BMW of North America v. Gore:* A Misplaced Guide for Punitive Damage Awards

I. INTRODUCTION

Punitive damage awards are not new. They have a long pedigree, dating back two thousand years before Christ.¹ Throughout this time, punitive damages have been sought to serve a number of important penal functions, including punishing the defendant and deterring the defendant and others from tortious conduct.² Some court decisions have even mentioned that punitive damages provide the plaintiff with compensation for damages such as humiliation and litigation expenses.³

Despite these meritorious goals, punitive damages have come under rigorous attack. One attack against punitive damages has been that they do not result in optimal deterrence, if any deterrence at all, because the majority of jurisdictions allow defendants to insure against punitive damage claims.⁴ Another argument to the contrary has been that punitive damages

* No. 94-896 (U.S. May 20, 1996).
   1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.
   2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.
4. See, e.g., Sales & Cole, supra note 1, at 1163. However, this argument does not seem to take into account that defendants may be affected by a rise in insurance premiums, that defendants who are repetitively held liable for punitive damages may be denied coverage for punitive damages, and that insurers may require defendants to take certain precautions to qualify for coverage. Note, "Common Sense" Legislation: The Birth of Neoclassical Tort Reform, 109 HARV. L. REV. 1765, 1771 n.54 (1996).
lead to overdeterrence because defendants act overly cautious for fear of uncertain liability. A third argument against punitive damages has been that punitive damages encourage excessive litigation, whereby defendants are more likely to settle in order to avoid the uncertainty of trial and to avoid filing punitive damage claims on required reporting documents that can be troubling to lenders, accountants, and governmental agencies. Lastly, another argument has been that it is unfair to award plaintiffs windfalls when they have already been fully compensated.

Through an examination of significant Supreme Court cases, this casenote seeks to unfold the controversy over punitive damage awards. Beginning with the Court's examination of statutory awards of punitive damages, this note traces the controversy to the modern issues of jury awards of punitive damages. It illuminates the Court's willingness to limit punitive damages and its ambiguity in doing so. The Court's eagerness to limit punitive damage awards and its vagueness in accomplishing such constraints are exemplified in BMW of North America v. Gore, which this note will discuss and analyze. Finally, this note will propose a more meaningful approach to the punitive damages issue and discuss the troublesome implications that BMW of North America v. Gore will have on the area of punitive damage awards.

II. CASE HISTORY

At the turn of this century, objections to punitive damage awards challenged state discretion to punish wrongdoers pursuant to a statutory scheme. One of the earlier cases involving a challenge to a statutory scheme was Seaboard Air Line Railway v. A.L. Seegers. Here, a common carrier challenged a South Carolina statute that required common carriers to

10. Id.
12. 207 U.S. 73 (1907).
pay for loss or damage to intrastate shipments within forty days of the filing of a claim or be subject to a fifty dollar penalty for each failure or refusal.13 The basis of the challenge was that the statute violated the Equal Protection Clause of the Fourteenth Amendment because there was no justification for the legislature to compel carriers to pay their debts under a threat of an unreasonable penalty for delay and not others.14 The Court held that the common carriers were not denied equal protection guaranteed by the Fourteenth Amendment15 since the statute’s goal was not to penalize carriers for late payments but to encourage prompt settlements. The Court concluded the penalty deterred the carrier’s refusals to settle just claims and compensated the claimant for the suit created by the carrier’s own actions.16 The Court, nevertheless, found that “there are limits beyond which penalties may not go . . . .”17 Without actually discussing those limits, however, the Court refused to hold that this penalty was beyond the state’s power.18

A similar challenge to a state statutory penalty was made in Waters-Pierce Oil Co. v. Texas.19 This case involved Texas anti-trust laws that allowed for the penalizing of a foreign corporation for violations of the anti-trust act, including forfeiting the corporation’s permit to do business in Texas except as to its interstate business.20 The Court upheld the law and hinted at possible due process limits on fines if “the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law.”21

Likewise, in Southwestern Telegraph & Telephone Co. v. Danaher,22 a telephone company challenged an Arkansas statute that provided for patrons of a telephone company to recover penalties at the rate of a hundred dollars per day in discrimination cases.23 The Court set aside a penalty against the telephone company on the basis that it was “so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due
process of law." Danaher did not establish any guidelines, but it did encourage the Court to examine possible due process limits on punitive damages awards.

Unlike these earlier cases, the Supreme Court cases from the last decade have not dealt so much with the imposition of penalties under state statutes. Rather, they have focused primarily on jury awards of exemplary damages. Nevertheless, as with the earlier cases, the Supreme Court has been ambiguous in providing adequate guidance for the lower courts in determining whether a penalty is a deprivation of property without due process.

This uncertainty in reviewing jury awards of punitive damages on due process grounds is evident in Aetna Life Insurance Co. v. Lavoie. In Lavoie, the defendant insurance company contended that punitive damages awarded by a jury violated the Excessive Fines Clause of the Eighth Amendment and that lack of adequate state standards governing punitive damages awards violated the Due Process Clause of the Fourteenth Amendment. The Supreme Court, although it based its decision on another ground, hinted that the defendant's "arguments raise important issues which, in an appropriate setting, must be resolved."

The Court's lack of direction in reviewing jury awards for punitive damages continued in Bankers Life & Casualty Co. v. Crenshaw. In

24. Id. at 491.
25. The Court's willingness to inquire into due process limits on punitive damage awards is evidenced by St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63 (1919). In this case, an Arkansas statute regulated railroad rates and prescribed a penalty of between fifty and three hundred dollars and costs of suit should a railroad demand or collect greater rates than the statute prescribed. Id. at 64. Using Waters-Pierce Oil Co. and Seaboard Air Line Ry. as precedents, the Supreme Court upheld the statute against a constitutional attack that the penalty was repugnant to the Due Process Clause of the Fourteenth Amendment. Id. at 67.
26. Franco, supra note 11, at 739.
27. Id.
29. Id. at 828. According to the Eighth Amendment, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.
31. The Court passed on the due process claims against the punitive damage award and held that the defendant insurance company's due process rights had been violated because a state supreme court judge who affirmed the decision may have been biased against the insurance company. See id.
32. Id. at 828-29.
Crenshaw, the defendant insurance company appealed a jury award for punitive damages, claiming that it was excessive, did not reasonably further any legitimate purpose, and was contrary to the Constitution. The Court refused to rule on any constitutional issues because they were not properly raised in the lower court. Justice O'Connor, who concurred in part and in judgment, nevertheless left the door open for review of punitive damage awards by noting that the defendant "touched on a due process issue that I think is worthy of the Court's attention in an appropriate case."

As in Crenshaw, the Court in Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc., passed on the due process challenge to a punitive damage award. Here, a defendant in an anti-trust action appealed from a jury award for punitive damages, asserting that the award violated the Excessive Fines Clause of the Eighth Amendment, that the award violated due process, and that the award was excessive as a matter of federal common law. The Court rejected the defendant's argument that the award violated the Excessive Fines Clause because the history and purpose of the Eighth Amendment was that the Excessive Fines Clause applies to Government attempts to punish criminals, not to punitive damages between private parties. The Court likewise rejected that the award was excessive as a matter of federal common law on the grounds that determining excessive-ness of exemplary damages should be left to the states, not federal common law. In addition, the Court bypassed the due process challenge because it had not been preserved at trial. Nonetheless, the evidence grew stronger that the Court would be willing to address due process challenges to excessive punitive damages under the appropriate circumstances.

34. Id. at 75-76.
35. Id. at 78.
36. Id. at 87 (O'Connor, J., concurring).
38. Id. at 277.
39. Id. at 259-77.
40. Id. at 260.
41. Id. at 279.
42. Browning-Ferris Indust. v. Kelco Disposal, Inc., 492 U.S. 257, 277 (1989). The Court noted that, although the Due Process Clause restricts the size of penalties under a statutory scheme, the question as to whether the Due Process Clause confines jury discretion to award punitive damages in absence of a statute had never been addressed. Id. at 276-77. Here, once again, the issue had not been preserved, and the question was left for another day. Id. at 277.
43. The concurring opinions urged that jury awards for exemplary damages must not be left unchecked. Justice Brennan, joined by Justice Marshall, felt it necessary to allow due process constraints on the imposition of punitive damages under the appropriate circumstances. See id. at 280-81 (Brennan, J. concurring). Justice Brennan stated that "[w]ithout
It was not until *Pacific Mutual Life Insurance Co. v. Haslip*\(^\text{44}\) that the Court articulated a standard to determine whether punitive damage awards by juries could violate the Due Process Clause of the Fourteenth Amendment. In *Haslip*, insureds sued a life insurer and its agent for fraud, alleging that they paid premium payments to the agent and the agent failed to notify them that their policy had been canceled.\(^\text{45}\) The jury awarded the insureds punitive damages of approximately $840,000, more than four times the amount of compensatory damages.\(^\text{46}\) The award was appealed on due process grounds, but the Court upheld the award.\(^\text{47}\)

The Court began its reasoning by noting that the common-law method for determining exemplary damages is not per se unconstitutional as to deny due process.\(^\text{48}\) The Court nevertheless conceded that unlimited judicial discretion in assessing punitive damages may exceed constitutional boundaries.\(^\text{49}\) The Court also agreed that, in regard to a standard for jury awards, "a mathematical bright line between the constitutionally acceptable and constitutionally unacceptable that would fit every case" would be impossible.\(^\text{50}\) The Court, however, did find that "general concerns of reasonableness and adequate guidance from the courts when the case is tried to a jury properly enter into the constitutional calculus."\(^\text{51}\) Applying this notion, the Court found Alabama's procedural protection, including the jury charge, the post-verdict hearing, and the appellate review, provided adequate guidance\(^\text{52}\) and the award, in light of other potential punishments, as reasonable.\(^\text{53}\)

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\(^\text{45}\) Id. at 6.

\(^\text{46}\) Id. at 7 n.2.

\(^\text{47}\) Id. at 19.

\(^\text{48}\) Id. at 17.


\(^\text{50}\) Id.

\(^\text{51}\) Id.

\(^\text{52}\) Id. at 23.

\(^\text{53}\) Id. Rejecting the need for the Court to apply a "reasonableness" standard, Justice Scalia, concurring only in judgment, reviewed the long tradition of American courts that has left punitive damages to jury discretion and concluded that, so long as the evidence supports the imposition of such damages, due process is satisfied. *Pacific Mut. Life Ins. Co. v.*
Justice O'Connor's lone dissent objected to the vagueness of the jury instructions in this case. Justice O'Connor looked to *Matthews, v. Eldridge*, a case the Court uses to determine whether the process provided is enough to satisfy the requirements of due process by balancing three factors: (1) the private interest at stake, (2) the risk that existing procedures will wrongly impair this private interest and the likelihood that additional procedural safeguards can effect a cure, and (3) the government's interest. After applying the three factors from *Eldridge*, Justice O'Connor concluded that Alabama failed to provide the jury with meaningful guidance in the application of its laws in violation of due process. To protect against future due process violations of jury awards, Justice O'Connor proposed that the State, not the Supreme Court, should constrain juries' discretion in determining whether to impose punitive damages and in fixing the amount of such awards through its legislature or its courts.

Two years later, the Court similarly addressed a jury award in *TXO Production Corp. v. Alliance Resources Corp.* In this case, TXO Production Corp. was sued under a counterclaim for slander of title. The jury found against TXO Production Corp. and awarded Alliance Resources Corp. nineteen thousand dollars in compensatory damages and ten million dollars in exemplary damages. TXO Production Corp. appealed, claiming that the punitive damage award was so grossly excessive as to constitute a denial of due process. A plurality of the Court, however, upheld the award as reasonable. In doing so, the Court again rejected a specific test to determine if an award is grossly excessive and instead applied the flexible "reasonableness" test espoused in *Haslip*. The Court noted that a jury

Haslip, 499 U.S. 1, 25-27 (1991) (Scalia, J., concurring). At most, Justice Scalia contended that the trial court should offer some review of a jury award and a new trial should be granted only if a verdict is found excessive. Id. at 44 (O'Connor, J., dissenting).

54. *Id.* at 44 (O'Connor, J., dissenting).
56. *Id.* at 335.
58. *Id.* at 63.
60. *Id.* at 447.
61. *Id.*
62. *Id.* at 452.
63. *Id.* at 458-62.
64. TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 457 (1993). In dissent, Justice O'Connor chided the plurality for its "reasonableness" standard as providing no guidance for courts in evaluating punitive damage awards and stressed the need for some type of objective criteria in order to avoid that element of subjectivity which would foreclose
must consider various factors unique to the particular case before it.65

One year later, the Court’s momentum in judicial review over jury awards of punitive damages for due process defects grew even stronger in *Honda Motor Co. v. Oberg.*66 In this case, Oberg brought a products liability suit against Honda for the manufacture of an all-terrain vehicle after he was injured in an accident.67 The trial court awarded Oberg $735,512.31 in compensatory damages and five million dollars in punitive damages.68 This award was affirmed by the Oregon Supreme Court.69 Honda challenged an amendment to the Oregon Constitution that prohibited judicial review of exemplary damages awarded by a jury “unless the court can affirmatively say there is no evidence to support the verdict.”70

The Supreme Court struck down the amendment as violating the Due Process Clause of the Fourteenth Amendment.71 The Court analyzed the amendment to Oregon’s Constitution in light of the historical common law judicial review of punitive damages and concluded that Oregon’s amendment was an unjustified departure.72 More importantly, the Court reiterated the need to review jury awards of punitive damages in order to ensure that awards are not so grossly excessive as to deny due process.73 The Court also repeated that the majority of justices have concluded that the Due Process Clause imposes limits on punitive damage awards, even though they failed to define those limits.74

III. **BMW OF NORTH AMERICA v. GORE**

A. THE FACTS

The Court finally broke its chain of ambiguity in defining limits on punitive damages and set out to establish due process limitations in *BMW*

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65. *Id.* at 457.
67. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 426-32. In dissent, Justice Ginsburg, joined by Chief Justice William Rehnquist, found that Oregon provides adequate due process protection before a case can go to the jury. *Id.* at 450-51 (Ginsburg, J., dissenting).
74. *Id.*

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of North America v. Gore. This case began as a result of BMW of North America’s nationwide policy involving BMW’s that were damaged in the course of manufacture or transportation, whereby only if the cost of repairing the damage exceeded three percent of the car’s suggested retail price was the BMW sold as used. Otherwise, the BMW was sold as new without disclosing to the dealer that any repairs had been made. This policy had been in effect since 1983 and had been applied to Ira Gore’s BMW purchase.

Several months after buying his “brand new” BMW for $40,750.88 from a Birmingham dealer, Gore took his BMW to an independent dealer to have it detailed. Much to Gore’s surprise, he learned from the dealer that his car had been refinished. Upset, Gore filed suit against BMW of North America, the American distributor of BMW’s, alleging that the failure to disclose that his car had been repainted was suppression of a material fact.

In his complaint, Gore prayed for five hundred thousand dollars in actual and punitive damages and costs; however, Gore later asked for four thousand dollars in compensatory damages and four million dollars in punitive damages. In order to support this punitive damage award, Gore looked to BMW’s nondisclosure policy’s impact nationwide. BMW responded that the refinished BMW’s were worth as much as BMW’s that had not been repainted, that its good faith belief in the refinished cars’ value
made punitive damages inappropriate, and that transactions in jurisdictions outside Alabama had no relevance to Gore's claim.\textsuperscript{85}

B. PROCEDURAL HISTORY

BMW's argument was to no avail as the jury awarded Gore his four thousand dollars in compensatory damages and, because they found that BMW's nondisclosure policy constituted "gross, oppressive or malicious fraud,"\textsuperscript{86} four million dollars in exemplary damages.\textsuperscript{87} Undoubtedly astounded by the punitive damage award, BMW filed a post-trial motion to set it aside.\textsuperscript{88} To support the motion, the company introduced evidence that its nondisclosure policy was legal in twenty-five states.\textsuperscript{89} In addition, BMW argued that its nondisclosure policy was never ruled to be unlawful in Alabama prior to this case.\textsuperscript{90} Responding to BMW's motion, Gore asserted that, in spite of the fact the policy was not adjudged to be unlawful, the company received a number of customer complaints regarding undisclosed repairs and settled some lawsuits.\textsuperscript{91} Gore further argued that other States' disclosure statutes were immaterial because BMW had failed to show how these disclosure statutes supplanted existing causes of action for fraud under common law.\textsuperscript{92}

At the outset, the trial judge held that the award was not excessive and denied BMW's post-trial motion.\textsuperscript{93} On appeal, the Alabama Supreme Court upheld the trial judge's decision\textsuperscript{94} based on the factors espoused in

\begin{footnotes}
86. Id. See ALA. CODE §§ 6-11-20, 6-11-21 (1993). According to § 6-11-20(a), "[p]unitive damages may not be awarded in any civil action, except civil actions for wrongful death pursuant to Sections 6-5-391 and 6-5-410, other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff." Id. § 6-11-21 limits a punitive damages award to $250,000, unless based upon any of the following: "(1) A pattern or practice of intentional wrongful conduct, even though the damage or injury was inflicted only on the plaintiff; or, (2) Conduct involving actual malice other than fraud or bad faith not a part of a pattern or practice; or, (3) Libel, slander, or defamation." Id.
88. Id. at 4.
89. Id.
90. Id. at 4. Shortly before Gore's case went to trial, an Alabama jury did find that BMW's nondisclosure policy constituted fraud. Yates v. BMW of N. Am., 642 So.2d 937 (Ala. 1993). In Yates, the jury awarded a comparable amount of compensatory damages but did not award any punitive damages. Id.
92. Id.
93. Id.
94. 646 So.2d 619 (Ala. 1994).
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Green Oil Co. v. Hornsby and endorsed by Pacific Mutual Life Insurance Co. v. Haslip. Essentially, the Alabama Supreme Court established guidelines to review jury awards of exemplary damages on the following factors: (1) the relationship of punitive damages to the potential harm that could occur from the defendant's conduct as well as to the harm that actually occurred, (2) the degree of reprehensibility of the defendant's conduct, (3) the profitability to the defendant from his conduct, (4) the wealth of the defendant, (5) the costs of litigation, (6) criminal sanctions against the defendant arising out of the same conduct, and (7) other civil actions against the defendant arising out of the same conduct.

Using this test, the Alabama Supreme Court found that BMW profited from its reprehensible nondisclosure policy. The court concluded that BMW's wealth is such that the award would not have a substantial impact on BMW, that the litigation costs to Gore were substantial, and that the award was reasonably related to both the potential and actual harm to Gore. BMW did, however, win on its contention that the jury should not look to the sales in other jurisdictions. As a result of the jury's reliance on actions outside Alabama's jurisdiction, the Alabama Supreme Court concluded that the jury's verdict was tainted, and the court ordered a remittitur of the punitive damage award from four million to two million dollars, which it found to be constitutionally reasonable. Accordingly, BMW applied for certiorari, which was granted by the United States Supreme Court so as to illuminate "the character of the standard that will identify constitutionally excessive awards" of punitive damages.

C. THE DECISION

Justice Stevens delivered the five to four majority opinion and began the Court's inquiry by noting that in this federal system the states necessarily have substantial flexibility in determining limits on exemplary damages. The Court likewise noted that most states in turn allow the jury

97. 646 So.2d 619, 624 (Ala. 1994).
98. Id. at 625.
99. Id. at 625-28.
100. Id. at 628.
101. Id. at 628-29. The Alabama Supreme Court did not explain why two million dollars was constitutionally reasonable. BMW of N. Am. v. Gore, No. 94-896, slip op. at 6 n. 10 (U.S. May 20, 1996).
102. Id. at 7 (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994)).
103. Id.
similar latitude in assessing punitive damages, requiring that the award be reasonable in vindicating the state’s interest in punishing unlawful conduct and deterring its repetition. Only when an exemplary damage award is “grossly excessive” in relation to these state interests, the Court reasoned, does the award violate the Due Process Clause of the Fourteenth Amendment.

Justice Stevens then determined that a possible state interest in this case is a state’s interest in protecting its citizens from deceptive trade practices by mandating disclosure of presale repairs of automobiles. The Court, however, interjected that the states do not, and need not, protect their citizens against nondisclosure policies in the same manner without congressional intervention. Since Congress was silent on BMW’s nondisclosure policy, the issue was left to the individual states. Consequently, comity and state sovereignty demand that states sanction violators of their laws, but they may not do so with the intent of changing the tortfeasors’ lawful conduct in other states.

The Court then applied these principles of state comity and sovereignty to Gore’s argument for punitive damages based on BMW’s nationwide policy of nondisclosure, even though such nondisclosure was lawful in those states, and concluded that Gore’s argument infringed on other states’ policy choices. As a result of the trial judge’s acceptance of Gore’s argument, the jury award was tainted, and BMW’s conduct must be re-evaluated in light of Alabama consumers only.

When an Alabama court is properly limited, the Court continued, the jury award will be shown to be grossly excessive based on the following three guideposts: the degree of reprehensibility of BMW’s nondisclosure; the ratio between Gore’s actual or potential harm and his punitive damage award; and the difference between this remedy and other sanctions for comparable misconduct. According to the Court, these three guideposts will show that BMW did not receive the constitutional fair notice required

104. *Id.*
105. *Id.*
107. *Id.* at 8-10. The Court noted that states have adopted various approaches ranging from no regulation whatsoever (allowing the distributor’s self-interest in its good will to dictate disclosure to consumers) to affirmative regulation by a state’s judiciary or legislature, resulting in a patchwork of rules. *Id.*
108. See *Id.*
109. *Id.* at 11.
111. *Id.* at 12-13.
112. *Id.* at 14.
under due process because it was not informed of how severe a penalty Alabama may impose.\(^{113}\)

The Court then discussed these three guideposts in detail, beginning with what it believed to be the most indicative of the reasonableness of the punitive damage award: the degree of reprehensibility of BMW's conduct.\(^{114}\) The Court found that no aggravating elements were associated with BMW's particular reprehensible conduct.\(^{115}\) For example, Gore's harm was purely economic, and BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others.\(^{116}\) Gore nevertheless argued that BMW's conduct was particularly reprehensible because nondisclosure of the repairs to his car was part of a nationwide pattern of tortious conduct.\(^{117}\) The Court agreed that where a defendant repeatedly engages in prohibited conduct while knowing or suspecting that the conduct was unlawful would provide relevant support for an argument that greater punitive damages may be required.\(^{118}\) The Court, however, rejected this contention because BMW could reasonably have interpreted the relevant state statutes as inapplicable to minor repairs and because there was no evidence that BMW acted in bad faith in determining what repairs should be disclosed or that BMW persisted in its nondisclosure policy after it had been ruled unlawful.\(^{119}\) Lastly, there was no evidence that BMW engaged in deliberate false statements, affirmative misconduct, or concealment of evidence of improper motive to warrant particularly stringent punishment.\(^{120}\) The Court concluded that, because BMW's conduct did not exhibit circumstances ordinarily associated with improper conduct, BMW's conduct was not sufficiently reprehensible to warrant a two million dollar punitive damage award.\(^{121}\)

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113. Id.
114. Id. The Court stressed the importance of this factor based on its pedigree, in which the Court pointed out that 150 years ago it had stressed that punitive damages imposed on a defendant should reflect "the enormity of his offense." BMW of N. Am. v. Gore, No. 94-896, slip op. at 14 (U.S. May 20, 1996) (citing Day v. Woodworth, 54 U.S. 363, 371 (1852)). In addition, the Court believed that this factor followed the accepted principle that some wrongs are more blameworthy than others. Id. at 15.
115. Id. at 15-16.
116. Id. at 16.
117. Id.
119. Id. at 18-19.
120. Id. at 19.
121. Id. at 20.
Next, the Court looked to the ratio between the plaintiff's compensatory damages and his punitive damages. The Court first noted that it has consistently refused to draw a constitutional line between actual and potential damages and punitive damages. Nevertheless, the Court determined that the two million dollar punitive damage award, five hundred times the amount of Gore's actual harm as determined by the jury, does "raise a suspicious judicial eyebrow."

Finally, the Court compared the punitive damage award and the civil or criminal penalties that could be imposed for comparable misconduct. On this point, the Court found that BMW's two million dollar punishment was substantially greater than the statutory and judicial fines available in Alabama and in other jurisdictions for similar actions. Accordingly, because BMW's actions were not particularly reprehensible, the ratio between Gore's actual and punitive damages was rather high, and there were no other comparative sanctions that could have been imposed on BMW, the Court found that BMW was not provided with fair notice that it could be subjected to a multi-million dollar verdict. Hence, the Court reversed the Alabama Supreme Court's decision and remanded the case.

In his concurring opinion, Justice Breyer, joined by Justice O'Connor and Justice Souter, agreed with the judgment and reasoning of the majority of the Court but focused more on procedural due process concerns. Justice Breyer began the analysis by stating that where "fair procedures were followed, a judgment that is a product of that process is entitled to a strong

122. Id.
123. BMW of N. Am. v. Gore, No. 94-896, slip op. at 22 (U.S. May 20, 1996).
124. Id. at 23 (quoting TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 482 (1993)).
125. Id.
126. Id. The maximum civil penalty for a violation of Alabama's Deceptive Trade Practices Act is two thousand dollars. ALA. CODE §8-19-11(b) (1993). Other States impose severe sanctions, ranging from five thousand to ten thousand dollars. Id. at 24 n. 40. In addition to BMW's lack of notice of the severity of statutory fines, there does not appear to be any judicial decision that would alert BMW that its policy might give rise to two million dollar verdict against it at the time that BMW's policy was first challenged. BMW of N. Am. v. Gore, No. 94-896, slip op. 24-25 (U.S. May 20, 1996).
127. Id. at 13-14. The Court pointed out that the fact that BMW was a large corporation rather than an individual does not diminish its rights to fair notice. Id. at 25-26. In fact, its status in the national economy implicates the federal interest in preventing undue hindrances on interstate commerce that unchecked punitive damages may create. Id. at 26.
128. Id.
presumption of validity...." However, the presumption is overcome in this case. According to Justice Breyer, standards constraining punitive damages are required not only to provide fair notice but also to assure the uniform treatment of persons similarly situated, which protects against purely arbitrary behavior. In this case, Justice Breyer contended, the vagueness of Alabama’s standards, although not violative of due process in itself, does invite the Court’s close scrutiny.

Justice Breyer began the inquiry by looking to the Alabama statute that provides for punitive damages and found that the standard treated those not similarly situated the same by not readily distinguishing between conduct that warranted small exemplary damages from conduct that warranted large exemplary damages. Next, Justice Breyer examined the Alabama courts’ reliance on the factors espoused in Green Oil Co. v. Hornsby. Justice Breyer contended that, although the factors limited the jury’s discretion per se, the Alabama courts’ application of them did not significantly prevent their ability to impose constitutionally unacceptable awards. Justice Breyer then searched for any other standard provided by the state, such as community understanding, historical practice, or other legislative enactments that would impose quantitative limits as checks on jury discretion, and he found none. In concluding that the presumption of validity was overcome, Justice Breyer determined that the award violated the basic guarantee of nonarbitrary government behavior that due process provides.

Justice Scalia, joined by Justice Thomas, dissented and attacked the Court’s “unprecedented” invalidation of a state-court punitive assessment as simply unreasonably large. According to Justice Scalia, the Court’s actions were an unjustified intrusion into the province of state governments because the Fourteenth Amendment’s procedural guarantee assures an opportunity to contest the reasonableness of a judgment for punitive

130. Id. at 1 (Breyer, J., concurring) (citing TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 457 (1993)).
131. Id. at 2.
132. Id. at 2.
133. Id. at 3.
135. 539 So.2d 218 (Ala. 1989).
137. Id. at 7-11.
138. Id. at 12.
139. Id. at 2 (Scalia, J., dissenting).
damages in state court and was not intended to provide a federal guarantee
that a damage award be reasonable. Justice Scalia further attacked the
Court’s attempt to provide guidance to the lower courts, particularly through
the three guideposts, as too vague to be any guidance to legislatures and to
state and federal courts. Moreover, Justice Scalia cautioned that the
majority inadvertently made every state civil suit involving evidentiary
sufficiency embody a constitutional question that would be subject to review
in the Supreme Court.

IV. ANALYSIS

A. BMW OF NORTH AMERICA V. GORE AS A GUIDE

There is clear protection in the Fourteenth Amendment against
deprivation of property without due process. The Court in BMW of North America v. Gore
acknowledged this for the first time in the punitive
damage arena when it invalidated a state-court punitive damage award as
being simply unreasonably large. Despite the Court’s good intentions
to defend due process rights in the area of punitive damages, it has taken the
wrong path by identifying a substantive due process right against grossly
excessive awards.

The Court established this substantive due process right by attempting
to clarify the earlier “reasonableness and adequate guidance” standard

140. Id. at 2 (Scalia, J., dissenting). Along with Justice Scalia, Justice Ginsburg, joined
by the Chief Justice, dissented. BMW of N. Am. v. Gore, No. 94-896 (U.S. May 20, 1996)
(Ginsburg, J., dissenting). They agreed with Justice Scalia that the Court unnecessarily
intruded into an area “dominantly of state concern” and hinted that the majority’s approach
to limiting punitive damages was too ambiguous to provide guidance. Id (Ginsburg, J.,
dissenting).

141. Id. at 5-9 (Scalia, J., dissenting).

142. Id. at 10-11.

143. The Fourteenth Amendment in pertinent part states that “[n]or shall any State
deprive any person of . . . property, without due process of law.” U.S. CONST. amend. XIV,
§ 1.

144. BMW of N. Am. v. Gore, No. 94-896, slip op. at 2 (Scalia, J., dissenting).

145. Id. at 2-3. The Court has recognized that excessive punitive damage awards might
have violated substantive due process as far back as 1919. St. Louis, Iron Mountain & S.
Ry. Co. v. Williams, 251 U.S. 63 (1919). Nevertheless, the Court in BMW of North America
v. Gore went against the tide of the substantive due process doctrine in that substantive due
process rights in the economic area have been on the decline since 1937. Gary T. Schwartz,
Browning-Ferris: The Supreme Court’s Emerging Majorities, 40 ALA. L. REV. 1237, 1246-
50 (1989).

through the use of three guidelines: the degree of reprehensibility of the defendant's conduct; the ratio between the plaintiff's actual or potential harm and his punitive damage award; and the difference between the remedy and other sanctions for comparable misconduct. The Court's new test still leaves a great deal of ambiguity for the lower courts, over which the dissenting justices rightfully protested.

Even those who feel that the Court finally set forth a clearer constitutional framework agree that many significant issues remain unresolved. For instance, with the first guidepost, the degree of reprehensibility of defendant's conduct, the Court found that conduct that created a purely economic harm and posed no threat to the health or safety of others was not reprehensible. The Court, however, provided no clarification as to conduct that created physical or emotional harm. Again, with the second guidepost, the Court's only measure in determining that a punitive damage award may be unconstitutional is that the ratio between the punitive damage award and actual or likely harm equal to or in excess of 500-to-1 may be treated as presumptively unconstitutional. Such ambiguity fails to provide notice to defendants. Notwithstanding the ambiguity of the Court's guidance in the punitive damage area, the Court should not indulge itself in developing excessive punitive damage awards as a substantive due process right. Rather, the Court's efforts would be better spent in developing procedural protection as advanced by Justice Breyer in his concurring opinion.

Without having the Court engage in developing inflexible boundaries in an area where many state legislatures plan to take or have already taken action, the Court should remain within its scope of power by focusing

148. Theodore J. Boutrous, Jr., Rule of Law: What's Next for Punitive Damage Awards, WALL ST. J., May 29, 1996, at A19. The article further discusses that the Court's decision to allow the jury award to reflect only the actions of BMW within Alabama as having significant ramifications because plaintiffs' lawyers frequently urge juries to punish defendants for nationwide conduct. Id. Moreover, the article mentions that, because of their inability to look at a company's out-of-state activities, state juries may not be allowed to calculate punitive damage from the company's wealth when its income is derived from activities in other states. Id.
149. Id.
150. Id.
152. Many state legislatures have already probed into the punitive damage award field by proposing or enacting legislation intended to alter the availability of punitive damages. Some legislation raises the burden of proof required to receive punitive damages to "clear and convincing" proof. See ALA. CODE § 6-11-20 (1993); ALASKA STAT. § 09.17.020 (1992);
on the procedural due process element of punitive damages and looking to *Matthews v. Eldridge*\(^{153}\) for guidance. In *Eldridge*,\(^ {154}\) the Court established a test to determine how much process is due by balancing three factors: (1) the private interest at stake, (2) the risk that existing procedures will wrongly impair this private interest and the likelihood that additional or other procedural safeguards can effect a cure, and (3) the government’s interest.\(^ {155}\)

Applying these factors, the Court should consider the defendant’s interest in avoiding excessive punitive damage awards and the government’s interest in punishing and deterring undesirable conduct. In addition, the Court should look to current procedures, including jury instructions and trial and appellate court review, to establish whether the defendant’s interest is sufficiently protected. It should then consider whether additional or other procedures would better protect this interest, while considering the government’s interest in not providing these procedures. As a result, the Court should establish a precedent whereby defendants will have notice of the ramifications of their actions in terms of punitive damages and legislatures and lower courts will be forced to take action to provide adequate procedures. This would provide the type of flexibility the states need, as the majority of the *BMW* Court contends, in controlling punitive damage awards.\(^ {156}\)

B. DISMAL IMPLICATIONS FROM SUPREME COURT ACTION

Despite the advantages of a procedural due process approach, the Court attempted to dictate with great ambiguity when and if punitive damages

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\(^{153}\) 424 U.S. 319 (1976). *Eldridge* involved a constitutional challenge to the administrative procedures for assessing whether a continuing disability exists. *Id.* The Court upheld the procedures against a due process attack by applying the standard set forth above. *Id.*

\(^{154}\) *Id.*

\(^{155}\) *Id.* at 335.

\(^{156}\) *BMW* of N. Am. v. Gore, No. 94-896, slip op. at 7 (U.S. May 20, 1996).
PUNITIVE DAMAGE AWARDS

should be awarded. This has dismal implications. First, as a practical matter, the Court really does nothing to guide legislatures and lower courts because of the ambiguity of the three guideposts.157 Second, the guideposts are a move toward undermining the function of the jury by dictating what they should consider. Here, the Court does not give much weight to the fact that the jury has historically awarded punitive damages158 and requires flexibility in each situation159 to determine when a punitive damages award will fulfill the goals of punishment and deterrence.160

Third, the path the Court takes in BMW of North America v. Gore may pose separation of powers issues. The primary goal behind punitive damages is not to compensate but to deter and punish.161 Punitive damages regulate the activities of individuals, the primary goal of a legislature,162 not the Supreme Court.163 Furthermore, where numerous states have enacted or are considering legislation,164 the Supreme Court should have deferred to the legislatures to the extent that such legislation does not exceed constitutional boundaries or disturb the balance of power.

Finally, BMW of North America v. Gore may create problems for federalism because it attempts to impose a national standard on state courts. Several Justices have shared this concern regarding intrusions into the domain of the states and have articulated these concerns throughout the cases.165 Moreover, state law has historically determined punitive damag-

157. Id. at 8-9 (Scalia, J., dissenting).
158. As far back as 1852, the jury’s role in imposing punitive damages has been well established in common law. Day v. Woodworth, 54 U.S. 363, 371 (1852). The importance of the jury in awarding punitive damages was reiterated in Smith v. Wade, 461 U.S. 30 (1983).
160. See RESTATEMENT (SECOND) OF TORTS, supra note 2, § 908.
161. Id.
162. Several examples of a legislative power to regulate can be found in U.S. CONST. art.I, § 8.
163. The Supreme Court’s primary goal is to resolve cases and controversies. U.S. CONST. Art. III, § 2, cl. 2. Admittedly, the Supreme Court’s power can also have a regulatory effect. Nevertheless, the issue here becomes even more acute because many states have taken some type of action, and the Supreme Court has decided to disregard this and has established its own guidelines to limit punitive damages.
164. See supra note 153.
165. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 63 (1991) (in dissenting Justice O’Connor stated that the determination of whether and how much to impose punitive damages should be left to the states and not the Supreme Court); See BMW of N. Am. v. Gore, No. 94-896, slip op. at 7 (U.S. May 20, 1996) (states should have substantial flexibility in determining limits on punitive damages); Id. at 1 (Scalia, J., dissenting) (the Court’s actions were an unjustified incursion into the province of state governments).
es, and attempts to limit punitive damages through federal legislation have been futile. If the Court continues on the path it paved by BMW of North America v. Gore to disregard state sovereignty, the Court could produce dire results for federalism.

V. CONCLUSION

The Supreme Court has been eager to become part of the punitive damage debate. Despite its many attempts at guiding punitive damage awards, the Supreme Court’s role in this controversy has remained ambiguous at best. Indeed, the Court’s three vague guideposts in BMW of North America v. Gore only add to the confusion. Once more, the Court may continue this aggressive stance found in BMW of North America v. Gore in limiting punitive damages and further complicate the debate by creating issues involving the jury’s function in awarding punitive damages, the balance of power between the legislature and judiciary, and the boundaries between the federal and state governments. Rather than compound the debate, the best stance for the Supreme Court to take is none at all. The states are competent to engage in substantive punitive damage reform.

MICHELLE J. CAREY


167. Punitive Reform Takes A Step, BUS. INS., May 27, 1996, at 8. Some attempts have been made by Congress to control punitive awards. Id. One broad tort reform bill that limited punitive damages was approved by the House of Representatives only to fail in the Senate. Id. A product liability reform bill that contained a formula to allocate punitive damages was approved by both houses only to be vetoed by the President. Id.