdict judicial review of the amount of a punitive damages award violated the Due Process Clause, because there was no protection against arbitrary and inaccurate adjudications that deprive a party of liberty or property.[85]

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79. *See id.* at 418. His suit alleged that Honda knew or should have known that the vehicle's three-wheeler design was unreasonably dangerous. *Id.*

80. *See id.* Because Oberg was 20% at fault, the compensatory damages were reduced to $735,512.31. *Id.*

81. *See id.* at 418–19 (quoting Oberg v. Honda Motor Co., 316 Ore. 263, 285 (1992)). Oregon allowed judicial review if a punitive damage award was appealed based on improper jury instructions, trial error, or if there was no evidence to support any punitive damages award. *Oberg*, 512 U.S. at 427.

82. *Id.* at 420.

83. *See id.*

84. *See id.*

85. *See id.* at 420, 432. Justice Ginsburg and Chief Justice Rehnquist dissented. *Id.* at 436–51.

Commentators disagreed on the effect of the *Oberg* decision. *Compare* Kemp, *supra* note 64, at 22–23 (noting that "perhaps *Oberg* will be reviewed narrowly and thus have little practical effect") *with* Mark. A. Klugheit, *"Where the Rubber Meets the Road": Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation*, 52 SYRACUSE L. REV. 803, 820 (2002) (stating that *Oberg* "offered no parameters for determining the legitimacy of particular punitive damages awards"). Many asserted that, after deciding three cases in less than four years, the Supreme Court still had not provided clear guidelines for states to determine if a punitive damage award was constitutional. *See e.g.*, Son B. Nguyen, Note, BMW of North America v. Gore: *Elevating Reasonableness in Punitive Damages to a Doctrine of Substantive Due Process*, 57 MD. L. REV. 251, 260 (1998) (noting that "[b]ecause 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"); E. Benjamin Alliker, *Punitive Damage Awards After* Honda Motor Co. v. Oberg: *Analyzing the Triumverate of History, Due Process and the Jury*, 6 MD. J. CONTEMP. LEGAL ISSUES 377, 397 (1995) (stating that *Oberg* "increased confusion regarding punitive damages reform").

The Court overturned a jury award of punitive damages on the ground that it was grossly excessive and exceeded constitutional limits for the first time in *BMW of North America, Inc., v. Gore*.[86] In that case, Gore alleged that BMW committed fraud under Alabama law by failing to disclose that the new car that he purchased from an authorized dealer had been damaged and repainted prior to its sale.[87] A jury awarded Gore $4,000 in compensatory damages[88] and $4 million in punitive damages, finding that BMW's actions constituted gross, oppressive or malicious fraud.[89] BMW appealed.[90] Although the Alabama Supreme Court rejected BMW's claim that the award was unconstitutionally excessive,[91] it reduced the punitive damages to $2 million, ruling that the jury improperly calculated the award by basing it on BMW's conduct in other states.[92] The United States Supreme Court reversed.[93]

The Court initially noted that a state may impose punitive damages to further its "legitimate interests in punishing unlawful conduct and deterring its repetition."[94] As a result, the Court stated that the inquiry to determine whether a punitive damages award is unconstitutionally excessive begins with identifying the interests that a punitive damages award is designed to serve.[95] The Court determined that while Alabama had a legitimate interest in award-

86. 517 U.S. 559 (1996).

87. *See id.* at 563. The Alabama statute provided: "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." *Id.* at 563 n.3 (quoting ALA. CODE § 6-5-102 (1993)).

The damage to Gore's car only amounted to $601.37, approximately 1.5% of its list price. *BMW*, 517 U.S. at 564. BMW admitted that it did not disclose the second paint job, based on a nationwide policy of suppressing details of repairs when the damage was less than 3% of the car's suggested retail price. *Id.* at 563–64. This practice was permitted by statute in 25 states, but not in Alabama. *Id.* at 565. BMW's non-disclosure policy had never been deemed unlawful before Gore filed suit. *Id.*

88. *See id.* at 564–65. Gore's actual damages were based on the statements of a former BMW dealer, who testified that the second paint job decreased the value of the BMW by 10%. *Id.* at 564.

89. *See id.* at 565.

90. *See id.* BMW asserted that evidence of its lawful conduct in other states wrongfully influenced the award and that punitive damages would serve no deterrent purpose because it had already repealed the non-disclosure policy. *Id.* at 565–66.

91. *See id.* at 566. The Alabama Supreme Court analyzed the award based on the factors set forth in *Haslip*. *Id.* at 567. The Alabama court noted that BMW acted reprehensibly, profited from its fraudulent behavior, was not subject to any criminal sanctions, and that only a large award could properly deter a large company like BMW. *Id.* at 567–68.

92. *See id.* at 567.

93. *See id.* at 585–86.

94. *Id.* at 568.

95. *See id.*

ing punitive damages in this case—preventing manufacturers from engaging in deceptive trade practices—such damages could only be imposed for conduct committed within its jurisdiction.[96] To impose economic sanctions for conduct outside the state, the Court held, would improperly punish BMW for conduct that was possibly lawful in other jurisdictions and that would have no effect on Alabama.[97] The Court thus agreed with the portion of the Alabama Supreme Court's decision that the jury had improperly calculated the amount of punitive damages because it based its award in large part on BMW's conduct outside the state.[98]

The Court next turned to whether the reduced award was unconstitutionally excessive. The Court announced three guideposts to be used in reviewing punitive damages awards: (1) the degree of reprehensibility of the defendant's misconduct, (2) the ratio between compensatory and punitive damages, and (3) the difference between the punitive damages award and the penalties authorized or imposed for similar conduct.[99]

The Court noted that the first guidepost, the degree of reprehensibility, was the most important indicium of reasonableness.[100] Applying this factor, the Court determined that BMW's conduct was not sufficiently reprehensible to justify a $2 million punitive damages award.[101] The Court explained that the harm to Gore was purely economic, as opposed to physical, and that there was no evidence of "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive."[102]

Turning to the second guidepost, the Court stated that the punitive damages must bear a reasonable relationship to the actual harm inflicted on the plaintiff.[103] Consistent with *Haslip* and *TXO*,

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96. *See id.* at 573.

97. *See id.*

98. *See id.* at 574–75. While Alabama was permitted to impose punitive damages to protect its own consumers, the basic tenets of state sovereignty forbid it to punish a corporation for its lawful conduct in other jurisdictions. *Id.* at 571. However, BMW's out-of-state conduct could be used to determine the degree of reprehensibility of its conduct. *Id.* at 573 n.20.

99. *See id.* at 575. Justice O'Connor had advocated similar criteria in *Browning-Ferris Industries of Vermont v. Kelco Disposal*, 492 U.S. 257, 297–98 (1989) (O'Connor, J., concurring in part and dissenting in part). She also advocated comparing punitive damages awards to legislative penalties in *TXO Production Corp v. Alliance Resources Corp.*, 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting).

100. *See BMW*, 517 U.S. at 575.

101. *See id.* at 580.

102. *Id.* at 579. The Court noted that conduct causing economic injury could be extremely reprehensible in some cases, especially when the defendant is financially vulnerable, but that BMW's conduct in this case was not. *Id.* at 579–80.

103. *See id.* at 580.

the Court refused to adopt a simple mathematical formula to determine the constitutionality of a punitive damages award.[104] It stated, however, that the $2 million punitive damages award against BMW, which was 500 times the actual harm to Gore, "surely raise[s] a suspicious judicial eyebrow."[105]

The Court then addressed the third guidepost, which compares the punitive damages award and the sanctions that could be imposed by the state for comparable misconduct.[106] The Court explained that, in applying this factor, a reviewing court should "accord 'substantial deference' to the legislative judgments concerning appropriate sanctions for the conduct at issue."[107] In the instant case, the Court stated, the maximum civil penalty for deceptive trade practices in Alabama was $2,000—far less than the $2 million punitive damages award.[108] The Court also noted 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."[109]

Based on its application of the three guideposts, the Court concluded that the award was so grossly excessive that it exceeded the constitutional limit.[110] It thus reversed the Alabama Supreme Court's judgment and remanded the case for that court to decide

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104. *See id.* at 582.

105. *Id.* at 582–83 (quoting TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 481 (O'Connor, J., dissenting)). The Court distinguished its approval of a 526 to 1 ratio in *TXO* by noting that the potential harm was much greater than the actual harm suffered by Alliance in *TXO*. *BMW*, 517 U.S. at 581. For a further discussion of *TXO*, see *supra* notes 65–77 and accompanying text.

106. *See id.* at 583. It should be noted that the majority of American states allow punitive damages even if the defendant has already been subject to criminal proceedings for the same conduct. *See* 1 KIRCHER & WISEMAN, *supra* note 27, § 3:2 (citing cases). There are two justifications for this rule. The first is that the prohibition on double jeopardy applies only to multiple criminal prosecutions by the same sovereign. *See* E.F. Hutton & Co. v. Anderson, 596 P.2d 413, 415 (Colo. App. 1979); Olson v. Walker, 781 P.2d 1015, 1024 (Ariz. Ct. App. Div. 1989). Civil and criminal penalties serve different purposes: criminal sanctions redress a wrong to the public, whereas punitive damages in a civil action redress a wrong to a private party. *See* Wittman v. Gilson, 520 N.E.2d 514, 515 (N.Y. 1988); Moody v. Payne, 355 So. 2d 1116, 1120 (Ala. 1978). By contrast, in some countries, such as Australia and New Zealand, punitive damages may not be assessed against a defendant if he or she has already been substantially punished in a criminal proceeding. *See* Gray v. Motor Accident Comm'n (1998) 158 A.L.R. 485; Daniels v. Thompson, [1998] 3 N.Z.L.R. 22.

107. *Id.* at 583 (quoting Browning Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)).

108. *See BMW*, 517 U.S. at 584.

109. *Id.*

110. *See id.* at 858–86.

whether to grant BMW a new trial or to independently determine a constitutionally appropriate award.[111]

Four years after *BMW*, the Supreme Court granted certiorari in another punitive damage case, *Cooper Industries v. Leatherman Tool Group, Inc.*[112] There, Leatherman alleged that Cooper had engaged in trade dress infringement, unfair competition, and false advertising.[113] A jury awarded Leatherman $50,000 in compensatory damages and $4.5 million in punitive damages.[114] The district court

111. *See id.* at 586. Justice Breyer, with whom Justices O'Connor and Souter joined, filed a concurring opinion. *Id.* at 586–87. Justice Breyer asserted that Alabama's procedures for awarding and upholding punitive damage awards were vague, providing few constraints, and that the Alabama Supreme Court failed to properly review the award. *Id.* at 588. He then scrutinized the award under the Alabama standards, approved in *Haslip*. *BMW*, 517 U.S. at 589–92. Justice Breyer found that BMW did not have adequate notice of the award and that the award was constitutionally unsound because Alabama's standards were unequally applied. *Id.* at 587. Justice Scalia dissented, rejecting the Court's finding that the Fourteenth Amendment provided substantive restraints on punitive damages awards. *Id.* at 599 (Scalia, J., dissenting). Justice Ginsburg, joined by Chief Justice Rehnquist, also dissented. She argued that the award should be upheld because the Alabama Supreme Court followed procedures approved by the United States Supreme Court in *Haslip*. *Id.* at 607 (Ginsburg, J., dissenting). In addition, she viewed the majority's decision as "unnecessarily and unwisely ventur[ing] into territory traditionally within the State's domain . . . ." *Id.*

Reaction to *BMW* was mixed. Some commentators maintained that *BMW* established a consistent test for determining whether an award was constitutional and ensured fair notice before punitive damage awards could be assessed. *See, e.g.*, Nguyen, *supra* note 85, at 269 (noting that "*BMW* Court developed a coherent framework for determining whether a punitive damages award is within the constitutionally accepted range"). Others argued that the three guide posts analyzed in *BMW*, reprehensibility, ratio and criminal sanctions, are "far too subjective and malleable to be meaningful beyond the facts of *BMW v. Gore*." Neil B. Stekloff, Note and Comment, *Raising Five Eyebrows: Substantive Due Process Review of Punitive Damages Awards After* BMW v. Gore, 29 CONN. L. REV. 1797, 1817 (1997). Another commentator averred that the Court left lower courts with no guidance to decide whether an award was constitutional. *See* Donnie E. Martin, BMW of North America, Inc. v. Gore: *An Explanation of Standards or a Mere Examination of the Constitutional Boundaries of Punitive Damage Awards*, 35 CT. REV. 26, 30 (1998) (noting that "the Court has left lower courts without any guidance with which to deal with future procedural challenges"). Notwithstanding these criticisms, lower courts immediately began applying *BMW*, reducing some damage awards and upholding others. *See, e.g.*, Smith v. Ingersoll-Rand Co., 214 F.3d 1245 (10th Cir. 2000) (upholding award because defendant had fair notice and ratio of punitive to compensatory damages was 1.78 to 1); EEOC v. W&O, Inc., 213 F.3d 600 (11th Cir. 2000) (holding that ratio of 26.3 to 1 satisfied due process); Mathie v. Fries, 121 F.3d 808 (2d Cir. 1997) (upholding $500,000 award because defendant's conduct was reprehensible, 2-1 ratio was not unreasonable, and award was less than comparable criminal penalties); Watson v. Johnson Mobile Homes, 284 F.3d 568 (5th Cir. 2002) (reversing award because Mississippi criminal statutes imposed smaller penalty than 175 times actual damage).

112. 532 U.S. 424 (2001).

113. *See id.* at 427–28.

114. *See id.* at 429. With respect to the punitive damages claim, the jury determined that "Leatherman [had] shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and . . . acted with a conscious indifference to Leatherman's rights." *Id.*

upheld the award and the Ninth Circuit affirmed, ruling *inter alia* that the district court did not abuse its discretion when it determined that the punitive damages award was constitutional under the *BMW* test.[115] The Supreme Court reversed.

The Court initially noted that punitive damages are "'quasi-criminal,' [and] operate as 'private fines' intended to punish the defendant and to deter wrongdoing."[116] It then drew a distinction between a jury's assessment of compensatory and punitive damages: the former is a factual determination while the latter is an expression of moral condemnation. Because of the nature of punitive damages, the Court held that the Constitution imposes limits on their imposition, and that the general criteria to determine whether an award violates the Due Process Clause are set forth in *BMW*.[117] Whether these criterion have been met, the Court ruled, must be determined *de novo* on appeal.[118] Accordingly, the Ninth Circuit erred in applying the less demanding abuse of discretion standard when it reviewed the district court's determination that the award was constitutional.[119]

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115. *See id.* at 429–31.

116. *Id.* at 432.

117. *See id.* at 432–35.

118. *See id.* at 436.

119. *See id.* at 432–43. In addition, the Court also stated that the jury's award of punitive damages was not a "finding of fact" and, as a result, a *de novo* review of that award "does not implicate Seventh Amendment concerns." *Id.* at 437.

The Court also independently reviewed the district court's decision and, after applying the *BMW* factors, speculated that the trial court's decision might not survive *de novo* review upon remand. *Id.* at 441–43. Applying the first factor, the degree of the defendant's misconduct, the Court noted that Cooper's conduct that resulted in the award of punitive damages may in fact have been entirely lawful and hence not reprehensible. The Court next opined that the district court may have improperly applied the second *BMW* factor, the ratio between compensatory and punitive damages. With respect to the third factor, the Court noted:

> [R]espondent argues that Cooper would have been subject to a comparable sanction under Oregon's Unlawful Trade Practices Act. In a suit brought by a State under that Act, a civil penalty of up to $25,000 per violation may be assessed. In respondent's view, each of the thousands of pieces of promotional material containing a picture of PST that Cooper [wrongfully] distributed warranted the maximum fine. Petitioner, on the other hand, argues that its preparation of a single "mock-up" for use in a single distribution would have been viewed as a single violation under the state statute. The Court of Appeals . . . observe[d] that the unfairness in Cooper's use of the picture apparently had nothing to do with misleading customers but was related to its inability to obtain a "mock-up" quickly and cheaply. This observation is more consistent with the single-violation theory than with the statutory violation would have been sanctioned with a multimillion dollar fine.

Id. at 443. While Cooper addressed an important appellate procedural question, it did little to further the due process issues faced by trial courts. *See* Klugheit, *supra* note 85, at 837.

The Supreme Court clarified the *BMW* guideposts last term in *State Farm Automobile Insurance Co. v. Campbell.*[120] The case arose after Curtis Campbell caused a car accident, killing Todd Ospital and permanently disabling Robert Slusher.[121] Ospital's estate and Slusher offered to settle for $50,000, Campbell's policy limit.[122] Although State Farm knew the accident was Campbell's fault, it refused to settle, and the case proceeded to trial.[123] The jury found Campbell entirely at fault and returned a verdict of $185,849.[124] State Farm thereafter refused to pay the difference between the proposed settlement amount and the jury verdict or to post a supersedeas bond so that Campbell could appeal the award.[125] Campbell then retained his own counsel and appealed the verdict.[126] After the appeal was denied, State Farm paid the entire judgment.[127]

The Campbells then filed suit against State Farm, alleging bad faith, fraud, and intentional infliction of emotional distress.[128] During both portions of the bifurcated trial,[129] State Farm attempted unsuccessfully to suppress evidence relating to its conduct outside of Utah.[130] A jury awarded the Campbells $2.5 million in compensatory

120. 123 S. Ct. 1513 (2003).

121. *See id.* Campbell, while driving with his wife, Inez Preece Campbell, tried to pass six vans on a two-lane highway. *Id.* Todd Ospital was traveling in the other lane. Ospital swerved to avoid colliding with Campbell and, as a result, he lost control of his vehicle and struck a car driven by Robert G. Slusher. *Id.* While the Campbells escaped uninjured, Ospital was killed and Slusher was permanently disabled. *Id.*

122. *See id.* at 1518.

123. *See id.* Originally, Campbell claimed that he was not at fault. *Id.* at 1517. However, after interviewing witnesses, State Farm investigators found otherwise and assured the Campbells that State Farm would represent their best interests. *Id.*

124. *See id.*

125. *See id.* Representatives for State Farm even told the Campbells to "put for sale signs on your property to get things moving." *Id.*

126. *See id.* While the appeal was pending, Campbell entered into an agreement with Ospital's estate and Slusher. *Id.* They would not seek satisfaction of their claims against Campbell in exchange for 90% of any verdict Campbell obtained in a bad faith action against State Farm. *Id.*

127. *See id.*

128. *See id.* State Farm's motion for summary judgment was initially granted because they paid the verdict, but was reversed on appeal. *Id.*

129. *See id.* In the first phase of the trial, the jury found that State Farm acted unreasonably by not settling. *Id.* In the second phase, the jury addressed State Farm's liability for fraud and intentional infliction of emotional distress and determined the damage amount. *Id.*

130. *See id.* at 1518–19. The contested evidence included unrelated cases outside of Utah and State Farm's Performance, Planning and Review (PPR) system. *Id.* at 1519. The PPR had been used nationwide by State Farm for 20 years. *Id.* Most of the PPR was unrelated to automobile insurance claims like the Campbells', but did focus on capping payouts to meet corporate fiscal goals. *Id.* at 1518–19.

damages and $145 million in punitive damages.[131] The trial court then reduced the award to $1 million in compensatory damages and $25 million in punitive damages.[132] Both parties appealed to the Utah Supreme Court.[133] After purporting to apply the guidelines set forth in *BMW,* that court reinstated the $145 million punitive damages award.[134] The United States Supreme Court reversed.[135]

The Court began its analysis by stating that grossly excessive punitive damages violate the Due Process Clause because they further no legitimate state purpose and constitute an arbitrary deprivation of property.[136] The Court noted that civil awards of punitive damages should be of particular concern, because, while they serve a similar purpose as criminal fines, the parties subject to awards of punitive damages are not accorded the same protections that defendants enjoy in criminal proceedings.[137] The Court further noted that because juries often have wide discretion in setting the amount of the punitive damages award, there is a potential for juries to use their verdicts to express their bias against the defendants, who are often nonresidents without strong local ties.[138]

The Court subsequently turned to *BMW*'s three guideposts for reviewing punitive damages awards: (1) the degree of reprehensibility of the misconduct, (2) the ratio between actual or potential harm and the punitive damages award, and (3) the difference between the sanctions for comparable conduct and the punitive damages award.[139] It then elaborated on the first guidepost. The Court stated that the defendant's reprehensibility, the most important guidepost, can be determined by looking to the following factors: (i) whether the harm caused was physical or economic, (ii) whether the defendant's conduct evinced an indifference to the safety or health of others, (iii) whether the plaintiff was experiencing financial difficulty or was otherwise vulnerable,

131. *See id.* at 1519.

132. *See id.* One commentator notes that "the jury, faced with reams of evidence of 'bad acts' on the part of State Farm, simply came up with a number that would 'send a message' or make State Farm 'stand accountable for what it's doing across the country.'" Catherine M. Sharkey, *Punitive Damages as Societal Compensatory Damages*, 113 YALE L. J. 347, 459 (2003).

133. *See State Farm*, 123 S. Ct. at 1519.

134. *See id.* The court found that State Farm's conduct was reprehensible, would only be punished once per every 50,000 incidents, and was comparable to the various civil and criminal penalties State Farm could face. *Id.*

135. *See id.* at 1526. Justices Scalia, Ginsburg, and Thomas dissented.

136. *See id.* at 1520.

137. *See id.*

138. *See id.*

139. *See id.* at 1521.

(iv) whether the conduct at issue was an isolated incident or was repeatedly performed by the defendant, and (v) whether the defendant's conduct exhibited malice, trickery or deceit.[140] While the Court found State Farm's conduct blameworthy enough to impose some punitive damages, it stated that a smaller award would serve Utah's dual goals of deterrence and retribution.[141] Here, Utah was punishing State Farm not only for its actions in the state, but also for its nationwide practices, which the Court specifically ruled improper in *BMW*.[142] The jury award was also incorrectly based on evidence of other conduct by State Farm that was objectionable, yet dissimilar.[143] Therefore, because the Campbells did not present evidence of similar conduct, State Farm's reprehensibility could be properly based only on its interaction with the Campbells.[144]

The Court next turned to the second guidepost and stated that courts must ensure that the punitive damages award is both reasonable and proportionate to the amount of harm to the plaintiff and the compensatory damages recovered.[145] As in its previous cases, the Court declined to adopt a bright-line ratio that a punitive damages award cannot exceed.[146] However, this time, the Court came close to such a rule: "few awards exceeding a single-digit ratio between compensatory and punitive damages, to a significant degree, will likely satisfy due process . . . ."[147] The Court further noted that a higher ratio may be constitutional if an especially malevolent act caused only a small amount of harm, and that a lower ratio would be constitutional if the compensatory damages were

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140. *See id.*

141. *See id.* at 1522.

142. *See id.* at 1521 ("This case . . . was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country.").

143. *See id.* at 1523 ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."). The Court noted that recidivist defendants may be more reprehensible than first-time offenders, but that punitive damage awards should be limited to only the conduct charged. *Id.* The Court also found that the award was erroneously based on twenty years of conduct by State Farm. *Id.* at 1524.

144. *See id.*

145. *See id.* at 1524.

146. *See id.* Before *State Farm*, the Court had refuse to draw any line between constitutional and unconstitutional punitive damage awards, instead relying on general considerations of "reasonableness." *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996) ("We have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and* potential damages to the punitive award."); *see also* Pacific Mut. Life Ins. Co v. Haslip, 499 U.S. 1, 18 (1991) ("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.").

147. *State Farm*, 123 S. Ct. at 1524. (citations omitted).

considerable.[148] The Court suggested that if compensatory damages are substantial, then the Constitution may limit recovery to a doubling of those damages.[149] Applying the guidepost, the Court opined that there was a presumption that the $145 million punitive damages award was invalid because of the 145 to 1 ratio, the $1 million compensatory damages award for a year and a half of emotional distress was substantial, and the Campbells had suffered only minor economic injuries.[150] The Court also dismissed as improper the Utah Supreme Court's assertion that State Farm's substantial assets provided a basis for upholding the excessive award.[151] The Court stated that an unconstitutional award is not justified because the defendant is wealthy.[152]

With respect to the third guidepost, the Court noted that in the past it had looked to criminal penalties that could be imposed because they illustrate the seriousness with which the state views the misconduct.[153] The Court cautioned that this guidepost should not be taken to mean that punitive damages could be used as a substitute for criminal punishment, which may be imposed only after proceedings where the defendant is accorded more protections and where there exists a higher standard of proof.[154] The Court

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148. *See id.* This sliding scale was originally suggested in *BMW*:

> [L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

BMW, 517 U.S. at 582.

149. *See State Farm*, 123 S. Ct. at 1524 ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.").

150. *See id.* at 1524–25. In fact, the Court noted that the compensatory award for emotional distress already contained a punitive element. *Id.* at 1525 (citing Restatement (Second) of Torts § 908, cmt. c, at 466 (1977)).

151. *See State Farm*, 123 S. Ct. at 1525.

152. *See id.* at 1525. *But see Haslip*, 499 U.S. at 21–22 (adopting "financial position of the defendant" as factor to determine whether punitive damage award is reasonable); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 463 n.28 (1993) (plurality opinion) (admitting evidence of defendant's wealth based on "well settled law").

153. *State Farm*, 123 S. Ct. at 1526.

154. The Court stated:

> When used to determine the dollar amount of the award, . . . the criminal penalty has less utility. Great care must be taken to avoid the use of the civil process to assess criminal penalties that can be imposed only after heightened protections of a criminal trial have been observed, including, of course, its higher standard of proof.

noted that the comparable penalty under Utah law for State Farm's conduct was a $10,000 fine for fraud.[155] That amount, the Court stated, was dwarfed by the punitive damages award of $145 million.[156]

As in *BMW*, applying the guideposts led the Court to conclude that the $145 million punitive damages award "was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant."[157]

These decisions show that, in a relatively short amount of time, the Court has evolved from a hands-off policy of reviewing punitive damages awards to establishing both procedural and substantive due process requirements for evaluating the constitutionality of punitive damages awards. The latter is particularly significant. Decisions, such as *BMW* and *State Farm*, unambiguously illustrate that the Court is deeply concerned with grossly excessive awards of punitive damages and that it will not hesitate to find that such damages arbitrarily deprive a defendant of property in violation of the Due Process Clause when they are neither reasonable nor proportionate to the wrong committed. Following the Supreme Court's lead, lower courts appear to be scrutinizing punitive damages awards more closely.[158]

Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

Id.

155. *See id.*

156. *See id.* Previously, the Supreme Court of Utah declared that the award was comparable to similar statutory sanctions because State Farm could have lost their business license or been subject to imprisonment. *Id.* The United States Supreme Court dismissed these findings as merely speculation, asserting that they were erroneously based on out-of-state and dissimilar conduct. *Id.*

157. *Id.* Justice Scalia dissented, once again asserting his belief that the Constitution imposed no substantive due process limits on punitive damages. *Id.* at 1526 (Scalia, J., dissenting). Justice Thomas agreed, noting, "I continue to believe that the Constitution does not constrain the size of punitive damage awards." *Id.* (Thomas, J., dissenting) (quoting Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 443 (2001) (Thomas, J., concurring) (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 599 (1996) (Scalia, J., joined by Thomas, J., dissenting))). Justice Ginsburg also dissented. She stressed that, although damage caps may be proper, they should be implemented solely through state action. *See State Farm*, 123 S. Ct. at 1527 (Ginsburg, J., dissenting). Justice Ginsburg additionally asserted that State Farm's out-of-state conduct was sufficiently similar to its interaction with the Campbells to be introduced at trial to demonstrate reprehensibility. *Id.* at 1527–31.

158. *See* Marc Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 WIS. L. REV. 1, 40 (examining studies of punitive damages awards and appellate review of such awards).

IV. INTERPRETING THE THIRD GUIDEPOST: UNCLEAR DIRECTIONS, WRONG TURNS AND CONFUSION ON THE ROAD

Despite the Supreme Court's concern about grossly excessive punitive damages awards and its desire to illuminate a path for lower courts to follow, the Court's guideposts have not produced a workable and predictable test for determining the constitutionality of large punitive awards.[159] The problems with the Court's approach stem from its interpretation of the first two guideposts and its failure to articulate what role the third guidepost should play in determining whether a punitive damages award violates substantive due process.

To date, much of the focus of courts has been on the first two guideposts.[160] Similarly, commentators have centered their attention on these two guideposts.[161] Because much has been written on

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159. This is not the fault of the lower courts, instead, the problems stem from the Supreme Court's failure to articulate a strong test for analyzing punitive damages awards. *See BMW*, 517 U.S. at 605 (Scalia, J., dissenting) ("In truth, the 'guideposts' mark a road to nowhere; they provide no real guidance at all.").

160. For court decisions focusing on the first guidepost, *see e.g.*, Willow Inn, Inc. v. Public Service Mut. Ins. Co., 2003 U.S. Dist. LEXIS 9558 (E.D. Pa. 2003) (upholding punitive damages award because target was financially vulnerable and insurer repeatedly failed to pay plaintiff's claim); Trinity Evangelical Lutheran Church v. Tower Ins. Co., 661 N.W.2d 789 (Wis. 2003) (upholding punitive damages award, stating "repeated disregard for the law and its duty indeed seems egregious and reprehensible"); *In re* John Richards Homes Bldg. Co., 291 B.R. 727 (E.D. Mich. 2003) (upholding punitive damages award because "evidence of Adell's bad faith is overwhelming"); Borne v. Haverhill Golf & Country Club, Inc., 791 N.E.2d 903, 916 (Mass. App. 2003) (upholding punitive damages award because defendant was "cavalier and callously indifferent").

For court decisions focusing on the second guidepost, see, e.g., Shales v. General Chauffeurs, Salesdrivers and Helpers Local Union No. 330, 2203 WL 22038643 (N.D. Ill. Aug. 28, 2003) (upholding punitive damages award where ratio of punitive damages to compensatory damages was less than 2 to 1 without discussion of other guideposts); Hudson v. Cook, 105 S.W.3d 821 (2003) (upholding award of punitive damages primarily because "7:1 ratio in this case is well within the acceptable range"); Wood v. Allstate Ins. Co., 1997 WL 602796 (E.D. Pa. Sept. 19, 1997) (upholding punitive damages award where ratio of punitive damages to compensatory damages was 10 to 1 without discussion of other guideposts).

161. For a critical discussion of the first two guideposts, see Douglas G. Harkin, BMW of North America, Inc. v. Gore: *A Trial Judge's Guide to Jury Instructions and Judicial Review of Punitive Damages Awards*, 60 MONT. L. REV. 367 (1999); Andrea A. Crurcio, *Breaking the Silence: Using A Notification Penalty and Other Notification Measures in Punitive Damages Cases*, 1998 WIS. L. REV. 343 364–65; Jim Davis, Note, BMW v. Gore: *Why States (Not the U.S. Supreme Court) Should Review Substantive Due Process Challenges to Large Punitive Damages Awards*, 46 U. KAN. L. REV. 395, 410–13 (1998); John Zenneth Lagrow, BMW of North America, Inc. v. Gore: *Due Process Protection Against Excessive Punitive Damages Awards*, 32 NEW ENG. L. REV. 157, 195–98 (1997); Stekloff, *supra* note 111, at 1817–23; Recent Development, BMW of North America, Inc. v. Gore: *Sticker Shock in America–From Showroom to Courtroom*, 23 J. CONTEMP. L. 236, 248 (1997); Glen R. Whitehead, BMW of North America v. Gore: *Is the Supreme*

the first two guideposts, we only survey them and offer a close examination of the third.[162]

Although the Court has said that the first guidepost, the degree of reprehensibility of the defendant's conduct, is the "most important," it has proved to be amorphous in application.[163] By nature, determining whether a defendant's conduct justifies a certain amount of punitive damages is a highly subjective assessment that is incapable of careful measurement and will vary based on the circumstances of a particular case.[164] Thus, applying this guidepost may ultimately undermine the purpose of a jury because it may result in the jury's notion of the degree of reprehensibility being substituted by that of the appellate court.[165] These problems have

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Court Initiating Judicial Tort Reform?, 16 Q.L.R. 533, 570–79 (1997); John M. Bodenhausen, Note, BMW of North America v. Gore: *Tort Reform Won the Battle But Did They Lose the War?*, 41 ST. LOUIS U. L.J. 691, 710–18 (1997); Donald C. Massey & Martin A. Stern, *Punitive Damages and the Louisiana Constitution: Don't Leave Home Without It*, 56 LA. L. REV. 743, 750 (1996); George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825 (1996).

162. It should also be noted that there has been much study of the process used to determine punitive damages and whether it results in unpredictable awards. *See* David A. Schkade, *Erratic by Design: A Task Analysis of Punitive Damages Assessment*, 39 HARV. J. ON LEGIS. 121, 163–64 (2002) (stating that the design of the punitive damages decision makes the system prone to erratic awards); Jonathan M Karpoff & John R,. Lott, Jr., *On the Determinants and Importance of Punitive Damages Awards*, 42 J.L. & ECON. 527, 571 (1999) (concluding that punitive damages awards are highly viable and unpredictable), Cass R. Sunstein et al., *Assessing Punitive Damages*, 107 YALE L.J. 2071 (1998) (same); A. Mitchell Polinshy, *Are Punitive Damages Really Insignificant, Predictable, and Rational?*, 26 J. LEGAL. STUD. (1997) (same); *but see* Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEG. STUD. 663 (1997) (concluding punitive damages are as predictable as compensatory damages). *See also* George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 826–30 (1996). The fact that punitive damages awards remain highly unpredictability even after *BMW* supports the need for clear guidelines for review on appeal.

163. *See, e.g.*, Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1337 (11th Cir. 1999) (upholding $4.35 million punitive damages award despite noting that defendant's conduct "was not particularly reprehensible"). *See also* Stekloff, *supra* note 111, at 1818–19 (concluding that "only guideline as to the 'degree of reprehensibility' becomes essentially 'how offended are the reviewing justices?'"); Lagrow, *supra* note 161, at 196–97 (noting that it is unclear "how courts should determine the proper amount of punitive damages to assess when the defendant's conduct falls between the ranges of violence and pure economic harm").

164. *See* Priest, *supra* note 161, at 838 ("Reprehensibility is a very vague concept and hardly susceptible of careful measurement."); Whitehead, *supra* note 161, at 571 (stating that reprehensibility "is a point over which reasonable people in the relevant community may differ"); Stephanie L. Nagel, BMW v. Gore: *The United States Supreme Court Overturns an Award of Punitive Damages as Violative of the Due Process Clause of the Constitution*, 71 TUL L. REV. 1025, 1039 (1997) (stating that "the only predictable cases are those that land at the extremes of the reprehensibility scale").

165. *See* D'Ambrosia, *supra* note 8, at 604 ("An examination of case law illustrates that a trial or appellate court applying this guidepost will substitute a jury's finding with that of a judge."); Stekloff, *supra* note 111, at 1818–19 (stating that degree of reprehensibility turns

led Justices Scalia and Ginsburg to remark that the guidepost is "insusceptible of principled application"[166] and courts simply are "not well equipped" to perform the requisite analysis.[167]

Reliance on the first guidepost has resulted in inconsistent punitive damages awards. For example, in *Johansen v. Combustion Engineering, Inc.*, the Eleventh Circuit upheld a $4.35 million punitive damages award even though that award was almost 100 times the compensatory damages of $47,000, and both the court of appeals and the district court determined that the defendant's conduct "was not highly reprehensible."[168] By contrast, in *Federal Deposit Insurance Corp. v. Hamilton*, the Tenth Circuit, in a case where the compensatory damages amounted to $44,000, reduced an award of punitive damages from $1.2 million to $264,000.[169] Furthermore, in a post-*State Farm* decision, a United States district court upheld a $60 million punitive damages award even though the ratio between punitive damages and compensatory damages was 153 to 1 because it held that a breach of the public trust was particularly reprehensible.[170] By contrast, the Court of Appeals of Texas ruled, in a case where compensatory damages totaled $600,000, that an award of $1.5 million in punitive damages was appropriate for a breach of the public trust.[171]

"on such factors as 'bad faith,' 'intent,' 'malice' and 'fairness'—all classic questions of fact that are properly resolved by a jury").

166. State Farm Mut. Auto. Inc. Co. v. Campbell, 123 S. Ct. 1513, 1526 (2003) (Scalia, J. dissenting); *see* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 604–05 (1996) (Scalia, J. dissenting).

167. *See BMW*, 517 U.S. at 612–13 (1996) (Ginsburg, J. dissenting).

168. *Johansen*, 170 F.3d at 1337.

169. *See* Fed. Deposit Ins. Corp. v. Hamilton, 122 F.3d 854, 861 (10th Cir. 1997). *See also* Schimizzi v. Ill. Farmers Ins. Co., 928 F. Supp. 760 (N.D. Ill. 1996) (reducing punitive damages to approximately 3 times the compensatory damages of $45,000); Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568 (8th Cir. 1997) (reducing punitive damages award with ratio to compensatory damages of 140 to 1 to 10 times the compensatory damages of $35,000). *But see* Baribeau v. Gustafson, No. 04-01-00732-CV, 2003 Tex. App. LEXIS 2106, at *23–*24 (Tex. App. Mar. 12, 2003) (upholding $200,000 punitive damage award even though there was only $500 in compensatory damages because reducing amount of punitive damages would not punish or deter egregious conduct); *see also* Motorola Credit Corp. v. Uzan, (upholding $2.1 billion punitive damages award because of reprehensibility of the defendant's conduct and because amount was "sufficient to achieve the desired deterrent effects").

170. *See* S. Union Co. v. Southwest Gas Corp., 2003 WL 22111144 (D. Ariz. Aug. 1, 2003). *See also* Southeastern Sec. Ins. Co. v. Holte, 473 S.E.2d 256 (Ga. Ct. App. 1996) (upholding punitive damages award in sexual harassment case where the ratio between punitive damages and compensatory damages was 45,000 to 1 because court determined that the conduct was reprehensible).

171. *See* City of Fort Worth v. Zimlich, 975 S.W.2d 399 (Tex. Ct. App. 1998). *See also* Lambert v. Fulton County, 97 F. Supp. 2d 1380(N.D. Ga. 2000) (upholding punitive damages award against public officers who engaged in "deceitful conduct where "ratio of actual damages to the actual punitive damages awarded for each Plaintiff against each Defendant [was]

Because weighing the gravity of the defendant's conduct in relation to the amount of punitive damages is much too discretionary to provide a meaningful and consistent constitutional test, some courts have relied more heavily on the second guidepost, the ratio between actual or potential harm and punitive damages awards.[172] However, here too there are serious shortcomings, as was pointed out by George Priest:

> [T]he mathematical relationship between the compensatory and punitive damages element is an odd judicial principle. Is there a principled reason that a ratio of 1 to 5 or 1 to 4 is *constitutionally* suspect in comparison to a ratio of 1 to 2 or less? Moreover, if the purpose of punitive damages is to deter behavior that is morally reprehensible, the relevance of the compensatory loss is not immediately evident unless an intent to affect the magnitude of loss was a specific element of the reprehensible action. Many totally inadvertent or accidental actions generate huge loss; many repugnant and reprehensible actions generate little harm, measured solely in compensatory lost income, needed expense, and pain and suffering.[173]

4.5:1"); Leather v. Ten Eyck, 97 F. Supp. 2d 482 (S.D.N.Y. 2000) (upholding $200,000 compensatory damages but vacating as excessive $435,000 in punitive damages against sheriff for selective enforcement of drunk driving laws and in retaliation for right to free speech). For a discussion of inconsistent punitive damages awards based on the application of the first guidepost, see Mark A. Klugheit, *"Where the Rubber Meets the Road:" Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation*, 52 SYRACUSE L. REV. 803, 826–33 (2002).

172. *See, e.g.*, Shales v. General Chauffeurs, Salesdrivers and Helpers Local Union No. 330, 2203 WL 22038643 (N.D. Ill. Aug. 28, 2003) (upholding punitive damages award where ratio of punitive damages to compensatory damages was less than 2 to 1 without discussion of other guideposts); Wood v. Allstate Ins. Co., 1997 WL 602796 (E.D. Pa. Sept. 19, 1997) (upholding punitive damages award where ratio of punitive damages to compensatory damages was 10 to 1 without discussion of other guideposts); *see also* Hudson v. Cook, 105 S.W.3d 821 (2003) (upholding award of punitive damages primarily because "7:1 ratio in this case is well within the acceptable range").

173. Priest, *supra* note 161, at 838. In fact, a U.S. district court in Arizona, in a post-*State Farm* decision, refused to apply the second guidepost, stating that the "application of the numerical ratio is most often unfit for the imprecise and limitless characterizations of the public trust." S. Union Co. v. Southwest Gas Corp., 2003 WL 22111144 (D. Ariz. Aug. 1, 2003). *See also* Cooper v. Casey, 97 F.3d 914, 919 (7th Cir. 1996) (Posner, J.) ("[A] mechanical ratio, such as two to one or three to one or four to one or even ten to one, would not make good sense.").

Indeed, one post-*BMW* study found that federal courts generally drew the constitutional line at a 5 to 1 ratio, while state courts tended to uphold awards with ratios as high as 30 to 1.[174]

A further problem with this guidepost is that it can be too easily manipulated through reliance on the imprecise notion of potential harm.[175] For example, the ratio in *TXO* has been described as being both 526 to 1 (when considering the punitive damages award to the actual compensatory damages) and as not more than 10 to 1 (when considering the punitive damages award to the potential compensatory damages if the tortious plan had succeeded).[176] Thus, the reliability and usefulness of the second guidepost is questionable.[177]

Each of the *BMW* guideposts was intended to provide courts with clear criteria for evaluating whether a punitive damages award violates substantive due process. Unfortunately, the Court's decisions appear to have obfuscated the third guidepost, the comparison between the sanctions that could be imposed for the same conduct and the punitive damages award. Because of the Court's lack of clarity with regard to the purpose of the third guidepost in the substantive due process analysis and how it is to be applied, courts sometimes ignore this guidepost and, when addressed, often differ over its application.

The confused state over the third guidepost results in part from the failure of the Court in *BMW* and *State Farm* effectively to integrate and implement reasons for the guidepost. The Court has

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174. *See* Davis, *supra* note 161, at 412; Samuel A. Thumma, *Damages*, NAT'L L.J., June 30, 1997, at B5. *See also* Klugheit, *supra* note 171, at 834 (surveying cases and concluding with respect to application of second guidepost "that there is not so much enduring analytic principles as factors applied idiosyncratically to justify either a jury award or a remittitur level that the court feels is right for a particular case").

175. *See* Richard W. Murphy, *Punitive Damages, Explanatory Verdicts and the Hard Look*, 76 WASH. L. REV. 995 1018 n.85 (2001) (noting that courts have had difficulty in applying second guidepost). *See also BMW*, 517 U.S. 559, 581, 581 n.34 (discussing potential harm); Trinity Evangelical Lutheran Church v. Tower Ins. Co., 661 N.W.2d 789, 810–11 (Wis. 2003) (Sykes, J., dissenting) (criticizing majority for adopting potential harm as measure used in ratio calculation). Some commentators argue that "The imposition of damages equal to harm appropriately multiplied to reflect the probability of escaping liability, achieves proper deterrence." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 896, 906 (1998). *But see* Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 422–23 (1998) (stating that "the limit suggested by Polinsky and Shavell is inappropriate in most punitive damages cases" because it focuses on optimal deterrence instead of complete deterrence).

176. *See TXO*, 509 U.S. at 459–62; *see also* TVT Records v. Island Def Jam Music Group, 2003 WL 22056308 (S.D.N.Y. Sept. 2, 2003) (noting that, in applying second guidepost, plaintiffs and defendants used different methods for determining the applicable ratio).

177. *See also supra* note 161 (listing articles analyzing second guidepost).

articulated three reasons for the third guidepost.[178] First, comparable legislative sanctions should give a defendant "fair notice" of potential punitive damages awards.[179] Second, awards in comparable cases indicate that a particular practice might result in a large award.[180] Third, comparable sanctions are persuasive evidence of the legislature's concern with deterring similar conduct.[181] However, without a clear and coherent vision from the Supreme Court, the lower courts have not fashioned a meaningful way to apply the third guidepost. As illustrated below, a number of lower courts have simply stated that an award of punitive damages does not run afoul of the third guidepost if there exists a state law that gives the defendant notice that the conduct at issue may give rise to some form of criminal or civil liability.[182]

Furthermore, the *State Farm* opinion itself appears to undercut the perceived value of the third guidepost in the substantive due process analysis. Writing for the Court, Justice Kennedy noted that the "existence of a criminal penalty does have bearing on the seriousness with which the state views the wrongful action," but that comparing the punitive damages award to "criminal penalties has less utility" in determining whether the amount of punitive damages is so excessive that it violates the Constitution.[183]

Thus, the Court has also obfuscated how the third guidepost is to be applied. Instead of articulating a straightforward approach for applying the third guidepost,[184] the *State Farm* decision confuses how the criminal sanctions for comparable conduct can be used in evaluating whether a punitive damages award comports with substantive due process. In elaborating on the third guidepost, Justice Kennedy wrote:

> Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed,

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178. *See BMW*, 517 U.S. at 584.

179. *See id.* ("None of these statutes would provide an out-of-state distributor with fair notice that the first violation—or indeed, the first 14 violations—of its provisions might subject an offender to a multimillion dollar penalty.").

180. *See id.* (stating that "there does not appear to have been any judicial decision in Alabama or elsewhere indicating that application of that policy might give rise to such severe punishment").

181. *See id.*

182. *See infra* notes 188–91 and accompanying text.

183. *State Farm*, 123 S. Ct. at 1526.

184. One commentator states that the third guidepost is "sufficiently malleable that the Court essentially is left to its discretion." *See* Stekloff, *supra* note 111, at 1822.

> including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.[185]

This cryptic passage is amenable to multiple interpretations. Perhaps Justice Kennedy was trying to explain that judges and juries should not view punitive damages as a substitute for criminal punishment. However, this passage also could be interpreted to mean that the amount a defendant may be liable for in a criminal proceeding for comparable conduct should not be compared with the award of punitive damages to determine whether the latter is excessive, because the civil suit lacks the protections afforded in criminal prosecutions. Indeed, one commentator has already asserted that this is precisely what Justice Kennedy meant.[186] If that is true, the third guidepost is essentially meaningless as far as substantive due process is concerned.

Not surprisingly, both state and federal courts have grappled with applying the third guidepost with little uniform success. While some courts have attempted to include an analysis of the third guidepost in their decisions, other courts have disregarded the third guidepost altogether.[187] For example, in *Borne v. Haverhill Golf & Country Club, Inc.*,[188] the Massachusetts Appeals Court reviewed a $1.4 million punitive damages award under the first and second *BMW* guideposts, completely ignoring the third guidepost.[189] Similar to Justice Kennedy's statement in *State Farm*, one court recently

185. *State Farm*, 123 S. Ct. at 1526.

186. *See* Andreason, *supra* note 14, at 2692 (stating that "the *Campbell* court drastically curtailed consideration of potential criminal penalties on the ground that cases in which punitive damages can be awarded lack the protections that attach to criminal prosecutions"); *see also* David E. Hogg, Commentary, *Alabama Adopts De Novo Review for Punitive Damages Appeals: Another Landmark Decision or Much Ado About Nothing?*, 54 ALA. L. REV. 223, 232 n.77 (2002) (stating that the third guidepost "is the least-used and most difficult to apply of the guideposts" and "quite often [is] dismissed out of hand").

187. *See* Diamond Woodworks, Inc. v. Argonaut Ins. Co., 2003 Cal. App. LEXIS 872 (2003) (ignoring comparable sanctions after finding ratio violated due process); McClain v. Metabolife Int'l, Inc., 259 F. Supp. 2d 1225 (N.D. Ala. 2003) (ignoring sanctions); Wal-Mart Stores, Inc. v. Goodman, 789 So. 2d 166, 183 (Ala. 2000) (noting that "[w]e have no basis for considering this factor relevant").

188. 791 N.E.2d 903 (Mass. App. 2003).

189. *See id.* at 928–31. The court mentioned all three *BMW* guideposts, directly quoting from *State Farm*, but only analyzed the defendant's reprehensibility and the ratio between the punitive damages award and the compensatory award. *Id.*

commented that "the comparable sanctions factor is the least important indicium."[190]

As noted, a number of courts have ruled that the inquiry under the third guidepost is limited to determining whether the defendant had reasonable notice that his or her conduct may result in criminal or civil liability.[191] In *Zimmerman v. Direct Federal Credit Union*, the First Circuit stated that "a reviewing court should search for comparisons solely to determine whether a particular defendant was given fair notice as to its potential liability for particular misconduct, not to determine an acceptable range into which an award might fall."[192] Applying this test, courts have upheld or reduced awards based on whether the legislative penalties provided the defendant with fair notice of the punitive damages award.[193] Although some courts have undertaken a direct comparison between comparable sanctions and the punitive damages award, many of these courts often base their ultimate decision on whether the defendant had fair notice.[194]

Courts have also struggled to determine what constitutes comparable sanctions. Some courts focus on legislative penalties while

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190. *See* Aken v. Plains Elec. Generation & Transmission Coop., 49 P.3d 662, 672 (N.M. 2002).

191. *See* Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc., 181 F.3d 446, 468 (3d Cir. 1999) (noting that "fundamental question" when reviewing punitive damages for excessiveness is whether defendant had "reasonable notice that its [conduct] could result in such a large punitive award" (quoting Cont'l Trend Res. v. Oxy USA, 101 F.3d 634, 641 (10th Cir. 1996)); Zimmerman v. Direct Fed. Credit Union, 262 F.3d 70, 83 (1st Cir. 2001) (stating that third guidepost should be used "to determine whether a particular defendant was given fair notice"); *see also* Lee v. Edwards, 101 F.3d 805 (2d Cir. 1996) (stating that "[w]hen penalties for comparable misconduct are much slighter than a punitive damages award, it may be said that the tortfeasor lacked 'fair notice' that the wrongful conduct could entail a substantial punitive award").

192. *See Zimmerman*, 262 F.3d at 83. The court in *Zimmerman* eventually upheld the award, finding that "the appellants had sufficient notice." *Id.*

193. *See* Waits v. City of Chicago, 2003 U.S. Dist. LEXIS 9448 (N.D. Ill. 2003) (reducing $2 million punitive damages award to $45,000). The district court further notes, "There is simply no way defendants could have fathomed that their conduct would subject them to two-million dollars in penalties. . . . Because defendants did not have fair notice of the severity of the jury's punitive damage verdict, the award must be reduced." *Id.* at *17–18. *See also* Watson v. Johnson Mobile Homes, 284 F.3d 568, 574 (5th Cir. 2002) (concluding that "Mississippi's statute could not have made Defendant aware that their acts . . . would result in a penalty amounting to 175 times actual damages"); Time Warner Entm't Co. v. Six Flags Over Georgia, L.L.C., 563 S.E.2d 178, 186 (Ga. Ct. App. 2002) (upholding award because "appellants received fair notice not only of the kind of conduct that would subject them to punishment, but also of the severity of the penalty that might be imposed").

194. *See* Romero v. U-Haul Int'l, 233 F.3d 655, 674 (1st Cir. 2000) (stating that "a defendant, through the statutory scheme of Title VII and the punitive damages cap figures set out therein, has full notice of the potential liability to which it was subject").

others consider comparable cases.[195] For example, in *Watson v. Johnston Mobile Homes*,[196] the Fifth Circuit compared the defendants' conduct to Mississippi's Consumer Protection Act[197] and found that the punitive damages award dwarfed the comparable penalty for first-time offenders.[198] The court noted that "[o]f particular relevance here are state statutes punishing perpetrators for conduct similar to the Defendants' . . . ."[199] Other courts have evaluated the size of the punitive damages award in light of awards in what they considered to be comparable cases.[200] For example, in *Baker v. National State Bank*,[201] a New Jersey court upheld a $1.8 million punitive damages award in an employment discrimination case.[202] The court found that the award satisfied constitutional review under the third guidepost because "cases indicate[d] to the Bank that it could be liable for punitive damages in the neighborhood of a million dollars and at a multiple of close to four times compensatory damages."[203]

Moreover, some courts have purported to apply the third guidepost, yet have blithely disregarded the legislative sanction, because they viewed the comparable penalty as being too small.[204] In *Jacque v. Steenburg Homes*, the jury awarded $1 in compensatory and $100,000 in punitive damages for the defendant's intentional tres-

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195. *See, e.g., Zimmerman*, 262 F.3d at 83 ("Decided cases are relevant, but positive law—statutes and regulations—are even more critical.").

196. 284 F.3d 568 (5th Cir. 2002).

197. MISS. CODE ANN. § 75-24-5(2)(a)–(l) (1972 & Supp. 2001).

198. *See Watson*, 284 U.S. at 573–74.

199. *Id.* at 573. The court compared the defendants' conduct to consumer protection statutes in Alabama and Mississippi, then reduced the award from $700,000 to $150,000. *Id.* at 574.

200. *See* Tillis Trucking Co. v. Moses, 748 So. 2d 874, 890 (Ala. 1999) (ordering remittitur on $7 million award because it was higher than other awards upheld on appeal); Wightman v. Consolidate Rail Corp., 715 N.E.2d 546, 555 (Ohio 1999) ("The far more relevant civil 'penalty' in cases like these is the potential civil damage award in a lawsuit."). Generally, if courts conduct a comparison of cases, they do so only after finding no comparable legislative sanctions are available. *See* Cont'l Trend Res., Inc. v. OXY USA Inc., 101 F.3d 634, 641 (10th Cir. 1996) (comparing punitive damage award to comparable cases because "OXY's misconduct involved a violation of common law tort duties that do not lend themselves to a comparison with statutory penalties").

201. 810 A.2d 1158 (N.J. Super. Ct. App. Div. 2002).

202. *See id.* at 1170.

203. *Id.*

204. *See* Daka v. Breiner, 711 A.2d 86, 102 (D.C. 1998) ("Because of the need to deter future misconduct, . . . the additional $100,000 is not so excessive to render the jury's award unconstitutional . . . ."); Jacque v. Steenburg, 563 N.W.2d 154, 165 (Wis. 1997) (stating that "the 'conduct at issue' here was scarcely that contemplated by the legislative action").

pass.[205] Pursuant to a separate criminal case, a judge fined the defendant $30.[206] The defendant appealed the punitive damages award to the Wisconsin Supreme Court. That court noted that maximum legislative penalty for the conduct at issue was $1,000.[207] However, the court found the defendant's conduct to be far more deliberate and egregious than that generally contemplated by the legislature.[208] As a result, it upheld the $100,000 punitive damages award, noting that the statute had failed to deter the defendant from engaging in the misconduct and that without that level of punitive damages, the defendant had "a financial incentive to trespass again."[209] Of course, anyone who commits a crime, by definition, has not been deterred by the applicable criminal statute. Thus, such reasoning renders the third guidepost illusory. Furthermore, it seems that such an approach usurps the legislature's considered decision and is contrary to the United States Supreme Court's direction that courts should "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue."[210]

Finally, in *Mathias v. Accor Economy Lodging, Inc.*,[211] the jury awarded each plaintiff $5,000 in compensatory damages and $186,000 in punitive damages because the motel allowed guests to be assailed by bedbugs and did not warn them of their very likely attacks. The Seventh Circuit reviewed that punitive damages award in light of the Court's decision in *State Farm* and affirmed. Although the parties apparently did not address the third guidepost below, the court of appeals concluded that this failing did not nullify the punitive damages award.[212] Highlighting the disrespect often accorded the third guidepost, the court, speaking through

205. *Jacque*, 563 N.W.2d at 158. In *Jacque*, Steenberg Homes needed to transport a mobile home to a neighbor of the Jaques. *Id.* at 156–57. The easiest route was across the Jacques' land, but even after multiple requests, the Jacques would not allow Steenberg to travel there. *Id.* at 157. The only other route was covered in seven feet of snow and contained a sharp turn. *Id.* Despite the Jacques' refusal, Steenberg delivered the mobile home across their property. *Id.* After the jury trial, Steenberg contested the punitive damages award as excessive and unconstitutional, but the Wisconsin Supreme Court affirmed. *Id.* at 163.

206. *Id.* at 157.

207. *See id.* at 165. Trespass to land under the Wisconsin Criminal Code is a Class B forfeiture. *See* WIS. STAT. § 943.13 (2002).

208. *See Jacque*, 563 N.W.2d at 165.

209. *Id.*

210. *BMW*, 517 U.S. at 583 (quoting Browning Ferris Indus. of Vt., Inc. v. Kelco Disposal, 492 U.S. 257, 301 (1989) (O'Connor, J. concurring in part and dissenting in part)).

211. 347 F.3d 672 (7th Cir. 2003) (Posner, J.).

212. *Id.* at 678.

Judge Posner, noted that comparing criminal and regulatory penalties to the punitive damages award was simply an "inquiry *recommended* by the Supreme Court."[213] The Seventh Circuit took judicial notice of the analogous penalties and found that an Illinois misdemeanor was comparable. That misdemeanor carried a maximum punishment of one year in prison, a fine of $2,500 or both.[214] The court recognized that "a corporation cannot be sent to prison, and $2,500 is obviously much less than the $186,000 warded to each plaintiff in this case as punitive damages."[215] Yet the court affirmed the award.

In upholding the award, the Seventh Circuit relied, in large part, on the fact that a municipal ordinance allows for the revocation of a hotel's business license if conditions are unsanitary. As noted *infra*,[216] this justification is unsatisfying, will almost always validate a punitive damages award, and thus will often make the third guidepost effectively pointless. The Seventh Circuit's other technique for evading a meaningful application of the third guidepost may be even more troubling. Although the punitive damages award is dramatically more than the potential maximum fine, the court stated that "this is just the beginning. Other guests of the hotel were endangered besides these two plaintiffs."[217] In other words, the court attempted to satisfy the third guidepost by inflating the comparable sanction to meet some *potential* number of violations/victims. This approach is not only counter-factual (no additional victims appear to have brought suit), but it would seem to allow all of those additional victims (assuming they can marshal the necessary proof) to be entitled to $186,000 in punitive damages as well. This is yet another example of how ignoring or manipulating the third guidepost can lead to significant problems. In fact, one is left with the impression that nearly any award would satisfy this court's vision of the third guidepost.

Because of the wildly divergent approaches taken in response to the Supreme Court's decisions in *BMW* and *State Farm*, courts need more guidance. At this point, very few courts can undertake a successful review of the constitutionality of a punitive damages award. Indeed, most courts do little more than note the existence of the third guidepost, as they are unable to use it effectively to evaluate punitive damages awards. Perhaps Judge Acker, in his opinion in

213. *Id.* (emphasis added).
214. *Id.*
215. *Id.*
216. *See* text at nn. 222–231.
217. *Id.*

McClain v. Metabolife International, Inc., has made the most accurate statements regarding the current state of constitutional review of punitive damages after *BMW* and *State Farm*: "The court hoped that *State Farm* would provide help for ruling on Metabolife's claim that the punitive damages imposed in these cases are excessive. Now the court is not sure that the wait was worth it."[218]

V. A NEW GUIDANCE SYSTEM FOR THE ROAD AHEAD

The demonstrated problems with the third guidepost are both pervasive and severe. The fog and confusion surrounding this guidepost, coupled with the weaknesses of other two, reinforce the view that the Supreme Court's current attempt to regulate punitive damages truly is a "road to nowhere."[219] Yet it need not be that way. The third guidepost can be an integral part of a principled and meaningful guidance system for evaluating punitive damages awards.[220] We propose a new approach to the third guidepost that will allow greater oversight of punitive damages while increasing proportionality and retaining flexibility.[221] At the same time, it will have the salutary effect of encouraging the states to become more involved with punitive damages awards in a sophisticated and substantial way.

The third guidepost should play a greater role in the analysis of whether a punitive damages award violates substantive due process.

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218. McClain v. Metabolife Int'l, Inc., 259 F. Supp. 2d 1225, 1228–29 (N.D. Ala. 2003).

219. *BMW*, 517 U.S. at 605 (Scalia, J., dissenting). This is particularly problematic because, as noted earlier, punitive damages awards are erratic and judicial oversight is important. *See supra* note 161. In fact, one commentator noted that "seventy-five to eighty percent of punitive damages awards are eliminated by judges." *Symposium: Reforming Punitive Damages*, 38 HARV. J. ON LEGIS. 469, 484 (2001) (remarks of Carl Bogus).

220. *Cf.* Priest, *supra* note 161, at 838 ("Perhaps the most helpful metric is the relationship to statutory criminal penalties for comparable offenses.").

221. If were we writing on a clean slate, we might consider other approaches. For example, we might consider abandoning the reliance on the second guidepost of a ratio because it seems to improperly focus the inquiry on the injuries of the plaintiff-victim as opposed to the intent of and retribution against the defendant-offender. Indeed, the Supreme Court of Canada recently rejected the use of a ratio between compensatory damages and punitive damages as a factor to determine whether a punitive damages award is excessive for that reason. *See* Whiten v. Pilot Ins. Co., [2002] S.C.R. 595, 656 (stating, "that relationship . . . is not even the most relevant because it puts the focus on the plaintiff's loss rather than where it should be, on the defendant's misconduct"). Furthermore, we question whether it is a worthwhile use of the limited resources of the federal judiciary to return to the "*Lochneresque*" economic substantive due process analysis. *See* Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917, 968 (1999).

Our proposal for a new understanding of the third guidepost reflects the reality of the *BMW/State Farm* framework and will markedly improve its application. We propose that the third guidepost focus on comparable criminal (or civil) monetary fines authorized by statute. These fines should be viewed as a "presumptive limit" on the punitive damages award.

This new "presumptive limit" approach to the third guidepost would work as follows. In evaluating the punitive damages award, the court would look to comparable criminal or civil monetary fines that are statutorily authorized. The highest comparable fine would be the presumptive limit on the punitive damages. If the punitive damages award provided by the jury was *smaller* than this presumptive limit, the third guidepost would present no bar to the imposition of the award. Of course, the punitive damages award must still survive the scrutiny of the first two guideposts before it would pass constitutional muster.[222] Nevertheless, passing the third guidepost would often be suggestive of a constitutionally permissible punitive damages award.

If, however, the punitive damages award is *larger* than the presumptive limit, the third guidepost would not be satisfied. Failing the third guidepost would be a strong indication, but not a guarantee, that the punitive damages award is unconstitutionally excessive. If the punitive damages award fails the third guidepost and has an unacceptably large ratio, the award would be unconstitutional in virtually all cases. If, however, the punitive damages award fails the third guidepost but has an acceptable ratio pursuant to the second guidepost, the court would concentrate on the first guidepost's inquiry into reprehensibility. In setting the statutory maximum fine that fixes the presumptive limit, the relevant legislature has spoken to the misconduct's reprehensibility already.[223] Thus, it will be difficult, but not impossible, to conclude that the misconduct is so reprehensible as to justify a punitive damages award greater than the presumptive limit set by the legislature. Indeed, we believe that this conclusion is appropriate only

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222. As noted, there are weaknesses in the first two guideposts, *see supra* text at nn. 160–177, but the Supreme Court is unlikely to abandon them. Furthermore, these first two guideposts can play a more meaningful role once the third guidepost is reformed as we propose. Given the concrete structure afforded by our "presumptive limit" approach to the third guidepost, the first two guideposts are substantially cabined. As such, their previous weakness of unrestrained malleability becomes a benefit of controlled flexibility. Thus, our proposal sets forth a realistic path for improving the Supreme Court's approach to evaluating punitive damages awards.

223. *See State Farm*, 123 S. Ct. at 1526 ("The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action.").

in cases of overwhelming reprehensibility in which the conduct falls outside of all bounds of decency.

We will demonstrate that this new presumptive limit approach to the third guidepost is largely consistent with (yet more easily applicable than) the Supreme Court's general views on the subject, satisfies the due process need for notice, is respectful of federalism concerns, and allows for greater proportionality and nuance while evaluating punitive damages awards.

Our conception of the third guidepost is largely consistent with the views of Justice O'Connor, on whose opinions in *Browning-Ferris* and *TXO* the guideposts are based.[224] In her opinion, she stressed, "the reviewing court must accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue."[225] She also noted, "because punitive damages are penal in nature, the court should compare the civil *and* criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil *and* criminal penalties imposed by different jurisdictions for the same and similar conduct."[226] Justice O'Connor's approach to this comparison is extraordinarily broad. She noted that "[i]n identifying the relevant criminal penalties, the court should consider not only the possible monetary sanctions, but also any possible prison term."[227] She expanded upon these assertions in *TXO*, noting, "jury awards in similar cases and the civil and penalties created by the legislature for like conduct can give us some idea of the limits of retribution."[228]

Justice O'Connor's statements provide a good foundation for the proper interpretation of the third guidepost. However, her views miss the mark concerning the role of comparable non-fine sanctions, the importance of penalties imposed instead of penalties authorized, and the value of practices in different jurisdictions.

Comparing punitive damages awards to non-monetary criminal punishments is fatally flawed. It would effectively eviscerate the third guidepost because such punishments are not meaningfully comparable to monetary fines. The most common incomparable punishment is imprisonment. Incarceration simply does not translate in a helpful way to a monetary punitive damages award,

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224. *See Browning-Ferris*, 492 U.S. at 300–01 (O'Connor, J., concurring in part and dissenting in part).

225. *Id.* at 301.

226. *Id.* (emphasis in original).

227. *Id.* at 300.

228. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 483 (1993) (O'Connor, J., dissenting).

particularly in the United States.[229] Any nontrivial potential term of imprisonment would likely justify almost any size punitive damages awards.[230] For example, courts have justified punitive damages awards of $500,000 based on a possible twenty-five year prison term,[231] $1.5 million based on a ten to forty year prison term,[232] and $17.9 million based on a maximum ten years in prison.[233] Similarly, the potential loss of a business license, if seriously considered, will dwarf virtually all punitive damages.[234] This is the "nuclear option," one which would completely destroy a defendant's business. A mere punitive damages award pales in comparison.[235] Our ap-

229. Fines are not used much in the American criminal system, but are the primary means of sanction in the civil justice system. Part of the reason for this is a distinctly American belief that nothing short of prison is proper punishment. *See* Dan M. Kahan, *Punishment Incommensurability*, 1 BUFF. CRIM. L. REV. 691, 691 (1998) (stating that "the United States relies excessively on imprisonment"); Hannah T.S. Long, *The "Inequability" of Incarceration*, 31 COLUM. J.L. & SOC. PROBS. 321, 324–35 (1998) (stating that "incarceration remains by far our most common punishment for serious offenses"); Steven A. Hatfield, *Criminal Punishment in America: From the Colonial to the Modern Era*, 1 USAFA J. LEG. STUD. 139, 152 (1990) (describing prison as the "primary means of criminal punishment in the United States"). The United States, unlike western European countries, relies on incarceration almost exclusively. *See* Michael Tonry, *Parochialism in U.S. Sentencing Policy*, 45 CRIME & DELINQUENCY 48, 48–49 (1999). *See also* Dennis M. Ryan, Note, *Criminal Fines: A Sentencing Alternative to Short-Term Incarceration*, 68 IOWA L. REV. 1285, 1286 (1983) ("The United States incarcerates a greater percentage of its population than any other western democracy."). Particularly over the past few decades, Western European countries have implemented fines and community service orders as alternatives to United States-style mandatory sentences and imprisonment. *See* Tonry, *supra*, at 48–49.

230. *See* Aken v. Plains Elec. Generation & Transmission Coop., Inc., 49 P.3d 662, 672 (N.M. 2002) ("The possibility of a jail sentence justifies a substantial punitive damages award.").

231. *See* Mathie v. Fries, 121 F.3d 808 (2d Cir. 1997) (comparing conviction for first degree sodomy with $500,000 punitive damages award).

232. Edwards v. Stills, 984 S.W.2d 366 (Ark. 1998) (comparing conviction for kidnapping with $1.5 million punitive damages award).

233. Eden Elec., Ltd. v. Amana Co., 258 F. Supp. 2d 958, 972 (N.D. Iowa 2003) (comparing legislative sanctions for fraud with punitive damages award). The court in *Eden* eventually reduced the $17.9 million punitive damages award because it was not constitutional under the first two guideposts. *Id.*

234. In *Dardinger v. Anthem Blue Cross & Blue Shield*, the Ohio Supreme Court noted, "The loss of Anthem's license to engage in the business of insurance in Ohio would certainly be a catastrophic punishment far outstripping the award in this case." 781 N.E.2d 121, 143 (Ohio 2002).

235. The only award that would come close is a punitive damages award that itself would bankrupt the company, but such an award would likely be invalid. *See e.g.*, City Stores Co. v. Mazzaferro, 342 So. 2d 827, 828 (Fla. Dist. Ct. App. 1977) (stating that punitive damages should "hurt, not bankrupt," defendant); Hazelwood v. Illinois Central Gulf R.R., 450 N.E.2d 1199, 1207 (Ill. 1983) ("Punitive damages should be large enough to provide retribution and deterrence but should not be so large that the award destroys the defendant."); Darcars Motors of Silver Spring, Inc. v. Borzym, 818 A.2d 1159, 1181 (Md. Ct. Spec. App. 2003) ("The purpose of punitive damages is not to bankrupt or impoverish a defendant . . . ."); *see also* 1 KIRCHER & WISEMAN, *supra* note 27, § 18:08 (noting that while punitive

proach, focusing on criminal (or civil) fines rather than imprisonment or other non-monetary sanctions, would further both practical concerns and law reform goals. Some commentators have argued that imprisonment is generally not necessary, and rarely available, for those defendants most likely to be assessed substantial punitive damages awards.[236] Furthermore, as discussed below, our approach would also encourage legislatures to take criminal fines more seriously.

Justice O'Connor's interest in punishments imposed instead of punishments authorized neglects the importance of the legislative judgments she otherwise champions. It is the view of the legislature that is entitled to "substantial deference,"[237] not that of sentencing judges or juries in other cases. The idea here is to provide a framework for punitive damages that is more objective and less dependent upon the vagaries and unpredictabilities of particular cases. Were the result otherwise, one aberrational, yet unchallenged (perhaps settled out-of-court), award or sentence could skew future punitive damages awards for years.

Furthermore, Justice O'Connor and the *BMW* Court have been internally inconsistent by instructing courts to compare punitive damages awards to comparable sanctions that could be imposed in other jurisdictions.[238] This view is in tension with the Court's teaching that out of state conduct cannot form the basis for a punitive damages award.[239] Indeed, looking to other jurisdictions minimizes the value of state sovereignty. One state's choice to authorize a sanction for a specific action should not justify an award in a different state. Moreover, using awards in other states does not satisfy the Court's concern with fair notice.[240] Defendants acting in one state

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damages should punish and deter, they "should not be so burdensome as to ruin the defendant").

236. *See* Jeffery W. Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241, 258 n.127 (1985) (stating that "incarceration normally is not needed in the punitive damages defendant's case since he is not the type of person that needs to be incapacitated until he can safely return to society").

237. Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part); *see also State Farm*, 123 S. Ct. at 1526 (comparing punitive damages award to "relevant civil sanction").

238. *See BMW*, 517 U.S. at 584 (comparing punitive damages award to maximum civil penalty in Alabama and other states); *Browning-Ferris*, 492 U.S. at 301 (noting that courts should compare punitive damages awards to legislative penalties "imposed by different jurisdictions for the same or similar conduct").

239. *See* 517 U.S. at 572.

240. *See supra*, notes 188–91. Also, the Court in *State Farm* noted that juries cannot use out of state conduct to justify the amount of a punitive damages award. 123 S. Ct. at 1522 ("Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and . . . would need to apply the laws of their relevant jurisdiction.").

are not put on notice that they can be awarded punitive damages according to the law of another state.

Despite the differences in application, our new approach to the third guidepost draws considerable strength from Justice O'Connor's views. For example, her decision to center the inquiry on comparable criminal (or civil) punishments is logical and appropriate. The Supreme Court has clearly stated that punitive damages awards, while arguably lacking the stigma of a criminal conviction, do constitute punishment.[241] Their role as punishment distinguishes them from compensatory awards, which are intended to indemnify the plaintiff.[242] "[T]hey are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."[243] Punitive damages have been described as "quasi-criminal,"[244] and as "punishment."[245] Multiple times the Court has noted that the primary justifications for imposing any punitive damages award are retribution and deterrence, the same theories used to support criminal punishments.[246] Also, while the stigma of a punitive damages award might not equal that accompanying a criminal conviction, "there is a stigma attached that does not accompany a

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If juries cannot use conduct in other states to justify the amount, reviewing courts should not care about how other states punish.

241. *Cf. Browning-Ferris*, 492 U.S. at 275 (holding that punitive damages awards are not governed by the Eighth Amendment's Excessive Fines provision). Since *Browning-Ferris*, however, some courts have altered their punitive damages laws, redirecting a portion of the award away from the plaintiff to benefit the state. *See, e.g.*, Dardinger v. Anthem Blue Cross & Blue Shield, 781 N.E.2d 121, 146 (Ohio 2002) (dividing up the $30 million punitive damages award so that $10 million went to plaintiff, then allotting portion for his litigation and attorney's fees, and allocating remaining amount to "a place that will achieve a societal good . . . a state institution"). The government's receipt of these funds may invoke review under the Eighth Amendment. *See* Janet v. Hallahan, *Social Interests Versus Plaintiffs' Rights: The Constitutional Battle over Statutory Limitations on Punitive Damages*, 26 LOY. U. CHI. L.J. 405, 417–18 (1995) (discussing states' restriction of punitive damages awards).

242. *See* David L. Walther & Thomas A. Plein, *Punitive Damages: A Critical Analysis:* Kink v. Combs, 49 MARQ. L. REV. 369 (1965) ("The objective of the civil law . . . has been indemnification of the complainant.").

243. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). *See also* Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 676 (7th Cir. 2003) (Posner, J.) ("The term 'punitive damages' implies punishment . . . .").

244. Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001) (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting)).

245. *Haslip*, 499 U.S. at 47 (O'Connor, J., dissenting).

246. *See State Farm*, 123 S. Ct. at 1519 ("[P]unitive damages serve a broader function; they are aimed at deterrence and retribution . . . ."); *BMW*, 517 U.S. at 568 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); *see also* Kent Greenawalt, *Punishment*, *in* 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1284 (2002) ("The dominant approaches to [criminal] justification are retributive and utilitarian.").

purely compensatory award."[247] Therefore, our approach to the third guidepost of treating statutory maximum fines as a "presumptive limit" is wholly consistent with the Court's long-standing views about the general nature of punitive damages.

Finally, this approach to the third guidepost is compatible with *State Farm*. In fact, it reflects the most logical and useful interpretation of Justice Kennedy's cryptic comment in *State Farm* about using criminal penalties in determining the constitutionality of punitive damages awards.[248] His opinion implies that punitive damages awards should not exceed comparable criminal sanctions.[249] Further, he recognizes that, to withstand constitutional scrutiny, punitive damages awards typically must be lower than comparable sanctions, since they are not subject to the same protections as criminal actions.[250] Punitive damages are easily comparable to criminal fines,[251] but lack the safeguards of criminal proceedings, and are thus easier to impose. Criminal defendants enjoy many rights not available to those defendants facing civil proceedings.[252] First, criminal defendants are protected against compelled self-incrimination by the Fifth Amendment.[253] Second, prosecutors in criminal trials face a higher

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247. *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting). One commentator has even noted, "[P]unitive damages may be a far more severe punishment than a criminal fine carrying the stigma effect of social condemnation." Grass, *supra* note 236, at 252; *cf.* Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 411 (1967) ("The one criminal punishment which approximates the form of punitive damages is the criminal fine. But the fine, unlike punitive damages, still carries the full weight of stigma associated with criminal convictions.").

248. *See supra* note 182.

249. *See State Farm*, 123 S. Ct. at 1526 ("[T]he remote possibility of a criminal sanction does not automatically sustain a punitive damages award.").

250. *See id.* ("Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trail have been observed, including, of course, its higher standard of proof.").

251. *See* Comment, *supra* note 247, at 411 ("The one criminal punishment which approximates the form of punitive damages is the criminal fine.").

252. *See* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1455 (1993) (stating that "punitive civil law omits many of the most prominent protections embodied in criminal law, and thus it appears to permit the infliction of punishment without constitutional safeguards").

253. *See* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."). Also, while civil juries may make negative inferences against those defendants who remain silent, criminal juries may not. *Compare* Griffin v. California, 380 U.S. 609, 615 (1965) ("[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.") *with* Baxter v. Palmigiano, 425 U.S. 308 (1976) ("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them . . . .").

burden of proof than plaintiffs in civil actions.[254] Third, unlike a criminal defendant, a civil defendant has no right to constitutionally effective counsel,[255] a unanimous verdict,[256] or the protection of the Excessive Fines Clause.[257] Thus, as Justice Kennedy noted in *State Farm*, "[g]reat care must be taken to avoid the use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed . . . ."[258]

The new "presumptive limit" approach to the third guidepost would also satisfy the Supreme Court's due process concerns about notice. The Court's exploration of this notice function in *BMW* and *State Farm* was one of the few things that lower courts have been able to discern as central to the third guidepost.[259] The Supreme Court has noted the importance of fair notice to ensure the constitutionality of punitive damages awards multiple times.[260] As Justice O'Connor observed in her dissent in *Pacific Mutual Life Insurance Co. v. Haslip*, "A State can have no legitimate interest in

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254. *See In re* Winship, 397 U.S. 358 (1970) (holding that, in criminal trials, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); *cf.* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991) (rejecting appellant's argument that higher standard of proof than "preponderance of the evidence" was constitutionally mandated).

255. *See* U.S. CONST. amend VI. ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."); *see also* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (stating that "the right to counsel is the right to effective assistance of counsel"). *Cf.* Watson v. Moss, 619 F.2d 775, 776 (8th Cir. 1980) ("There is no constitutional or statutory right for an indigent to have effective assistance of counsel in a civil case.").

256. *See* Schad v. Arizona, 501 U.S. 624, 635 n.5 (explaining due process requirement of unanimous verdict in federal trials). Many states recognize guarantee criminal defendants the right to unanimous verdicts in jury trials, but are not constitutionally mandated to do so. *See id.*

257. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). *See also* Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 1, 23 (1991) (holding that punitive damages awards are not subject to Excessive Fines Clause). For a further discussion of *Browning-Ferris*, see *supra* notes 42–49 and accompanying text.

258. 123 S. Ct. at 1526.

259. *See, e.g.*, Zimmerman v. Direct Fed. Credit Union, 262 F.3d 70 (1st Cir. 2001). For a further discussion of *Zimmerman* and lower court's focus on the notice requirement, see *supra* notes 188–91 and accompanying text.

260. In *State Farm*, the Court noted, "'[E]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State will impose.'" 123 S.Ct. at 1520 (quoting *BMW*, 517 U.S. at 574). The Court also noted the importance of notice in its discussion of the standard of review for punitive damages awards. Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001) (quoting *BMW*, 517 U.S. at 587 (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 . . . .").

deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim."[261] Wildly unpredictable awards, by definition, do not provide fair notice.[262] If a defendant has no idea of the general magnitude of the award that can be imposed against him or her, the defendant has insufficient notice of the award.[263] The "presumptive limit" approach provides notice by tying most acceptable punitive damages awards to clear, published statutory maximum fines.

In addition to furthering the Supreme Court's views on the need for notice, the "presumptive limit" approach to the third guidepost would allow the states to play a significant and nuanced role in guiding punitive damages awards. States would have the opportunity to provide significant input into the guidance system for punitive damages awards.[264] By setting a statutory maximum fine for a particular offense, states would be sending a clear message about the reprehensibility of that conduct, which would also be relevant for the first guidepost, while also fixing the "presumptive limit" for punitive damages awards based on that conduct.

Our "presumptive limit" approach would lead to legislatively-guided proportionality, not unpredictability. This concept is more sophisticated than mere pre-set state-law caps on punitive damages awards. Most states that cap damages use one of two methods.[265]

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261. 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting).

262. Some scholars advocate unpredictable punitive damages awards as the only means to effectively punish and deter wrongdoers. One court noted that, "with a definite idea of the amount of punitive damages that could be assessed against it, a wrongdoer would be capable of building the cost of the penalty into the cost of the product, at the same time maintaining low standards of product quality or business behavior." Aken v. Plains Elec. Generation & Transmission Coop., 49 P.3d 662, 672 (N.M. 2002) (citing Sajevic, *supra* note 9, at 547). However, encouraging unpredictable punitive damages awards directly contradicts not only recent Supreme Court decisions, but the fundamental theories behind common law negligence as well. Negligence is usually determined "by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued." WILLIAM L. PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 31 (5th ed. 1984); *see also* United States v. Carroll Towing Co., 159 F.2d 169 (1947) (discussing cost-benefit analysis to determine negligence). Unpredictable punitive damages awards would undermine this cost/benefit analysis.

263. *See* Watson v. Johnston Mobile Homes, 284 F.3d 568, 574 (5th Cir. 2002) (concluding that comparable legislative sanction "could not have made Defendants aware that their acts of fraud, conversion, and intentional breach of contract would result in a penalty amounting to 175 times actual damages").

264. *See State Farm*, 123 S. Ct. at 1526 ("The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action.").

265. *See generally BMW*, 517 U.S. at 614–619 (O'Connor, J., dissenting) (listing state statutes limiting punitive damages awards); *see also Developments in the Law–The Paths of Civil*

One approach is to implement a flat cap that prohibits punitive damages above a particular dollar amount.[266] Another approach is to cap punitive damages at some multiple of compensatory damages.[267] Neither of these approaches is satisfactory.[268] The specific dollar cap, to be meaningful, will logically be set at a level appropriate for either the average or the most common misconduct sparking punitive damages. Those defendants engaging in conduct that is less offensive than average may be subject to punitive damages in excess of what the legislature might think is appropriate. In contrast, those defendants engaging in conduct that is more offensive than average may not be subject to as large a punitive damages award as the legislature might deem appropriate. As for multiplier caps, they suffer from one of the same weaknesses as the second or ratio guidepost, that is they focus attention on the victim instead of on the offender.[269] Not only are these multiplier caps crude (in a way similar to flat caps), but they are also not able to address situations of grave misconduct resulting in low compensatory damages. Furthermore, civil caps on punitive damages would continue to allow private civil punishment to exceed public criminal punishment, contrary to the proper understanding of Justice Kennedy's *State Farm* opinion.[270]

Litigation, 113 HARV. L. REV. 1752, 1793–94 (2000) (surveying state legislative punitive damages reform).

266. *See, e.g.*, KAN. STAT. ANN. § 60-3701(e) (2002) (limiting punitive damages awards to "the lesser of the annual gross income earned by the defendant . . . or $5 million," whichever is lower); VA. CODE ANN. § 8.01-38.1 (Michie 2003) ("In no event shall the total amount awarded for punitive damages exceed $350,000.").

267. *See, e.g.*, COLO. REV. STAT. § 13-21-102 (2002) (limiting punitive damages awards to three times compensatory damages in all actions); Conn. Gen. Stat. § 52-240b (2003) (limiting punitive damages awards to twice compensatory damages in products liability actions).

268. *See* SUNSTEIN ET AL., *supra* note 37, at 218 (noting that "caps on damages may function to increase some award amounts because they also can serve as anchors . . . ."). With a general punitive damages cap, punishments will rarely be proportionate. Instead, many defendants, whether their actions were malicious or reckless, and without a substantive inquiry into the amount of harm caused, will be assessed the same amount of punitive damages.

269. *See, e.g.*, President's Council on Competitiveness' 1992 Model State Punitive Damages Act (no more than equal to compensatory); LORI S. NUGENT, PUNITIVE DAMAGES 29 (2002); *see also supra* note 15.

270. It is beyond of the scope of this piece to explore the distinction between private and public (i.e., government initiated) civil actions, except to note that such public civil actions are often viewed as remedial. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976) (noting that public law litigation is traditionally viewed as broadly remedial); *see also* Thomas C. Gray, *Accidental Torts*, 54 VAND. L. REV. 1225, 1245 (2001) (describing public civil actions, including public regulatory enforcement using civil penalties, as "remedial hybrids").

Unlike these kinds of flat or multiplier caps, the "presumptive limit" approach allows for finer gradations of legislative input. The legislature is not pushed to set a one-size-fits-all cap on punitive damages. Some torts—like some crimes—are far more reprehensible and therefore deserving of greater punishment. Encouraging the legislature to address the possible criminal sanctions gives it a chance to express its views on the reprehensibility of the conduct.[271] Using legislative criminal sanctions as a presumptive limit on punitive damages also remains in line with the basic tenets of federalism by moving law-making decisions from the jury back to the legislature.[272] Through our approach, legislatures have an incentive to more finely calibrate their judgment as to reprehensibility and proportionality, thereby helping to create workable guidelines for assessing punitive damages awards.[273]

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271. State governments have the responsibility to set limits. By doing so, legislatures reinforce moral condemnation associated with punitive damages awards. *See supra*, note 169. Simply setting punitive caps on a tort arguably would not maintain alignment between moral condemnation and punitive damages. One commentator has noted that "statutory penalties often are outdated and obsolete[, and] rarely are adjusted for inflation." *See* Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damages Reform*, 46 AM. U. L. REV. 1573, 1605 (1997). However, this should not preclude courts from using the legislative sanction as a presumptive cap. It is the job of the legislature, not the courts, to make the law, and legislatures are free to adjust statutory penalties to reflect inflation and public opinion. "As in the criminal sentencing context, legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards." Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433 (2001).

272. As one commentator noted:

> [E]ven though judges review punitive awards for excessiveness and many state legislatures have recently imposed caps limiting their size, juries exercise an alarmingly vast amount of power in awarding punitive damages. The lessons of separation of powers, especially as applied in the criminal law, teach that such a concentration of power in any one entity in the punishment process is dangerous and encourages arbitrary results.

See Murphy, *supra* note 8, at 502–03; *cf.* SUNSTEIN ET AL., *supra* note 37, at 2124 n.187 ("[J]uries do, of course, have some control over sentencing through their choices among different theories of criminal liability.").

273. An additional benefit of our approach is that it may motivate legislatures to engage in criminal sentencing reform. It may even spark a renewed interest in non-incarcerative punishments for some criminal acts.

There has been a small renewed interest in criminal fines. The 1994 ABA Criminal Justice Sentencing Standards "take a more aggressive view toward the use of fines as criminal sanctions than the prior edition." CRIMINAL JUSTICE SENTENCING STANDARDS 18-3.16 (History of Standard) (3d ed. 1994). The ABA encourages fines to be available in all cases, for both individual and organization offenders. *Id.* at 18-3.16(a). A collateral benefit to this analysis would be an increased awareness of the value of criminal fines.

Our approach to the third guidepost provides courts with a powerful and useful analytical tool. We have demonstrated that lower courts, by treating statutory maximum fines as a "presumptive limit," will be acting in accordance with the broad guidance of the Supreme Court, protecting substantive due process rights of defendants, and, consistent with the statements of the Court, respecting federalism concerns. Beyond those important benefits, there is a very practical advantage for lower courts. The "presumptive limit" approach is easy to apply and will likely increase uniformity.

Our approach offers lower courts a simple and objective starting point—a statutory maximum fine. Unlike the other two guideposts, the properly understood third guidepost does not demand that judges turn to intuition and vague notions of justice. Given this common starting point, courts are more likely to treat roughly comparable punitive damages awards, based on roughly comparable conduct within a particular jurisdiction, in a more uniform fashion. While the *BMW/State Farm* guideposts are not meant to yield a precise formula, the "presumptive limit" approach to the third guidepost will bring much needed structure to the process.

There are some potential factual scenarios that might raise questions under our "presumptive limit" approach to the third guidepost. These scenarios, reflecting either excessive action or complete inaction on the part of the states, do not ultimately detract from the value of the "presumptive limit" approach.

> When used appropriately, fines can advance punitive objectives on an incremental scale, and can also further the goals of general and specific deterrence. . . . [T]here has been growing recognition that fines historically imposed on organizations have been too small to deter organizational criminality. There has thus been movement in the law toward higher fine schedules for organizational offenders.

Id. at 18-3.16 (Commentary). In fact, Delaware and other states have recently increased the possible punishment for organizations. *See* DEL. CODE. ANN. tit. 11 § 4208 (2003) (signed into law by Governor, June 30, 2003); *see also* Cris Barrish & Steven Church, *For Corporations, a Criminal Conviction May Mean Small 'Nes, But Larger Consequences for Business*, NEWS JOURNAL (Wilmington, Del.), June 28, 2003, at 19A (discussing implementation of larger fines for corporations in Delaware and other states).

It is unrealistic to expect that legislatures will suddenly start to view economic sanctions as a viable alternative to imprisonment. However, the use of criminal fines as presumptive limits for punitive damages awards may encourage more extensive incorporation of fines in sentencing, perhaps reducing the reliance on incarceration, particularly for non-violent offenses. *See generally* Long, *supra* note 229, at 324–47; Ryan, *supra* note 229, at 1285. One possibility might be for legislatures to promote the increased use of criminal fines in conjunction with incarceration terms of shorter duration for certain offenses.

One point that might be raised is what should happen if states respond to the new "presumptive limit" approach by setting multi-million dollar maximum criminal fines for every offense, no matter how trivial. This issue will not be problematic. As noted above, passing the third guidepost does not obviate the need to consider the other two guideposts. While a high statutory maximum will inform an evaluation of the first guidepost, it does not compel the outcome. The second guidepost must also be considered and the higher the punitive damages award, the higher—and more suspect—the ratio. Furthermore, there are separate restraints on a state's ability to set a maximum criminal fine. While it is a weak restraint,[274] there is a separate constitutional upper limit on criminal punishments. Any legislatively imposed criminal fine must satisfy the Eighth Amendment's Excessive Fines Clause.[275]

A second potential concern revolves around how to deal with the fact that many criminal offenses currently carry statutory maximum fines that may be viewed as very low. Given the current state of criminal punishment in America, it would not be surprising to find potential monetary fines that seem low, particularly in comparison to potential terms of imprisonment.[276] First and foremost, our "presumptive limit" approach would provide states with an incentive to reassess their monetary fine

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274. *See* Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (upholding mandatory sentence of life in prison for cocaine possession and holding, "[T]he Eighth Amendment contains no proportionality guarantee"); Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 106 (1995) (describing Court's holdings regarding constitutional limits on punishment as "limited" and "inconsistent"); *see also* Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1263–64 (2000) ("[W]hile proportionality review of excessive criminal punishment survives, successful challenges are nearly impossible.").

275. The Eighth Amendment limits the government's power to impose fines as punishment. United States v. Bajakjian, 524 U.S. 321, 328 (1998). The Court in *Bajakjian* noted, "The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish," and held, "[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Id.* at 334.

The precise connection between the way in which courts deal with excessive criminal punishments and excessive punitive damages may appropriately be noted but is beyond the scope of this piece. *See generally* Gershowitz, *supra* note 274. Perhaps in light of the clearer legislative role under our approach to the third guidepost, the Supreme Court would take a less aggressive stance in evaluating punitive damages awards, which would be more consistent with its approach to prison terms. *See id.* at 1263–64 (stating that "successful challenges [of sentences of imprisonment] are nearly impossible").

276. *See, e.g.*, IND. CODE ANN. § 35-50-2-3 (Michie 2003) (authorizing 45–65 year sentence and up to $10,000 fine as sentence for murder).

structure.[277] If, however, a state does not change a seemingly low statutory maximum fine, it has made a choice that should be respected. Second, if a punitive damages award exceeds the seemingly low statutory maximum fine, it will not satisfy the third guidepost. Nevertheless, as discussed *supra*, running afoul of the third guidepost does not guarantee that the punitive damages award is unconstitutionally excessive. Although it would be very difficult for a court to uphold a punitive damages award that exceeds the "presumptive limit," it would be possible. If the court found overwhelming reprehensibility in which the conduct was outside of all bounds of decency, the award might be sustained. This high burden on a punitive damages award that exceeds the "presumptive limit" is justified in part because the state's legislative judgment about the reprehensibility of the conduct is entitled to "substantial deference." Furthermore, a punitive damages award in excess of the "presumptive limit" raises serious concerns about a defendant's notice of the potential punishment. While the state's judgment cannot automatically equate to constitutional propriety, exceeding it is a strong indication in this circumstance of a punitive damages award that is out of bounds.[278]

Finally, a similar potential question is how courts should respond when the state has not provided a criminal (or civil) punishment for particular misconduct. This issue should arise in extremely few circumstances. When the conduct at issue is not a crime, but is instead, for example, a common law tort, courts should focus on the first two guideposts, reprehensibility and ratio. However, the court should note the legislature's failure to criminalize the conduct while conducting the reprehensibility analysis.[279] Similar to the situation of a seemingly low statutory maximum fine, discussed *supra*, the state has made a choice. As Justice Kennedy observed in *State Farm*, "[T]he existence of a criminal penalty does have bearing on the se-

277. *See supra* note 265 (discussing potential additional benefits of sparking fuller sentencing reform).

278. It is not revolutionary for a constitutional test to vary according to the jurisdiction in which the conduct occurs. *Cf.* Miller v. California, 413 U.S. 15, 30 (1973) (addressing constitutional standards for obscenity).

279. For example, an Alabama court was unable to conduct the comparative analysis in *AutoZone, Inc. v. Leonard*, 812 So. 2d 1179, 1188 (Ala. 2001). The court noted, "[w]e cannot consider this guidepost, because Alabama law provides no sanctions, either civil or criminal, for a retaliatory discharge other than the remedy Leonard pursued through his civil action . . . ." *Id.* The court then analyzed the award using the first two *BMW* guideposts, finding the $275,000 award constitutional. *Autozone*, 812 So. 2d at 1187–88. The punitive damages award was 3.67 times the compensatory award. *Id.* at 1187.

riousness with which a state views the wrongful action."[280] Because the conduct is not a crime, it is unlikely to be considered reprehensible enough to justify a punitive damages award. Once again, there are notice concerns as the defendant would not even know that certain conduct warranted punishment. Courts seeking to approve punitive damages in such circumstances would have to demonstrate what makes this case so unusual as to support punitive damages. The presumption in our "presumptive limit" approach can be overcome, but it should not be overcome easily. Up to this point, most courts have only paid lip service to the third guidepost. Under the "presumptive limit" approach, however, more than that would be needed to allow a punitive damages award that exceeds the presumptive limit.

Our new "presumptive limit" approach provides a logical and beneficial interpretation of the Supreme Court's attitudes toward the third guidepost. While no court has explicitly adopted this reasoning, a few decisions have pointed toward this general path in the wake of *BMW.* In *United States v. Big D Enterprises, Inc.*,[281] for example, an apartment complex owner and management company were sued for discriminating based on race.[282] A jury awarded the individual plaintiffs $1,000 in compensatory damages and $100,000 in punitive damages, $50,000 against each defendant.[283] The Eighth Circuit compared the statutory penalties under the Fair Housing Act[284] to the $50,000 punitive damages awards against each defendants.[285] The court approved the $50,000 punitive damages award in part because it did not exceed the maximum civil penalty permitted for a first time offense.[286]

More recently, in *Lincoln v. Case*,[287] the Fifth Circuit was faced with a comparable housing discrimination case. The jury awarded the plaintiff $500 in compensatory damages and $100,000 in punitive damages. On appeal, the defendants challenged the award as being excessive. Under the first guidepost, the court found that the defendants' conduct was reprehensible.[288] Next, the court noted

280. *State Farm*, 123 S. Ct. at 1526.
281. 184 F.3d 924 (8th Cir. 1999).
282. *See id.* at 928.
283. *See id.* at 933.
284. 42 U.S.C. §§ 3601–19.
285. *See Big D Enterprises*, 184 F.2d at 933.
286. *See id.* ("The fact that the FHA permits courts to impose a fine up to $50,000 in addition to compensatory and punitive damages significantly undercuts appellants' argument that the punitive damage award in this case is excessive.").
287. 340 F.3d 283 (5th Cir. 2003).
288. *Id.* at 293.

that the ratio from the second guidepost—here 200 to 1—exceeded the *State Farm* goal of a single digit multiplier. Yet the court was persuaded by the plaintiff's argument that the "ratio in this case is justifiable given the 'inherently low or hard-to- determine actual injuries' in housing discrimination cases and the important goal of deterring future wrongdoing."[289] Finally, with respect to the third guidepost, the court observed that the statutory maximum civil penalty is $55,000 for a first-time offense comparable to what was demonstrated in this case. After evaluating the *State Farm/BMW* approach, in which the punitive damages award clearly violated only the third guidepost, the Fifth Circuit remitted the award to the statutory maximum civil penalty of $55,000 "in order to comport with due process."[290] Ultimately, the court concluded that "in this case a punitive damages award coextensive with the statutory maximum civil penalty is reasonable and proportionate to the wrong committed."[291]

VI. CONCLUSION

Through *BMW* and *State Farm*, the Supreme Court has attempted to restrain punitive damages awards. Unfortunately, lower courts have been unable to apply the guideposts consistently, especially regarding the third guidepost, evaluating the punitive damages award and comparable legislative sanctions. Because of these uncertainties, punitive damages awards still lack meaningful review. Our approach, using legislatively determined maximum fines and penalties for comparable misconduct as a "presumptive limit" on punitive damages awards, solves this problem, giving lower courts the guidance they need. This nuanced and proportionate approach not only provides civil defendants with fair notice of potential punitive damages awards, it also reinforces the proposition that important lawmaking authority belongs in the hands of state legislatures and gives increased value and meaning to the Supreme Court's holdings in *BMW* and *State Farm*.

289. *Id.* at 293–294.

290. *Id.* at 294.

291. *Id.* (citing *Big D. Enterprises*). Although the *Lincoln* court cited to and quoted from *Big D. Enterprises*, the *Lincoln* court analysis was closer to our presumptive limit approach because it more clearly approved of the award under the first two guideposts but not the third and reduced the award accordingly.