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THE LIMITS OF STATE SOVEREIGNTY AND THE ISSUE OF MULTIPLE PUNITIVE DAMAGES AWARDS

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Finding an effective and equitable method for awarding punitive damages in mass tort cases is a puzzle that continues to vex the courts even after decades of litigation. Unlike a typical lawsuit, mass tort cases do not have a single jury determining the appropriate amount of punishment for a defendant who has wronged one victim, or even a very small number of victims. Rather, mass tort cases involve multiple juries in many states deciding the appropriate level of punishment for a defendant whose course of tortious conduct has caused a variety of injuries to many victims.

Although the courts have struggled to bring order to the application of punitive damages in mass tort cases, courts have yet to find a satisfactory approach. As a result, juries in such cases are given little guidance on the extent to which they can and should punish a defendant's conduct. This lack of guidance has given rise to two real concerns: first, whether the overall punishment meted out to a mass tort defendant will be appropriate; and second, whether these awards will be equitably allocated among equally deserving plaintiffs.

In its most recent case on punitive damages, BMW of North America, Inc. v. Gore, [FN1] the United States Supreme Court laid the groundwork for an alternative approach to the multiple awards issue based on the constitutional principles of state sovereignty and comity. In doing so, the Court in BMW v. Gore pointed the way to a coherent and equitable solution to the problems inherent ***276** in the current chaotic system for awarding punitive damages in mass tort cases. This approach is based on the principles of sovereignty and comity that limit any given states' power to use punitive damages to punish the defendant for conduct that occurred beyond that state's territorial borders.

This Article considers the extent to which the constitutional principles of sovereignty and comity apply to the area of punitive damages. Part I of this Article discusses the multiple awards issue and canvasses the various approaches by which the courts in mass tort cases have tried (largely unsuccessfully) to achieve not only appropriate levels of punitive damages, but also equitable distribution of such damages. Part II of this Article reviews the Court's jurisprudence on the limits imposed by state sovereignty and examines the Supreme Court's recent decision in BMW v. Gore, in which the Court held that the constitutional principles of sovereignty and comity forbid a state from imposing punitive damages on a defendant for conduct that occurred in other jurisdictions, at least in situations where the defendant's conduct was lawful in those jurisdictions.

Part III considers whether these same principles of sovereignty and comity also prohibit a state from imposing extraterritorial punishment in situations where the defendant's conduct was unlawful not only in the forum state, but in other states as well. This Article concludes that these well- established principles should also be applied to limit a state from punishing conduct beyond its own borders, whether that conduct was lawful or unlawful in the jurisdiction where it occurred. Finally, Part IV addresses how recognition of these sovereignty-based limits will help to provide a more principled basis for the imposition of punitive damages in mass tort cases.

I

The Multiple Awards Issue

Punitive damages enjoy a long tradition in American law. [FN2] These damages are imposed in private civil actions to punish and ***277** deter conduct that is especially malicious or outrageous. [FN3] Although punitive damages are awarded directly to the plaintiff, they are not designed to serve as compensation. Rather, punitive damages are assessed on top of the compensatory award for the express purpose of punishing and deterring the

defendant. [FN4] They thus combine a peculiar hybrid of elements from the civil and criminal law and constitute the most direct regulatory component of the traditional system of civil justice that was developed at the common law.

Typically, the jury determines whether the defendant is liable for punitive damages and, if so, then sets the award amount. [FN5] To guide the jurors in setting the amount for punitive damages, the judge generally instructs the jury to consider a variety of factors that have been refined over time. The standard factors generally include the culpability of the defendant's conduct, the defendant's wealth, the injury to the victim, and the need for punishment and deterrence. [FN6]

***278** Although punitive damages have a long pedigree, their application in the last several decades has changed dramatically in response to other changes in the legal system. The most prominent of these changes is the rise of mass tort litigation, where hundreds, even thousands, of lawsuits may be filed against a single defendant based on a single course of tortious conduct. Products liability cases, where a manufacturer is sued for a defect in a mass-marketed product, are the most common form of mass tort litigation, [FN7] but such litigation also occurs in the wake of major disasters involving mass injuries [FN8] and in situations where companies have employed the same fraudulent policy or practice against multiple consumers. [FN9]

Prior to the surge of mass tort litigation, claims for punitive damages typically arose in cases which involved a relatively straightforward tort against a single victim, such as assault, trespass, defamation, or fraud. [FN10] In such cases, a single jury was ***279** asked to assess whether and to what extent the defendant's conduct warranted punitive damages. This was a task for which the jury was thought to be especially well-suited insofar as it was called upon to formulate and apply the collective sense of outrage that existed in the community. [FN11]

In mass tort cases, however, there is no longer a single jury evaluating whether and how severely to punish the defendant. Instead, there are many juries (potentially hundreds or thousands of juries) separately deciding on the appropriate punishment for a course of wrongful conduct that may have resulted in many distinct injuries. The danger here is clear: too many juries trying to do the same job without a clear understanding of what has gone on before or what will come after presents the very real risk that the overall punishment meted out will be inappropriate to the circumstances. As Judge Henry Friendly recognized in 1967, at the advent of mass tort litigation: "The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." [FN12] Additionally, and less commented on, is the other side of this issue: if the jury is unable effectively to determine the defendant's full course of conduct, the award imposed could turn out to be inadequate, rather than excessive. In other words, the prospect of multiple juries making separate assessments without any clear understanding of the overall picture presents, in the aggregate, the potential for either overdeterrence or underdeterrence. Moreover, even if the aggregate total of punitive awards is fair punishment for the defendant, there remains a significant concern that the allocation of ***280** these awards among equally deserving plaintiffs will unfairly favor the lucky few who reach the courthouse first. [FN13]

Over the last thirty years, courts and commentators have struggled to find a way to deal with the issue of multiple punitive awards in mass tort litigation. An early proposal was to limit punitive damages to the first plaintiff. The courts quickly realized, however, that the "first comer" solution was unworkable. Especially in products liability litigation the extent of the harm caused by the defendant is rarely known at the end of the first lawsuit. The first jury will likely not be in a position to assess the magnitude of the defendant's wrong. [FN14] In addition, the "first comer" solution exacerbates the problem of unfair discrimination among plaintiffs. It allows a huge windfall in punitive damages to the first plaintiff and leaves nothing for the many plaintiffs who file suit or reach judgment later. [FN15] Further, it is inherently unlikely ***281** that judges and juries would be willing to so restrict punitive recoveries in their own states, with no assurance that other states would do the same. [FN16]

Another proposal was to resolve all punitive damages claims against a mass- tort defendant in one mandatory class action. This approach is appealing for many reasons, particularly because it compresses multiple claims into a single action, allowing a single jury to survey and assess the defendant's entire course of conduct. As one commentator has stated:

By using representative parties, a class action can cut across jurisdictional lines and determine the rights of a large group of similarly interested claimants in a single proceeding. Overkill would be avoided because the defendant's entire punitive damages liability would be determined in a single action. The amount awarded in a single trial

could be distributed among claimants on a basis far more equitable than approaches that reward only the first few successful plaintiffs. [FN17]

The practical problems of using the class action device, however, have proved virtually insurmountable. In order for a class action effectively to address the issue of multiple punitive awards, it must be certified as a mandatory class action so that individual claimants cannot opt to seek punitive damages in their own separate lawsuits. Two of the requirements for certifying a mandatory class action under Federal Rule of Civil Procedure 23, [FN18] however, are highly problematic. First, in order to certify ***282** any class action, optional or mandatory, there must be "questions of law or fact common to the class." [FN19] Although there would undoubtedly be many common questions in a nationwide class action involving punitive damages, the variations in both state tort laws and state punitive damages laws might well require application of dozens of different legal approaches to the same issue. This requirement would greatly complicate the proceeding. [FN20]

Second, in order for the class to be mandatory, there must be a showing that separate actions would substantially impair the ability of some class members to protect their interests, such as in cases where numerous plaintiffs are making claims against a limited fund. [FN21] The main argument has been that a defendant's finite resources constitute a limited fund and punitive damages awards to early plaintiffs may deplete the fund. [FN22] Most courts, however, have been skeptical, refusing to find that the requisite limited fund exists without a strong factual showing that early claims for punitive damages will necessarily affect later claims, or at least create a substantial probability that the defendant's assests will be exhausted. [FN23] In addition, even if the requirements of ***283** Rule 23 are met, a mandatory class action may well run afoul of the Anti-Injunction Act if certification of the class will have the effect of enjoining pending state court proceedings. [FN24]

The seemingly intractable problems associated with the "first comer" and mandatory class action proposals [FN25] have led most courts to approach the issue of multiple awards by simply instructing the jury to take into account past punitive awards and the possibility of future additional punitive awards when determining the appropriate award amount. [FN26] This approach, however, has not effectively met the challenge. On a practical level, nobody, including a jury, is in a position to assess the uncertain hypothetical prospect of potential future liability. As one court commented: "[I]t is hard to see what even the most intelligent jury would do with [such an instruction], being inherently unable to know what punitive damages, if any, other juries in other ***284** states may award other plaintiffs in actions yet untried." [FN27] Similarly, informing the jury of awards of punitive damages in previous cases can distort or prejudice the current proceedings. Informing the jury that punitive damages have already been awarded for the defendant's conduct could hinder plaintiffs from recovering additional damages in later cases, thus leading to insufficient deterrence in light of the defendant's entire course of conduct. In addition, referring to prior awards is a risky strategy for mass-tort defendants because such information might prejudice the jury's determination of whether the defendant should be held liable for punitive (or even compensatory) damages. [FN28]

More fundamentally, there is little incentive for state courts to push juries to reduce punitive awards on the ground that plaintiffs in other states have received (or will receive) punitive damages. It is hardly in a court's interest to deny full punitive damages to an injured citizen of its own state when that court has no assurance that other state courts will act as responsibly. [FN29] As Professor Jeffries concluded:

Because the problem arises not from any single judgment, ***285** but from the repetitive and cumulative litigation of punitive claims, no state has either the incentive or the opportunity to take corrective action. All a state court can do is to instruct the jury properly in the case before it, and the current crisis testifies to the inadequacy of that remedy. [FN30]

In recent cases, the Supreme Court has suggested yet another possible approach to the issue of multiple punitive awards. In TXO Production Corp. v. Alliance Resources Corp., [FN31] the Court recognized that the Due Process Clause of the Fourteenth Amendment "imposes a substantive limit on the amount of a punitive damages award," [FN32] and in BMW of North America, Inc. v. Gore, [FN33] the Court held that the particular punitive damages award in that case exceeded the constitutional limit. [FN34] Although the Court did not address the multiple awards issue in these cases, it is likely that the Court's endorsement of a substantive due process limit on punitive damages will extend not only to individual awards, but also to the aggregate total of multiple punitive awards for a single course of conduct. Indeed, a number of the lower courts have already recognized that there is a due process***286** limit on the aggregate amount of punitive awards in mass tort cases. [FN35]

Nevertheless, this solution does not promise much relief. Although in BMW v. Gore the Supreme Court finally established that there is an outer boundary beyond which punitive damages may not go, the contours of this boundary are vague, [FN36] and it is fairly clear that courts will find that it has been crossed only in the most egregious cases. [FN37] Further, the lower courts that have considered the multiple awards issue have insisted on a significant evidentiary showing: the defendant must provide the court with "a factual basis sufficient for evaluating the entire scope of the defendant's wrongful conduct," [FN38] as well as evidence about past awards actually paid and the defendant's ability to satisfy future awards. [FN39] Not surprisingly, courts have generally refused ***287** to find that the aggregate amount of multiple punitive awards in mass tort cases violate the Due Process Clause. [FN40] Moreover, it seems unlikely that courts will find such a violation, given the substantial evidentiary burden and the courts' general reluctance to find punitive awards to be constitutionally excessive even in cases involving only a single victim. It seems more likely that, as the punitive awards add up against a mass tort defendant, the pressure of those awards will drive the defendant into bankruptcy proceedings before any court will be willing to hold that the aggregate total has exceeded the constitutional limit. [FN41]

In addition, the Supreme Court's new substantive due process jurisprudence offers no relief from the potential problem of underdeterrence. To the extent that this jurisprudence supplies a new basis for reducing or vacating punitive damages awards, it seems likely that this constitutional gloss on existing law will only exacerbate the possibility of underdeterrence.

The system for awarding punitive damages in mass tort cases thus remains in urgent need of some constraining principle. Even without the multiplicity problem, the jury's task in such cases is extremely difficult. Unlike traditional tort cases where jurors are asked to assess whether an individual defendant's conduct was sufficiently outrageous to justify punitive damages, jurors in mass tort cases must assess the wrongfulness of corporate conduct, which often requires an understanding and evaluation of complex design and decisionmaking processes. [FN42] In addition, when dealing with large corporate defendants, juries lack an intuitive sense of how big the award should be in order to punish and ***288** deter the defendant appropriately. [FN43] On top of all this, the jury must also deal with the multiple awards issue by somehow factoring in the possibility of additional punitive damages liability to other victims.

Exacerbating the problem even more, jurors rarely have a clear sense of what they are to punish in a mass tort case. Are jurors to punish the defendant for the entire course of wrongful conduct (including all of the injuries it caused)? [FN44] Or are they to punish for something less than that, and if so, what? If jurors do not know their function, or if judicial guidance about it is unclear, then the resulting awards could be either too high or too low relative to the level that is conceptually ideal.

In BMW v. Gore, however, the Supreme Court provided the basis for resolving at least the confusion about what a jury may properly punish. In doing so, the Court pointed the way to an approach that should significantly address the multiple awards issue. This approach is founded on the concept of state sovereignty and the attendant limits that it imposes on any given state's power to punish conduct that occurs beyond its borders. [FN45]

***289** II

The Limits of State Sovereignty

A.BMW of North America, Inc. v. Gore

In BMW v. Gore, Dr. Ira Gore sued BMW, claiming that BMW had fraudulently failed to disclose that it had repainted portions of his new car after the car had sustained acid rain damage during shipment from Germany to the United States. [FN46] At the time, BMW had in place a nationwide policy of disclosing such repair work only if its cost exceeded three percent of the car's suggested retail price. [FN47] Approximately twenty-five states had laws mandating disclosure of pre-sale repairs. BMW's policy was consistent with the strictest of those laws, which mandated disclosure only if the cost of the repair work was more than three percent of the suggested retail price. [FN48] As the cost of the repair work on Gore's car came to only about 1.5% of the car's suggested retail price, BMW did not disclose either the damage or its repair to Gore. [FN49]

At trial, Gore sought compensatory and punitive damages. [FN50] On his claim for compensatory damages, Gore produced evidence that the repainting work had reduced the value of his car by approximately ten percent, or $4000. [FN51] In support of his claim for punitive damages, Gore introduced evidence that since 1983 [FN52] BMW had

sold more than 983 cars that had been refinished (at a cost of more than $300 per car) without disclosing the repair to the customer. [FN53] Gore urged the jury to base its punitive award on this nationwide conduct:

They've taken advantage of nine hundred other people on those cars that were worth more . . . . If what Mr. Cox said is true, they have profited some four million dollars on those automobiles. Four million dollars in profits that they have made that were wrongfully taken from people. That's wrong, ladies and gentlemen. They ought not be permitted to keep that. You ought to do something about it.

***290** . . . .
I urge each and every one of you and hope that each and every one of you has the courage to do something about it. Because, ladies and gentlemen, I ask you to return a verdict of four million dollars in this case to stop it. [FN54]

The jury returned a verdict in favor of Gore, awarding him $4000 in compensatory damages and $4 million in punitive damages. [FN55]

After the trial judge denied BMW's post-trial motions to overturn or reduce the punitive damages award, [FN56] BMW appealed to the Alabama Supreme Court, contending that the punitive award was constitutionally excessive. The Alabama Supreme Court conducted its standard, multi-factor excessiveness inquiry [FN57] and affirmed the judgment against BMW. [FN58] The Alabama Supreme Court did, however, hold that it was improper for the jury to have based the punitive award on BMW's conduct in other jurisdictions, and it thus ordered a remittitur of the punitive damages award. [FN59] The court recognized that the jury had calculated the punitive award by multiplying Gore's compensatory damages ($4000) by the number of similar instances nationwide (approximately 1000). [FN60] It also noted that there were only fourteen such instances in Alabama. [FN61] Nonetheless, rather than apply these figures in accordance with its own logic, the court simply cut the punitive award in half. [FN62] The court provided no explanation as to ***291** how it decided on $2 million as an appropriate figure. [FN63]

The United States Supreme Court granted certiorari in the case "to illuminate 'the character of the standard that will identify unconstitutionally excessive awards' of punitive damages," [FN64] and held that, as a matter of substantive due process, the punitive award against BMW was constitutionally excessive. [FN65] In doing so, the Court identified three guideposts for courts to consider in analyzing whether a punitive award is so severe that it violates the Due Process Clause: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the punitive award to the actual or potential harm inflicted on the victim; and (3) the difference between the punitive award and the civil or criminal penalties that could have been imposed for comparable misconduct. [FN66]

Perhaps more importantly, however, the Court prefaced its identification and consideration of the guideposts with a discussion of the scope of a state's legitimate interests in punishing a defendant and deterring it from further misconduct. Obviously concerned about the jury's attempt to punish BMW for its conduct (much of which was apparently lawful) in all fifty states, the Supreme Court took pains to note that the longstanding principles of state sovereignty and comity apply in this area. [FN67]

***292** More specifically, the Court reiterated the fundamental principle that, while an individual state may make policy choices for its own state, a state may not impose those policy choices on the other states. [FN68] In admonishing that states must avoid encroaching on the policy choices of other states, the Court declared that "the economic penalties that a state such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy." [FN69] In evaluating whether the remitted punitive award of $2 million was constitutionally permissible the Court, therefore, considered only Alabama's legitimate interest in protecting its own citizens. [FN70]

In BMW v. Gore, the Court thus raised the possibility of bringing an entirely distinct set of constraints to bear on the issue of multiple punitive damages awards. In suggesting that the imposition of punitive damages awards in mass tort cases should be confined within the limitations posed by principles of comity, federalism, and state sovereignty, the Court presented a means of alleviating at least some of the various problems associated with such awards. And in doing so, the Court signalled the way to protect the ability of the state courts and state legislatures to decide how much punishment and deterrence to achieve through punitive damages, as opposed to direct regulation or criminal sanctions, within their own states. Before reviewing the Court's discussion of state sovereignty in BMW v. Gore and its possible effect on the multiple awards issue in greater detail, this Article first

sets out and examines the historical foundations of the Court's jurisprudence on the principles of state sovereignty and comity.

B. The Constitutional Basis for Imposing Limits Founded on Sovereignty Principles

The principle of state sovereignty, and its corresponding limit on a state's power to encroach on the sovereign authority of other states, is well established in constitutional law. Federalism is the foundational principle on which our government is structured. In our federal system, each state possesses an inherent ***293** sovereign authority to govern its citizens within its territorial borders, subject only to the supreme authority of the federal government. [FN71] Protecting the ability of each state to enjoy its own sovereign power, however, necessarily requires that the exercise of this power be restricted to each state's own territorial jurisdiction. In other words, respect for the sovereignty of each individual state demands that all states limit the reach of their laws and the exercise of their authority to govern within their own boundaries. [FN72] As the Supreme Court has explained: "No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular." [FN73]

These fundamental principles of state sovereignty are so deeply ingrained in our constitutional system that the Court has only infrequently had to step in to restrain states that have sought to operate extraterritorially. Indeed, over a century ago, the Supreme Court itself noted this phenomenon in invalidating a Missouri law that limited the permissible terms of out-of-state contracts. The Court stated:

[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound. [FN74]

***294** When necessary, though, the Supreme Court has consistently reined in states that have attempted to overstep the bounds of their sovereign authority. For example, in Bigelow v. Virginia, [FN75] the Commonwealth of Virginia sought to enforce a Virginia statute that prohibited encouraging the procuring of an abortion against the editor of a Virginia newspaper who published an advertisement for abortion services in the State of New York. [FN76] After reaffirming that commercial speech enjoys a degree of First Amendment protection, [FN77] the Supreme Court focused on state sovereignty and found that Virginia had exceeded the limits of its authority. The Court stated: "The Virginia Legislature could not have regulated the advertiser's activity in New York, and obviously could not have proscribed the activity in that State. . . . Virginia possessed no authority to regulate the services provided in New York . . . ." [FN78] Further, the Court emphasized that: "A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State." [FN79] The Court thus held that Virginia could not apply its statute to punish the editor's publication of the New York advertisement. [FN80]

Likewise, the Court has taken a strong stance against state economic regulation that projects beyond state borders to affect economic activity in other states. The Court has stressed that the Constitution has a "special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual ***295** States within their respective spheres." [FN81] In Healy v. Beer Institute, [FN82] a recent case in which the Court struck down a Connecticut beer price-affirmation law, the Court set forth three basic propositions regarding the extraterritorial effects of state regulations. First, "the 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." ' [FN83] Second, "'a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." ' [FN84] And third, "the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States." [FN85] Employing these basic guidelines, the Court invalidated the price-affirmation law because it had "the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State." [FN86]

In similar vein, under the Due Process and Commerce Clauses, [FN87] the Court has struck down a variety of state laws that ***296** operate extraterritorially. In Edgar v. MITE Corp., [FN88] the Court rejected an Illinois law

that allowed the Illinois Secretary of State to evaluate the fairness of any takeover offer for the shares of an Illinois company, regardless of whether the shareholders were Illinois residents. [FN89] The Court stated that "[w]hile protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders." [FN90] In Southern Pacific Co. v. Arizona ex rel. Sullivan, [FN91] the Court invalidated Arizona's Train Limit Law, which regulated the maximum length of railroad trains operating in Arizona. [FN92] The Court explained: "The practical effect of such regulation is to control train operations beyond the boundaries of the state exacting it because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and after leaving the regulating state." [FN93] Finding that the Arizona law created a "serious impediment to the free flow of commerce," the Court struck it down. [FN94] In St. Louis Cotton Compress Co. v. Arkansas, [FN95] the Court rejected the State of Arkansas' attempt to exact a financial penalty against a Missouri company that had purchased insurance for its Arkansas property in Missouri from an insurance company not authorized to do business in Arkansas. [FN96] The Court admonished: "It is true that the State may regulate the activities of foreign corporations within the State but it ***297** cannot regulate or interfere with what they do outside." [FN97]

The Supreme Court has also enforced the same fundamental principles of federalism and state sovereignty in situations where states have attempted to apply their laws to disputes with which they have no significant relationship. Recently, the Court reiterated these sovereignty-based limits on choice of law in Phillips Petroleum Co. v. Shutts. [FN98] In that case, approximately 28,000 royalty owners from all over the country brought a class action lawsuit against Phillips, claiming that Phillips owed them interest on royalty payments that were belatedly made under individual leases that allowed Phillips to produce natural gas from their respective properties. [FN99] Despite the fact that the vast majority of the leases were located outside of Kansas, and the vast majority of plaintiffs had no connection to Kansas, [FN100] a Kansas state court certified the class action and proceeded to apply Kansas law to the claims of all class members.

In the United States Supreme Court, Phillips argued that application of Kansas law to all of the claims violated the constitutional limits on choice of law. [FN101] The Court agreed with Phillips, holding that "Kansas' lack of 'interest' in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, [rendered] application of Kansas law to every claim in this case . . . sufficiently arbitrary and unfair as to exceed constitutional limits." [FN102] More generally, the Court held that in order for a forum state to apply its own law the state "must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of [the forum state's] law is not arbitrary or unfair." [FN103] Moreover, the Court ***298** made clear that this rule is grounded in principles of federalism: "[A state] 'may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." ' [FN104]

The Supreme Court has also imposed sovereignty-based limits on the power of states to tax activities or property located in other states. The Court has long recognized that "the Constitution places limits on a State's power to tax value earned outside of its borders." [FN105] As the Court has explained, this fundamental limitation on state power resides in both the Due Process and Commerce Clauses:

The taxation of property not located in the taxing State is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due. A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to "project the taxing power of the state plainly beyond its borders." [FN106]

***299** To enforce this limitation in the age of multistate business enterprises, the Supreme Court has adopted the unitary business principle, which allows a state to tax an interstate corporation on the apportionable share of the business conducted in the taxing state. [FN107] Through this principle, the Court has sought to recognize "two imperatives: the States' wide authority to devise formulae for an accurate assessment of a corporation's intrastate value or income; and the necessary limit on the States' authority to tax value or income that cannot in fairness be attributed to the taxpayer's activities within the State." [FN108] Through these "two imperatives," the Court has, in this area as well, given voice to the core principles of sovereignty and federalism: a state has sovereign authority within its own jurisdiction, but that authority stops at its territorial borders.

III

Sovereignty-Based Limits on Punitive Damages Awards

Application of these principles of state sovereignty to awards of punitive damages may have a substantial impact on both the problem of inequitable distribution of punitive damages among equally deserving plaintiffs and the potential for inappropriate punitive damages "overkill." Imposing sovereignty-based limits on punitive damages awards will not only minimize the risk that states will interfere with and disrupt the substantive and remedial policy choices of other states, it will also enable judges to provide juries with clearer guidance on the proper scope of punishment. [FN109]

Thus, the issue is whether and to what extent the core principles of sovereignty and federalism apply to state court awards of punitive damages. [FN110] In BMW v. Gore, the Court signalled that these principles play a role in this area, at least in circumstances ***300** where the state court is punishing the defendant for conduct that is lawful in other states. [FN111] The Court, however, expressly left open the question of whether and how these principles apply in situations where the state court is punishing the defendant for conduct that is unlawful in other jurisdictions as well. [FN112] This Article considers this question, but first reviews the Court's discussion in BMW v. Gore of the scope of a state's legitimate interest in punishing and deterring a civil defendant whose conduct was lawful, or at least potentially lawful, in other jurisdictions.

A. Imposition of Punitive Damages Based on Conduct that is Lawful in Other States

In BMW v. Gore, the Court treated the case as presenting the issue of whether a state court may impose punitive damages to punish a defendant for conduct that was lawful in the other states where it occurred. [FN113] In that case, the Alabama jury assessed punitive damages against BMW based on BMW's use of its nondisclosure threshold, which BMW had adopted as a nationwide policy, in sales made not only in Alabama, but in every state of the country. [FN114] Gore, however, had produced no evidence that BMW's conduct was unlawful in the sales outside of Alabama, while BMW had introduced evidence indicating that in the majority of such sales its conduct was in fact lawful. [FN115] In any event, it was clear that across the nation disclosure obligations, with respect to presale repairs of new automobiles, were governed by a "patchwork of rules representing the diverse policy judgments of the lawmakers in 50 States." [FN116]

It was against this backdrop that the Court was confronted ***301** with the question of whether the punitive award against BMW was constitutionally excessive. Although the Alabama Supreme Court, in remitting the punitive award from $4 million to $2 million, had expressly denounced reliance on any out-of- state conduct, the United States Supreme Court nonetheless felt obliged to discuss whether and to what extent such conduct is cognizable in assessing punitive damages. [FN117] In doing so, the Court recognized that the reviewing court must know what conduct to measure the award against in order to determine whether an award is excessive, because excessiveness is, to a large degree, a relative concept. The Court thus began its discussion of excessiveness by seeking to define "the scope of [a state's] legitimate interests in punishing [the defendant] and deterring it from future misconduct." [FN118]

In its effort to clarify what conduct a state may legitimately punish with punitive damages, the Court focused, for the first time in a punitive damages case, on the limits of state sovereignty and comity. Concerned that the Alabama jury had used the punitive damages award to influence BMW's conduct nationwide, the Court stressed that a state may not use this tool to supersede the policy choices of other states. [FN119] Citing many of the cases on state sovereignty discussed above, [FN120] the Court stated: "[O]ne State's power to impose burdens on the interstate market for automobiles is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States." [FN121] The Court emphasized that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." [FN122] The Court cautioned that states must ***302** not encroach on the sovereign domain of other states: "the economic penalties that a State such as Alabama inflicts on those who transgress its laws . . . must be supported by the State's interest in protecting its own consumers and its own economy." [FN123] Moreover, the Court reiterated that this is a question of power:

Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions. [FN124]

The Court's holding in BMW v. Gore, that a state may not impose punitive damages to punish or deter lawful

conduct in other states, is fully consistent with the principles of sovereignty and federalism discussed above. [FN125] When a state court awards punitive damages against a defendant, the state is acting to punish and deter that defendant, thereby exercising power over the defendant. [FN126] This exercise of power is clearly within the sovereign authority of the state when the conduct at issue occurred within that state. [FN127] However, when a state court imposes punitive damages based on the defendant's nationwide conduct, the state is acting to punish and deter the defendant for conduct that occurred beyond its borders.

In BMW v. Gore, the Supreme Court recognized that this extraterritorial exercise of power implicates fundamental principles of sovereignty and comity where a state is using the device of punitive damages to influence a defendant's lawful conduct in other states. [FN128] When one state punishes conduct that other states have expressly determined to be legally proper, that state is acting improperly to override the different policy choices made ***303** by those states operating within their own sovereign spheres. [FN129] Such action violates the well-established constitutional principles of state sovereignty and comity under which "[n]o state can legislate except with reference to its own jurisdiction . . . . Each State is independent of all the others in this particular." [FN130] Applying the limits that inhere in the notion of state sovereignty, the Court explicitly held that the Constitution forbids a state from punishing and deterring conduct that is lawful in the states where it occurred. [FN131]

B. Imposition of Punitive Damages Based on Conduct that May or May Not Be Lawful in Other States

In BMW v. Gore, the Court's analysis and holding were based on the assumption that the defendant's conduct was lawful in other states. On the facts of that case, however, it was far from clear that BMW's conduct was lawful in all or any other states. Indeed, Gore argued vigorously that BMW's conduct constituted illegal fraud in all states, and that the state disclosure statutes merely supplemented, rather than supplanted, common law remedies for fraud. [FN132] Moreover, the Court itself acknowledged that this issue was unresolved in the states that had enacted disclosure laws: "[A]t the time this action was commenced no state court had explicitly addressed whether its State's disclosure statute provides a safe harbor for nondisclosure of presumptively minor repairs or should be construed instead as supplementing common-law duties." [FN133]

Nonetheless, in the Court's analysis of what conduct Alabama could legitimately punish, it assumed that BMW's out-of-state conduct was lawful, apparently because Gore had failed to present the jury or trial court "with evidence that any of BMW's out-of-state conduct was unlawful." [FN134] Further, because this evidence ***304** was lacking, the Court held that the Alabama Supreme Court

[t]herefore properly eschewed reliance on BMW's out-of-state conduct, and based its remitted award solely on conduct that occurred within Alabama. The award must be analyzed in the light of the same conduct, with consideration given only to the interests of Alabama consumers, rather than those of the entire Nation. [FN135]

Even within the immediate confines of the Court's analysis, therefore, the extraterritoriality limit applies not only when the defendant's conduct is unquestionably lawful in other states, but also when it is unclear whether the conduct is lawful or unlawful in other states. Moreover, the Court indicated that the plaintiff would bear the burden of proving unlawfulness. [FN136] Thus, even within the limits of the Court's direct holding, it appears that state courts would at least be required to do a state-by-state analysis of whether the defendant's conduct was unlawful (based of course on the laws of each individual state) and limit the jury to imposing punishment for conduct only in those jurisdictions where the plaintiff had proved that the conduct was in fact unlawful.

At a minimum, BMW v. Gore thus stands for the proposition that principles of state sovereignty and comity bar a state court from using punitive damages to punish a defendant's conduct in other states where the defendant's conduct was lawful or even potentially lawful. The Court, however, expressly reserved the broader question of whether these principles of sovereignty are also implicated where a state seeks to punish the defendant for out-of-state conduct that was unlawful in the state where it occurred. [FN137] Resolution of that issue is of critical importance because, in many cases, the defendant's conduct will be unlawful in some or all jurisdictions.

***305** C. Imposition of Punitive Damages Based on Conduct that is Unlawful in Other States

In its discussion of state sovereignty and comity in BMW v. Gore, the Court primarily focused on the impermissible impact that extraterritorial punishment would have on the policy choices of other states. [FN138] The central theme of the Court's discussion was that a state must not be permitted to use the device of punitive damages to export its own regulatory policies and impose them on other states, thereby undermining the sovereign

authority of those states. [FN139]

When, however, a defendant's conduct is unlawful not only in the forum state, but in all other states as well, there is less risk that extraterritorial punishment will directly interfere with the substantive regulatory choices of other states. Nevertheless, imposition of a punitive award based on the defendant's nationwide conduct still causes the forum state to encroach substantially into the sovereign domain of other states. This encroachment occurs in at least two respects.

First, one state's imposition of punitive damages based on the defendant's nationwide conduct infringes on the ability of the other states to exact punishment for wrongs done within their jurisdictions. In a series of cases, the Court has made it clear that there is a constitutional limit, based in substantive due process, on the size of punitive damages awards. [FN140] Although the Supreme Court itself has not spoken on the issue, it seems likely that this constitutional limit will apply not only to individual awards, but also to the aggregate total of multiple punitive awards for a single course of conduct. As noted above, a number of lower courts have already reached this conclusion. [FN141]

In light of this substantive limit, one state's award of punitive damages based on the defendant's extraterritorial conduct may ***306** undermine the ability of other states to award punitive damages to their own plaintiffs in cases against the same defendant based on the same course of conduct. This impact, of course, occurs because the extraterritorial award will bring the aggregate of awards disproportionately closer to the "zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." [FN142]

This phenomenon is most readily apparent when anticipating the possible result if each individual state were allowed to use punitive damages to punish and deter conduct that is occurring in all fifty states. Under such a system, the first state court to award punitive damages against the defendant could do so, based on the defendant's nationwide conduct, up to the substantive limit of due process. The second state court to award punitive damages could do so, also based on the defendant's nationwide conduct, up to the substantive limit of due process, taking the first award into account. This could continue until the aggregate substantive limit was reached, which might occur after the first award, or the tenth award, or the fortieth award depending on the size of the individual awards. But once that substantive limit was reached, states that had not yet acted to punish the defendant would be unable to do so.

The ability to punish wrongdoers is a core component of a state's sovereign authority. The power to punish crime is "[f]oremost among the prerogatives of sovereignty." [FN143] This prerogative of state sovereignty is so critical that "[t]o deny a State its power to enforce its criminal laws because another State has won the race to the courthouse 'would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines." ' [FN144]

As the Supreme Court has consistently recognized, the imposition ***307** of punitive damages is a legitimate and important means by which a state may punish unlawful conduct. [FN145] One state's usurpation of another's ability to impose punitive damages to punish conduct that occurred within that state's own jurisdiction constitutes a direct intrusion on that state's sovereignty. As the Court recognized in Heath v. Alabama: "A State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of its own laws." [FN146]

The second way in which a punitive award based on the defendant's nationwide conduct encroaches on the authority of other states is by displacing their laws governing the standards and procedures for awarding punitive damages. Laws regulating the various aspects of punitive damages vary dramatically from state to state. [FN147] States employ different substantive tests for finding a defendant liable for punitive damages, [FN148] different standards of proof that must be met, [FN149] and different procedures for determining whether to grant a punitive award. [FN150] Some states have even prohibited punitive damages almost entirely, [FN151] and others have placed relatively strict caps on the amount that may be awarded. [FN152]

***308** When one state imposes punitive damages, using its own substantive and procedural standards for awarding punitive damages, based on the defendant's extraterritorial conduct, that state projects its own regulatory choices regarding punitive damages onto other states. In this respect, the forum state is "infringing on the policy choices of other States." [FN153] In BMW v. Gore, the Supreme Court held that fundamental principles of state sovereignty and comity forbid a state from infringing on the substantive policy choices of other states by using punitive

damages to punish and deter conduct that is lawful in those states. [FN154] A state's policy choices regarding the availability of punitive damages merit this same respect. Thus, fundamental principles of state sovereignty and comity should also forbid a state from infringing on the remedial policy choices of other states by using its own punitive damages rules to punish and deter conduct that occurred in those other states.

In Phillips Petroleum Co. v. Shutts, [FN155] the Court held that, even when a state properly has jurisdiction over the parties to a case, the state may not apply its own law to the dispute unless it has "a 'significant contact or significant aggregation of contacts' to the claims asserted . . ., contacts 'creating state interests,' in order to ensure that the choice of [the forum state's] law is not arbitrary or unfair." [FN156] In the context of a punitive damages award based on the defendant's nationwide conduct, the state court does not, ***309** of course, even have jurisdiction over any individual dispute except the one immediately before it. Moreover, the defendant's conduct with respect to persons other than the plaintiff, occurring in states other than the forum state, will rarely have "significant contacts" to the forum state. [FN157] And it is not enough that citizens of the forum state might at some point be affected by the defendant's conduct in another state. As the Court has emphasized: "A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State." [FN158]

Constitutional principles of sovereignty and federalism thus forbid a state from imposing punitive damages based on the defendant's out-of-state conduct, regardless of whether the defendant's conduct was lawful or unlawful where it occurred. To allow an individual state to impose punitive damages based on conduct, lawful or unlawful, having no significant contacts with that state would indeed, "[throw] down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." [FN159]

IV

The Effect of Restricting Extraterritorial Punitive Damages Awards

Placing sovereignty-based limits on state court awards of punitive damages should help to bring order to the punitive damages system in a variety of respects. Most obviously, it will minimize the risk that states will tread on the substantive and remedial policy choices of other states because states will not be permitted to use punitive damages awards to punish and deter conduct that occurs in other states. As discussed above, this preserves the essential balance in our federal system of states that are "equal to each other 'in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United ***310** States by the Constitution itself." ' [FN160]

In addition, this sovereignty-based limit should also reduce the risk of punitive damages "overkill" in mass tort cases. At present, juries in individual cases are generally given little if any guidance on the scope of conduct that they may punish and deter with a punitive damages award. [FN161] Asking a single jury in a single jurisdiction to gauge the appropriate sanction for a nationwide course of conduct, and then to factor in the unknown and uncertain prospect of additional awards in future cases, has proven to be an immensely difficult task. By clarifying the constitutional limits on the scope of punitive damages, juries as well as judges will have a clearer sense of the extent to which they are to deter and punish the defendant. This, in turn, should help alleviate the risk of overlap, that is, the risk that many juries in many states will independently impose punitive awards that are intended to punish and deter the defendant for the very same course of conduct nationwide.

Indeed, this sovereignty-based limit on punitive damages should function similarly to the unitary business principle that the Court employs in cases involving a state's power to tax interstate businesses. As noted above, [FN162] the Court has held that although a state may tax value-producing activities within its borders, it may not tax value earned in other states. [FN163] Because the operations of an interstate business are not neatly confined to a single state, the Court has thus required that the taxes imposed on such a business be fairly apportioned among the states. [FN164] In this way, the Court has sought to recognize the sovereign authority of individual states to tax activities within their borders, but to protect businesses from the "severe multiple taxation" that would occur if all fifty states were allowed to tax interstate businesses independently, based on their business activities that are undertaken throughout the nation. [FN165]

***311** Limiting each state's ability to impose punitive damages based on the defendant's activity within that state should help to address this same concern. If the courts of every state are allowed to impose punitive damages based

on the defendant's entire course of conduct nationwide, there is an analogous risk of inappropriate aggregate exactions. Imposing a sovereignty- based limit on punitive damages awards serves, in essence, to apportion punitive damages among the states, based on the amount of unlawful activity that is determined to have occurred within each state. At the same time, however, it also safeguards the authority and ability of each state to impose punitive damages that will fully punish and deter the defendant for its entire course of conduct within the boundaries of that state.

The sovereignty-based approach also provides a means of addressing some of the other issues that have surfaced with multiple punitive awards. Apportioning awards on a state-by-state basis should reduce the potential for inequity among plaintiffs, by restricting the ability of the first, or first few, plaintiffs to capture all of the punitive damages that may be appropriate to punish and deter the defendant's misconduct. In addition, it will enable states more effectively to develop mechanisms for fairly allocating punitive damages among their own plaintiffs, whether by judicial doctrine or through legislative intervention.

Apportioning awards on a state-by-state basis may also help in alleviating the potential problem of underdeterrence. By forcing the judicial system to focus on the proper level of deterrence and punishment that should be imposed within each state, there is less likelihood that juries and courts will become confused in attempting to weigh the suitable import and probable consequences of multiple awards that may have been imposed in other states. Confining each jury's considerations within a limited scope is more likely to assure that the assessments made will reflect, in the aggregate, an overall level of deterrence that is tailored to address the full course of the defendant's conduct nationwide. In some areas, the overall level of awards may turn out to be higher than they have been to date and, in other areas, they may turn out to be lower. Just as the apportionment of taxes on interstate businesses has been thought to permit a more ***312** rational and more finely calibrated assessment of businesses' activities, the apportionment of punitive damages awards on a state-by-state basis should tend to achieve a similarly improved regime of regulating and punishing misconduct. [FN166] In addition, any dissatisfaction with the results over time could more readily be subject to judicial supervision or legislative action when the objectives of the punitive damages regime are being pursued and assessed within the confines of each state's boundaries.

Although this sovereignty-based allocation of authority should help to bring a more principled fairness to the punitive damages regime, it is in some tension with a related rule, which the Court reaffirmed in BMW v. Gore. This rule allows the jury to consider the defendant's out-of-state actions in determining the degree of reprehensibility of the defendant's conduct. [FN167]

In BMW v. Gore, the Court established three "guideposts" for assessing whether a punitive award is constitutionally excessive. [FN168] The first (and most important) of these is the degree of reprehensibility of the defendant's conduct. [FN169] In discussing this factor, the Court held that in setting the punitive award, the jury may take into account "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful." [FN170] Moreover, the Court also made clear that the jury may consider this type of evidence even if the defendant's other wrongdoing occurred in other states. [FN171]

The Court's endorsement of use of this "pattern" evidence is consistent with its longstanding rule in criminal cases that courts may consider the defendant's past criminal behavior (regardless ***313** of whether it occurred in the same jurisdiction or even whether it resulted in conviction) to determine the appropriate sentence. [FN172] Endorsement of this type of evidence is also consistent with the Court's previous practice in punitive damages cases, where the Court has regularly allowed consideration of the defendant's other similar conduct in determining reprehensibility. [FN173]

In theory, this rule is also consistent with the Court's holding in BMW v. Gore that a jury may not use a defendant's out-of-state conduct in computing the amount of the punitive award. [FN174] Under this holding, a jury may not use punitive damages to punish the defendant directly for the out-of-state conduct itself. [FN175] This more specific use of the out-of-state conduct evidence is broader, and thus potentially distinct, from the more limited use that the Court sanctioned in BMW v. Gore--use of the evidence to help evaluate the blameworthiness of the defendant's in-state conduct. [FN176]

Nevertheless, the distinction is a fine one, and it is questionable whether juries will be able to understand and apply it properly. [FN177] There is a significant risk that once the jury is presented with evidence of the defendant's similar misconduct in other states, the jury will succumb to the temptation to punish the defendant directly for that conduct as well, rather than simply using the evidence to determine reprehensibility as one of the

factors in deciding whether to impose punitive damages. Yet BMW v. Gore expressly reaffirmed that this more limited use of the evidence is permissible, even as it stressed the constitutional limitations imposed by the overarching principles of state sovereignty.

This difficulty in distinguishing between the proper and improper ***314** uses of out-of-state conduct evidence may to some extent interfere with the territorial apportioning of punitive damages liability. Even so, prohibiting jurors from fixing the amount of a punitive award based on the defendant's extraterritorial conduct should give them a better sense of what they may properly punish, which in turn should assist in attaining the objective of rationalizing the apportionment of punitive damages awards among the states. Although this apportionment is unlikely to be perfect, a sovereignty-based approach of this nature should bring more order to the current haphazard system for awarding punitive damages in mass tort cases.

Conclusion

Long-established principles of state sovereignty limit a state's power to encroach on the sovereign authority of other states. In BMW v. Gore, the Supreme Court confirmed that these principles and their corresponding limits apply in the area of punitive damages, at least in circumstances where a state court is using punitive damages to punish the defendant not only for its in- state conduct, but also for its similar but lawful conduct in other states. This Article contends that these same principles of state sovereignty and comity bar a state from punishing a defendant for its out-of-state conduct, regardless of whether that conduct was lawful or unlawful in the state where it occurred. Recognition of this sovereignty-based limit on the imposition of punitive damages should help to address the issues created by multiple punitive damages awards in mass tort cases. The sovereignty-based limits will reduce the risk of overlapping and thus ultimately excessive punitive exactions against defendants, facilitate a more equitable allocation of punitive damages among equally deserving plaintiffs, and improve the overall calibration of appropriate levels of punishment and deterrence by apportioning awards on a state-by-state basis. The application of principles of state sovereignty in this area also will protect the authority of state courts and state legislatures to address any further issues or systemic concerns that may emerge over time.

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[FN1]. 517 U.S. 559 (1996).

[FN2]. See, e.g., Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 15 (1991) ("'Punitive damages have long been a part of traditional state tort law." ' (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984))); id. at 14-17 (describing the tradition of punitive damages); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838 (2d Cir. 1967) (same).

[FN3]. State legislatures and the courts have struggled to find a precise and workable definition of the standard for awarding punitive damages. See, e.g., Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 680 (Ariz. 1986) (adopting the standard of "an evil mind," which may be inferred from "consciously disregarding the unjustifiably substantial risk of significant harm"); Budget Car Sales v. Stott, 662 N.E.2d 638, 638 (Ind. 1996) (requiring "clear and convincing evidence that the defendant acted with malice, fraud, gross negligence or oppressiveness"); Tuttle v. Raymond, 494 A.2d 1353, 1361 (Me. 1985) (requiring clear and convincing evidence of express malice, which includes actual ill will towards the victim or conduct "so outrageous that malice toward a person injured as a result of that conduct can be implied"). See generally Richard L. Blatt et al., Punitive Damages: A State by State Guide to Law and Practice, ch. 8 (1991 & Supp. 1996) (providing a summary of each state's punitive damages laws).

Although punitive damages are permitted in most tort actions, they are typically not available in suits for wrongful death and breach of contract, or in suits against governmental entities. See David G. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 8-9 (1982) (citing cases); Richard A. Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37, 45 (1983) (citing cases).

[FN4]. See, e.g., BMW v. Gore, 517 U.S. at 568 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989) ("[P]unitive damages advance the interests of punishment and deterrence."); Owen, supra note 3, at 7-8 (generally describing punitive damages); Seltzer, supra note 3, at 42-43

(same).

[FN5]. See Haslip, 499 U.S. at 15-17.

[FN6]. See id. at 15 ("Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct."); Douglas Laycock, Modern American Remedies 672-675 (2d ed. 1994) (discussing the factors that juries are instructed to take into account); Seltzer, supra note 3, at 47 (discussing the factors and citing cases).

[FN7]. See, e.g., Dunn v. HOVIC, 1 F.3d 1371, 1394 (3d Cir.) (Weis, J., dissenting) (noting that as of 1990 more than 90,000 cases were pending against asbestos manufacturers), modified on other grounds, 13 F.3d 58 (3d Cir. 1993); In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 893 (N.D. Cal. 1981) (noting that more than 1500 lawsuits had already been filed against A.H. Robins for injuries related to use of its Dalkon Shield IUD), vacated, 693 F.2d 847 (9th Cir. 1982). See generally Seltzer, supra note 3, at 37-38 (describing products liability litigation involving formaldehyde, diethylstilbestrol (DES), Agent Orange, automobiles, and tampons); N. Todd Leishman, Note, Juzwin v. Amtorg Trading Corp.: Toward Due Process Limitations on Multiple Awards of Punitive Damages in Mass Tort Litigation, 1990 Utah L. Rev. 439, 442-43 (1990) (same).

[FN8]. See, e.g., In re Federal Skywalk Cases, 680 F.2d 1175, 1177 (8th Cir. 1982) (describing the litigation which followed the collapse of two skywalks in the lobby of the Hyatt Regency Hotel in Kansas City, Missouri; 114 people were killed and hundreds more were injured); Seltzer, supra note 3, at 40 & n. 16 (describing the litigation which followed the fire at the MGM Grand Hotel in Las Vegas, Nevada; 85 people were killed and more than 500 lawsuits were filed).

[FN9]. See, e.g., BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 621-22 (Ala. 1994) (involving allegations that BMW's nationwide policy on disclosure of repairs made to cars damaged in the course of manufacture or transportation was fraudulent and affected hundreds of customers), rev'd on other grounds, 517 U.S. 559 (1996); Hawkins v. Allstate Ins. Co., 733 P.2d 1073, 1077- 78 (Ariz. 1987) (involving charges that Allstate's policy of deducting a $35 cleaning fee from all "total loss" claims was fraudulent and affected hundreds of customers).

[FN10]. See Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838 (2d Cir. 1967) ("What strikes one [about traditional punitive damages cases] is not merely that these torts are intentional but that usually there is but a single victim; a punitive recovery by him ends the matter, except for such additional liability as may be provided by the criminal law."); John Calvin Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 141 (1986) ("Before [1967], the typical punitive damages claim arose from an isolated incident involving only two parties."); Dennis Neil Jones et al., Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process, 43 Ala. L. Rev. 1, 1 (1991) ("Historically, claims for punitive damages were sought by only one plaintiff against one defendant.").

[FN11]. See Owen, supra note 3, at 45 ("When one person deprives another of his rights in one of these contexts, the jury is usually a good gauge of the community's pulse on whether the defendant acted with malice or reckless abandon, whether the misconduct requires punishment and, if so, the [[appropriate] amount of punitive damages ....").

[FN12]. Roginsky, 378 F.2d at 839; see also Jeffries, supra note 10, at 141-42 (discussing the "destructive synergism between traditional punitive damages doctrine and modern mass tort litigation"); Seltzer, supra note 3, at 40 (describing the issues raised by "decentralization" of jury responsibility for imposing punitive damages).

[FN13]. See Roginsky, 378 F.2d at 839-40. Judge Friendly colorfully presented the problem:
Neither does it seem either fair or practicable to limit punitive recoveries to an indeterminate number of first-comers .... While jurisprudes might comprehend why Toole in California should walk off with $250,000 more than a compensatory recovery ... most laymen and some judges would have some difficulty in understanding why presumably equally worthy plaintiffs in the other 75 cases before Judge Croake or elsewhere in the country should get less or none.
Id.

[FN14]. In holding unconstitutional a Georgia statute that allowed only one award of punitive damages in products

liability cases, the court in McBride v. General Motors Corp., 737 F. Supp. 1563, 1570 (M.D. Ga. 1990), explained the problem:

> The flaw is that this statute has no rational relationship to an award sufficient to penalize, punish, or deter any business from a course of harmful conduct, particularly in a multi-tort or mass-tort setting, where history has demonstrated that the extent and magnitude of the wrongdoing is seldom if ever determined in an initial instance. Only after repeated actions and continued discovery does the full extent of the injury and damage caused by the wrongdoing become known and its offensive character recognized, such that a meaningful, substantial, and deterring award can be expected.

See also Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 280 (2d Cir.) (discussing the problems with a "single punitive award" approach), cert. dismissed, 497 U.S. 1057 (1990); Owens-Corning Fiberglas Corp. v. Rivera, 683 So. 2d 154, 155 n.1 (Fla. Dist. Ct. App. 1996); Jones et al., supra note 10, at 14-15 (same). But see Ohio Rev. Code Ann. § 2315.21(D)(3) (West 1997) (adopting a statutory "first comer" approach, with very narrow exceptions).

[FN15]. See Roginsky, 378 F.2d at 839-40 (noting the unfairness to subsequent plaintiffs of allowing only the first plaintiff to recover punitive damages); State ex rel. Young v. Crookham, 618 P.2d 1268, 1272 (Or. 1980) ("This court cannot endorse a system of awarding punitive damages which threatens to reduce civil justice to a race to the courthouse steps."); Jones et al., supra note 10, at 14 (discussing the "windfall" problem).

[FN16]. See Roginsky, 378 F.2d at 840 (discussing the pressure on courts and juries to award punitive damages to an in-state plaintiff); Jerry J. Phillips, Multiple Punitive Damage Awards, 39 Vill. L. Rev. 433, 442-43 (1994) ("If additional punitive damage awards can be imposed upon a defendant for the same course of conduct in other jurisdictions, they would defeat the one-award approach as well as unfairly disadvantage plaintiffs in the restrictive jurisdiction.").

[FN17]. Seltzer, supra note 3, at 63; see also Leishman, supra note 7, at 453 (describing the class action as "an optimal solution"); Phillips, supra note 16, at 444-45 ("If all punitive damage awards can be determined in a single proceeding, the appropriate level of total punishment can be determined at this proceeding and the sum representing that total can then be apportioned among the various claimants.").

[FN18]. Fed. R. Civ. P. 23 provides in pertinent part:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> ....
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests ....

[FN19]. Fed. R. Civ. P. 23(a)(2).

[FN20]. See In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 693 F.2d 847, 850 (9th Cir. 1982) (noting that the fact that states employ very different punitive damages standards makes the commonality requirement problematic); Laycock, supra note 6, at 669 (suggesting that a nationwide class action might have to be divided into 50 subclasses to accommodate variations in state tort law); see also Castano v. American Tobacco Co., 84 F.3d 734, 741-44 (5th Cir. 1996) (decertifying a nationwide class action against the tobacco companies because the district court failed to analyze how variations in state tort and punitive damages laws would affect the requirements of predominance and superiority).

[FN21]. See Fed. R. Civ. P. 23(b)(1)(B).

[FN22]. See Dalkon Shield, 693 F.2d at 851-52; In re Federal Skywalk Cases, 680 F.2d 1175, 1179 (8th Cir. 1982); Jones et al., supra note 10, at 6.

[FN23]. See In re School Asbestos Litig., 789 F.2d 996, 1005-06 (3d Cir. 1986); In re Bendectin Prod. Liab. Litig., 749 F.2d 300, 306 (6th Cir. 1984); Dalkon Shield, 693 F.2d at 851-52; Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269, 277 (E.D. Tex. 1985), aff'd, 782 F.2d 468 (1986); see also Jones, et al., supra note 10, at 7-11 (discussing the court's reaction to the limited fund argument); Phillips, supra note 16, at 447-48 (same); Seltzer, supra note 3, at 72-83 (same). But cf. In re "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 726-28 (E.D.N.Y. 1983) (certifying a mandatory class action for punitive damages on the basis that there was a substantial probability that earlier adjudications would be dispositive of the interests of other claimants), aff'd, 818 F.2d 145 (2d Cir. 1987).

[FN24]. See Federal Skywalk, 680 F.2d at 1180-83 (reversing district court's certification of mandatory class action because it would have enjoined existing state court proceedings in violation of the Anti-Injunction Act). The Anti-Injunction Act, 28 U.S.C. § 2283 (1994), prohibits a federal court from enjoining state court proceedings "except as expressly authorized ... or to protect or effectuate its judgments." See also Jones et al., supra note 10, at 25-26 (discussing the obstacles presented by the Anti-Injunction Act); Seltzer, supra note 3, at 78-79 (same).

[FN25]. Commentators have proposed a variety of other possible approaches. Professor Phillips, for instance, has suggested that bankruptcy is a "viable, indeed attractive" solution for mass tort defendants. Phillips, supra note 16, at 448-50. Defendants, however, are reluctant to give up any control to the bankruptcy court, and plaintiffs fear that their claims may be disallowed or underpaid. Mr. Leishman has proposed that separate lawsuits go forward in the various state and federal courts, but that the defendant refuse to pay any punitive damages awarded; once the litigation is substantially complete, the defendant should bring a declaratory judgment action in federal court, so that the federal court can review (and if necessary adjust) the aggregate punitive damages award. See Leishman, supra note 7, at 468-76. Encouraging defendants to ignore final judgments, however, is highly problematic, as is the notion that a single federal court would override the decisions of multiple state courts. Commentators have also suggested a variety of procedural fixes, such as bifurcating the liability and damages phases of the trial, and also having the judge, rather than the jury, determine the amount of the punitive award. See Owen, supra note 3, at 52; Seltzer, supra note 3, at 51. Although these procedural mechanisms may make some difference, it is unlikely that they will alleviate the multiple awards problem to a significant degree.

[FN26]. E.g., State ex rel. Young v. Crookham, 618 P.2d 1268, 1272-74 (Or. 1980); Wangen v. Ford Motor Co., 294 N.W.2d 437, 459-60 (Wis. 1980); Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 391 (Cal. Ct. App. 1981). Cf. Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 40-42 (Tex. 1998) (allowing the jury to consider prior awards, but not the possibility of future awards).

[FN27]. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967).

[FN28]. Most states refuse to allow the defendant to introduce evidence of prior punitive awards for the first time at the remittitur or appellate stage. See, e.g., Kochan v. Owens-Corning Fiberglass Corp., 610 N.E.2d 683, 697 (Ill. App. Ct. 1993); Tetuan v. A. H. Robins Co., 738 P.2d 1210, 1241 (Kan. 1987); see also Davis v. Celotex Corp., 420 S.E.2d 557, 566 (W. Va. 1992) (requiring a "developed factual record on the circumstances and the amounts of prior punitive damages awards"); Jeffries, supra note 10, at 146 (pointing out that "this supposed protection" might well "backfire" on defendants); Seltzer, supra note 3, at 59-60 (noting that this solution places the defendant at risk).

A related problem is that courts have generally refused to consider amounts paid in settlement that reflect anticipated punitive damages. See, e.g., Dunn v. HOVIC, 1 F.3d 1371, 1390 (3d Cir.) (refusing to count amounts paid in settlement in determining whether a punitive award exceeded the limits of due process because of the difficulty of identifying the punitive portion of the overall settlement), modified on other grounds, 13 F.3d 58 (3d Cir. 1993); Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 282 (2d Cir.) (same), cert. dismissed, 497 U.S. 1057 (1990).

[FN29]. Judge Friendly captured the problem:

> [W]e think it somewhat unrealistic to expect a judge, say in New Mexico, to tell a jury that their fellow townsman should get very little by way of punitive damages because Toole in California and Roginsky and Mrs. Ostopowitz in New York had stripped that cupboard bare, even assuming the defendant would want such a charge, and still more unrealistic to expect that the jury would follow such an instruction or that, if they didn't, the judge would reduce the award below what had become the going rate.

Roginsky, 378 F.2d at 840; see also Dunn, 1 F.3d at 1383 (discussing the lack of incentives for state courts to disadvantage their own citizens); Jeffries, supra note 10, at 146 (same).

[FN30]. Jeffries, supra note 10, at 152-53.

[FN31]. 509 U.S. 443 (1993). In TXO, TXO had tried to put a cloud on the plaintiff's title to land that had valuable mineral deposits. The jury found TXO liable for slander of title and awarded the plaintiff $19,000 in actual damages and $10 million in punitive damages. In the United States Supreme Court, TXO argued that the punitive award, which was over 526 times greater than the compensatory award, was constitutionally excessive. The Court, however, upheld the award, relying on the great potential harm to the plaintiff, TXO's bad faith, the fact that the scheme was part of a larger pattern of fraud and deceit, and TXO's wealth. See id. at 447-462.

[FN32]. TXO, 509 U.S. at 454-55; see also Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994).

[FN33]. 517 U.S. 559 (1996). In BMW v. Gore, the plaintiff sued BMW for fraud, claiming that BMW had failed to disclose that portions of the plaintiff's new car had been repainted due to acid rain damage during the car's transit from Germany to the United States. See id. at 564. At the time, BMW had a nationwide policy in place of disclosing such repair work only if the cost exceeded three percent of the car's suggested retail price; as the repair work on the plaintiff's car was only about 1.5% of its suggested retail price, BMW did not disclose the damage or repair to the plaintiff. See id. The jury found BMW liable for fraud and awarded the plaintiff $4000 in compensatory damages and $4 million in punitive damages. See id. at 565. After the Alabama Supreme Court reduced the punitive award to $2 million, BMW sought review in the United States Supreme Court, claiming that the $2 million award was constitutionally excessive. See id. at 566-67. After considering whether BMW had fair notice that such a severe punitive award might be assessed against it in light of the reprehensibility of its conduct, the amount of the actual or potential harm suffered, and the civil and criminal sanctions for comparable misconduct, the Supreme Court held that the punitive award was grossly (and thus unconstitutionally) excessive. See id. at 573-586.

[FN34]. See id.

[FN35]. See, e.g., Dunn v. HOVIC, 1 F.3d 1371, 1389-91 (3d Cir.) (considering whether "the aggregate of prior awards has reached the maximum amount tolerable under the Due Process Clause"), modified on other grounds, 13 F.3d 58 (3d Cir. 1993); Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 280-82 (2d Cir. 1990) (same); Greco v. Ford Motor Co., 937 F. Supp. 810, 817 (S.D. Ind. 1996) (refusing to dismiss claim for punitive damages on summary judgment because due process concerns could be addressed after the jury's verdict); Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 50- 52 (Tex. 1998) (holding that the aggregate amount of multiple punitive awards may violate substantive due process); cf. Juzwin v. Amtorg Trading Corp., 718 F. Supp. 1233, 1234-35 (D.N.J. 1989) (on reconsideration of its earlier holding that multiple punitive awards necessarily violate due process, court held that such awards violate due process only where the earlier jury intended its award to constitute full punishment). See generally Barbara J. Shander, Note, Punitive Damages--Addressing the Constitutionality of Punitive Damages in the Third Circuit: Dunn v. HOVIC (1993), 39 Vill. L. Rev. 1105, 1123-29 (1994).

In contrast, however, most courts have held that the Due Process Clause does not forbid multiple punitive awards for the same course of conduct. In other words, these courts have held that the Clause does not impose a "single award" limit. See Dunn, 1 F.3d at 1389; Glasscock v. Armstrong Cork Co., 946 F.2d 1085, 1096 (5th Cir. 1991); Simpson, 901 F.2d at 280; Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565, 1571 (6th Cir. 1985).

[FN36]. See BMW v. Gore, 517 U.S. at 585 ("[W]e are not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award.").

[FN37]. See, e.g., TXO, 509 U.S. at 462 (upholding a $10 million punitive award in a case involving economic harm); Letz v. Turbomeca Engine Corp., 975 S.W.2d 155, 180 (Mo. Ct. App. 1997) (reducing a punitive verdict from $67.5 million to $26.5 million in a wrongful death case); Ingalls v. Paul Revere Life Ins. Group, 561 N.W.2d 273, 285-86 (N.D. 1997) (upholding a $2.5 million punitive verdict against an insurer in a case involving breach of contract and bad faith).

[FN38]. Simpson, 901 F.2d at 280; see also Dunn, 1 F.3d at 1389 (adopting the same standard).

[FN39]. See Dunn, 1 F.3d at 1391. In addition, these courts have refused to consider settlement amounts paid in anticipation of punitive damages. See id. at 1390; Simpson, 901 F.2d at 282.

[FN40]. See, e.g., Dunn, 1 F.3d at 1391 (holding that defendant had not satisfied the evidentiary burden); Simpson, 901 F.2d at 282 (same); Johnson v. Celotex Corp., 899 F.2d 1281, 1287-88 (2d Cir. 1990) (same); Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 52-53 (Tex. 1998) (same).

[FN41]. Many mass tort defendants have resorted to bankruptcy in this situation. See, e.g., In re A.H. Robins Co., 89 B.R. 555, 558 (Bankr. E.D. Va. 1988) (Dalkon Shield litigation); In re Johns-Manville Corp., 68 B.R. 618, 624 (Bankr. S.D.N.Y. 1986) (asbestos litigation), aff'd in part & rev'd in part, 78 B.R. 407 (S.D.N.Y. 1987), aff'd sub nom. Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988); In re UNR Indus., Inc., 29 B.R. 741, 743 (Bankr. N.D. Ill. 1983) (asbestos litigation), appeal dismissed, 725 F.2d 1111 (7th Cir. 1984); see also Phillips, supra note 16, at 448-50 (describing the advantages that mass tort defendants may enjoy by filing for bankruptcy).

[FN42]. See Owen, supra note 3, at 46 & n.217 (discussing the difficulty that jurors have in measuring institutional culpability, and citing recent literature on corporate responsibility and culpability); Seltzer, supra note 3, at 49 (describing why "juries in products liability cases are ill-equipped to mete out fair and effective punishment to large corporate defendants").

[FN43]. See Owen, supra note 3, at 45-46 (noting that jurors have trouble understanding a corporate defendant's financial status, as well as gauging the appropriate size of the punitive award).

[FN44]. Plaintiffs in a number of cases have successfully urged the jury to base its punitive award on the defendant's entire, nationwide conduct. For instance, in General Motors Corp. v. Moseley, 447 S.E.2d 302 (Ga. Ct. App. 1994), the plaintiff sought compensatory and punitive damages for injuries that occurred in an accident involving a GM pickup truck, claiming that GM had defectively designed the truck's side saddle fuel tank. During closing argument, the plaintiff specifically asked the jury to award $20 in punitive damages for each of the five million GM pickup trucks with side saddle fuel tanks currently in use. See id. at 312. The jury obliged, awarding $101 million in punitive damages. See id. Although the Georgia Court of Appeals reversed the judgment and ordered a new trial, it expressly approved the plaintiff's use of the nationwide multiplier argument. See id.; see also Hawkins v. Allstate Ins. Co., 733 P.2d 1073 (Ariz. 1987) (plaintiffs sued Allstate claiming that Allstate's policy of deducting a $35 cleaning fee from all "total loss" claims was fraudulent; plaintiffs urged the jury to calculate punitive damages by multiplying the number of "total loss" claims per year (100,000) by the amount saved by deducting the cleaning fee ($35); jury awarded $3.5 million, exactly that amount); Ford Motor Co. v. Ammerman, 705 N.E.2d 539 (Ind. Ct. App. 1999) (plaintiff sued Ford claiming that the Bronco II was defectively designed; plaintiff asked the jury to calculate punitive damages by multiplying the amount that it would have cost Ford to correct the problem ($83 per vehicle) by the number of Bronco II's that were sold between 1983 and 1990 (700,000); jury awarded $58 million, almost exactly the amount requested; the award was later reduced to $13.8 million).

[FN45]. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 567-73, 585 (1996) (discussing the limits of state sovereignty); see also infra Part III.

[FN46]. 517 U.S. at 562 & n.1.

[FN47]. Id. at 563-64.

[FN48]. Id.

[FN49]. Id at 564. Gore paid $40,750.88 for his BMW; the repainting work cost $601.37. Id. at 563-64.

[FN50]. Id.

[FN51]. Id.

[FN52]. BMW adopted its nationwide disclosure policy in 1983. Id.

[FN53]. Id. The reason for Gore's use of a $300 threshold was not explained. Id. at 564 n.5.

[FN54]. BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 627 (Ala. 1994), rev'd, 517 U.S. 559 (1996).

[FN55]. BMW v. Gore, 517 U.S. at 565. Interestingly, just a few months earlier, another Alabama jury faced with a virtually identical case awarded the plaintiff comparable compensatory damages, but refused to award any punitive damages. Yates v. BMW of N. Am. Inc., 642 So. 2d 937, 938-39 (Ala. Civ. App.), cert. quashed, 642 So. 2d 937 (Ala. 1993).

[FN56]. BMW v. Gore, 517 U.S. at 566.

[FN57]. The Alabama Supreme Court applies the factors announced in Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989). Those factors require consideration of: (1) the relationship of the actual or potential harm to the amount of damages; (2) the degree of reprehensibility of the defendant's conduct; (3) whether the conduct was profitable to the defendant; (4) the defendant's financial position; (5) the costs of litigation; (6) whether criminal sanctions have been imposed on the defendant; and (7) whether there have been other civil actions against the defendant based on the same course of conduct. See id. The United States Supreme Court approved these factors in Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991).

[FN58]. BMW v. Gore, 646 So. 2d at 629.

[FN59]. Id. at 627-29.

[FN60]. Id.

[FN61]. Id.

[FN62]. Id.

[FN63]. See id. As the United States Supreme Court noted:
In light of the Alabama Supreme Court's conclusion that (1) the jury had computed its award by multiplying $4,000 by the number of refinished vehicles sold in the United States and (2) that the award should have been based on Alabama conduct, respect for the error-free portion of the jury verdict would seem to produce an award of $56,000 ($4,000 multiplied by 14, the number of repainted vehicles sold in Alabama).
BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 567 n.11 (1996).

[FN64]. BMW v. Gore, 517 U.S. at 568 (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1995)).

[FN65]. Id. at 585.

[FN66]. See id. at 574-85. In holding that the $2 million punitive award was grossly excessive, the Court noted that BMW caused Gore purely economic harm and that it may have done so in good faith (based on the disclosure laws of other states), that the ratio of punitive damages to actual damages was 500 to 1, and that the maximum civil penalty for BMW's conduct under Alabama's Deceptive Trade Practices Act was $2000. See id.

[FN67]. The Supreme Court reached out to address this issue despite the fact that the Alabama Supreme Court had "properly eschewed reliance on BMW's out- of-state conduct, and based its remitted award solely on conduct that occurred within Alabama." Id. at 573-74 (citation omitted); see also id. at 603 (Scalia, J., dissenting) (noting that these issues were "not remotely presented for resolution" because the Alabama Supreme Court had not relied on acts that occurred in other jurisdictions in setting the punitive award).

[FN68]. See id. at 568-73.

[FN69]. Id. at 572.

[FN70]. See id. at 573-74.

[FN71]. See U.S. Const. art. VI; Heath v. Alabama, 474 U.S. 82, 89 (1985) ("The States are equal to each other 'in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." ' (quoting Coyle v. Smith, 221 U.S. 559, 567 (1911))).

[FN72]. See New York Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914) (recognizing that the states must operate only within their proper spheres); Coyle v. Smith, 221 U.S. 559 (1911) (same); Huntington v. Attrill, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States.").

[FN73]. Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881). In Bonaparte, the Court was confronted with the question of whether a state could make its public stock (or debt) tax-exempt not only within that state itself, but in other states as well. Id. The Court held that a state cannot insist that other states confer such an exemption. Id. at 594-95.

[FN74]. Head, 234 U.S. at 161. In Head, Richard Head (a citizen and resident of New Mexico) purchased two life insurance policies in Missouri from New York Life Insurance Company. Id. at 154. The policies stipulated that they should be considered as having been issued in New York, and be treated as New York contracts. Id. at 154-55. Head eventually transferred one of the policies to his daughter, Mary Head. Id. at 155. Mary Head then borrowed money against the policy from New York Life, pursuant to an agreement consistent with New York law. Id. Shortly thereafter, Mary Head defaulted on the loan, which, under the agreement, diminished the amount of the insurance policy. Id. at 155-56. However, when Richard Head died, Mary Head sued for the full amount of the policy, claiming that Missouri law would have required New York Life to retain sufficient surplus to continue the premiums on temporary insurance, and that, had New York Life complied with this Missouri law, the full amount of the policy would have been valid at the time of Richard Head's death. Id. at 156. The Court refused to allow "the State of Missouri to extend its authority into the State of New York." Id. at 161.

[FN75]. 421 U.S. 809 (1975).

[FN76]. Id. at 811-12. The statute at issue made it a misdemeanor for "any person, by ... the sale or circulation of any publication ... [to] encourage or prompt the procuring of abortion." Id. at 812-13 (quoting Va. Code Ann. § 18.1-63 (1960)).

[FN77]. Id. at 818-23.

[FN78]. Id. at 822-23.

[FN79]. Id. at 824.

[FN80]. See id. at 829.

[FN81]. Healy v. Beer Inst., 491 U.S. 324, 335-36 (1989) (footnotes omitted). In elaborating on this "special concern," the Court quoted the plurality in Edgar v. MITE Corp.: "'The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." " ' Id. at 336 n.13 (quoting Edgar v. MITE Corp., 457 U.S. 624, 643 (1982) (plurality opinion) (quoting Shaffer v. Heitner, 433 U.S. 186, 197 (1977)).

[FN82]. 491 U.S. 324 (1989). In Healy, the Court struck down a Connecticut law that required out-of-state beer shippers to affirm that their posted prices for beer sold to Connecticut merchants were, as of the moment of posting, no higher than the prices offered to merchants in Massachusetts, New York, and Rhode Island. Id. at 326, 343.

[FN83]. Id. at 336 (quoting Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982) (plurality opinion)).

[FN84]. Id.

[FN85]. Id.

[FN86]. Id. at 337. The Court found that the interaction of the Connecticut affirmation statute with the various liquor laws of Massachusetts, New York, and Rhode Island had the practical effect of controlling prices and discounts in those states. Id. at 337-39; see also Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 576-84 (1986) (invalidating New York's prospective liquor price-affirmation law).

[FN87]. The Due Process Clause provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law ...." U.S. Const. amend. XIV. The Commerce Clause provides: "Congress shall have Power ... [t]o regulate Commerce ... among the several States ...." U.S. Const. art. I, § 8, cl. 3.

[FN88]. 457 U.S. 624 (1982).

[FN89]. Id. at 626-27, 643-46.

[FN90]. Id. at 644. The Court noted:
The effects of allowing the Illinois Secretary of State to block a nationwide tender offer are substantial. Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer mechanism provides incumbent management to perform well so that stock prices remain high is reduced.
Id. at 643. In a portion of the opinion that only garnered a plurality, Justice White also expressed concern that "if Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled." Id. at 642 (plurality opinion).

[FN91]. 325 U.S. 761 (1945).

[FN92]. Id. at 763, 783-84.

[FN93]. Id. at 775.

[FN94]. Id.

[FN95]. 260 U.S. 346 (1922).

[FN96]. Id. at 347-49.

[FN97]. Id. at 349.

[FN98]. 472 U.S. 797 (1985).

[FN99]. See id. at 799.

[FN100]. See id. at 800-03, 814-15.

[FN101]. See id. at 816. Noting that "there can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit[,]" id., the Court first considered and found that Kansas's law differed materially from the laws of the states where the majority of the gas leases were located, see id. at 816-18.

[FN102]. Id. at 822.

[FN103]. Id. at 821-22 (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981) (plurality opinion)). In Shutts, the Court carefully distinguished the issue of personal jurisdiction over parties to a lawsuit from the issue of constitutional limitations on choice of law. See id. at 821. For a state to exercise personal jurisdiction over a party, the party must have "certain minimum contacts with the State." Id. at 807. Even if that constitutional requirement is met (as it was in Shutts, see id. at 806-14), the state may only apply its law to the party's claims if the state has significant contacts to the asserted claims. See id. at 821-22.

[FN104]. Id. at 822 (quoting Home Ins. Co. v. Dick, 281 U.S. 397, 410 (1930)); see also John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 182 (1936) (refusing to allow application of Georgia law to the parties' insurance contract where there was "no occurrence, nothing done [in Georgia], to which the law of Georgia could apply"); Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143, 149 (1934) (noting that a state may limit "the making of certain contracts within its own territory but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made" (citation omitted)); Home Ins. Co. v. Dick, 281 U.S. 397, 410 (1930)

(holding that a state "may not validly affect contracts which are neither made nor are to be performed" in that state).

[FN105]. Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768, 784 (1992); see also ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 315 (1982) ("As a general principle, a State may not tax value earned outside its borders."). Thus, for instance, a state may not assess a tax on the premiums received for reinsurance contracts made and payable in another state, where the only connection to the taxing state is that the underlying insurance contracts (i.e., the contracts that were reinsured) were effected in the taxing state. See Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 80 (1938) ("[A] state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere.").

[FN106]. Norfolk & Western Ry. Co. v. Missouri State Tax Comm'n, 390 U.S. 317, 325 (1968) (quoting Nashville, C. & St. Louis Ry. Co. v. Browning, 310 U.S. 362, 365 (1940)) (footnote omitted); see also Allied-Signal, 504 U.S. at 777-78 ("[I]n a Union of 50 States, to permit each State to tax activities outside its borders would have drastic consequences for the national economy, as businesses could be subjected to severe multiple taxation.").

[FN107]. See Allied-Signal, 504 U.S. at 778; Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983); Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123, 134 (1931). For a description of the evolution of the unitary business principle, see Allied-Signal, 504 U.S. at 778-83.

[FN108]. Allied-Signal, 504 U.S. at 780.

[FN109]. For more detailed discussion of the beneficial effects of imposing sovereignty-based limits on punitive damages awards, see, infra, Part III.C.

[FN110]. The Court has held that "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 n.17 (1996).

[FN111]. See id. at 572-73.

[FN112]. See id. at 574 n.20 ("Given that the verdict was based in part on out-of-state conduct that was lawful where it occurred, we need not consider whether one State may properly attempt to change a tortfeasor's unlawful conduct in another State.").

[FN113]. As discussed more fully below, it was in fact unclear whether BMW's conduct was lawful or unlawful in other states. See infra notes 133-34 and accompanying text.

[FN114]. See BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 627 (Ala. 1994), rev'd, 517 U.S. 559 (1996); see also supra notes 47-49 and accompanying text (discussing this aspect of the jury's decision in BMW v. Gore).

[FN115]. See BMW v. Gore, 517 U.S. at 573 (describing the Alabama Supreme Court's findings on this point).

[FN116]. Id. at 570; see also id. at 570 n.13 (describing numerous state statutes on presale disclosure of vehicle repairs); id. at 578 (noting that "a corporate executive could reasonably interpret the disclosure requirements [of a statute mandating disclosure of repairs over a certain value] as establishing safe harbors.").

[FN117]. See id. at 567-577.

[FN118]. Id. at 568.

[FN119]. Id. at 572. In fact, the Court noted: "Before this Court Dr. Gore argued that the large punitive damages award was necessary to induce BMW to change the nationwide policy that it adopted in 1983. But by attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States." Id.

[FN120]. The Court cited Healy v. Beer Institute, 491 U.S. 324, 335-36 (1989), Edgar v. MITE Corp., 457 U.S. 624, 643 (1982), Bigelow v. Virginia, 421 U.S. 809, 824 (1975), New York Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914), Huntington v. Attrill, 146 U.S. 657, 669 (1892), and Bonaparte v. Tax Court, 104 U.S. 592, 594

(1881). See BMW v. Gore, 517 U.S. at 571-75. These cases are discussed in supra Part II.B.

[FN121]. BMW v. Gore, 517 U.S. at 571 (citation omitted).

[FN122]. Id. at 572. Although a jury, rather than the Alabama legislature, imposed the sanction on BMW, "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." Id. at 572 n.17; see also San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959) (noting that states can effectively regulate through awards of damages).

[FN123]. BMW v. Gore, 517 U.S. at 572.

[FN124]. Id. at 572-73 (footnote omitted). The Court also stated: "While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation." Id. at 585.

[FN125]. See supra Part II.B.

[FN126]. See BMW v. Gore, 517 U.S. at 568, 572 n.17 (noting that the purpose of punitive damages is to punish and deter, and that state power is exercised when a jury imposes punitive damages).

[FN127]. See id. at 568-72 (recognizing that a state has a legitimate interest in imposing punitive damages to protect its own citizens).

[FN128]. See id. at 567-75.

[FN129]. See id.

[FN130]. Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881); see also supra note 73 (discussing Bonaparte).

[FN131]. See BMW v. Gore, 517 U.S. at 572.

[FN132]. See id. at 577; Respondent's Brief at 18-19, BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) (No. 94-896).

[FN133]. BMW v. Gore, 517 U.S. at 577. In a footnote, the Court noted two recent state court decisions on the issue, one of which suggested that its disclosure statute operated as a safe harbor, and the other of which suggested that its disclosure statute did not displace pre-existing common law remedies. See id. at 577 n.27.

[FN134]. Id. at 573.

[FN135]. Id. at 573-74 (citations omitted).

[FN136]. Id. at 573; see also supra text accompanying notes 134-35 (quoting the relevant passages from BMW v. Gore); Bruce J. McKee, The Implications of BMW v. Gore for Future Punitive Damages Litigation: Observations from a Participant, 48 Ala. L. Rev. 175, 219-20 (1996) (noting that BMW v. Gore places the burden on the plaintiff to prove that defendant's out-of-state conduct was unlawful, and discussing the practical problems of having the jury consider whether the defendant's conduct was unlawful under the specific laws of each of the fifty states).

[FN137]. See BMW v. Gore, 517 U.S. at 573 n.20.

[FN138]. See id. at 570-73; see also supra notes 119-24 and accompanying text (discussing this aspect of the Court's opinion).

[FN139]. See BMW v. Gore, 517 U.S. at 585 (reiterating that a state may not "use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation").

[FN140]. See id. at 562 (recognizing that the Due Process Clause imposes a limit on the amount of a punitive award); Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994) (same); TXO Prod. Corp. v. Alliance Resources

Corp., 509 U.S. 443, 454-55 (1993) (same); see also supra notes 31-34 and accompanying text (discussing these cases).

[FN141]. See supra note 35 (citing cases); see also supra notes 35-41 and accompanying text (discussing the status of a substantive due process limit on multiple punitive damages awards).

[FN142]. BMW v. Gore, 517 U.S. at 568.

[FN143]. Heath v. Alabama, 474 U.S. 82, 93 (1985); see also United States v. Lopez, 514 U.S. 549, 564 (1995) (noting that states have historically been sovereign in the area of criminal law enforcement); Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 601 (1982) (identifying two sovereign interests: "First, the exercise of sovereign power over individuals and entities within the relevant jurisdiction-this involves the power to create and enforce a legal code, both civil and criminal; second, the demand for recognition from other sovereigns-most frequently this involves the maintenance and recognition of borders."); Younger v. Harris, 401 U.S. 37, 44 (1971) (discussing the importance of comity in the context of state criminal prosecutions).

[FN144]. Heath, 474 U.S. at 93 (quoting Bartkus v. Illinois, 359 U.S. 121, 137 (1959)).

[FN145]. See BMW v. Gore, 517 U.S. at 567-68 (citing cases); see also Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989) (noting that "punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law").

[FN146]. 474 U.S. at 93.

[FN147]. See generally Blatt et al., supra note 3, ch. 8 (canvassing state punitive damages laws).

[FN148]. See supra note 3 (providing various examples).

[FN149]. Compare Ala. Code § 6-11-20(a) (1993) (imposing a "clear and convincing evidence" standard) and Ohio Rev. Code Ann. § 2315.21(D)(2) (West 1999) (same) with Schaefer v. Edward D. Jones & Co., 552 N.W.2d 801, 808 & n.6 (S.D. 1996) (holding that a "preponderance of the evidence" standard applies).

[FN150]. Compare Cal. Civ. Code § 3295(d) (West 1997) (requiring bifurcation of the liability and punitive damages phases of the trial) with Colo. Rev. Stat. § 13-21-102(6) (1999) (prohibiting consideration of defendant's wealth in determining punitive damages) and Ohio Rev. Code Ann. § 2315.21(D)(1) (West 1999) (allowing the jury to determine liability for and amount of punitive damages, but requiring the judge to reduce the award if necessary to meet the statutory cap).

[FN151]. See, e.g., Kewin v. Massachusetts Mut. Life Ins. Co., 295 N.W.2d 50, 55 (Mich. 1980) ("In Michigan, exemplary damages are recoverable as compensation to the plaintiff, not as punishment of the defendant."); N.H. Rev. Stat. Ann. § 507:16 (1997) (allowing punitive damages only where expressly permitted by statute).

[FN152]. See, e.g., Colo. Rev. Stat. § 13-21-102(1)(a) & (3) (1999) (limiting punitive damages to the amount of actual damages); Ohio Rev. Code Ann. § 2315.21(D)(1)(a) (West 1999) (capping punitive damages at the lesser of $100,000 or three times compensatory damages where defendant is not a large employer); Va. Code Ann. § 8.01-38.1 (Michie 1992 & Supp. 1999) (capping punitive damages at $350,000).

In her dissent in BMW v. Gore, 517 U.S. 559, 612-16 (1996), Justice Ginsburg argued that it was unwise and unnecessary for the Supreme Court to assume the task of reviewing state court punitive damages awards, in part because the state courts and legislatures were already engaged in efforts to limit punitive damages. In an appendix, Justice Ginsburg noted: "State legislatures have in the hopper or have enacted a variety of measures to curtail awards of punitive damages. At least one state legislature has prohibited punitive damages altogether, unless explicitly provided by statute." Id. at 614 (Ginsburg, J., dissenting). She also provided a useful summary of state legislative activity on three tort reform proposals: capping punitive damages, providing that portions of punitive damages awards be turned over to state agencies, and bifurcating trials to separate the substantive liability issues from the punitive damages issues. See id. at 614-19 (Ginsburg, J., dissenting).

[FN153]. BMW v. Gore, 517 U.S. at 572.

[FN154]. Id. at 569-74, 585-86.

[FN155]. 472 U.S. 797 (1985); see also supra notes 98-104 and accompanying text (discussing Shutts).

[FN156]. Id. at 821-22 (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981) (plurality opinion)).

[FN157]. Id. at 819.

[FN158]. Bigelow v. Virginia, 421 U.S. 809, 824 (1975); see also supra notes 75-80 and accompanying text (discussing Bigelow).

[FN159]. New York Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914); see also supra note 74 and accompanying text (discussing Head).

[FN160]. Heath v. Alabama, 474 U.S. 82, 89 (1985) (quoting Coyle v. Smith, 221 U.S. 559, 567 (1911)).

[FN161]. See supra note 44 and accompanying text (discussing the confusion on this point).

[FN162]. See supra notes 105-08 and accompanying text (discussing the Court's adoption of the unitary business principle).

[FN163]. See Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768, 784 (1992); ASARCO Inc. v. IdahoState Tax Comm'n, 458 U.S. 307, 315 (1982).

[FN164]. See Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983); Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123, 134 (1931)).

[FN165]. Allied-Signal, 504 U.S. at 778. Indeed, the Court stated: "In a Union of 50 States, to permit each State to tax activities outside its borders would have drastic consequences for the national economy, as businesses could be subjected to severe multiple taxation." Id. at 777-78.

[FN166]. See id. at 777-85 (reviewing the history of the unitary business principle and concluding that it is workable and sound).

[FN167]. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 n.21, 575-77 (1996).

[FN168]. See id. at 573-86.

[FN169]. See id. at 575-76. The Court also directed the lower courts to consider the ratio of the punitive award to the actual or potential harm inflicted on the victim, and the difference between the punitive award and the civil or criminal penalties that could have been imposed for comparable misconduct. See id. at 573-84; see also supra note 66 and accompanying text (discussing the three guideposts).

[FN170]. BMW v. Gore, 517 U.S. at 576.

[FN171]. See id. (citing TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 462 n.28 (1993)). The Court affirmed its willingness to consider out-of-state conduct by citing TXO. In TXO, 509 U.S. at 462 n.28, the Court noted in a footnote that the defendant had argued that it was improper for the jury to consider "evidence of its alleged wrongdoing in other parts of the country." But the Court brushed this argument aside: "Under well-settled law, however, factors such as these are typically considered in assessing punitive damages." Id.

[FN172]. See BMW v. Gore, 517 U.S. at 573 n.19, 575-78 (discussing this rule); Williams v. New York, 337 U.S. 241, 244-51 (1949) (holding that a judge may consider misconduct that the defendant has not even been charged with in sentencing a criminal defendant); Gryger v. Burke, 334 U.S. 728, 732 (1948) (holding that a recidivist may be punished more severely based on his prior convictions).

[FN173]. See TXO, 509 U.S. at 462 n.28; Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991).

[FN174]. See BMW v. Gore, 517 U.S. at 567-74 & n.21.

[FN175]. The Court's holding was, of course, limited to situations where the defendant's out-of-state conduct was potentially lawful where it occurred. See id. at 571-74 & n.20. As discussed in supra Part III.C, however, that holding should be expanded to include even situations where the defendant's out-of-state conduct was unlawful where it occurred.

[FN176]. See id. at 574 n.21, 575-77.

[FN177]. See McKee, supra note 136, at 219 (noting how difficult the distinction is, and doubting whether jurors can follow it).