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Selective Due Process: The United States Supreme Court Has Said That Punitive Damages Awards Must Be Reviewed for Excessiveness, but Many Courts Are Failing to Follow the Letter and Spirit of the Law

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Selective Due Process: The United  
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Punitive damages are a long-standing, and frequently controversial part of the American civil justice system.<sup>1</sup> For much of their history punitive damages were awarded infrequently, but there has been a “dramatic increase” in the incidence and size of

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<sup>1</sup> See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 25 (1991) (Scalia, J., concurring) (stating that “punitive or ‘exemplary’ damages have long been a part of Anglo-American law. They have always been controversial.”).

punitive damages verdicts in recent decades.<sup>2</sup> As one commentator has noted, “hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case.”<sup>3</sup> Punitive damages are being imposed so frequently, and in such large amounts, that U.S. Supreme Court justices have expressed concern that punitive damages in this country are “skyrocketing”<sup>4</sup> and have “run wild.”<sup>5</sup> The gravity of the Court’s concern is reflected in the attention that the Court has given to the issue. In a little over a decade, the Court has addressed punitive damages issues in seven opinions.<sup>6</sup>

In the decision that goes to the core of this Article, in 1996 the Court held in *BMW of North America, Inc. v. Gore* that punitive damages awards that are “grossly excessive” violate due process under the Fourteenth Amendment of the U.S. Constitution.<sup>7</sup> The *Gore* Court provided three “guideposts” for determining whether punitive damages awards are unconstitutionally excessive: (1) the reprehensibility of the defendant’s conduct; (2) the ratio between the actual damages and the punitive damages award; and (3) the comparable civil and criminal sanctions for the conduct.<sup>8</sup> In an earlier law review article and *amicus curiae* briefs to the Court, the authors of this Article suggested that punitive damages should be considered in light of criminal fines for similar conduct.<sup>9</sup>

<sup>2</sup> George L. Priest, *The Problem and Efforts to Understand It*, in PUNITIVE DAMAGES, HOW JURIES DECIDE 1 (Cass R. Sunstein et al. eds., 2002).

<sup>3</sup> Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation*, 40 ALA. L. REV. 919, 919 (1989).

<sup>4</sup> *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O’Connor, J., concurring in part and dissenting in part).

<sup>5</sup> *Haslip*, 499 U.S. at 18.

<sup>6</sup> See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Haslip*, 499 U.S. 1; *Browning-Ferris*, 492 U.S. 257.

<sup>7</sup> *Gore*, 517 U.S. at 563.

<sup>8</sup> *Id.* at 575.

<sup>9</sup> See Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued by The Supreme Court of the United States* in *Haslip*, 42 AM. U.L. REV. 1365, 1380 n.90 (1993); Brief of Am. Auto. Mfrs. Ass’n et al., as *Amicus Curiae* in Support of Pet’r, *TXO Prod. Corp. v. Alliance Res. Corp.*, No. 92-479, at 21; Brief of Am. Tort Reform Ass’n and Ass’n for Cal. Tort Reform as *Amicus Curiae* in Support of Pet’r, *BMW of N. Am., Inc. v. Gore*, No. 94-896, at 7-9.

Unfortunately, lower courts have struggled in their attempts to apply the *Gore* criteria, particularly the third *Gore* factor.<sup>10</sup> Some courts have faithfully applied all three of the Court’s guideposts, but many courts have selectively applied the criteria in ways that run counter to the letter and spirit of the Court’s jurisprudence. In particular, many courts ignore, give “short shrift” to, or misapply the third *Gore* factor.<sup>11</sup>

This Article begins with a brief outline of the history of punitive damages to put current trends in context. Second, the Article examines the Supreme Court’s recent punitive damages opinions, and discusses how the Court’s decisions impose both procedural and substantive limits on such awards.<sup>12</sup> Third, the Article looks at several courts that have ignored, discounted, or otherwise failed to properly apply the third *Gore* factor. The Article compares these cases to decisions by other courts that have faithfully applied the third *Gore* factor. Finally, the Article proposes that courts reviewing a punitive damages verdict for a claim of excessiveness should strive to properly consider and weigh each of the factors articulated by the *Gore* Court, including the third factor, which requires consideration of civil or criminal fines that are comparable to the conduct in question.

## I

### OVERVIEW OF PUNITIVE DAMAGES

The historical roots of punitive damages extend back to several ancient legal systems which allowed punitive damages in specific

<sup>10</sup> See Brief of Gen. Dynamics Corp. as *Amicus Curiae* in Support of Pet’r, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, No. 99-2035, at 3-8 (explaining how the “vast majority of appellate courts have ignored or misapplied [*Gore*’s] third Guidepost) [hereinafter Brief of Gen. Dynamics Corp.]. See also Mark A. Klugheit, “Where the Rubber Meets the Road”: *Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation*, 52 SYRACUSE L. REV. 803, 834 (2002) (“The Third *BMW* factor—existing sanctions for comparable misconduct—seems to have been honored by lower courts as much in the breach, as in the observance.”).

<sup>11</sup> See Brief of Gen. Dynamics Corp., *supra* note 10, at 4 (reviewing reported appellate decisions as of 2000). In *Cooper*, the Court encouraged appellate courts to use their particular expertise in applying the third *Gore* factor. See *Cooper*, 532 U.S. at 440. Since that decision, a few courts have faithfully applied the third *Gore* factor. See *infra* section IIIC. Nevertheless, many courts continue to have problems applying the third factor, as described in the Brief of Gen. Dynamics Corp. as *Amicus Curiae*. See *infra* section IIIB.

<sup>12</sup> See RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 17.10 (2002 Supp.).

situations.<sup>13</sup> The Anglo-American notion of punitive damages can be traced to two eighteenth century English cases involving illegal searches and seizures by officers of the Crown, *Huckle v. Money*<sup>14</sup> and *Wilkes v. Wood*.<sup>15</sup> It was in these cases that the English Courts first recognized that punitive, or exemplary, damages could be awarded apart from compensatory damages.<sup>16</sup> After these decisions, English courts permitted punitive damages to be imposed in other cases where one individual intentionally caused harm to another, such as assault and battery, malicious prosecution, false imprisonment, and trespass.<sup>17</sup> The concept soon made its way across the ocean, and punitive damages were recognized by American courts in the late eighteenth century.<sup>18</sup> The U.S. Supreme Court first recognized punitive damages in 1852.<sup>19</sup>

The basis for and frequency of punitive damages awards in America changed significantly beginning in the latter half of the twentieth century. Until the late 1900s, for instance, punitive damages "merited scant attention," because they "were rarely assessed and likely to be small in amount."<sup>20</sup> Typically, punitive damages awards only slightly exceeded compensatory damages awards, if at all.<sup>21</sup>

Traditionally, courts imposed punitive damages on defendants

<sup>13</sup> See James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1119 (1984) (noting that forms of punitive damages appeared in the Code of Hammurabi in 2000 B.C., and also appeared in ancient Hittite law, the Hindu Code of Manu, and Mosaic law in the Bible).

<sup>14</sup> 95 Eng. Rep. 768 (C.P. 1763).

<sup>15</sup> 98 Eng. Rep. 489 (K.B. 1763).

<sup>16</sup> See Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 14 (1982).

<sup>17</sup> See Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Punitive Damages Reform By Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1007 (1999).

<sup>18</sup> See Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1290-91 (1993).

<sup>19</sup> See *Haslip*, 499 U.S. at 26 (Scalia, J., concurring) (citing *Day v. Woodworth*, 13 How. 363, 14 L. Ed. 181 (1852)).

<sup>20</sup> Ellis, *supra* note 16, at 2.

<sup>21</sup> See, e.g., *S. Kan. Ry. Co. v. Rice*, 38 Kan. 398 (1888) (\$35 costs and fees, \$10 injury to feelings, \$71.75 punitive); *Fay v. Parker*, 53 N.H. 342 (1872) (\$150 actual, \$331.67 exemplary); *Woodman v. Town of Nottingham*, 49 N.H. 387 (1870) (\$578 actual, \$100 exemplary); *Taylor v. Grand Trunk Ry. Co.*, 48 N.H. 304 (1869) (\$500 actual damages, \$858.50 exemplary).

that intentionally caused injury to the plaintiff.<sup>22</sup> Beginning in the 1960s, however, with the emergence of mass products liability litigation, courts became more willing to impose punitive damages for less than intentional conduct.<sup>23</sup> As a result, the 1970s and 1980s saw a dramatic increase in the size of punitive damages awards.<sup>24</sup> Furthermore, "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface."<sup>25</sup>

As a result of these trends, astronomical judgments that would have been considered extreme even just a few years ago have been handed down in several recent cases. These include several verdicts since 1998 exceeding \$1 billion:

- In October of 2002, a Kansas City, Missouri jury awarded \$2.2 billion in punitive damages to a cancer patient whose pharmacist diluted drugs to boost profits, even though most of the pharmacist's assets had already been seized.<sup>26</sup>
- In October of 1999, a Williamson County, Illinois trial court entered a judgment of almost \$1.18 billion (including \$600 million in punitive damages) against State Farm Mutual Automobile Insurance Company in favor of a nationwide class of State Farm policyholders.<sup>27</sup> The case arose out of a long-standing State Farm practice (shared by other automobile insurers) of using non-Original Equipment Manufacturer (OEM) parts to repair cars after accidents. The practice

<sup>22</sup> See Schwartz et al., *supra* note 17, at 1008-09.

<sup>23</sup> See Rustad & Koenig, *supra* note 18, at 1306-07 (acknowledging that the standard for imposing punitive damages has shifted from "malicious acts to highly negligent ones" but disputing that punitive damages are awarded routinely).

<sup>24</sup> See Peter Kinzler, *Recent Studies of Punitive Damage Awards: The Tale of the Tape*, 15 J. INS. REG. 402, 404 (1997); George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123 (1982). See also *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) (noting that a decade before the decision, "the largest award of punitive damages affirmed by an appellate court in a products liability case was \$250,000. Since then, awards more than 30 times as high have been sustained on appeal."); Schwartz et al., *supra* note 17, at 1009.

<sup>25</sup> John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986); see also Philip Borowsky & Lee Nicolaisen, *Punitive Damages in California: The Integrity of Jury Verdicts*, 17 U.S.F. L. REV. 147, 148 (1983) (noting the trend of "juries . . . award[ing] substantial punitive damages with increasing frequency").

<sup>26</sup> See *What's News*, WALL ST. J., Oct. 11, 2002, at A1. The award was reduced by the trial court to \$330 million. See *Missouri Award Against Pharmacist Reduced*, LIAB. & INS. WEEK., Feb. 24, 2003, at 5.

<sup>27</sup> See *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242, 1246 (Ill. App. Ct. 2001) (finding that \$130 million in disgorgement damages was duplicative of the specification damage award, but affirming the trial court judgment in all other respects).

had been fully disclosed to policyholders. State Farm and other insurance companies followed this practice to create and assure a competitive market with OEM parts and to reduce repair costs.<sup>28</sup>

- In July of 1999, a Los Angeles, California court ordered General Motors Corp. to pay \$4.9 billion to six people who were injured when their vehicle was rear-ended by a speeding drunk driver and caught on fire. The trial judge later reduced the award to \$1.2 billion. The case was settled in 2003 for an undisclosed amount.<sup>29</sup>

## II

### RECENT SUPREME COURT JURISPRUDENCE ON PUNITIVE DAMAGES

The Supreme Court's jurisprudence since the late 1980s demonstrates the Court's concern that punitive damages awards should not be assessed without constraints on jury discretion. Beginning with the Court's 1989 decision in *Browning-Ferris Industries, Inc. v. Leatherman Tool Group, Inc.* (discussed *infra*) through the Court's most recent pronouncement in *State Farm Mutual Automobile Insurance Co. v. Campbell* (also discussed *infra*), the Court has attempted to ensure that punitive damages are not awarded arbitrarily and capriciously. In doing so, the Court has invoked the Due Process Clause of the Fourteenth Amendment. Although the concepts have not always been clearly delineated in the Court's opinions,<sup>30</sup> the Court has held that a defendant has a right to both procedural and substantive due process protections when punitive damages are assessed. The lack of a clear distinction between substantive and procedural due process protections may be one of the reasons that lower courts have not consistently applied the "guideposts" articulated by the Supreme Court in *Gore* (discussed *infra*).

In this section, we will review the Court's recent punitive dam-

<sup>28</sup> See generally Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215 (2001).

<sup>29</sup> See Margaret Cronin Fisk, *The Biggest Verdict of 1999*, NAT'L L. J., Feb. 28, 2000, at A1 (discussing *Anderson v. Gen. Motors Corp.*, No. BC 116, 926 (Super. Ct., Los Angeles, Cal. 1999)); Frederic M. Biddle, *GM Verdict Cut \$3.8 Billion in Suit Over Explosion*, WALL ST. J., Aug. 27, 1999, at B5; *GM to Settle Case Over Gas Tank Explosion*, L.A. TIMES, July 25, 2003, at B4.

<sup>30</sup> See ROTUNDA & NOWAK, *supra* note 12 at § 14.6(e) (explaining the difference between the procedural and substantive due process issues that are raised in the Court's decisions).

ages cases with a focus on substantive and procedural due process to clarify that both concepts are present in the Court's decisions. As we will show, confusion arises in applying the *Gore* factors as a result of a preoccupation with the procedural due process issue of "notice," when courts analyze the substantive issue of whether a punitive damages award is "grossly excessive."

#### 1. *Browning-Ferris*

In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,<sup>31</sup> the Supreme Court first opened the door to the argument that the Fourteenth Amendment places limits on punitive damages awards.<sup>32</sup> The issue before the Court was whether the Excessive Fines Clause of the Eighth Amendment applies to punitive damages.<sup>33</sup> The Court found that punitive damages in private civil actions are "too far afield from the concerns that animate the Eighth Amendment," and therefore held that the Excessive Fines Clause does not apply to punitive damages.<sup>34</sup> The defendant also asked the Court to review whether the award was excessive under the Due Process Clause of the Fourteenth Amendment.<sup>35</sup> The Court declined to address the issue, however, since it had not been raised before either the district court or the court of appeals below.<sup>36</sup> Nevertheless, in dicta, the Court invited defendants to bring the issue before the Court again, noting that "[t]here is some authority in [the Court's] opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award," but "[t]hat inquiry must await another day."<sup>37</sup>

#### 2. *Haslip*

Two years later, in *Pacific Mutual Life Insurance Co. v. Haslip*,<sup>38</sup> the Court for the first time acknowledged that excessive punitive damages awards could violate the Fourteenth Amendment, although the Court held that the award in that case did not

<sup>31</sup> 492 U.S. 257 (1989).

<sup>32</sup> *Id.* at 276-77.

<sup>33</sup> *Id.* at 259.

<sup>34</sup> *Id.* at 275.

<sup>35</sup> *Id.* at 276.

<sup>36</sup> *Id.* at 275.

<sup>37</sup> *Id.* at 276-77.

<sup>38</sup> 499 U.S. 1 (1991).

violate due process.<sup>39</sup> The defendant asserted that the punitive damages award of \$840,000 (more than four times the \$200,000 compensatory damages award in the case)<sup>40</sup> was "the product of unbridled jury discretion and . . . violative of [the defendant's] due process rights."<sup>41</sup> The Court granted certiorari to "review the punitive damages procedures and award in light of the long-enduring debate about their propriety."<sup>42</sup> The Court determined that the punitive damages award did not violate due process because the instructions given to the jury, the post-trial review procedures, and the appellate review procedures imposed "a sufficiently definite and meaningful constraint on the discretion [of the jury to award] punitive damages."<sup>43</sup>

Although the Court in *Haslip* recognized that the punitive damages imposed in the case greatly exceeded the comparable civil fine,<sup>44</sup> the Court's decision focused upon the procedures used to impose and review punitive damages awards. The Court did not focus upon the question of whether a verdict can be so large as to violate due process, even if there are sufficient procedural protections. In *Haslip*, the Court was satisfied that due process was satisfied because the defendant "had the benefit of the full panoply of Alabama's procedural protections."<sup>45</sup>

In a dissent that foreshadowed the Court's later jurisprudence, Justice Sandra Day O'Connor criticized the trial court in *Haslip* for failing to provide sufficient guidance to the jury. Justice O'Connor said that the instructions did not suggest:

what relation, if any, should exist between the harm caused and the size of the award, nor how to measure the deterrent effect of a particular award. It provided no information to the jury about criminal fines for comparable conduct and the range of punitive damages awards in similar cases.<sup>46</sup>

<sup>39</sup> *Id.* at 18-19.

<sup>40</sup> *See id.* at 6 n.2. The Court noted that "[a]lthough there is controversy about the matter, it is probable that the general verdict for respondent *Haslip* contained a punitive damages component of not less than \$840,000."

<sup>41</sup> *Id.* at 7.

<sup>42</sup> *Id.* (emphasis added).

<sup>43</sup> *Id.* at 20, 22.

<sup>44</sup> *See id.* at 23. Specifically, the Court noted that the punitive damages award in *Haslip*, which was an insurance fraud case, was "much in excess of the fine that could be imposed for insurance fraud" under the relevant sections of the Alabama code. *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 48 (O'Connor, J., dissenting).

Justice O'Connor also noted that the issues raised in *Haslip* were distinct from substantive due process concerns.<sup>47</sup> She stated that judicial review of a punitive damages award tests whether the award is "grossly excessive," noting "this is an important substantive due process concern, but our focus here is on the requirements of procedural due process."<sup>48</sup>

### 3. *TXO*

In *TXO Production Corp. v. Alliance Resources Corp.*,<sup>49</sup> a plurality of the Supreme Court finally held that "the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'<sup>50</sup> The parties in *TXO* urged the Court to adopt a bright-line test for determining whether an award is "grossly excessive."<sup>51</sup> The Court rejected the approaches advanced by both parties, and concluded that the award was not "grossly excessive."<sup>52</sup> Justices Antonin Scalia and Clarence Thomas filed a concurring opinion in which they noted that they declined to join the majority opinion because "it makes explicit what was implicit in *Haslip*: the existence of a so-called 'substantive due process' right that punitive damages be reasonable."<sup>53</sup> Thus, after *TXO*, a substantive right to reasonable punitive damages awards had been recognized, but the standard for determining whether that right had been violated had not yet been clearly articulated.<sup>54</sup>

In a dissenting opinion in *TXO*, Justice O'Connor, joined by Justices Byron White and David Souter, noted that the Court's decision provided "not a single guidepost to help other courts find their way through this area."<sup>55</sup> The dissenting justices suggested that the Court should consider adopting objective factors by which to judge whether punitive damages awards are unconstitutionally excessive.<sup>56</sup>

<sup>47</sup> *Id.* at 44.

<sup>48</sup> *Id.* at 55-56.

<sup>49</sup> 509 U.S. 443 (1993).

<sup>50</sup> *Id.* at 454.

<sup>51</sup> *Id.* at 455-56.

<sup>52</sup> *Id.* at 462.

<sup>53</sup> *Id.* at 470 (Scalia, J., concurring).

<sup>54</sup> *See* *ROTUNDA & NOWAK*, *supra* note 12, at § 14.6(e) (noting that *TXO* established that the Court was ready to recognize both procedural and substantive due process rights in punitive damages cases).

<sup>55</sup> *TXO*, 509 U.S. at 480 (O'Connor, J., dissenting).

<sup>56</sup> *See id.*

4. *Honda Motor Co.*

In *Honda Motor Co. v. Oberg*,<sup>57</sup> the Supreme Court departed from substantive due process questions to consider the procedural issue of whether a state must provide judicial review of the amount of a punitive damages award.<sup>58</sup> The Court held that states must allow for judicial review of the size of punitive damages awards, and Oregon's failure to do so violated due process.<sup>59</sup> In *Honda Motor*, the Court noted that "our recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damages awards."<sup>60</sup> Although the Court's decision centered on procedural issues, the Court took an opportunity to reiterate the point that punitive damages awards that are so large as to be "grossly excessive" are unconstitutional.<sup>61</sup>

5. *Gore*

The Supreme Court returned to substantive due process considerations in *BMW of North America, Inc. v. Gore*.<sup>62</sup> The Court granted certiorari in *Gore* to "help . . . illuminate the character of the standard that will identify unconstitutionally excessive awards."<sup>63</sup> *Gore* involved a claim by an Alabama doctor alleging that BMW, the auto manufacturer, committed fraud by failing to disclose minor cosmetic repairs to cars sold as new.<sup>64</sup> In Dr. Gore's case, the flawed "paint job" on his new BMW sedan was so minor that he never noticed it.<sup>65</sup> The repair was brought to his attention months later when he took the car to a "detailer"—someone who would thoroughly clean the car inside and out to make it look "snazzier than it normally would appear."<sup>66</sup> The detailer noted that portions of Dr. Gore's car had been repainted and brought this to the doctor's attention.<sup>67</sup> Dr. Gore sued the American distributor of BMW automobiles seeking both compensatory and punitive damages on the theory that BMW's failure to disclose the repainting constituted "gross, op-

<sup>57</sup> 512 U.S. 415 (1994).

<sup>58</sup> *Id.* at 420.

<sup>59</sup> *Id.* at 432.

<sup>60</sup> *Id.* at 420.

<sup>61</sup> *See id.*

<sup>62</sup> 517 U.S. 559 (1996).

<sup>63</sup> *Id.* at 568.

<sup>64</sup> *Id.* at 563.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

pressive or malicious" fraud under Alabama law.<sup>68</sup>

At trial, BMW acknowledged that it had a national policy of repairing cars that were damaged in the course of manufacture or during shipment.<sup>69</sup> If the cost of a repair exceeded three percent of the car's suggested retail price, it was placed in company service for a period of time and then sold as used. If the repair was less than three percent of the purchase price, however, BMW sold the car as "new" without advising the dealer or the customer that any repairs had been made.<sup>70</sup>

Because the cost of repainting Dr. Gore's car was only about one and a half percent of his car's suggested retail price, BMW did not disclose its repair to the Alabama dealer or to Dr. Gore.<sup>71</sup> BMW's nondisclosure policy was consistent with the statutory laws of approximately twenty-five states which define disclosure obligations of automobile manufacturers, distributors, and retailers.<sup>72</sup> Under these state laws, BMW's failure to disclose minor refinishing was lawful.

Nevertheless, an Alabama jury awarded Dr. Gore \$4,000 as compensatory damages for the difference in the value of the car he "bargained for" and the car he received.<sup>73</sup> The jury also awarded \$4 million in punitive damages, which it apparently calculated by multiplying Dr. Gore's damage estimate (\$4,000) by 1,000, the number of cars BMW allegedly sold throughout the country under its nondisclosure policy.<sup>74</sup>

On appeal to the Alabama Supreme Court, BMW contended, among other things, that its out-of-state conduct was permissible under the disclosure statutes of other states and, therefore, could not serve as a basis for a punitive damages award.<sup>75</sup> The Alabama Supreme Court agreed, holding that the jury should *not* have been permitted to consider sales by BMW outside of Alabama.<sup>76</sup> Having found the verdict tainted, the court reduced the punitive damages award to \$2 million, believing that this amount was "a constitutionally reasonable" punishment for BMW's con-

<sup>68</sup> *Id.* at 565.

<sup>69</sup> *Id.* at 563.

<sup>70</sup> *Id.* at 563-64.

<sup>71</sup> *Id.* at 564.

<sup>72</sup> *Id.* at 565.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 567.

<sup>75</sup> *Id.* at 565.

<sup>76</sup> *Id.* at 567.

duct in Alabama.<sup>77</sup>

The U.S. Supreme Court overturned the Alabama Supreme Court's decision, holding that the reduced punitive damages award was still "grossly excessive" in violation of due process.<sup>78</sup> In determining that the award was unconstitutionally excessive, the Court used terminology that describes both substantive and procedural due process concerns with respect to punitive damages awards.<sup>79</sup> For example, the Court began its opinion by noting that "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor."<sup>80</sup> Then, just before articulating the three guideposts that led the Court to determine that the award was unconstitutionally excessive, the Court stated that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose."<sup>81</sup> The Court's reference to the defendant's "notice" of the severity of the penalty has led many lower courts to conclude that a punitive damages award is not unconstitutional if the defendant had notice of the size of the award that could be imposed.<sup>82</sup> Yet, the Court held in *Gore* that the award against BMW was "grossly excessive," which is a substantive due process concern. The *Gore* court recognized, as it had in *TXO*, that there are "substantive limits 'beyond which penalties may not go.'"<sup>83</sup>

The *Gore* Court offered three "guideposts" for determining whether a punitive damages award is "unconstitutionally excessive." Those factors are: the "degree of reprehensibility of the defendant's conduct,"<sup>84</sup> the ratio of actual damages to punitive damages;<sup>85</sup> and a comparison to "civil or criminal penalties that could be imposed for comparable misconduct."<sup>86</sup>

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 574.

<sup>79</sup> See ROTUNDA & NOWAK, *supra* note 12, at § 14.6(e) (stating "Justice Stevens' majority opinion in *Gore*, at certain points, seems to mix procedural due process and substantive due process issues").

<sup>80</sup> *Gore*, 517 U.S. at 562.

<sup>81</sup> *Id.* at 574.

<sup>82</sup> *Id.* at 561.

<sup>83</sup> *Id.* at 568; see also *TXO*, 509 U.S. at 454.

<sup>84</sup> *Gore*, 517 U.S. at 575.

<sup>85</sup> See *id.* at 580.

<sup>86</sup> *Id.* at 583.

## 6. *Cooper Industries*

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,<sup>87</sup> the Court affirmed that the Due Process Clause places substantive limits on punitive damages awards, and provided lower courts with additional guidance for reviewing such awards for excessiveness.<sup>88</sup> The Court held that appellate courts must engage in a de novo review of punitive damages awards to determine if an award is unconstitutionally excessive.<sup>89</sup> In addition, the Court stated in dicta that in *Gore* it had "instructed courts evaluating a punitive damages [award] . . . to consider three criteria."<sup>90</sup> This statement directs courts to consider all three *Gore* factors when reviewing a punitive damages award for excessiveness. In *Cooper*, the Court did not say that it had merely proposed or suggested three factors to be applied by lower courts determining the excessiveness of a punitive damages award. Rather, the Court clearly stated that it had *instructed* courts to consider all three of the *Gore* factors. Moreover, the Court specifically noted that the third *Gore* factor is "more suited to the expertise of appellate courts."<sup>91</sup>

## 7. *State Farm*

The U.S. Supreme Court's most recent opinion in *State Farm Mutual Automobile Insurance Co. v. Campbell*<sup>92</sup> is a significant addition to the Court's recent line of punitive damages decisions. The Court's six-to-three ruling clarified the guideposts set forth in *Gore* and also laid down new standards for courts to follow.

*State Farm* stemmed from an automobile accident in Utah. Curtis Campbell, driving north on a highway, passed six vehicles and barely avoided a collision by veering back into his lane just before he would have smashed into an oncoming car.<sup>93</sup> The driver of the oncoming car swerved into the shoulder, lost control, and collided with a third vehicle, leaving one driver dead

<sup>87</sup> 532 U.S. 424 (2001).

<sup>88</sup> *Id.* at 433 ("Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion.")

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 440.

<sup>91</sup> *Id.*

<sup>92</sup> 123 S. Ct. 1513 (2003).

<sup>93</sup> *Id.* at 1517.



and the other permanently disabled.<sup>94</sup> Campbell's insurer, State Farm, contested liability and declined to settle the claims against Campbell for his \$50,000 policy limit (\$25,000 per claimant).<sup>95</sup> A jury then returned a verdict against Campbell for three times the policy limit, finding him to have been 100% at fault for the accident.<sup>96</sup> State Farm later agreed to pay the entire judgment, including the amounts in excess of Campbell's policy limit.<sup>97</sup> Campbell and his wife nonetheless sued State Farm for bad faith, fraud, and intentional infliction of emotional distress based on State Farm's initial refusal to settle the auto accident case.<sup>98</sup> Evidence was introduced at trial that pertained to State Farm's business practices in numerous states, but bore no relation to the types of claims alleged in the Campbells' complaint.<sup>99</sup> The jury awarded the Campbells \$2.6 million in compensatory damages and \$145 million in punitive damages, which the trial court reduced to \$1 million and \$25 million, respectively.<sup>100</sup> On appeal, the Utah Supreme Court reinstated the entire \$145 million punitive damages award, taking into account such factors as State Farm's net worth and aspects of its behavior in other states.<sup>101</sup> The U.S. Supreme Court reversed, holding that the award "was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant."<sup>102</sup>

The Court began its opinion by discussing the various factors it laid out in *Gore* for determining when punitive damages awards are unconstitutionally excessive. The Court proceeded to provide important clarification with respect to the *Gore* guideposts—essentially putting "meat" on the due process "bones" outline in *Gore*.

First, the Court reminded lower courts that the "most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."<sup>103</sup>

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1518.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *See id.*

<sup>100</sup> *Id.* at 1519.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 1521.

<sup>103</sup> *Id.* at 1522 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 559, 572 (1996)).

The Court made clear that it is unconstitutional to consider out-of-state conduct that was legal in the state where it was conducted.<sup>104</sup> The Court indicated that juries must be instructed that they "may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."<sup>105</sup> "Nor as a general rule," the Court added, "does the State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction."<sup>106</sup> "A basic principle of federalism is that each State may make its own judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."<sup>107</sup>

The Court also stated that punitive damages may not be calculated based upon the hypothetical claims of other claimants because "[p]unishment on these bases creates the possibility of multiple punitive damage awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains."<sup>108</sup> Finally, with respect to reprehensibility, the Court noted that this "guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period."<sup>109</sup>

The *State Farm* Court went on to provide important, additional clarification regarding the second *Gore* guidepost: the ratio between compensatory and punitive damages awards. The Court declined once again to create a "bright-line ratio which a punitive damages award cannot exceed," but indicated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."<sup>110</sup> The Court noted that in exceptional cases a higher ratio may be justified where "a particularly egregious act has resulted in only a

<sup>104</sup> *Id.* ("A State cannot punish a defendant for conduct that may have been lawful where it occurred.").

<sup>105</sup> *Id.* at 1522-23.

<sup>106</sup> *Id.* at 1522. The Court explained that "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious," but warned "that conduct must have a nexus to the specific harm suffered by the plaintiff." *Id.*

<sup>107</sup> *Id.* at 1523.

<sup>108</sup> *Id.* (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 593 (1996)).

<sup>109</sup> *Id.* at 1524.

<sup>110</sup> *Id.*

small amount of economic damages."<sup>111</sup> The Court, however, observed that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."<sup>112</sup> Finally, with respect to the ratio guidepost, the Court reminded lower courts that the "wealth of the defendant cannot justify an otherwise unconstitutional punitive damages award."<sup>113</sup>

Having decided that the punitive damages award in *State Farm* violated the first two guideposts set forth in *Gore*, the Court concluded that it was not necessary to "dwell long" on the third *Gore* factor—the disparity between the punitive damages award and the civil or criminal penalties imposed in comparable cases.<sup>114</sup> The Court did suggest, however, that application of this factor reinforced its decision to find the \$145 million punitive damages award unconstitutionally excessive. The Court explained: "The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a \$10,000 fine for an act of fraud, an amount dwarfed by the \$145 million punitive damages award."<sup>115</sup>

### III

#### APPLYING THE THIRD GORE FACTOR: MOST COURTS HAVE DISTORTED THE SUPREME COURT'S INSTRUCTIONS, BUT A FEW HAVE GOTTEN IT RIGHT

##### A. Lower Courts Have Failed to Follow The Spirit of the Court's Overall Guidance

Taken together, the Supreme Court's recent punitive damages opinions reflect a clear desire by the Court to reduce arbitrariness and excessiveness in punitive damages awards. First, the fact that the Court has addressed constitutional limits on punitive

<sup>111</sup> *Id.* The authors have posed a hypothetical where somebody throws harmful acid at another person intending serious physical injury, but causes only minimal damage to that person's clothing. In such a case, punitive damages substantially exceeding actual damages may be justified. See Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform—State Legislatures Can And Should Meet The Challenge Issued By The Supreme Court Of The United States in Haslip*, 42 AM. U. L. REV. 1365, 1379 n.86 (1993).

<sup>112</sup> *State Farm*, 123 S. Ct. at 1525.

<sup>113</sup> *Id.* at 1525.

<sup>114</sup> *Id.* at 1526 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

<sup>115</sup> *Id.* at 1526 (internal citations omitted).

damages repeatedly since 1989 indicates that the Court views the problem of punitive damages "run wild" as a serious one.<sup>116</sup> The Court is not likely to issue a "bright line," easily applicable rule in punitive damages cases, but one of the clear themes that has emerged from the Court's holdings is that punitive damages awards should be fair and reasonable under the circumstances. There is little doubt that in *Gore* and *State Farm* the Court sought to provide standards for courts to use in reviewing punitive damages for excessiveness. The *Gore* Court stated that it accepted the case because it believed that "review of [the] case would help illuminate 'the character of the standard that will identify unconstitutionally excessive awards' of punitive damages."<sup>117</sup> As Justice O'Connor had previously stated in her dissent in *Haslip*, "vague reference to 'the character and the degree of the wrong' and the 'necessity of preventing a similar wrong' do not assist a jury in making a reasoned decision."<sup>118</sup> In order to make punitive damage awards more than just an arbitrary assignment of damages based upon the jurors' "feelings" in a case, appellate courts must take seriously and apply *all* three guideposts articulated by the court in *Gore* and explained further in *State Farm*.

Taken individually, however, the various statements that have been made by the Supreme Court in its punitive damages decisions could be used to support a variety of outcomes on appellate review. For example, in *Haslip*, the Court stated that it could not "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."<sup>119</sup> Nevertheless, the Court noted that the punitive damages award in that case, which was four times the amount of compensatory damages, was close to the line of constitutional impropriety.<sup>120</sup> In *Gore*, the Court stated that the punitive damages award, which was 500 times the compensatory damages awarded, "raise[d] a suspicious judicial eyebrow."<sup>121</sup> Thus, although the Court's statement in *Haslip* could be seen as raising a red flag when the ratio between punitive and compensatory damages is higher than four to one, some lower courts have relied

<sup>116</sup> *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

<sup>117</sup> *Gore*, 517 U.S. at 568.

<sup>118</sup> *Haslip*, 499 U.S. at 48 (O'Connor, J., dissenting).

<sup>119</sup> *Id.* at 18.

<sup>120</sup> *Id.* at 23-24.

<sup>121</sup> *Gore*, 517 U.S. at 583.

upon *Gore* to uphold awards with a large ratio by claiming that the punitive damages award in question was far below the 500-to-1 ratio deemed unconstitutionally excessive in *Gore*.<sup>122</sup> The *Gore* and *State Farm* standards provide instructive assistance to lower courts while retaining enough flexibility to accommodate the facts of a particular case. Unfortunately, some courts have taken advantage of the flexibility of the *Gore* guideposts and have bent them beyond recognition.<sup>123</sup>

The third *Gore* factor, which looks at the comparable civil or criminal penalties that could be assessed for conduct similar to the conduct at issue in the case, has received too little attention from the judiciary (including from the Supreme Court in *State Farm*). This factor is significant in that it is the only one of the *Gore* Court's three criteria that ties the punitive damages verdict to broader policy judgments made by "society," as expressed through the legislature, as to what the appropriate punishment for the behavior at issue should be. The comparable civil or criminal penalty is not an absolute limit on the size of the punitive damages award, but it should be used as a guidepost to determine if the size of the punitive damages award is "grossly excessive."

#### B. Courts That Have Failed to Follow the Letter of the *Gore* Guideposts

Lower courts have had particular difficulty applying the third *Gore* factor. One reason may be that factors one and two encompass concepts that are easy to understand and apply without going beyond the facts of the case. The Supreme Court declared the first factor, reprehensibility, "perhaps the most important."<sup>124</sup> Reviewing courts can conceptualize that the level of punishment should reflect how "bad" the conduct was, and how much damage was caused. The second factor, the ratio between compensatory and punitive damages, is a seemingly objective fac-

<sup>122</sup> See, e.g., *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473 (Or. 2001) (upholding a punitive damages award eighty-seven times the compensatory damages award); *Paracelsus Health Care Corp. v. Willard*, 754 So. 2d 437 (Miss. 2000) (holding that an award in which punitive damages were 150 times the actual damages awarded was not unconstitutionally excessive). The U.S. Supreme Court's *State Farm* opinion may curb the problem of lower courts finding creative ways to justify such large ratios. As the Court explained, "few awards exceeding a single-digit ratio . . . will satisfy due process." *State Farm*, 123 S. Ct. at 1516.

<sup>123</sup> See sources cited *supra* note 11. See also discussion *infra* section III.B.

<sup>124</sup> *Gore*, 517 U.S. at 575.

tor. By way of contrast, the third factor requires courts to go beyond the particular facts of the case in considering whether an award is excessive. Factor three requires a comparison of the jury's award to legislative determinations regarding appropriate sanctions for the behavior in question.

#### 1. Disregarding Factor Three

Although the U.S. Supreme Court has called on appellate courts to use their "expertise" in applying the third *Gore* factor,<sup>125</sup> lower courts have struggled in applying it.<sup>126</sup> Many appellate courts have disregarded and misunderstood the third guidepost.<sup>127</sup> These courts have failed to uphold the letter of the law. For example, in the very same case in which the Supreme Court set forth the *Gore* guideposts, on remand the Alabama Supreme Court declared the comparable statutory fines too low to merit consideration.<sup>128</sup> On remand in *Gore*, the Alabama Supreme Court reconsidered the punitive damages verdict against BMW in light of the U.S. Supreme Court's decision in that case.<sup>129</sup> The Alabama Supreme Court considered the first two factors given by the U.S. Supreme Court, and found that the reprehensibility of the defendant's conduct and the large ratio between compensatory and punitive damages indicated that the award was excessive.<sup>130</sup> Turning to the third factor, however, the Alabama Supreme Court noted that the U.S. Supreme Court had instructed it to accord "substantial deference" to legislative judgments regarding the appropriate penalty in similar cases, and then proceeded to completely disregard the Court's direction.<sup>131</sup> The Alabama Supreme Court stated that the maximum civil penalty under Alabama law would be \$2,000, and then declared that because the statutory penalty was set "at such a low level, there is

<sup>125</sup> *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 (2001).

<sup>126</sup> See Brief of Gen. Dynamics Corp., *supra*, note 10.

<sup>127</sup> See, e.g., *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1253-54 (10th Cir. 2000) (discussing the reprehensibility of the defendant's conduct and the ratio between compensatory damages and punitive, but not making any reference to the third *Gore* factor); *Dean v. Olibas*, 129 F.3d 1001 (8th Cir. 1997) (analyzing the first and second *Gore* factors, but making no mention of factor three); *Wal-mart Inc. v. Goodman*, 789 So. 2d 166, 182 (Ala. 2000) (stating that the court had "no basis for considering [the third *Gore*] factor relevant").

<sup>128</sup> *BMW of N. Am. v. Gore*, 701 So. 2d 507, 514 (Ala. 1997).

<sup>129</sup> *Id.* at 508.

<sup>130</sup> *Id.* at 512-13.

<sup>131</sup> *Id.* at 514.

little basis for comparing it with any meaningful punitive damages award."<sup>132</sup> The Alabama Supreme Court's analysis blatantly defied the U.S. Supreme Court's instruction. The U.S. Supreme Court indicated that appellate courts should give legislative judgments "substantial deference," but the Alabama Supreme Court gave its legislature no deference at all.

The Minnesota Court of Appeals also disregarded a statutory fine that it considered too low in *Brantner Farms Inc. v. Garner*,<sup>133</sup> a land dispute involving a neighbor who planted grass seed on a tract of land that he erroneously believed belonged to him.<sup>134</sup> The jury awarded the plaintiff \$819 in compensatory damages and \$50,000 in punitive damages.<sup>135</sup> The defendant appealed, asserting that the punitive damages award was "grossly excessive."<sup>136</sup> The Minnesota Court of Appeals held that the award was not "grossly excessive" in light of the *Gore* standards.<sup>137</sup> In analyzing the third *Gore* factor, the court acknowledged that the criminal statute provided a comparable sanction,<sup>138</sup> but the court then essentially disregarded the available sanction of \$1,000, noting that it is "not sufficient to deter appellants' behavior in the future."<sup>139</sup>

Some courts have failed to even perform a cursory factor three analysis.<sup>140</sup> For example, in *Williams v. Aetna Finance Co.*,<sup>141</sup> a consumer fraud case in which the plaintiff was awarded \$15,000 in compensatory damages and \$1.5 million in punitive damages, the Supreme Court of Ohio cryptically stated that "it would appear that when one of the guideposts is particularly relevant a lesser reliance on the other guideposts may be justified."<sup>142</sup> The Mississippi Supreme Court was similarly dismissive in *Paracelsus*

<sup>132</sup> *Id.* at 514. The Alabama Supreme Court echoed this sentiment in other cases as well. For example, in *Wal-Mart Stores, Inc. v. Robbins*, 719 So. 2d 245, 247 (Ala. 1998), the court again found that the statutory penalty for misfilling a prescription was too low to merit comparison to the punitive damages awarded in that case.

<sup>133</sup> No. C6-01-1572, 2002 WL 1163559 (Minn. App. Jun. 4, 2002), *review denied* (Minn. Aug. 20, 2002).

<sup>134</sup> *Id.* at \*1.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at \*5.

<sup>137</sup> *Id.* at \*7.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See Brief of Gen. Dynamics Corp., *supra*, note 10 (collecting cases in which courts conducted a *Gore* analysis without mentioning the third factor).

<sup>141</sup> 700 N.E.2d 859 (Ohio 1998).

<sup>142</sup> *Id.* at 871.

*Health Care Corp. v. Willard*,<sup>143</sup> a case in which the plaintiffs asserted breach of employment contract and retaliatory discharge for reporting forged checks.<sup>144</sup> The two plaintiffs were awarded \$10,000 and \$35,102 respectively, and each plaintiff was awarded \$1.5 million in punitive damages.<sup>145</sup> The Supreme Court of Mississippi summarily concluded that "there are no other sanctions which could be imposed under the facts of this case."<sup>146</sup> Contrary to the statements by these state courts, the fact that the U.S. Supreme Court has named this factor as a "guidepost" is a sufficient reason for any court reviewing whether a punitive damages award is unconstitutionally excessive to consider this factor relevant. The Court's statement in *Cooper* that lower courts are "instructed" to consider the three *Gore* factors affirms the Court's intention that reviewing courts consider each of the three *Gore* criteria.<sup>147</sup>

A low statutory sanction or the lack of a criminal or civil fine should not be presumed to be the result of mistake or oversight on the part of the legislature; a statutory penalty is the result of the legislative process. A small civil or criminal penalty, or the absence of a penalty does not indicate that there is no basis for comparison.<sup>148</sup> Rather, a low or nonexistent penalty reflects a policy judgment that the conduct at issue in the case is not considered by the legislature to be so serious as to merit substantial punishment. This fact was recognized by the United States District Court for Washington State in *Groom v. Safeway, Inc.*<sup>149</sup> In *Groom*, the district court considered a punitive damages award against a store in a case brought by a shopper who was unreasonably detained by a security guard employed by the store.<sup>150</sup> The jury awarded the plaintiff \$5,000 in compensatory damages and \$750,000 in punitive damages.<sup>151</sup> After considering the reprehensibility of the defendant's conduct and the ratio between the pu-

<sup>143</sup> 754 So. 2d 437 (Miss. 1999).

<sup>144</sup> *Id.* at 439.

<sup>145</sup> *Id.* at 440.

<sup>146</sup> *Id.* at 445.

<sup>147</sup> See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 (2001) (noting that in *Gore* the Court had "instructed courts evaluating a punitive damages award's consistency with due process to consider three criteria."):

<sup>148</sup> See George Clemon Freeman, Jr., *Constitutional Constraints on Punitive Damages and Other Monetary Punishments*, 57 BUS. LAW. 587, 614 (2002).

<sup>149</sup> 973 F. Supp. 987 (W.D. Wash. 1997).

<sup>150</sup> *Id.* at 989.

<sup>151</sup> *Id.*

nitive damages and compensatory damages awards, the court considered the third *Gore* factor and noted that "the fact that apparently there is no law imposing civil or criminal penalties for comparable conduct strongly suggests that an enormous punitive damage award is not warranted here."<sup>152</sup>

## 2. Using Jury Verdicts Rather Than Statutory Penalties as the Basis for Comparison

Other courts, in an apparent attempt to apply the third *Gore* factor, have compared the punitive damages award with jury verdicts in civil cases, rather than with civil penalties.<sup>153</sup> For example, in *Wightman v. Consolidated Rail Corp.*,<sup>154</sup> an Ohio wrongful death case arising from a collision between a freight train and an automobile, the plaintiff was awarded \$1 million in compensatory damages and \$25 million in punitive damages.<sup>155</sup> The state trial court judge reduced the punitive damages award to \$15 million.<sup>156</sup> In reviewing the defendant's claim that the reduced award was still excessive and unconstitutional, the Supreme Court of Ohio asserted that the "relevant civil penalty" for comparison was the potential award which could be handed down in a civil lawsuit.<sup>157</sup> This is not the best application of the third *Gore* factor for two reasons. First, as discussed above, the third factor compares the jury's judgment in the case with the legislature's judgment about the appropriate sanctions for the conduct at issue.<sup>158</sup> Comparing a punitive damages award to other jury verdicts divorces this factor from its connection to the legislature's policy judgments. Second, unlike statutory penalties, which are prospectively enacted to cover a broad range of situations, jury verdicts are retroactive judgments based upon specific factual situations. Because jury verdicts are dependent

<sup>152</sup> *Id.* at 995.

<sup>153</sup> See *St. John v. Coisman*, 799 So. 2d 1110, 1114 (Fla. App. 2001) ("Stated another way the third criterion is to consider whether the defendant's conduct was sufficiently egregious to merit the amount of punitive damages in light of other awards in similar cases."); see also Brief of Gen. Dynamics Corp., *supra* note 10.

<sup>154</sup> 715 N.E.2d 546 (Ohio 1999).

<sup>155</sup> *Id.* at 549-50.

<sup>156</sup> *Id.* at 550.

<sup>157</sup> *Id.* at 555.

<sup>158</sup> See Cass R. Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2090 (1998) (stating that the third *Gore* factor "serves as a means of checking jury determination against assessments of democratically elected legislatures").

on the specific facts in a case, they are less appropriate for comparison than statutory penalties, which are intended to apply to a broad range of situations.

## 3. Misreading Factor Three as a Mere "Notice" Requirement

Other courts have interpreted the third *Gore* factor as simply requiring defendants to have fair "notice" of potentially large punitive damages awards, rather than as a way in which to measure whether the award is "grossly excessive."<sup>159</sup> For example, in a recent product liability action against an automobile manufacturer in which the jury awarded \$235,000 in compensatory damages and \$3 million in punitive damages, the Sixth Circuit Court of Appeals offered the following as its entire analysis of the third *Gore* factor: "it can be said that automobile manufacturers are generally on notice that their reckless conduct resulting in death could trigger a substantial punitive damages award."<sup>160</sup> This statement appears to mean that, at least in the Sixth Circuit, the third *Gore* factor may be presumed to support large punitive damages awards against auto manufacturers because they are "generally on notice" that large punitive damages awards are possible. The ultimate result of this type of reasoning would be that extreme punitive damages awards may be used to support excessive punitive damages awards in the future.<sup>161</sup>

It is unlikely that this is the result the U.S. Supreme Court intended in *Gore* when it instructed lower courts to compare punitive damages awards with potentially available civil sanctions, particularly given the Court's concern that punitive damages have "run wild."<sup>162</sup> Although the Supreme Court did make reference in *Gore* to whether BMW had "notice of the severity of

<sup>159</sup> For example, the First Circuit Court of Appeals has held that while statutes and regulations should be the focus of a factor three analysis, "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 the acceptable range into which an award might fall." *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 83 (1st Cir. 2001). Similarly, in *Continental Trend Res., Inc. v. Oxy USA, Inc.*, 101 F.3d 634, 641 (10th Cir. 1996), the Tenth Circuit Court of Appeals stated that the "fundamental question" in a factor three analysis is whether a defendant has "reasonable notice" that its conduct "could result in such a large punitive award."

<sup>160</sup> *Clark v. Chrysler Corp.*, 310 F.3d 461, 482 (6th Cir. 2002).

<sup>161</sup> See, e.g., *Wightman v. Consol. Rail Corp.*, 715 N.E.2d 546, 555 (Ohio 1999) (holding that because verdicts in excess of a million dollars could result from railroad accidents resulting in severe injuries, the defendant "could see this coming").

<sup>162</sup> *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

the punishment to be imposed," notice alone does not make a punitive damages award constitutionally valid.<sup>163</sup> Notice is a concept associated with procedural due process.<sup>164</sup> The issue at the heart of *Gore* was substantive due process, that is, there are some limits on the amount of a punitive damages award "beyond which penalties may not go."<sup>165</sup> Therefore, as with factors one and two, what courts are really after is a determination of whether the award is so large as to be "grossly excessive."<sup>166</sup> Comparing a punitive damages award to the comparable civil and criminal fines provides one yardstick by which to measure whether an award is grossly excessive. In contrast, reading the third *Gore* factor as merely a notice requirement does little to further the analysis of the whether the size of the award is so large as to be unconstitutionally excessive.

The distinction between the requirement that a citizen have notice of a potential penalty, and the prohibition on grossly excessive penalties, can perhaps be more clearly illustrated with the following example. Imagine that a state passed a new law imposing a \$10,000 fine on anyone caught driving more than ten miles per hour in excess of the speed limit, but did not inform drivers of this change.<sup>167</sup> If a driver were pulled over the next day and fined in accordance with the statute, the driver might argue that his or her due process rights were violated because there was no way that he or she could have known of the substantial penalty that might be imposed under the new law. The driver might also argue that \$10,000 is a grossly excessive fine for a minor speeding

<sup>163</sup> See Michael J. Phillips, *The Progressiveness of the Lochner Court*, 75 DENV. U. L. REV. 453, 471 n.110 (1998) (noting that the *Gore* "criteria appear to be substantive" and "[e]ven if the state had given BMW all the notice in the world . . . it still might have violated due process under these criteria").

<sup>164</sup> See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 465 (1993). In *TXO*, the Court distinguished between substantive and procedural due process. *TXO*'s argument that the punitive damages award was unfair because it did not have notice of the possible size of the punitive damages award is discussed in Part IV of the plurality's opinion within the context of a discussion regarding the procedural fairness of the punitive damages award.

<sup>165</sup> *Id.* at 454. For a complete discussion of the differences between procedural and substantive due process in punitive damages, see also ROTUNDA & NOWAK, *supra* note 12, at § 14.6(e).

<sup>166</sup> As the Court recognized in *Gore*, defendants are entitled to notice of the severity of the penalty that can be imposed. Despite what some reviewing courts have held, however, notice alone does not satisfy the factor three analysis.

<sup>167</sup> See Joseph E. Murphy, *The Duty of the Government to Make the Law Known*, 51 FORDHAM L. REV. 255 (1982) (discussing the government's constitutional obligation to make laws publicly known).

infraction. The latter argument is entirely distinct from the argument that the driver was unaware of the potential penalty.

Now assume the facts in the above hypothetical were slightly different, and before the law imposing the \$10,000 fine took effect, the state undertook a massive campaign of public service announcements to alert drivers to the new law. Under this scenario, a driver who was fined under the new law would be unable to argue that he or she lacked reasonable notice of the potential penalty, but he or she could still argue that the \$10,000 fine is "grossly excessive" in relation to the state's interest in protecting its citizens on the highways. As this example illustrates, a defendant's notice of a potential penalty does not trump potential constitutional issues with regard to the amount of punishment that may be imposed. While the Excessive Fines Clause may apply to bar states from imposing an extreme fine like the one in the hypothetical, the Supreme Court's jurisprudence discussed above indicates that the Due Process Clause imposes similar substantive limits on civil punitive damages awards.

### C. Courts That Have Given Due Meaning to the Third Guidepost

Some courts have taken the U.S. Supreme Court's *Gore* decision seriously and have diligently applied all three factors set forth by the Court to determine whether a punitive damages award passes constitutional muster. A notable example is the decision of the Ninth Circuit Court of Appeals in *In re Exxon Valdez*,<sup>168</sup> in which the court reviewed the \$5 billion punitive damages verdict arising out of the Alaskan oil spill. As in most appellate reviews, the court examined the defendant's conduct and the ratio between the economic and punitive damages awarded. The Ninth Circuit then engaged in a thorough review of the comparable civil and criminal penalties to the conduct at issue, noting that the case was "unusually rich in comparables."<sup>169</sup>

The Ninth Circuit in *Exxon Valdez* first compared the punitive damages verdict to available criminal fines, stating that "[c]riminal fines are particularly informative because punitive damages are quasi-criminal."<sup>170</sup> The court found that the puni-

<sup>168</sup> 270 F.3d 1215 (9th Cir. 2001).

<sup>169</sup> *Id.* at 1245.

<sup>170</sup> *Id.*

tive damages award was 25,000 times one of the comparable criminal fines, which was \$200,000.<sup>171</sup> The court also noted that the limit on liability provided by Congress in the Trans-Alaska Pipeline Act is \$100 million, 1/50 of the amount of punitive damages awarded by the jury in *Exxon Valdez*.<sup>172</sup> In addition, the Court referenced a plea agreement between Exxon and the Attorneys General of the United States and the State of Alaska in which Exxon agreed to pay \$150 million in fines and restitution.<sup>173</sup> Finally, after the oil spill, Congress enacted the Oil Pollution Act, which provides that owners of vessels can be subject to a maximum fine of \$3,000 per barrel for "gross negligence or willful misconduct" resulting in discharged oil.<sup>174</sup> That law did not apply to Exxon's conduct with respect to the Valdez incident because it was passed after the oil spill. Nevertheless, the Ninth Circuit found that the Oil Pollution Act reflected Congress's policy judgment as to an appropriate penalty in the precise situation at hand.<sup>175</sup> If the Act had applied, Exxon's liability would not have exceeded \$786 million.<sup>176</sup> Each of the civil fines that the Ninth Circuit used as a basis for comparison indicated that \$5 billion was a "grossly excessive" punitive damages award.<sup>177</sup>

Many cases will not be as "rich in comparables" as the *Exxon Valdez* litigation.<sup>178</sup> Nevertheless, some courts have managed to give meaning to the third *Gore* factor, even where there were fewer bases for comparison than in *Exxon Valdez*. For instance, in *Watson v. Johnson Mobil Homes*,<sup>179</sup> the Fifth Circuit Court of Appeals found that an award of \$4,000 in compensatory damages

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1246.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> On remand, the district court issued an opinion that openly disagreed with the Ninth Circuit and can only be characterized as defiant. See *In re the Exxon Valdez*, 236 F. Supp. 2d 1043 (D. Alaska 2002). The trial court adhered to its view that the \$5 billion punitive damage award was not excessive. The trial court, however, did reduce the award to \$4 billion in order to comply with what it viewed as the literal terms of the Ninth Circuit's mandate. See *id.* at 1068. In August 2003, the Ninth Circuit once again vacated the damages award and sent it back to the lower court for reconsideration in light of the Supreme Court's decision in the *State Farm* case. See *Sea Hawk Seafoods, Inc. v. Exxon Corp.*, No. 03-35166 (9th Cir. Aug. 18, 2003) (order vacating and remanding damages award); Russell Gold, *U.S. Court Rejects Punitive Award for Exxon Spill*, WALL ST. J., Aug. 25, 2003, at B2.

<sup>178</sup> 270 F.3d at 1245.

<sup>179</sup> 284 F.3d 568 (5th Cir. 2002).

and \$700,000 in punitive damages stemming from defendant's alleged failure to return the plaintiff's loan deposit on the purchase of a mobile home was unconstitutionally excessive.<sup>180</sup> With respect to the third *Gore* factor, in particular, the court noted that Mississippi's consumer protection laws provided for a comparable civil penalty of up to \$10,000 for each offense.<sup>181</sup> Mississippi law also provided that a first time offender may be subject to a fine of between \$1,000 and \$5,000, and between one and five years imprisonment.<sup>182</sup> The court noted that although the statute permitted "relatively severe" penalties for individuals who take advantage of consumers, the single incident offense was small in comparison to the punitive damages award in the *Watson* case.<sup>183</sup> Accordingly, the court remitted the punitive damages award to \$150,000.<sup>184</sup>

Furthermore, in *Watkins v. Lundell*,<sup>185</sup> involving claims for breach of contract and fraud, the Eighth Circuit Court of Appeals found that a \$3.5 million punitive damages award was unconstitutionally excessive.<sup>186</sup> In making that determination, the court relied in part on the fact that the punitive damages award was 350 times the civil sanction that could have been awarded against the defendant for its conduct.<sup>187</sup>

#### IV

#### APPLYING THE THIRD GORE FACTOR IN FUTURE CASES

As the previously discussed examples demonstrate, courts can and should engage in a serious and faithful analysis of the third *Gore* factor. Courts should not simply declare that there are no similar or comparable fines and either end the analysis there or move to a discussion of comparable jury verdicts in civil cases. If courts began to apply the third factor as required, litigants would have an incentive to provide courts with information as to the comparable or analogous fines in similar situations. For example, a court or litigant in a property damage case may look to criminal

<sup>180</sup> *Id.* at 573-74.

<sup>181</sup> *Id.* at 573.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 574.

<sup>185</sup> 169 F.3d 540 (8th Cir. 1999).

<sup>186</sup> *Id.* at 545.

<sup>187</sup> *Id.* at 546.

finer for arson or theft. Similarly, a court or litigant in a product liability personal injury case may look to criminal fines for battery or, in appropriate cases, manslaughter. The appendix to this Article provides a sampling of state criminal fines and federal civil and criminal fines as examples of penalties that could be used by a court analyzing the comparable civil or criminal fines required by *Gore*.<sup>188</sup>

Courts applying the third *Gore* factor will in some cases need to address situations in which the comparable criminal punishment includes imprisonment. Many courts have used the fact that imprisonment may result from the conduct in question as a *carte blanche* to permit juries to impose any amount of punitive damages.<sup>189</sup> Courts proceeding under this theory point to the Supreme Court's statement in *Haslip* that while the punitive damages were "much in excess" of the permissible fine, "imprisonment . . . could also be required in a criminal context."<sup>190</sup> Criminal imprisonment should not, however, be a reason to give the jury free rein to award exorbitant punitive damages. As the Court stated in *State Farm*: "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."<sup>191</sup>

In *Haslip*, the Court noted that the four-to-one ratio between punitive and compensatory damages awards in that case was "close to the line" of being unconstitutional, but the court ultimately found that the punitive damages award was justified, presumably due in part to the fact that imprisonment was available as an analogous criminal punishment.<sup>192</sup> Thus, criminal imprisonment was in essence a "thumb on the scale" in favor of a large punitive damages award. By way of comparison, the Supreme Court of New Mexico has taken a balanced view of the issue, holding that "the possibility of a jail sentence justifies a substantial punitive damages award."<sup>193</sup> In *Aken v. Plains Electric Gen-*

<sup>188</sup> See Appendix.

<sup>189</sup> See *Romo v. Ford Motor Co.*, 99 Cal. App. 4th 1115, 1151 (2002) (stating that comparison to comparable civil and criminal fines only appropriate where the conduct in question cannot result in imprisonment, and is "inappropriate" if the conduct could result in "substantial imprisonment").

<sup>190</sup> *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 23 (1991).

<sup>191</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1526 (2003).

<sup>192</sup> 499 U.S. at 23.

<sup>193</sup> *Aken v. Plains Elec. Gen. & Transmission Co-op., Inc.*, 49 P.3d 662, 671-72 (N.M. 2002).

*eral & Transmission Cooperative, Inc.*, the court reviewed two punitive damages awards given in the same case, one for wrongful termination (\$500,000 compensatory and \$1.75 million punitive damages), and another for libel (\$100,000 compensatory and \$1 million punitive damages).<sup>194</sup> With respect to the libel claim, the court found that the defendant's conduct had been sufficiently reprehensible to support punitive damages.<sup>195</sup> The court then considered the ratio, and reduced the award in the libel claim from a ratio of ten-to-one to three-to-one.<sup>196</sup> The court noted that criminal libel in New Mexico could be punished by a \$100 fine or up to one year imprisonment, or both.<sup>197</sup> The court found that the possibility of imprisonment justified a higher award than the monetary statutory fine alone (\$100) would justify.<sup>198</sup> The New Mexico court's judgment represents sound reasoning, because, as noted above, the court did not use the possibility of imprisonment to justify a punitive damages award that was ten times the compensatory damages award. Rather, the court reduced the award to three times the compensatory damages awarded, and noted that the possibility of imprisonment justified a higher award than the criminal monetary fine alone might justify. Therefore, the totality of the court's opinion is that imprisonment may justify a higher punitive damages award, but the possibility of imprisonment does not justify a limitless award.

By taking the third *Gore* factor seriously, and not allowing the possibility of imprisonment to override all other concerns, the New Mexico court met the U.S. Supreme Court's call to appellate courts to use their particular expertise to give meaning to the third *Gore* factor. Other courts would be wise to follow the example set by the New Mexico Supreme Court.

#### CONCLUSION

As the U.S. Supreme Court has recognized, punitive damages awards in this country have "run wild."<sup>199</sup> In response to "skyrocketing"<sup>200</sup> punitive damages awards, the Court has recog-

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 670.

<sup>196</sup> *Id.* at 671.

<sup>197</sup> *Id.* at 672.

<sup>198</sup> *Id.*

<sup>199</sup> *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 18 (1991).

<sup>200</sup> *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J. concurring in part and dissenting in part).



nized that both substantive and procedural protections are guaranteed to defendants against whom punitive damages are awarded. In *Gore*, the Court held that punitive damages that are "grossly excessive" are unconstitutional. The Court also set forth three "guideposts" that must be applied by lower courts to determine whether a punitive damages award is unconstitutionally excessive: (1) the reprehensibility of the defendant's conduct, (2) the ratio between the actual damages and the punitive damages award, and (3) the comparable civil and criminal sanctions for the conduct.<sup>201</sup> The importance of these factors was recently reinforced by the Court in *State Farm*.

Courts seem to have had relatively little difficulty applying the first and second *Gore* factors. Applying the third *Gore* factor, however, has often been more difficult for courts. Yet, as the U.S. Supreme Court has recognized, appellate courts are uniquely situated to apply the analysis required to give meaning to the third *Gore* factor. Application of the third *Gore* factor, although a sometimes challenging task, is the only means by which the courts can truly give the appropriate deference and meaning to the Supreme Court's punitive damages jurisprudence. Rather than ignore or give short shrift to this factor, courts should strive to follow the letter and spirit of the law.

<sup>201</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996).

APPENDIX  
EXAMPLES OF STATE CRIMINAL PENALTIES

DISTRICT OF COLUMBIA

| Title and Section in the <i>District of Columbia Code</i> | Description  | Fine  |
|---|--|---|
| § 22-404  | Assault or threatened assault in a menacing manner | Not more than \$1,000 or imprisonment of not more than 180 days, or both.   |
| § 22-712  | Bribery  | Not more than \$25,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisonment not to exceed ten years, or both.  |
| § 22-2402   | Perjury  | Not more than \$5,000, or imprisonment not to exceed ten years.   |
| § 22-3212   | Penalties for theft                                | Not more than \$5,000 or imprisonment, not more than ten years for first degree; not more than \$1,000 or imprisonment not to exceed 180 days or both.  |
| § 22-3222   | Penalties for fraud                                | For first degree fraud—not more than \$5,000 or three times the value of the property, whichever is greater, or imprisonment for not more than ten years, or both, if the value of the property is \$250 or more; not more than \$1,000 or imprisonment not to exceed 180 days or both, if the value of the property is less than \$250. For second degree fraud, not more than \$3,000 or three times the value of the property, whichever is greater, or imprisonment not to exceed three years, or both, if the value of the property is \$250 or more; not more than \$1,000 or imprisonment not to exceed 180 days or both, if the value of the property is less than \$250. |
| § 22-3301   | Unlawful entry on property                         | Not more than \$100, or imprisonment not to exceed six months or both.  |

ILLINOIS

| Title and Section in the <i>Illinois Compiled Statutes Annotated</i> | Description | Fine  |
|--|-------------|---|
| §720 5/12-1  | Assault     | Not to exceed \$1,500, or imprisonment not to exceed thirty days.       |
| §720 5/12-3  | Battery     | Not to exceed \$2,500, or imprisonment for any term less than one year. |

|             |                           |  |
|-------------|---------------------------|--|
| §720 5/16-1 | Theft                     | \$2,500 or the amount specified in the offense, whichever is greater, or imprisonment for any term less than one year if the property is not greater than \$300; \$25,000 or twice the value of the property, or imprisonment not less than five years and not to exceed ten years if the property is valued more than \$300 and less than \$10,000. |
| §720 5/21-3 | Criminal trespass to land | Not to exceed \$1,500, or imprisonment not to exceed six months.   |
| §720 5/32-2 | Perjury                   | Not to exceed \$25,000 or the amount specified in the offense, whichever is greater, or imprisonment not less than five years and not more than ten years.   |
| §720 5/33-1 | Bribery                   | Not to exceed \$25,000 or the amount specified in the offense, whichever is greater, or imprisonment not less than seven years and not more than fourteen years.   |

## MARYLAND

| Title and Section in the Annotated Code of Maryland (1957) | Description  | Fine  |
|--|--|---|
| Art. 27, § 12A   | Assault  | Imprisonment not to exceed twenty-five years for first degree offense; not more than \$2,500 or imprisonment not to exceed ten years or both for second degree offense. |
| Art. 27, § 22  | Offering bribe to or receiving bribe by public officer; witness in prosecution | Not less than \$100, not more than \$5,000, or imprisonment not less than two years and not to exceed twelve years, or both.  |
| Art. 27, § 35D   | Abuse or neglect of vulnerable persons   | Not more than \$5,000, or imprisonment not to exceed five years, or both.   |
| Art. 27, § 36  | Carrying or wearing concealed weapon; carrying openly with intent to injure    | Not more than \$1,000, or imprisonment not to exceed three years.   |
| Art. 27, § 173   | Fraud—Conversion of partnership money  | Not more than \$5,000, or imprisonment not to exceed ten years, or both.  |
| Art. 27, § 209   | Fraud—Receiving premiums after insolvency                                      | Not more than \$500, or imprisonment not to exceed six months, or both.   |

## Selective Due Process

|                |                             |   |
|----------------|-----------------------------|---|
| Art. 27, § 342 | Theft                       | A value of \$300 or greater shall restore property to owner or pay the value of the property or services and be fined not more than \$1,000, or imprisonment not to exceed fifteen years, or both; a value of less than \$300 shall restore property to owner or pay him the value of the property or services and be fined not more than \$500, or imprisonment not to exceed eighteen months. |
| Art. 27, § 439 | Perjury                     | Incarceration only not to exceed ten years.   |
| Art. 27, § 576 | Trespass on posted property | Not exceeding \$500, or imprisonment not to exceed three months.  |

## MICHIGAN

| Title and Section in Michigan Compiled Laws Service | Description  | Fine   |
|---|--|--|
| Penal Code § 750.81a                                | Assault without weapon and infliction of serious injury without certain intent | Not more than \$500, or imprisonment not to exceed ninety-three days, or both.   |
| Penal Code § 750.118                                | Bribe  | Not more than \$5,000, or imprisonment not to exceed ten years.  |
| Penal Code § 750.174                                | Embezzlement   | Not more than \$500 or three times the value of the money or property embezzled, whichever is greater, or imprisonment not to exceed ninety-three days, or both if valued at \$200 or less; not more than \$2,000 or three times the value of the money or property embezzled, whichever is greater, or imprisonment not to exceed one year, or both if the property embezzled has a value of \$200 or more but less than \$1,000. |
| Penal Code § 750.356                                | Larceny  | Not more than \$500 or three times the value of the property stolen, whichever is greater, or imprisonment not to exceed ninety days, or both if the property stolen has a value less than \$200; not more than \$2,000 or three times the value of the property stolen, whichever is greater, or imprisonment not to exceed one year, or both if property stolen has a value of \$200 but less than \$1,000.                      |
| Penal Code § 750.362                                | Larceny by conversion or embezzlement  | †  |

† Penal Code § 750.503 provides that the punishment for a felony, when not fixed by statute, is not more than \$2,000, or imprisonment not to exceed four years, or both. Mich. Penal Code § 750.504 also provides that the punishment for a misde-

|                                  |                             |  |
|----------------------------------|-----------------------------|--|
| Penal Code § 750.422             | Perjury committed in courts | Incarceration only not to exceed more than fifteen years.        |
| Penal Code §§750.546 and 750.547 | Willful trespass            | Not more than \$100, or imprisonment not to exceed ninety days.† |
| Penal Code § 750.556             | Wage discrimination         | Not more than \$100, or imprisonment not to exceed ninety days.† |

## NEW YORK

| Title and Section in New York Consolidated Laws | Description                            | Fine*   |
|---|--|---|
| Penal Law § 120.00                              | Assault in the third degree            | Not exceeding \$1,000, or imprisonment not to exceed one year.  |
| Penal Law § 120.05                              | Assault in the second degree           | Not exceeding the higher of \$5,000, or double the amount of defendant's gain from commission of the crime, or imprisonment of at least two years and not to exceed seven years.        |
| Penal Law § 120.10                              | Assault in the first degree            | Not exceeding the higher of \$5,000, or double the amount of defendant's gain from commission of the crime, or imprisonment of at least five years and not to exceed twenty-five years. |
| Penal Law § 140.10                              | Criminal trespass in the third degree  | Not exceeding \$500, or imprisonment not to exceed three months.  |
| Penal Law § 140.15                              | Criminal trespass in the second degree | Not exceeding \$1,000, or imprisonment not to exceed one year.  |
| Penal Law § 140.17                              | Criminal trespass in the first degree  | Not exceeding the higher of \$5,000, or double the amount of defendant's gain from commission of the crime, or imprisonment of at least two years and not to exceed seven years.        |
| Penal Law § 155.25                              | Petit Larceny                          | Not exceeding \$1,000, or imprisonment not to exceed one year.  |
| Penal Law § 155.40                              | Grand Larceny in the second degree     | Not exceeding the higher of \$5,000, or double the amount of defendant's gain from commission of the crime, or imprisonment of at least 3½ years and not to exceed fifteen years.       |
| Penal Law § 155.42                              | Grand Larceny in the first degree      | Not exceeding the higher of \$5,000, or double the amount of defendant's gain from commission of the crime, or imprisonment of at least five years and not to exceed twenty-five years. |
| Penal Law § 170.15                              | Forgery in the first degree            | Not exceeding the higher of \$5,000, or double the amount of defendant's gain from commission of the crime, or imprisonment of at least 3½ years and not to exceed fifteen years.       |

†meanor, when not fixed by statute, is not more than \$100, or imprisonment not to exceed ninety days, or both.

|                    |                                     |   |
|--------------------|-------------------------------------|---|
| Penal Law § 185.05 | Fraud involving a security interest | Not exceeding \$1,000, or imprisonment not to exceed one year.  |
| Penal Law § 190.05 | Issuing a bad check                 | Not exceeding \$500, or imprisonment not to exceed three months.  |
| Penal Law § 200.00 | Bribery in the third degree         | Not exceeding the higher of \$5,000, or double the amount of defendant's gain from commission of the crime, or imprisonment of at least two years and not to exceed seven years.        |
| Penal Law § 200.03 | Bribery in the second degree        | Not exceeding the higher of \$5,000, or double the amount of defendant's gain from commission of the crime, or imprisonment of at least 3½ years and not to exceed fifteen years.       |
| Penal Law § 200.04 | Bribery in the first degree         | Not exceeding the higher of \$5,000, or double the amount of defendant's gain from commission of the crime, or imprisonment of at least five years and not to exceed twenty-five years. |
| Penal Law § 210.05 | Perjury in the third degree         | Not exceeding \$1,000, or imprisonment not to exceed one year.  |
| Penal Law § 210.10 | Perjury in the second degree        | Not exceeding the higher of \$5,000, or double the amount of defendant's gain from commission of the crime, or imprisonment of at least 1½ years and not to exceed four years.          |
| Penal Law § 210.15 | Perjury in the first degree         | Not exceeding the higher of \$5,000, or double the amount of defendant's gain from commission of the crime, or imprisonment of at least two years and not to exceed seven years.        |

## TEXAS

| Title and Section in Vernon's Texas Codes Annotated | Description       | Fine*   |
|---|-------------------|---|
| Penal Code § 22.01                                  | Assault           | If a third degree felony, imprisonment not to exceed ten years or less than two years, and may also be fined not to exceed \$10,000; if a Class A misdemeanor, not to exceed \$4,000, or imprisonment not to exceed one year, or both; if a Class C misdemeanor, not to exceed \$500. |
| Penal Code § 30.05                                  | Criminal Trespass | Not to exceed \$4,000, or imprisonment not to exceed one year.  |

|                    |                                      |   |
|--------------------|--------------------------------------|---|
| Penal Code § 31.03 | Theft (includes embezzlement)        | Not to exceed \$500 if value of property stolen is less than \$50; if value of property stolen is \$50 or more but less than \$500, not to exceed \$2,000, or imprisonment not to exceed 180 days, or both; if value of property stolen is \$500 or more but less than \$1,500, not to exceed \$4,000, or imprisonment not to exceed one year, or both; imprisonment not to exceed two years or not less than 180 days, and may be fined not to exceed \$10,000 if value of property stolen is at least \$1,500 but less than \$20,000. |
| Penal Code § 32.21 | Forgery                              | Not to exceed \$10,000, or imprisonment not more than two years or less than 180 days.  |
| Penal Code § 32.41 | Issuance of Bad Check                | Not to exceed \$500.  |
| Penal Code § 32.45 | Misapplication of Fiduciary Property | Not to exceed \$500 if value of property is less than \$20; not to exceed \$2,000, or imprisonment not to exceed 180 days, or both if value of property is \$20 or more but less than \$500; not to exceed \$4,000 or imprisonment not to exceed one year, or both if value of property is \$500 or more but less than \$1,500; imprisonment not more than two years or less than 180 days, and may be fined not to exceed \$10,000 if value of property is \$1,500 or more but less than \$20,000.                                     |
| Penal Code § 36.02 | Bribery                              | Imprisonment not to exceed twenty years or less than two years, and may be fined not to exceed \$10,000.  |
| Penal Code § 37.02 | Perjury                              | Not to exceed \$4,000, or imprisonment not to exceed one year, or both.   |

## VIRGINIA

| Title and Section in the Code of Virginia | Description                           | Fine*  |
|---|---------------------------------------|--|
| § 18.2-95                                 | Grand larceny (includes embezzlement) | Not more than \$2,500, or imprisonment not to exceed twelve months, or both. |
| § 18.2-96                                 | Petit larceny                         | Not more than \$2,500, or imprisonment not to exceed twelve months, or both. |
| § 18.2-119                                | Trespass                              | Not more than \$2,500, or imprisonment not to exceed twelve months, or both. |

\* If the defendant is not a natural person, the court shall impose only a fine, Va. Code § 18.2-10(g).

|            |   |   |
|------------|---|---|
| § 18.2-181 | Issuing bad checks  | Not more than \$2,500, or imprisonment not to exceed twelve months, or if the value is less than \$200; not more than \$2,500, or imprisonment not to exceed five years and not less than twelve months or both, if the value is \$200 or more. |
| § 18.2-204 | False statement for the purpose of defrauding industrial sick benefit company | Not more than \$500.  |
| § 18.2-434 | Perjury   | Not more than \$2,500, or imprisonment for not less than twelve months and not more than ten years, or both.  |
| § 18.2-449 | Bribery   | Not more than \$100,000 and imprisonment not less than two years nor more than ten years.   |

## WEST VIRGINIA

| Title and Section in the West Virginia Code | Description  | Fine  |
|---|--|---|
| § 61-2-9                                    | Malicious or unlawful assault; battery   | Not exceeding \$500, and imprisonment not to exceed twelve months, or imprisonment only not less than one nor more than five years.   |
| § 61-3-12                                   | Entry of building other than dwelling  | Not exceeding \$100, and imprisonment not less than two nor more than twelve months.  |
| § 61-3-13                                   | Grand and petit larceny  | Not exceeding \$2,500, and imprisonment not more than one year, or imprisonment only not less than one year nor more than ten years.  |
| § 61-3-24                                   | Obtaining money, property and services by false pretenses  | Not more than \$2,500 and imprisonment not more than one year, or imprisonment only not less than one year nor more than ten years, if value of the goods is \$1,000 or more.   |
| § 61-3-24a                                  | Obtaining or attempting to obtain goods, property or service by false or fraudulent use of credit cards or other false or fraudulent means | Not more than \$2,500 and imprisonment not more than one year, or imprisonment only not less than one year nor more than ten years, if value of the goods is \$1,000 or more; if less than \$1,000 in value, not more than \$2,500, or imprisonment not more than one year. |
| § 61-3-38                                   | Publication of false advertisements  | Not more than \$100 and not less than \$10.   |
| § 61-3-39a                                  | Making, issuing worthless check  | Not more than \$200; on third or subsequent conviction, not more than \$200, or imprisonment not more than ten days, or both.   |

|           |   |   |
|-----------|---|---|
| § 61-3B-2 | Trespass in structure or conveyance   | Not more than \$100; if armed with a dangerous weapon with the intent to do bodily injury, not less than \$100 nor more than \$500, or imprisonment not more than twelve months, or both. |
| § 61-3C-4 | Computer fraud  | Not more than \$10,000, or imprisonment not more than ten years, or both.   |
| § 61-5-3  | Perjury   | Not more than \$1,000, or imprisonment not more than one year.  |
| § 61-5-7  | Bribery   | Not more than \$5,000, and imprisonment not less than one year nor more than ten years.   |
| § 61-3-37 | Publication of false statement as to financial condition of person, firm or corporation | Not more than \$1,000, or imprisonment not more than one year, or both.   |

EXAMPLES OF FEDERAL CRIMINAL PENALTIES UNDER THE FEDERAL SENTENCING GUIDELINES

| Title and Section in the United States Code* | Description  | Fine   |
|--|--|--|
| 18 U.S.C. § 2A2.3                            | Minor Assault                                      | Minimum of \$500 and maximum of \$5,000.   |
| 18 U.S.C. § 2A2.2                            | Aggravated Assault                                 | Minimum of \$4,000 and maximum of \$40,000.  |
| 18 U.S.C. § 2A2.1                            | Assault with the intent to murder                  | Minimum of \$12,500 and maximum of \$125,000.  |
| 18 U.S.C. § 2B1.1                            | Theft, Embezzlement, Receipt of Stolen Property    | Minimum of \$500 and maximum of \$5,000 if the loss is less than \$5,000; minimum of \$17,500 and maximum of \$175,000 if the loss is more than \$1 million. |
| 18 U.S.C. § 2B2.3                            | Trespass   | Minimum of \$250 and maximum of \$5,000.   |
| 18 U.S.C. § 2B3.1                            | Robbery, Extortion, Blackmail                      | Minimum of \$75,000 and maximum of \$150,000 if the loss is more than \$5 million.   |
| 18 U.S.C. § 2C1.1                            | Offering, Giving, Soliciting, or Receiving A Bribe | Minimum of \$2,000 and maximum of \$20,000.  |
| 18 U.S.C. § 2G2.2                            | Sexual Exploitation of Minors                      | Minimum of \$5,000 and maximum of \$50,000; minimum of \$10,000 and maximum of \$100,000 if done for pecuniary gain.   |
| 18 U.S.C. § 2M1.1                            | Treason  | Minimum of \$25,000 and maximum of \$250,000 if tantamount to waging war.  |
| 18 U.S.C. § 2N1.1                            | Tampering with Consumer Products                   | Minimum of \$10,000 and maximum of \$100,000.  |

\* The fines for individual defendants are found in 18 U.S.C. § 5E1.2.

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| 18 U.S.C. § 2N2.1 | Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetics, or Agricultural Product                               | Minimum of \$500 and maximum of \$5,000.      |
| 18 U.S.C. § 2Q1.1 | Knowingly Endangerment Resulting From Mishandling of Hazardous or Toxic Substances, Pesticides or Other Pollutants   | Minimum of \$10,000 and maximum of \$100,000. |
| 18 U.S.C. § 2Q1.2 | Mishandling of Hazardous or Toxic Substances or Pesticides; Record keeping, Tampering and Falsification; Unlawfully Transporting Hazardous Materials in Commerce | Minimum of \$1,000 and maximum of \$10,000.   |

EXAMPLES OF CIVIL PENALTIES FOR VIOLATIONS OF CERTAIN FEDERAL REGULATIONS PROVIDED FOR BY STATUTE

| Federal Statute  | Description   | Fine  |
|--|---|---|
| Federal Food, Drug and Cosmetic Act 21 U.S.C. § 301 <i>et seq.</i> * | Adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce | Not more than \$1,000 or imprisonment for not more than one year, or both; not more than \$10,000 or imprisonment for not more than three years, or both for the second violation or if with the intent to defraud or mislead.  |
| 21 U.S.C. § 331(t)   | Prescription drug marketing violations  | Not more than \$250,000 or imprisonment not more than ten years, or both. Any manufacturer or distributor that distributes drug samples by means of mail or common carrier, and sells, trades, or offers to sell such samples shall be fined not more than \$50,000 for each of the first two violations resulting in a conviction of any representative of the manufacturer or distributor in any ten-year period, or fined not more than \$1 million for each violation resulting in a conviction of any representative after the second conviction in any ten-year period. |

\* Prohibited acts of the Federal Food, Drug and Cosmetic Act are found in 21 U.S.C. §§ 331(a)-(z), and penalties for violation of 21 U.S.C. § 331 can be found in 21 U.S.C. § 333.

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| 21 U.S.C. § 333(f)  | Misbranding or removal or alteration of any mark or label required to identify a device**   | If any person violates § 331 as it relates to devices, a civil penalty not to exceed \$15,000 for each violation, and not to exceed \$1 million for all such violations in a single proceeding.   |
| 21 U.S.C. § 342(a)(2)(b)  | Introduction into interstate commerce adulterated food that bears or contains unsafe pesticide chemical residue   | Not more than \$50,000 in the case of an individual, and \$250,000 in the case of any other person for such introduction or delivery, not to exceed \$500,000 for all such violations adjudicated in a single proceeding.                         |
| Toxic Substance Control Act of 1976   | Violations of 40 C.F.R. Parts 700-766 (use of chemical substances; import and export of chemical substances; lead-based paint poisoning prevention; and containment of asbestos materials in schools)   | \$27,500 per violation per day.   |
| Resource Conservation Recovery Act of 1976 (which amends the Solid Waste Disposal Act of 1965. 42 U.S.C. § 321 <i>et seq.</i> ) | Violations of 40 C.F.R. Parts 261-299 (management and disposal of hazardous waste), Parts 239-257 (management and disposal of solid waste), Parts 280-282 (management and disposal of underground storage tanks), and Part 259 (management and disposal of medical waste) | \$27,500 per violation per day.   |
| Clean Air Act of 1970 as amended, 42 U.S.C. § 7401 <i>et seq.</i> (1990)  | Violations of 40 C.F.R. Parts 50-59 (ambient air quality standards, including filtration and emissions standards)   | \$27,500 per violation per day or per motor vehicle/engine; violations of the tampering requirements by a person other than the dealer or company, or defeat device provisions by anyone may incur penalties up to \$2,750 per vehicle or engine. |

\*\* A device generally means a medical device such as an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article which is intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man, or other animals; or intended to affect the structure or any function of the body of man or other animals.

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| Clean Water Act, 33 U.S.C. § 1251 <i>et seq.</i> (1977)  | Violations of 40 C.F.R. Parts 112-115, 116-117, 122-125 and 129-133 (water programs, <i>i.e.</i> , oil pollution prevention, water quality planning and management and water quality standards), Parts 230-233 (disposal sites standards for dredged or fill materials), Parts 405-471 (effluent guidelines and standards for agricultural mills to prevent water contamination) and Parts 501 and 503 (use and disposal of sewage sludge to prevent water contamination) | Up to \$27,500 per violation per day.*<br>Class I penalties are fined up to \$10,000 per violation not to exceed \$25,000.<br>Class II penalties are fined up to \$10,000 per day per violation not to exceed \$125,000.**  |
| Safe Drinking Water Act, 42 U.S.C. § 300 (f) <i>et seq.</i> (1974)                                 | Violations of 40 C.F.R. Parts 141-149 (national primary and secondary drinking water standards to prevent above ground water contamination; underground injection control standards to prevent below ground contamination)  | Not to exceed \$25,000 per day; tampering with a public water system carries a maximum civil penalty of \$50,000; a maximum civil penalty of \$20,000 can be imposed for an attempt or threat to tamper with a public water system.   |
| National Traffic and Motor Vehicle Safety Act of 1966, as amended 49 U.S.C. § 30101 <i>et seq.</i> | Violations of 49 C.F.R. Parts 529-596 (defective automobile parts and substandard design)   | A person who manufactures, sells or imports noncomplying motor vehicles and equipment is liable for a civil penalty of not more than \$5,000 for each violation. A separate violation occurs for each motor vehicle or item of motor vehicle equipment and for each failure or refusal to allow or perform an act required by any of those sections. The maximum civil penalty is \$15 million. |

\* Section 309 of the Clean Water Act.

\*\* Section 311 of the Clean Water Act.