STEERING CLEAR OF THE "ROAD TO NOWHERE"[1]: WHY THE *BMW* GUIDEPOSTS SHOULD NOT BE USED TO REVIEW STATUTORY PENALTY AWARDS

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1. Justice Scalia characterized the Court's "guideposts," designed to guide due process review of punitive damage awards as "mark[ing] a road to nowhere." BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 605 (1996) (Scalia, J., dissenting).

I. INTRODUCTION

Many statutes utilize civil penalties as their primary enforcement mechanism.[2] These penalties, like the regulations to which they give force, are products of legislative determinations. Nevertheless, state and federal courts have recently begun grappling with the question of whether statutory penalty awards can be struck down as unconstitutionally excessive under the Due Process Clause.[3] Defendants have even begun challenging the constitutionality of prospective awards.[4] Despite the fact that the relevant standard for review of statutory damages has not changed in ninety years,[5] a number of scholars suggest that the standard should be changed to one far less deferential to legislators.[6]

In numerous contexts, the Supreme Court has emphasized that federal laws—the product of Congress's deliberation—should be given substantial deference by the courts. In the context of due process review, except in a narrow range of cases,[7] courts presume that statutes are constitutional and apply the lowest level of judicial scrutiny.[8] Throughout its history, the Court has been reluctant to expand the types of statutes to which it would "raise a suspicious judicial eyebrow"[9] and perform more searching review.[10] In light of

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2. *See* Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681n(a)(1)(A) (2006); Copyright Act, 17 U.S.C. § 504(c) (2006); Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(3)(B) (2006); Cable Communications Policy Act ("CCPA"), 47 U.S.C. § 551(f)(2)(A) (2006); Clean Water Act ("CWA"), 33 U.S.C. § 1319(a)(1) (2006); *see also* N.Y. Navigation Law § 192 (2009).

3. *E.g.*, Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 587 (6th Cir. 2007); State v. LVF Realty Co., 59 A.D.3d 519, 519 (N.Y. App. Div. 2009).

4. *E.g.*, Parker v. Time Warner Entm't Co., 331 F.3d 13, 15 (2d Cir. 2003); Murray v. GMAC Mortg. Corp., 434 F.3d 948, 952 (7th Cir 2006).

5. A penalty award should be affirmed unless "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 67 (1919).

6. For example, Professor Sheila Scheuerman argues that courts should "deny class certification when faced with aggregated statutory damages that are constitutionally excessive under BMW and State Farm." Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 151 (2009).

7. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Moore v. City of E. Cleveland, 431 U.S. 494 (1977).

8. In performing "rational basis" review, courts ask whether the statute is rationally related to a legitimate government purpose, or whether it is arbitrary and capricious. *See, e.g.*, United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 (1938). If satisfied that these minimal requirements are met, courts do not substitute their judgment for that of the legislature. *Id.* at 153.

9. This phrase was used by Justice O'Connor in dissent in *TXO Prod. Corp. v.*

the Supreme Court's willingness to perform non-deferential review of punitive damage awards,[11] scholars[12] and courts[13] have suggested that the same standard ought to apply to review civil statutory penalty awards. This Note argues that statutory penalties are fundamentally different from punitive damage awards and do not warrant, or even permit, searching non-deferential review.

For some time after the close of the *Lochner* era, the Supreme Court consistently declined to apply heightened scrutiny to substantive due process claims.[14] Gradually, beginning with *Griswold v. Connecticut*,[15] the Court recognized substantive due process protections in a narrow scope of cases relating to privacy and intimate relationships.[16] Finally, the Court decided to return to the practice of applying heightened scrutiny in cases involving only pure pecuniary interests. In *BMW of North America v. Gore*, the Court announced, controversially, that punitive damages warrant heightened review, and if excessive, violate due process.[17]

Intending to provide an analytical framework to the lower courts, the *BMW* Court proposed three "guideposts" to be used to determine whether a punitive damage award is unconstitutionally excessive. Courts are to consider: (1) the degree of reprehensibility of the defendant's conduct, (2) the ratio of punitive damages to compensatory damages, and (3) civil or criminal penalties available for comparable conduct.[18] Although the application of the

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Alliance Resources Corp., 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting), in response to the over 500 to 1 ratio of punitive to compensatory damages in that case.

10. For the types of cases that warrant application of strict scrutiny, courts generally refer to *Carolene Products* and its famous footnote four. *See Carolene Products*, 304 U.S. at 152 n.4 (1938).

11. *See, e.g., TXO*, 509 U.S. 443; BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

12. *See, e.g.*, Scheuerman, *supra* note 6 (arguing that the *BMW* guideposts should be used to review statutory penalty awards, particularly when aggregated by class actions); Blaine Evanson, Note, *Due Process in Statutory Damages*, 3 GEO J.L. & PUB. POL'Y 601, 602 (2005) (arguing that the *BMW* guideposts should be used to review statutory penalty awards, because many penalties present the same excessiveness problems as punitive damages).

13. *See, e.g.*, Parker v. Time Warner Entm't Co., 331 F.3d 13, 22 (2d Cir. 2003) (suggesting, in dicta, that in a "sufficiently serious case the due process clause might be invoked").

14. This posture is embodied by the statement from *Ferguson v. Skrupa*, that "[w]e have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." 372 U.S. 726, 730 (1963).

15. 381 U.S. 479 (1965).

16. *See, e.g., id.*; Roe v. Wade, 410 U.S. 113 (1973); Moore v. City of E. Cleveland, 431 U.S. 494 (1977).

17. 517 U.S. 559, 574 (1996).

18. *Id.* at 574-75.

"guideposts" has been inconsistent,[19] and the critics have been vocal and numerous,[20] the precedent is now "well established" and unlikely to be abandoned.[21]

Similar concerns over statutory penalty awards have arisen largely in two types of cases: (1) in class actions where large numbers of identical claims for small statutory penalty awards create potentially crippling awards,[22] and (2) where large penalty awards are granted by juries within wide statutory ranges.[23] While it is undisputed that statutory penalty awards have the potential to be both excessive and unpredictable, this Note argues that the fundamental differences between statutory penalty awards and punitive damages renders the application of the *BMW* guideposts both unworkable and judicially impermissible.

Part II of this Note will provide a brief summary of the history of the Court's review of both statutory penalties and punitive damages to illustrate the precedent relied on by the Court in *BMW* and its progeny. Parts III and IV will highlight the obstacles the Court would face if it sought to extend its punitive damage jurisprudence to statutory penalties, focusing both on the logical leaps the Court would be required to make from its punitive damage precedent and the fundamental differences between the two types of awards.

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19. As a result of the Court's refusal to draw a mathematical bright line, the ratios of those penalties struck down and those affirmed by lower courts have been all over the map. *Compare* Patterson v. Balsamico, 440 F.3d 104, 110-11, 122 (2d Cir. 2006) (striking down punitive damages one-fifth the size of the compensatory damages), *with* Grabinski v. Blue Springs Food Sales, Inc., 203 F.3d 1024, 1025-26 (8th Cir. 2000) (affirming a punitive damage award 99 times greater than the compensatory damages). Also, before *BMW*, the Court declined to strike down an award of over 526 to 1. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453, 462-63 (1993).

20. *E.g.*, Michael L. Rustad, *The Uncert-Worthiness of the Court's Unmaking of Punitive Damages*, 2 CHARLESTON L. REV. 459 (2008); A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085 (2006).

21. At least so said Justice Breyer in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 416 (2003). Justice Ginsburg directly criticized this characterization, stating that "[i]f our activity in this domain is now 'well established,' it takes place on ground not long held." *Id.* at 431 (Ginsburg, J., dissenting) (internal citation omitted).

22. *See, e.g.*, Parker v. Time Warner Entm't Co., 331 F.3d 13 (2d Cir. 2003); *see also* Scheuerman, *supra* note 6, at 149 (recognizing that these arguments often are raised at the class-certification stage, because, faced with the "bet-the-company proposition" of trial, few companies take these cases to judgment).

23. Although these types of cases are less frequent, they often arise from state or federal environmental statutes which often have wide ranges of penalties to be assessed on a per-day-of-continued-violation basis. *See* U. S. v. Gurley, 384 F.3d 316, 319-22 (6th Cir. 2004) (challenging a penalty assessed under 42 U.S.C. 9614(c) ("CERCLA")); State v. LVF Realty Co., 59 A.D.3d 519, 523 (N.Y. App. Div. 2009) (challenging a penalty assessed under N.Y. Navigation Law § 192).

Finally, Part V will attempt to illustrate the specific problems courts would likely face in applying the *BMW* guideposts to statutory penalty awards.

II. LOCHNERISM REBORN? – A BRIEF SURVEY OF THE HISTORY OF ECONOMIC SUBSTANTIVE DUE PROCESS.

The Due Process Clause of the Fifth Amendment to the U.S. Constitution declares that "no person shall . . . be deprived of life, liberty, or property, without due process of law."[24] The Fourteenth Amendment provides individuals the same protections against state government.[25] At first, "due process" was interpreted as protecting against laws which are inconsistent with the specific provisions of the Constitution.[26] This narrow definition has broadened substantially to protect specifically enumerated rights, and also against laws which impinge upon non-enumerated, but still "fundamental," rights.[27] When faced with a law that impinges upon a fundamental right, courts apply strict scrutiny, affirming only those laws that are necessary to serve a compelling government interest.[28] All other laws are presumed constitutional and affirmed if rationally related to a legitimate government purpose, and therefore not arbitrary or capricious.[29]

In the early twentieth century, at the height of laissez faire economic thought, the right to contract and certain other economic rights were viewed by the Court as fundamental.[30] In *Lochner v. New York*, the Supreme Court struck down a statute which forbade employees from working more than sixty hours per week.[31] For the *Lochner* Court, the right to freely enter contracts was sacrosanct, and therefore it held that the law preventing unfettered exercise of that

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24. U.S. CONST. amend. V.

25. U.S. CONST. amend. XIV, § 1. "To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection." Malinsky v. New York, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring).

26. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276 (1856) (concluding that the term "due process of law" was intended by the framers to convey the same meaning as "by the law of the land" in the Magna Carta).

27. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) ("'This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause.'" (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974))).

28. *See id.* at 499-501.

29. For a quintessential example of the "rational basis" test, albeit in an Equal Protection case, see Railway Express Agency v. New York, 336 U.S. 106, 109-10 (1949).

30. "The general right to make a contract . . . is part of the liberty of the individual protected by the 14th Amendment." Lochner v. New York, 198 U.S. 45, 53 (1905).

31. *Id.* at 45-65.

right was unconstitutional despite the state's valid concern for employee welfare.[32] Justice Harlan, vocal in dissent, reminded the majority that "[w]hether or not this be wise legislation it is not in the province of the court."[33] However, despite the vocal critics on the Court, *Lochner* was not formally overruled until the late 1930s. In *West Coast Hotel v. Parrish*, the Court eliminated the last vestiges of *Lochnerism*.[34] The Court declared that legislatures are entitled deference in policy determinations, "[e]ven if the wisdom of the policy be . . . debatable."[35]

During the *Lochner* Era, the Court also decided several due process cases involving statutory penalty awards that were disproportionate to the actual harm suffered by the plaintiffs.[36] The Court, however, applied a far more deferential standard. In *Waters-Pierce Oil Co. v. Texas*, the Court declared that courts could "only interfere . . . if the fines imposed [were] so grossly excessive as to amount to a deprivation of property without due process of law."[37] The Court later refined the standard, giving greater deference to legislatures and signaling the Court's retreat from this province. In *St. Louis, Iron Mountain & Southern Railway. Co. v. Williams,* the Court explained that "the [S]tates still possess a wide latitude of discretion in the matter, and that their enactments transcend the limitation only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."[38] In fact, after *Williams*, the Court has not struck down a single statutory penalty award[39] despite the fact that courts still apply its standard today.[40]

As the century progressed, the size of punitive damage awards

32. While the Court recognized that it is within states' police power to enact laws protecting public health, it determined that the state interest did not warrant encroachment on the right to contract. *Id.* at 57-58.

33. *Id.* at 69 (Harlan, J., dissenting).

34. 300 U.S. 379 (1937).

35. *Id.* at 399.

36. *See, e.g.,* Seaboard Air Line Ry. v. Seegers, 207 U.S. 73 (1907); Waters-Pierce Oil Co. v. Tex., 212 U.S. 86 (1909).

37. *Waters-Pierce*, 212 U.S. at 111 (citing Coffey v. Harlan County, 204 U.S. 659 (1907)).

38. 251 U.S. 63, 66-67 (1919).

39. Even those penalties struck down before *Williams* were not held unconstitutional because of their "excessiveness," but rather because inadequate procedures were employed. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 601 (1996) (Scalia, J., dissenting) (discussing Sw. Telegraph & Telephone Co. v. Danaher, 238 U.S. 482 (1915)).

40. *See, e.g.,* Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 587 (6th Cir. 2007).

grew dramatically,[41] and, as a result, constitutional challenges have appeared on the Court's docket in various forms.[42] Although entirely in dicta at first, the Court expressed its willingness to enter a province formerly left to the states and perform searching due process review of punitive damage awards.[43] Viewing the early *Lochner* Era statutory penalty cases as permitting this type of judicial review,[44] members of the Court recognized that jury-granted punitive damages present even greater dangers of excessiveness.[45] After the Court declined to strike down the first few awards to come before it,[46] the "tort reform" advocates[47] presented the perfect test case—*BMW of North America v. Gore*.[48]

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41. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) (noting that throughout the late 1970s and 1980s, the highest punitive damage awards had increased more than thirty-fold).

42. *See, e.g., id.* at 259 (reviewing an excessiveness claim under the Excessive Fines Clause of the Eighth Amendment); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) (reviewing an excessiveness claim under the Due Process Clause of the Fourteenth Amendment).

43. While the Court declined to strike down the challenged award, it engaged in a non-deferential due process review, noting that:

> [T]he fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable . . . . [H]owever, . . . general concerns of reasonableness and adequate guidance from the court . . . enter into the constitutional calculus. With these concerns in mind, we review the constitutionality of the punitive damages awarded in this case.

Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18-19 (1991) (footnote and citation omitted).

44. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 478-79 (1993).

45. Justice O'Connor, the staunchest opponent of excessive punitive damage awards, joined Justice Brennan in recognizing that the Court's "scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits." *Haslip*, 499 U.S. at 47 (O'Connor, J., dissenting) (quoting *Browning-Ferris*, 492 U.S. at 281 (Brennan, J., concurring)). Likewise, Justice Kennedy noted that "[u]nlike a legislature, whose judgments may be predicated on educated guesses and need not necessarily be grounded in facts adduced in a hearing, a jury is bound to consider only the evidence presented to it in arriving at a judgment." *TXO*, 509 U.S. at 468 (Kennedy, J., concurring in part and concurring in judgment) (internal citations omitted).

46. *See TXO*, 509 U.S. 443; *Haslip*, 499 U.S. 1.

47. As would be expected, among the Amici filing briefs in support of BMW was the American Tort Reform Association. *See* Brief for American Tort Reform Association et al. as Amici Curiae Supporting Petitioner, BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

48. 517 U.S. 559 (1996). This was such an appealing case to bring before the Court, both because of the 500 to 1 ratio between punitive and compensatory damages and the low level of purely economic harm sustained by the plaintiff. *Id.* at 563-568.

Dr. Gore sued BMW for fraudulently concealing damage to a used car he purchased.[49] While Gore's damages were only $4,000, the jury awarded punitive damages of $4,000,000 upon evidence that BMW acted similarly nationwide.[50] Upon BMW's motion, the trial judge remitted the punitive damages to $2,000,000.[51] Focusing on the 500 to 1 ratio and the relatively low reprehensibility of BMW's conduct, the Court held, for the first time, that the punitive damage award, even after it was reduced, was so excessive that it violated due process.[52] Refining and building upon the wealth of dicta in its prior punitive damage cases, the Court set forth three "guideposts," or relevant factors, to guide the due process review of punitive damages. Courts are to consider the following: "[1] the degree of reprehensibility of the [defendant's conduct]; [2] the disparity between the harm or potential harm suffered by [the plaintiff] and [the] punitive damages award; and [3] the difference between this remedy and the civil penalties authorized or imposed in comparable cases."[53]

Following *BMW*, the Court affirmed the "guideposts" and narrowed the permissible ratio between compensatory and punitive damages. In *State Farm Mutual Auto Insurance Co. v. Campbell*, the Court declared that "few awards exceeding a single-digit ratio . . . will satisfy due process."[54] In fact, the Court has even suggested that for cases involving especially large compensatory damages, punitive damage awards in excess of a one to one ratio might be problematic.[55] The *BMW* Court stressed that courts should permit punitive awards no larger than necessary to satisfy the legitimate objectives of punishment and deterrence.[56] Any larger award, determined by this searching constitutional calculus, "furthers no legitimate purpose and constitutes an arbitrary deprivation of property."[57] Further, in *Cooper Industries, Inc. v. Leatherman Tool Group*,[58] the Court held that punitive damage awards should be reviewed de novo, concluding that the awards themselves were not findings of fact.[59] The *BMW*

49. *Id.* at 563.

50. *Id.* at 565.

51. *Id.* at 567.

52. *Id.* at 585-86.

53. *Id.* at 575.

54. 538 U.S. 408, 425 (2003).

55. *Id.*

56. *See BMW*, 517 U.S. at 568 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.").

57. *State Farm*, 538 U.S. at 417.

58. 532 U.S. 424 (2001).

59. *Id.* at 435.

guideposts coupled with de novo review are indicative of the dramatic shift the Court's Due Process excessiveness review has undergone. That is, at least as it applies to punitive damages.

III. PUNITIVE DAMAGE PRECEDENT CANNOT LOGICALLY SUPPORT THE ELEVATION OF THE LEVEL OF SCRUTINY FOR CIVIL STATUTORY PENALTY AWARDS.

In the wake of *BMW* and *State Farm*, courts face the task of determining whether the Court was merely announcing a new level of scrutiny applicable only to punitive damages, or if these opinions were harbingers of a greater ideological shift and expansion of the role of the judiciary. Scholars[60] and courts, entirely in dicta,[61] were quick to recognize that similarly excessive damage awards (in pure proportional terms) were frequently issued pursuant to statutory penalty schemes. They suggest, therefore, that the *BMW* guideposts should guide the courts' review of those awards as well.[62] Stretching the "guideposts" to enable their use to review statutory penalty award review would not only render them unrecognizable, but would constitute an impermissible invasion into the domain of the legislature. While in *BMW*, and in the cases leading up to that decision, the Court relied on rough precedential analogies,[63] the precedential over-extension proposed here would approach logical fallacy.

In the Supreme Court's early punitive damage opinions, it made necessary reference to, and even took precedential support from old—but still valid—cases reviewing statutory penalty awards.[64] In fact, in *TXO Production Corp. v. Alliance Resources Corp.*, the Court purported to apply the same *Waters-Pierce* "gross excessiveness"

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60. *E.g.*, Scheuerman, *supra* note 6.

61. *E.g.*, Parker v. Time Warner Entm't Co., 331 F.3d 13, 25 (2d Cir. 2003).

62. *See, e.g.*, Scheuerman, *supra* note 6, at 131.

63. Dissenting in *BMW*, Justice Scalia aptly pointed out that the line of punitive damage cases leading up to *BMW* relied entirely on *Lochner*-era cases involving the review of statutory penalties. *BMW*, 517 U.S. at 600-01 (Scalia, J., dissenting). He characterized these cases as "a handful of errant federal cases . . . which invented the notion that an unfairly severe civil sanction amounts to a violation of constitutional liberties." *Id.* at 600. In further criticism of the Court's reliance of this precedent, Justice Scalia reminded us that in not one of these cases did the Court actually strike down a damage award. *Id.* at 601.

64. In recognition of the Court's previous foray into the review of exemplary damage awards, the court cites the entire line for *Lochner*-era statutory penalty cases from *Sea Board* to *Williams*. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 454 (1993) (citing, e.g., Seaboard Air Line Ry. v. Seegers, 207 U.S. 73, 78 (1907); St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 66-67 (1919)).

test.[65] However, recognizing that "[t]he review of a jury's award for arbitrariness and the review of legislation . . . are significantly different,"[66] the Court introduced proportionality factors which laid the foundation for *BMW* and *State Farm*.[67]

In *BMW*, the Court's use of the *Lochner*-era precedent is evident, but veiled.[68] To justify heightened review, the Court explained, albeit implicitly and by reference to its previous punitive damage opinions, that because the Court had historically performed excessiveness review, due process review of punitive damage awards is not only permissible, but even more necessary because jury determinations are inherently more unpredictable.[69] Justice Scalia fervently

65. *See TXO*, 509 U.S. at 458.

66. *Id.* at 456.

67. The Court noted that "'punitive damages should bear a reasonable relationship to compensatory damages,'" *id.* at 459 (quoting Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 909 (W. Va. 1991)), and that "'[p]unitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred.'" *Id.* at 460 (quoting *Garnes*, 413 S.E.2d at 909) (emphasis omitted). It is important to note that, while the *TXO* opinion seems to have endorsed considering harm to third parties, the Court has subsequently rejected that notion. *See* Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (holding that due process "forbids a State to use a punitive damages award to punish a defendant for [injuries inflicted] upon nonparties or . . . strangers to the litigation").

68. In *BMW*, the Court cited extensively to *TXO* and *Haslip*. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 576-85 (1996). The sole Supreme Court precedent relied on by those cases to justify the Court's heightened review of punitive damage awards was the series of cases culminating in *Williams*. *See TXO*, 509 U.S. at 453-58 ("[S]everal of our opinions have stated that the Due Process Clause . . . imposes substantive limits beyond which penalties may not go." (quoting *Seaboard Air*, 207 U.S. at 78) (internal quotation marks omitted)); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 12 (1991) (citing *Williams*, 251 U.S. 63, and its progeny to support that "[t]he constitutional status of punitive damages . . . is not an issue that is new to this Court"). Justice Scalia criticized the Court's apparent reliance on these cases and simultaneous efforts to distance themselves from the negative connotations. *See BMW*, 517 U.S. at 600-02 (Scalia, J., dissenting). He recognized that this idea of judicial excessiveness review is not new and that "Haslip and TXO revived the notion, moribund since its appearance in the first years of this century." *Id.* at 600. Regarding the negative connotation these precedents carry, giving a criticism often associated with *Lochner*, Justice Scalia charged that *Williams* and its predecessors "simply fabricated the 'substantive due process' right at issue." *Id.* at 601.

69. "[F]air notice . . . of the severity of the penalty," the primary reason the Court gave to support its guideposts, is obviously satisfied by a legislatively determined statutory penalty. *BMW*, 517 U.S. at 574. Justice Brennan, in concurrence in *Kelco*, stated "I for one would look longer and harder at an award of punitive damages . . . than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed." Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan, J., concurring). In addition, inherent in the third guidepost—comparison to statutory penalties for comparable conduct—and the "substantial deference" courts are to give, is the understanding of the trustworthiness of legislative determinations. *See BMW*, 517 U.S. at 583.

criticized this approach, diminishing the statutory penalty cases as "simply not authoritative."[70] He also pointed out that the Court had never before "declar[ed] a punitive award unconstitutional simply because it was 'too big.'"[71]

While the *BMW* Court likely arrived at a conclusion unanticipated by the *Lochner*-era precedent, its problems did not rise to the level of logical contradiction. This problem would be encountered, however, if as suggested, the *BMW* guideposts were used to review statutory penalty awards. The Court cannot elevate punitive damage review based on its statutory penalty precedent and then heighten scrutiny for review of statutory penalty awards on the basis of the newly-minted punitive damage standard.[72] A recent commentator provided a perfect example of this flawed logic:

> Building on these cases, the Court elaborated on the meaning of excessiveness in the punitive damages context. In an ironic twist, although the punitive damages excessiveness standards derived from the earlier statutory damages jurisprudence, courts generally have found the punitive damages framework inapplicable to statutory damages, and return instead to the *Lochner*-era caselaw.[73]

Building a house does not render the foundation meaningless or cause it to vanish. While, in practice, judicial opinions often ignore the laws of logic,[74] courts should not use precedent as a subterfuge to

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70. *BMW*, 517 U.S. at 602 (Scalia, J., dissenting). It must be noted that this is among the mildest of Scalia's criticisms of *BMW*.

71. *Id.* at 600.

72. Should the Court determine that the *BMW* guideposts apply to statutory penalties, the logical path the Court would have to take to get there would be nonsensical. This is illustrated by the following propositions:

(1) The Court has a tradition of performing due process review of statutory penalty awards. *See, e.g.*, St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63 (1919).

(2) Because statutory penalties present a lower danger of excessiveness, the applicable standard of review for reviewing punitive damage awards should be greater than that traditionally used for statutory penalties. *See TXO*, 509 U.S. at 453-58. This reasoning was adopted in *BMW* by reference. *See supra* notes 68-69.

(3) But, statutory penalties, in fact, present similar dangers of excessiveness; therefore the newly established standard of review used for punitive damage awards should apply to statutory penalty awards as well. This has been proposed by several scholars and courts. *See, e.g.*, Scheuerman, *supra* note 6; Evanson, *supra* note 12.

73. Scheuerman, *supra* note 6, at 116 (footnote omitted).

74. Recognizing both that judges, and even Supreme Court Justices, are often untrained in formal logic, and that the complexity of cases requires a unique type of argumentation, Andrew McClurg explains the role logic typically plays in Supreme Court opinions:

> [T]he logic of Supreme Court opinions is the *logic of practical argumentation*, of straight thinking, of getting from A to Z through a maze of complex, often conflicting legal principles, facts and policies without committing either

steer the decision whichever way it chooses. If stare decisis means anything, it means this.[75]

In fact, the *Lochner*-era statutory penalty precedent is alive and still being applied by courts.[76] If the Court were willing to overrule *Williams* and its progeny, a new standard could, of course, be set down in its place. However, the Court could not do so on the basis of *BMW*, because these cases provided its primary (arguably, its only) precedential support.[77]

IV. THE MYRIAD OF DIFFERENCES BETWEEN PUNITIVE DAMAGES JUSTIFY THE DIFFERENT STANDARDS OF REVIEW.

Statutory penalty awards and punitive damage awards substantially differ in terms of the level of deference they are entitled,[78] the purpose they are designed to serve,[79] and the predictability of their application.[80] If the Court were to address the question of whether a particular statutory penalty award violated due process, these factors, viewed together, would likely guide its hand in deciding whether a new excessiveness standard is necessary. The excessiveness standard devised by the *Williams* Court[81] is still readily used by lower courts in assessing penalty awards.[82] The bar set by *Williams* for constitutionality is low. A penalty award is constitutional unless it is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."[83]

> intentional rhetorical tricks or unconscious errors of reasoning. This is the logic by which we can measure judges and their decisions and is probably the logic the Justices themselves so frequently exalt.

Andrew Jay McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. COLO. L. REV. 741, 754 (1988) (footnote omitted). This logical ideal notwithstanding, McClurg presents the realist criticism (which he believes is an unfair simplification) that judges often decide cases "not by logical deduction, but by intuition or 'hunch.' . . . [T]he written reasoning . . . becomes little more than an attempt at rationalization." *Id.* at 750-51 (footnote omitted).

75. This bootstrapping argument involves simultaneous reliance and rejection of the same precedent. This obviously offends stare decisis, a principle compelling courts "to stand by and adhere to decisions and not disturb what is settled." *In re* Osborne, 76 F.3d 306, 309 (9th Cir. 1996).

76. *See*, e.g., Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 587 (6th Cir. 2007).

77. *See supra* text accompanying notes 68-69.

78. *See infra* Part IV.A.

79. *See infra* Part IV.B.

80. *See infra* Part IV.C.

81. St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 66-67 (1919).

82. *See, e.g.*, Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 587 (6th Cir. 2007).

83. *Id.* (citing *Williams*, 251 U.S. at 67).

Especially during the so-called *Lochner*-era, such a standard demonstrated impressive judicial restraint.[84] Because the above-mentioned factors suggest that the standard of review for statutory penalty awards should be lower than that for punitive damages, it seems clear that the *Williams* standard is at least in the ballpark of where it should be.

A. Civil Penalty Awards Are Specifically Prescribed by Congress and Thus Are Entitled to More Deference than Jury or Court-Imposed Punitive Damages.

As a preliminary matter, courts give more deference to awards prescribed by statute than punitive awards imposed by a jury.[85] The Constitution, in defining the roles of the various branches of government, granted Congress alone the power to enact laws.[86] In validation of Congress's law-making power, courts recognize the foundational principle that acts of Congress are presumed constitutional unless they are shown to be arbitrary and capricious or lacking a rational basis.[87] As the Court in *United States v. Carolene Products Co.* explained:

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial

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84. The Court in *TXO* noted that the staunchest opponents of the *Lochner* decision, including Justice Holmes and the others who dissented, joined in the statutory penalty cases. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 455 (1993).

85. This reasoning reverberates throughout the opinions of those Justices in favor of due process review of punitive damages leading up to the decision in *BMW*. *See, e.g., TXO*, 509 U.S. at 483 (O'Connor, J., dissenting) ("[A] $5,000 punitive damages award on actual damages of $1 may not seem well proportioned at first blush; but if the legislature has seen fit to impose a $50,000 penalty for that very same conduct, the award might be deemed a reasoned retributive response."); *id.* at 468 (Kennedy, J., concurring) ("Unlike a legislature, whose judgments may be predicated on educated guesses and need not necessarily be grounded in facts adduced in a hearing . . . a jury is bound to consider only the evidence presented to it in arriving at a judgment."); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan, J., concurring) ("I . . . would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed.").

86. U.S. CONST. art. I, § 1.

87. In the context of an equal protection case, the court in *City of Cleburne v. Cleburne Living Center* noted that "the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." 473 U.S. 432, 441-42 (1985). Yet, it is important to note that most substantive due process cases have been grounded in the Due Process Clause of the Fourteenth Amendment. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973). Subsequently, however, courts have read the Due Process Clause of the Fifth Amendment to carry the same substantive protections. *See, e.g.*, Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574 (6th Cir. 2007).

> transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[88]

Judgments by trial courts, whether by judge or jury, are entitled far less deference.[89] Surely, Congress has made and continues to make unwise laws. The relative fallibility of Congress versus the courts is beyond the scope of this argument. Rather, it is enough to say for present purposes that laws and court judgments should be treated separately and distinctly. It is a necessary extension of this argument that the constitutionality of penalty awards within the range prescribed by Congress should be analyzed under a deferential standard of review,[90] rather than the scrutinizing analysis mandated by the *BMW* guideposts.[91]

The Supreme Court has been out of the practice of second-guessing unwise laws solely on the basis of their lack of wisdom for almost eighty years.[92] Although some believe the recent punitive damage decisions to be harbingers of the Court's return to "Lochnerism,"[93] the stigma associated with the practice,[94] together with the barriers imposed by logic,[95] and the absence of a need for a

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88. 304 U.S. 144, 152 (1938).

89. While various levels of scrutiny are used to review different aspects and types of court proceedings, regarding the level of review in this instance, the Court has clarified that, for example, Congress enacted the statutory damage provision of the Copyright Act of 1909 to "take[ ] the matter out of the ordinary rule . . . of abuse of discretion." Douglas v. Cunningham, 294 U.S. 207, 210 (1935).

90. *See generally* St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 66-67 (1919) (emphasizing the wide range of discretion the states have despite the limits that the Due Process Clause imposes).

91. *See generally* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 577-85 (1996). The Court's review under the guideposts was made even less deferential after *Cooper Industries, Inc. v. Leatherman Tool Group*, 532 U.S. 424, 435 (2001), where the Court held that jury-awarded punitive damages should be reviewed de novo. Since there is far less attenuation between a jury's findings of fact and its statutory damage award, such awards would likely be given more deference by the Court for that reason as well. *See id.* at 437 ("'Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury.'" (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 459 (1996) (Scalia, J., dissenting) (internal citation omitted))).

92. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 397-99 (1937).

93. *See* Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 587 (6th Cir. 2007) (discussing that various courts have suggested in dicta that *BMW* and *State Farm* could apply to statutory damages).

94. For a discussion and explanation of the stigma associated with *Lochner*, see Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 950-51 (1999).

95. *See supra* Part III.

new "excessiveness" standard[96] will likely discourage the Court from doing so in the context of statutory penalties. Punitive damages are different, however. Without comment on the merits and potential overreaching of the decisions reached in *BMW* or *State Farm*, it is important to note that the Court recognized *Williams* and the new decisions as distinct doctrines.[97] The argument that the *BMW* Court conflated the two doctrines is a mischaracterization of what the plurality was actually trying to do.[98] The plurality in *BMW* took great pains to mask its reliance on the *Lochner*-era statutory damage cases,[99] most likely because under the previous standard the Court had only struck down one award.[100] Rather, the Court relied on the differences between the two types of exemplary damage awards to justify a stricter standard for punitive damages than the then-existing damage awards.[101] This argument for conflation is further undermined by *BMW's* third guidepost, which requires courts to compare punitive damages to similar civil penalties as an indicator of reasonableness.[102]

Judicial deference to legislative determinations is based on the principle that Congress is institutionally competent to make such decisions.[103] Statutory penalties, a common enforcement mechanism of regulatory schemes, should be treated no differently. It does not follow that laws—more specifically statutory penalty provisions—which appear at first glance to be lacking a sufficient level of Congressional deliberation, should be reviewed under an elevated level of scrutiny.[104] In fact, despite suggestions to the contrary, the Court has held that Congress need not present an explicit factual basis for a piece of legislation to save it from arbitrariness.[105] Even the lowest level of scrutiny is sufficient to ferret out truly arbitrary

96. *See* discussion *infra* Part VI.

97. In *TXO Production Corp. v. Alliance Resources. Corp.*, 509 U.S. 443, 456 (1993), the immediate predecessor to *BMW* from which it drew much of its support, the Court stated that "[t]he review of a jury's award for arbitrariness and the review of legislation surely are significantly different."

98. *Contra* Scheuerman, *supra* note 6, at 119.

99. In fact, the plurality cited only once to any case in the entire line. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996). More frequently, *BMW* cited the *Lochner*-era cases indirectly, by citing *TXO* and *Haslip* which relied on them more extensively. *Compare BMW*, 517 U.S. at 559-86, *with TXO*, 509 U.S. at 443-66 (relying extensively on the line of cases), *and* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 1-24 (1991) (same).

100. *See* Sw. Telegraph & Telephone Co. v. Danaher, 238 U.S. 482, 491 (1915).

101. *See* discussion *supra* note 72.

102. *See BMW*, 517 U.S. at 583; *see also* discussion *infra* Part V.C.

103. *See supra* text accompanying note 87.

104. *See supra* text accompanying note 87.

105. *See supra* text accompanying note 87.

laws and strike them down. [106] That most statutory penalty awards survived the *Williams* test is not necessarily an indicator that it is insufficient,[107] but rather, perhaps, it shows that few statutory penalty awards are truly "excessive" or, as commentators recognize, that many such claims are brought prematurely.[108]

Notwithstanding the different rationales underlying both doctrines, critics of many modern statutory penalty schemes suggest that elevated review is necessary to protect against mechanical application of penalties that have not been carefully measured, or whose consequences have not been fully understood.[109] As an exemplar of their concerns, commentators and some judges point to class actions brought under the Fair and Accurate Credit Transactions Act ("FACTA").[110] FACTA requires that businesses print no more than "the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale."[111] For willful violations of this provision,[112] businesses are liable for "actual damages sustained by the consumer . . . of not less than $100 and not more than $1,000."[113] FACTA claims are commonly brought as class actions due to the low level of damages authorized and the commonality of material facts between plaintiffs.[114] Faced with large classes of plaintiffs, each seeking damages within the statutory range, defendants have routinely

106. Whether applying the traditional rational basis test or the *Williams* excessiveness test, a truly arbitrary award would fail, either because it is "arbitrary and capricious," *see, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937), or "wholly disproportioned from the offense," St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 67 (1919).

107. This Note does not argue that the *Williams* test is a rigorous one. Rather, it argues that it is properly constrained in light of concerns for judicial restraint and is sufficient to strike down damage awards that far exceed the purpose for which the scheme was designed.

108. *See* Scheuerman, *supra* note 6, at 127-29 (recognizing that most courts have declined to consider the potential excessiveness of a statutory penalty award at the class certification stage); *see also* Murray v. GMAC Mortg. Corp., 434 F.3d 948, 954 (7th Cir. 2006) (concluding that "constitutional limits are best applied after a class has been certified"); Parker v. Time Warner Entm't Co., L.P., 331 F.3d 13, 20-22 (2d Cir. 2003) (vacating the lower court's decision to deny class certification because it was made before any discovery).

109. *See, e.g.*, Scheuerman, *supra* note 6, at 136; Evanson, *supra* note 12, at 631.

110. Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (2003). *See* Scheuerman, *supra* note 6, at 104-07, 111-12.

111. 15 U.S.C. § 1681c(g)(1) (2006).

112. *Id.* § 1681n(a).

113. *Id.* § 1681n(a)(1)(A).

114. *See* Murray v. GMAC Mortg. Corp., 434 F.3d 948, 953 (7th Cir. 2006) (concluding that, despite the statutory damage provision in the Fair Credit Reporting Act, a class action is a superior procedure because "the potential recovery is too slight to support individual suits.").

moved to dismiss or moved to deny class certification on the basis that even the minimum award would violate due process.[115] The courts' answer has been almost uniform—that such challenges are premature and can only be made upon a final judgment.[116]

Prescribing statutory penalties which are capable of reflecting the precise empirical "harm" in each case is an impossible endeavor. In fact, statutory penalties are often used to protect against harms which are difficult, if not impossible, to quantify.[117] Statutory penalties are also used to safeguard individual interests in situations where the actual (measurable) harm is very small, thus creating an interest that is worth litigating.[118] If the regulated activity is against public policy, creating liability that is worth pursuing is an effective method of enforcement. These types of injuries, minute but numerous and identical, are also well suited for class actions,[119] a fact which, despite suggestions to the contrary,[120] is surely not missed by Congress.[121] Congress likely intended this, but perhaps not. Regardless, it is the province of Congress to make laws, and when unintended consequences arise, to amend them.

The potentially devastating consequences of these class actions (or any lawsuit for that matter) do not bear on their constitutionality. Judge Easterbrook explained:

> Maybe suits such as this will lead Congress to amend the Fair Credit Reporting Act; maybe not. While a statute remains on the books, however, it must be enforced rather than subverted. An

115. *See, e.g.*, *id.* at 951 (motion to deny class certification); Parker v. Time Warner Entm't Co., 331 F.3d 13, 15 (2d Cir. 2003) (same); Soprych v. T.D. Dairy Queen, Inc., No. 08C2694, 2009 WL 498535, at *1 (N.D. Ill. Feb. 26, 2009) (motion to dismiss).

116. *See, e.g.*, *Murray*, 434 F.3d at 954; *Parker*, 331 F.3d at 22; *Soprych*, 2009 WL 498535, at *1. *But see* Grimes v. Rave Motion Pictures Birmingham, L.L.C., 552 F. Supp. 2d 1302, 1307-09 (N.D. Ala. 2008) (granting defendant's motion for summary judgment on the basis that FACTA was unconstitutional on its face and as applied because the statutory range was unconstitutionally vague and the damages sought were unconstitutionally excessive), *vacated and remanded by* Harris v. Mexican Specialty Foods, Inc., 564 F.3d 1301 (11th Cir. 2009).

117. *See* Scheuerman, *supra* note 6, at 110.

118. *See id.*

119. *See Murray*, 434 F.3d at 953. An important feature of FACTA claims, versus claims under similar statutes, is that to succeed the plaintiff must prove that the defendant violated the statute "willfully." *Compare* Fair and Accurate Credit Transactions Act (FACTA) of 2003, 15 U.S.C. § 1681n(a) (2006) (providing for civil liability for willful noncompliance), *with* Truth in Lending Act (TILA), 15 U.S.C. § 1640(a) (2006) (providing for statutory damages absent a showing of willfulness). Perhaps this difference explains why Congress concluded that FACTA did not require a class-action cap, 15 U.S.C. § 1681n(a)(2) (2006), but that TILA did, 15 U.S.C. § 1640(a)(2)(B) (2006).

120. *See, e.g.*, Evanson, *supra* note 12, at 629-31.

121. *See infra* text accompanying notes 123-25.

> award that would be unconstitutionally excessive may be reduced, but constitutional limits are best applied after a class has been certified.[122]

That liability can force a company into bankruptcy is certainly not a concept foreign to Congress. The argument that Congress did not fully appreciate the potential for large damage awards under FACTA (or any other similar scheme) when aggregated in a class action[123] is undermined by provisions in similar statutes that cap the damage rewards recoverable in class actions.[124] Thus, Congress was aware of the possibility of placing such a cap on FACTA damage awards and chose not to. Moreover, Congress has passed legislation to limit plaintiffs' ability to bring suits alleging less dangerous violations of the FACTA truncation requirement.[125] Where the policy interests are sufficiently important to protect, a forceful regulatory scheme is necessary to assure compliance. The penalty must be large enough to remove the incentive to disregard or disobey it.[126]

Also, the critics' characterization of the issues at stake in FACTA is patently one-sided. Focusing entirely on the potentially devastating liability to defendants,[127] the public interests FACTA was designed to protect are ignored.[128] The danger of identity theft from non-truncated credit card receipts is so widely known that twenty-three states currently have statutes requiring truncation,

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122. *Murray*, 434 F.3d at 954 (internal citation omitted).

123. *See* Scheuerman, *supra* note 6, at 111-12, 136; Evanson, *supra* note 12, at 631.

124. *E.g.*, Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(2)(B)(ii) (2006) (limiting recovery by class actions to "the lesser of $500,000 or 1 per centum of the net worth of the [defendant]"); Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B) (2006) (same); Equal Credit Opportunity Act, 15 U.S.C. § 1691e(b) (2006) (same); Electronic Funds Transfer Act, 15 U.S.C. § 1693m(a)(2)(B)(ii) (2006) (same).

125. Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, 122 Stat. 1565, 1566 (2008) ("Clarification Act") (providing businesses a safe harbor from liability where the alleged violation is solely based on the printing of the expiration date). Some courts have interpreted the Clarification Act to have a broader reach, concluding that the purpose of the statute was to prevent suits where no actual harm was suffered or even potential. *E.g.*, Bateman v. Am. Multi-Cinema, Inc., 252 F.R.D. 647, 650 (C.D. Cal. 2008) (concluding that the Clarification Act precluded claims based on the printing of more than five digits, but still not enough to pose a genuine risk of identity theft).

126. *Cf.* CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, REINVENTING ENVIRONMENTAL ENFORCEMENT & THE STATE/FEDERAL RELATIONSHIP 60 (2003) ("The essential task for enforcement agencies is to make penalties high enough . . . that it becomes economically irrational for regulated entities to violate the law.").

127. *See* Scheuerman, *supra* note 6, at 105-06.

128. FACTA's truncation requirement was designed to protect against the real threat of identity theft. Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (2003). Among its purposes, the Act expressly states that it is an Act "to prevent identity theft." *Id.*

many of which have penalties harsher than FACTA.[129] Visa and MasterCard have also mandated truncation and have imposed even stiffer penalties than mandated under FACTA.[130] With a mindset that reflects the laissez faire attitude of the *Lochner* Court, the critics impliedly suggest that the corporations' right to exist outweighs the public interests protected by consumer protection statutes.[131] While it is certainly the case that some regulatory schemes are wiser than others, it is not the province of the court to strike down penalties that fail to rise to the level of true excessiveness. Of course, if a particular statutory penalty is too harsh, Congress can react and make changes (and lobbyists will be certain that they at least consider that possibility). This statute-by-statute legislative solution is preferable to a judicially-imposed and universally elevated standard for statutory penalty awards, which would have the effect of removing the teeth of countless regulations designed to protect discrete public interests.[132]

B. The Multi-Purposed Rationale for Civil Penalties is Different and More Complicated than That for Punitive Damages.

According to the Supreme Court, punitive damages are designed to "further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[133] Both justifications focus on the nature and extent of a defendant's conduct. Punishment and deterrence principles are often used to justify statutory penalty schemes as well,[134] but they are not the only interests at stake.

Statutory penalty schemes also focus on providing a new avenue for those harmed to receive compensation. By creating an alternative for plaintiffs beyond mere compensatory damages, statutory

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129. *See State Truncation Laws*, EMG SERVICE, http://emgservice.com/service/security/truncation_laws (last visited Sept. 13, 2010); *see also* ALASKA STAT. § 45.48.750 (2008).

130. *See State Truncation Laws*, *supra* note 129; *see also* VISA U.S.A, CARD ACCEPTANCE AND CHARGEBACK MANAGEMENT GUIDE FOR VISA MERCHANTS 17 (2004), *available at* http://www.uiowa.edu/~fustreas/visa_new_acceptance_merchant_responsibility.pdf.

131. It is important to note again that FACTA's penalties are only for "willful" violations. 15 U.S.C. § 1681n(a) (2006).

132. While commentators would likely argue that judicial excessiveness review proceeds on a case-by-case basis and thus would not affect the overall effectiveness of a regulatory scheme, this argument fails to recognize that, in light of a universally heightened standard, consumers would be less likely to bring suits knowing they will likely receive far less than the penalty prescribed by statute.

133. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996).

134. *See* Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 472 (2009) (recognizing the punitive and deterrent function statutory damages can play).

penalties provide remedies for the private consumer that it would be unlikely (or unable) to pursue otherwise.[135] As Judge Easterbrook explained in *Murray v. GMAC Mortgage Corp.*, "[t]hat actual loss is small and hard to quantify is why statutes such as the Fair Credit Reporting Act provide for modest damages without proof of injury."[136] In fact, Judge Easterbrook recognized that the practical alternative to consolidated class-actions like that in *Murray* is a claim seeking minute compensatory damages and comparatively massive punitive damages.[137] Moreover, the Court has declared that such awards would rarely pass constitutional muster.[138]

In addition, many statutes rely on statutory penalties to recoup government expenditures incurred as a result of a defendant's wrongdoing. Many environmental statutes, including the Clean Water Act[139] and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")[140] authorize suits by the government against tortfeasors to punish and deter future misconduct, but also to recover the government's remediation expenses.[141] CERCLA, for example, as it employs a strict liability scheme, does not require any finding of wrongdoing and covers "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of."[142] In such cases, it is clear that the *BMW* guideposts are incompatible with excessiveness review. Statutory penalties and punitive damages serve different purposes and the *BMW* Court's "does-the-punishment-fit-the-crime?" inquiry misses the mark.

Statutory penalty schemes also act to legitimize the underlying regulation, for, in light of the perceived practical force of the statute, consumers (or the public in general) can feel secure that their rights and interests are sufficiently protected.[143] Some statutory schemes

135. *See* Murray v. GMAC Mortg. Corp. 434 F.3d 948, 953 (7th Cir. 2006).

136. *Id.*

137. *Id.*

138. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424-25 (2003).

139. 33 U.S.C. § 1251 (2006).

140. 42 U.S.C. § 9601 (2006).

141. *See* 33 U.S.C. § 1319(d) (2006); 42 U.S.C. § 9607 (2006); *see also* NICHOLAS A. ASHFORD & CHARLES C. CALDART, ENVIRONMENTAL LAW, POLICY, AND ECONOMICS: RECLAIMING THE ENVIRONMENTAL AGENDA 808 (2008) (explaining that the goals of the CWA are compliance, deterrence, and restitution); Tull v. United States, 481 U.S. 412, 422-23 (1987) (holding that under the CWA the courts should also consider the goal of retribution); Tracy J. Crane, Note, *Passive Migration of Pollutants and CERCLA PRP Liability:* Carson Harbor Village, Ltd. v. Unocal Corporation, 39 IDAHO L. REV. 619, 641 (2003) ("CERCLA is a remedial statute, and its primary purpose is restitution, or cost recovery for remediation activities.").

142. 42 U.S.C. § 9607(a)(2) (2006).

143. For example, Congress stated that FACTA's purpose was "to prevent criminals

are enforced by criminal penalties. Others permit the government to assess civil penalties or fines.[144] Still others, like FACTA, are self-enforcing in that they authorize individual suits for civil penalties and thus impose a disincentive to disobey the statute without the expenditure of any governmental resources.[145]

To determine an appropriate punitive damage award, the judge instructs the jury to weigh the interests of deterrence and retribution regarding the defendant's conduct.[146] While juries have some discretion in setting civil penalty awards for those statutes with a penalty range, the legislature has already weighed the relevant interests in setting that range. For those statutes with no range, juries have no discretion. If they find the defendant violated the statute, they impose the prescribed penalty mechanically.[147] Juries determine facts, such as blameworthiness, but they do not interpret the law. They certainly do not analyze the policies behind the law. While the Court has placed affirmative checks on excessive punitive damage awards, it is not as clear, contrary to the conclusions reached by some commentators, that the same solution should logically follow in the case of statutory penalty awards.[148] If the Court agreed, in effect it would be second-guessing two decisions: the jury determination that the statute was violated (and under certain schemes the amount of the penalty) and the underlying legislative decision that the penalty or penalty-range was appropriate.

C. Statutory Penalties Provide Greater Notice of Liability for Defendants.

With regard to punitive damages, one feature beyond all others, precipitated the Supreme Court's recent foray into exemplary damage review. At bottom, it was the unpredictability of jury awards that led the Court to conclude that it must step in to tell the states that due process required more. As members of the Court have recognized, "[j]uries assess punitive damages in wholly unpredictable

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from obtaining access to consumers' private financial and credit information in order to reduce identity theft and credit card fraud." Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, § 2(a)(1), 122 Stat. 1565, 1565 (2008). As the statute's sole enforcement mechanism, without statutory penalties FACTA's words would be empty threats. *See* 15 U.S.C. § 1681(n)(a) (2006) (outlining the liability to the consumer for willful violation).

144. *See* Clean Water Act, 33 U.S.C. § 1319(d) (2006); CERCLA, 42 U.S.C. § 9607 (2006).

145. *See* 15 U.S.C. § 1681n(a) (2006).

146. For a relevant excerpt of the jury instructions given in *Pacific Mutual Insurance Co. v. Haslip*, 499 U.S. 1 (1991), see *infra* text accompanying notes 154-55.

147. *See* Evanson, *supra* note 12, at 624.

148. *See* Sheuerman, *supra* note 6, at 107; Evanson, *supra* note 12, at 602-03.

amounts bearing no necessary relation to the actual harm caused."[149] On the other hand, this problem does not exist regarding statutory penalties. Statutory penalties are perhaps too predictable,[150] providing express notice of the exact amount of liability, or at least the upper limit of liability for each violation. That liability may be large—perhaps devastating—does not make it unforeseeable, or unconstitutional.

In the first of the line of cases eventually leading to *BMW*, Justice Brennan cautioned the majority that the "[g]uidance [provided to juries in assessing punitive damages] is scarcely better than no guidance at all. . . . [P]unitive damages are imposed by juries guided by little more than an admonition to do what they think is best."[151] The Court has recognized that juries have been provided such scant guidance regarding punitive damages since the nineteenth century.[152] As the Court recognized in 1885, "The discretion of the jury in such cases is not controlled by any definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice."[153] Take, for example, the instructions given in *Pacific Mutual Insurance Co. v. Haslip*; the jury was told that punitive damages were extra-compensatory damages designed "to punish the defendant and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future."[154] But as Justice O'Connor noted, the instructions failed to "advise the jury to refrain from awarding more than necessary to meet these objectives."[155] Most importantly, jurors, compared to legislators, are more inclined to vote for high punitive damage awards based on their individual whims and caprice.[156] The "layman jury cannot be so quickly

149. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 475 (1993) (O'Connor, J., dissenting) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (internal quotation marks omitted)). It is also worth noting that "unpredictability" concerns bear not only on procedural due process claims. Excessive punitive damages awards are more likely to result from jury awards; thus, heightened review is appropriate. *See infra* text accompanying note 161.

150. This is one reason statutory penalties are well-suited for class actions. *See* Murray v. GMAC Mortg. Corp., 434 F.3d 948, 953 (2006) ("[Class actions were] designed for situations such as this, in which the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate.").

151. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan, J., concurring).

152. *See* Missouri Pac. Ry. Co. v. Humes, 115 U.S. 512, 521 (1885).

153. *Id.*

154. Pac. Mut. Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) (internal quotation marks omitted). *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) (recognizing that most states have similar instructions).

155. *Haslip*, 499 U.S. at 49 (O'Connor, J., dissenting).

156. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 474 (1993) (O'Connor, J.,

domesticated to official role and tradition."[157]

Also, particularly evident in *BMW*, the unpredictability of punitive damages is exacerbated when state statutory or common law provide the source of the claim. To internalize the cost of lawsuits, national corporations must predict their liability exposure.[158] Where juries in one state grant punitive damages awards for conduct that is fully legal in another, companies cannot make this calculation. As the *BMW* Court recognized, "Elementary notions of fairness . . . dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[159] Further, application of the newly announced guideposts "indicate[d] that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose" for its conduct.[160]

Defendants against whom statutory penalties have been awarded cannot claim lack of notice. The statute explicitly states the potential liability exposure for each violation. While some defendants are undoubtedly unaware of the penalties, all defendants have the ability to become aware of their potential liability and legal responsibilities. BMW, subject to jury-imposed punitive damages, did not have this luxury. Moreover, the Court has recognized that safeguards in the legislative process protect against random damage awards.[161] It is part of the legislative process to set penalties or penalty ranges that in all applications satisfy constitutional requirements. This is not to say that the legislature is always correct in their conclusion,[162] but the excessiveness inquiry regarding a statutory penalty award is surely categorically different than that of a punitive damage award. The claim here by defendant-corporations is not that there was insufficient notice of the level of liability, but rather that the penalties permitted by the statute are simply too high. It is perhaps rough justice that a business should be forced into bankruptcy because it violated a "trivial" federal law several million

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dissenting).

157. HARRY KALVEN JR. & HANS ZEISEL, THE AMERICAN JURY 498 (1966).

158. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) (citing Brief for Pharmaceutical Manufacturers Association et al. as Amicus Curiae Supporting Petitioner at 5-23); *see also id.* (noting that companies facing unpredictable punitive damage awards become unnecessarily risk averse).

159. BMW of N. Am., Inc. v Gore, 517 U.S. 559, 574 (1996).

160. *Id.*

161. *TXO*, 509 U.S. at 456 ("[I]t is not correct to assume that the safeguards in the legislative process have no counterpart in the judicial process.").

162. The *Waters-Pierce* and *Williams* excessiveness tests were designed to root out legislatively prescribed penalties that fail to meet due process requirements. *See supra* text accompanying notes 37-38; *infra* note 184.

times, but the legislature may make that judgment.

V. THE *BMW* GUIDEPOSTS ARE INAPPROPRIATE FOR REVIEW OF CIVIL STATUTORY PENALTY AWARDS.

Applying the *BMW* guideposts to a statutory penalty award demonstrates their incompatibility. Even in the critics' best case scenario, a statute like FACTA where claims involving little measurable harm can be aggregated into multi-million dollar class actions,[163] it is evident that a test designed to root out unconstitutional punitive damage awards cannot be used to review statutory penalty awards. This is not to say that statutory penalty awards are never unconstitutionally excessive, but rather that the guideposts are the wrong legal tool for the job. This is best illustrated by example through the lens of a FACTA class action.

A. Guidepost #1: Degree of Reprehensibility

First, the *BMW* Court instructed that courts should consider the reprehensibility of the defendant's conduct.[164] It is nothing new that courts should consider reprehensibility when reviewing statutory penalty awards for excessiveness. In *Williams*, the Court's single-pronged test asked whether an award was "wholly disproportioned to the offense."[165] The problem with this guidepost is not that consideration of reprehensibility itself is inappropriate. Rather, the problem lies in the rigor of the test that *BMW* and *State Farm* prescribe.

For FACTA cases, despite the commentators' suggestions to the contrary,[166] Congress has already determined that the penalty fits the "crime".[167] FACTA adopted the enforcement mechanism of the Fair Credit Reporting Act ("FCRA") which includes "damages of not less than $100 and not more than $1,000" for "willful" violations of any requirement of the statute.[168] The facts in such cases are nearly identical. A company or retailer prints a receipt bearing more than five digits of numerous consumers' credit card receipts[169] in violation of FACTA's requirement that those additional numbers be redacted.[170] To succeed, the plaintiffs must show that the defendant

163. *See* Sheuerman, *supra* note 6, at 104-07 (explaining that FACTA class actions provide difficult test cases for the proposition that the *BMW* guideposts should apply to statutory penalty awards).

164. *BMW*, 517 U.S. at 575.

165. St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 66-67 (1919).

166. *See, e.g.*, Samuelson & Wheatland, *supra* note 134, at 473.

167. *See supra* text accompanying notes 124-26.

168. 15 U.S.C. § 1681n(a)(1)(A) (2006).

169. For a comprehensive list of cases, see Scheuerman, *supra* note 6, at 104 n.7.

170. 15 U.S.C. § 1681c(g)(1) (2006).

was "willful" in its disregard of FACTA.[171] Mere negligence will not suffice. The statute's scienter requirement, "willfulness," has been determined by the Court to include reckless disregard of the duty imposed by the statute.[172]

The question is therefore whether any award between $100 and $1,000 for a reckless (the lowest degree of scienter covered) FACTA violation is excessive. The typical analysis of punitive damage awards involves identifying whether any of the "aggravating factors associated with particularly reprehensible conduct is present."[173] The most recent cases have limited courts' focus to only the "conduct that harmed [the plaintiffs]."[174] The Court has been most concerned with punishing defendants for nationwide conduct that is legal in some states, but illegal in others. At bottom, the Court seeks to ensure that punitive damages are only awarded if the defendant's culpability, vis-à-vis the plaintiffs, "is so reprehensible to warrant the imposition of further sanctions to achieve punishment or deterrence."[175]

For punitive damages, the comparison of the punishment to the "crime" is relatively straightforward because the award is designed to serve the purposes of deterrence and retribution.[176] But statutory penalties are often in excess of the actual harm to the plaintiff, and thus exemplary; but unlike punitive damages, they are an alternative to compensatory damages.[177] The calculus under this guidepost to assess a statutory penalty award would thus be much different, if not impossible. Appellate courts would be comparing the conduct of the defendant with the purposes of the underlying statutory scheme, some of which Congress does not articulate.[178] This cannot be what the Court intended.

Where Congress has already defined the substantive offense and set the scienter requirement and monetary penalty, egregiousness, as long as it meets the statute's requirement, should be largely irrelevant. It is true that those schemes, like FACTA, which permit a range of penalties, leave discretion to a jury to set the precise amount of the penalty.[179] Yet, in those cases, Congress has concluded, albeit implicitly, that even the largest penalty within the range is appropriate for any qualifying violation. The excessiveness inquiry

171. *Id.* § 1681n(a).
172. *See* Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 71 (2007).
173. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 576 (1996).
174. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424 (2003).
175. *Id.* at 419.
176. *BMW*, 517 U.S. at 568.
177. *See supra* text accompanying note 135.
178. *See supra* Part IV.B.
179. *See, e.g.*, 15 U.S.C. § 1681n(a)(1)(A) (2006).

must be tempered by legislative deference.[180] This legislative check is not available in punitive damages cases.[181]

Despite that egregiousness in this context is of limited relevance, it is worth noting that in many FACTA cases the penalty would easily survive the first guidepost. The *BMW* Court went as far as to recognize that a repeated knowing violation of a statute "would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law."[182] Thus, in those cases where plaintiffs can show that the defendants had actual knowledge of FACTA, they could likely also show that it was numerous and repeated, representing the required "aggravating factors."[183]

The question remains: how should egregiousness factor into the review of statutory penalty awards? While it is true that the early-twentieth-century excessiveness cases considered whether the nature of the penalty fit the penalty imposed, they questioned the statutory authorization of the penalty and not a jury's subsequent imposition of a penalty in accordance with that statute.[184] It is much more in line with past precedent to require defendants to challenge the statute itself rather than the application of the authorized penalty.

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180. See *supra* Part IV.A for a discussion of the deference to the legislature that is due in statutory penalty cases.

181. The Court has not suggested that punitive damage awards below the legislative cap may be excessive, nor has it explained how the analysis under the guideposts would proceed. *See* Cooper Indus., Inc. v. Leatherman Tool Grp., 532 U.S. 424, 433 (2001) (explaining that due process "imposes substantive limits on [legislative] discretion"); *see also* Evanson, *supra* note 12, at 623 (stating that several lower courts have reduced punitive damage awards that fell within statutory caps, although most of the cases involved awards reduced on non-constitutional grounds). There is a difference, however, between a legislative cap on punitive damage awards and a statutory penalty range. Punitive damage caps are not as determinative regarding constitutionality because the *BMW* guideposts require case-by-case comparison of the compensatory and punitive damages. Legislatures cannot predict conclusively that punitive damages will be constitutional in all cases. For statutory penalties, where the legislature sets the penalty and the qualifying conduct simultaneously, it can so conclude.

182. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 576-77 (1996).

183. In its discussion of the "aggravating factors," the *BMW* Court recognizes that intentional conduct is certainly "more reprehensible than negligence." *Id.* at 576.

184. *See* Waters-Pierce Oil Co. v. Tex., 212 U.S. 86, 111 (1909) (explaining that the Court would not "interfere with such legislation and judicial action of the [courts] enforcing it" unless it was "grossly excessive."); St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 66-67 (1919) (explaining that legislative "enactments [only] transcend the limitation [of due process] where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense.").

B. *Guidepost #2: Ratio Between Compensatory and Punitive Damages.*

For the second guidepost, courts consider the ratio between the punitive award and the actual harm inflicted.[185] While the court has refused to impose a bright-line rule, in the cases since *BMW* it has certainly tightened the leash on disproportionate punitive damage awards. In *TXO Production Corp. v. Alliances Resources Corp.*, before the guideposts, the Court permitted an award of over 526 to 1 to stand.[186] After *BMW*, the Court announced that "few awards exceeding a single-digit ratio . . . will satisfy due process."[187] This guidepost requires courts to determine the monetary value of the harm to plaintiffs.[188]

In all cases where punitive damages are sought, the jury or court must determine that compensatory damages are due before any inquiry into punitive damages may be made. In a statutory damage case, however, there is only one award. And there is no finding of actual harm. In fact, statutory schemes, including FACTA, make clear that plaintiffs seek statutory penalties as an alternative to compensatory damages.[189] So, must a reviewing court determine the actual harm to the plaintiffs to assess an award's constitutionality? Commentators suggest yes.[190] In the context of FACTA class actions, they stress that, in all cases, there is very little actual harm, and when aggregated, the "injustice" is multiplied. The problem with this suggestion is three-fold. First, this requires appellate courts to act as fact-finders to determine the actual harm. Second, this guidepost does not account for potential harm to the plaintiffs, which in the case of FACTA violations, is very high. Third, aggregation should not change the inquiry if all cases are identical.

First, appellate courts performing excessiveness review should not act as fact-finders. Commentators who suggest this approach confess that statutory damage cases do not require a jury finding of actual harm.[191] In some cases there is sufficient information in the record from which a finding could be made, but that is not the role of an appellate court.[192] In a punitive damage case, a lower court has

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185. *BMW*, 517 U.S. at 580.

186. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453, 462 (1993).

187. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

188. *See id.*

189. 15 U.S.C. § 1681n(a)(1)(A) ("any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000").

190. *See* Scheuerman, *supra* note 6, at 134; Evanson, *supra* note 12, at 632.

191. *See* Evanson, *supra* note 12, at 632.

192. *Id.* (arguing that despite the fact that most courts "do not . . . make actual harm findings in . . . statutory damages case[s]," "[t]here is . . . no reason why [they]

necessarily made a finding regarding compensatory damages. This guidepost calls for a comparison of actual damages and exemplary damages,[193] a comparison that cannot take place in the statutory damage context unless appellate judges step out of their normal roles and make factual findings beyond those made by the trial court.

While the Court has been clear in its punitive damage jurisprudence that punitive damages must not take into account potential harm (or actual harm) to third parties,[194] it only makes sense that in the assessment of a statutory award, the jury, and Congress before them, may consider the potential harm to the plaintiffs. Such an inquiry is not out-of-bounds.[195] A plaintiff bringing a FACTA claim for statutory damages foregoes any claim for actual damages. Further, FACTA's purpose is to prevent identity theft. Surely, FACTA does not require that plaintiffs actually be victims of identity theft to have a claim under the statute. The *TXO* Court, in the context of punitive damages, considered the potential harm to the plaintiff.[196] In fact, in that case that consideration was vital in the Court's justification of a massively disproportionate award.[197] The Court stated, "[i]t is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its . . . victim."[198] While *BMW* and *State Farm* foreclosed consideration of potential harm to non-parties, potential harm to the plaintiff is still a relevant factor for consideration.[199] But potential harm is not easily or consistently calculable. And as the Court recognizes, "a higher ratio might be necessary where 'the injury is hard to detect.'"[200] The case of the FACTA class action makes this

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cannot").

193. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996).

194. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424 (2003).

195. The *BMW* Court stressed that "there is no suggestion that Dr. Gore . . . was threatened with any additional *potential harm*." *BMW*, 517 U.S. at 582 (emphasis added). In *State Farm*, the Court stated, "we have been reluctant to identify concrete constitutional limits on the ratio between harm, *or potential harm*, to the plaintiff and punitive damages." *State Farm*, 538 U.S. at 424 (emphasis added).

196. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993).

197. Considering potential harm, instead of just the compensatory damages, the Court reduced the ratio from 526 to 1, to 10 to 1. *See id.* at 472 (Scalia, J., concurring).

198. *Id.* at 460.

199. The *BMW* Court affirmatively cited *TXO* to stress that the 500 to 1 ratio in *BMW* was more excessive. *BMW*, 517 U.S. at 582.

200. *State Farm*, 538 U.S. at 425 (quoting *BMW*, 517 U.S. at 582) (emphasis omitted). It is likely that many FACTA plaintiffs will not find out that they are identity theft victims until after the suit. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-737, PERSONAL INFORMATION: DATA BREACHES ARE FREQUENT, BUT EVIDENCE OF RESULTING IDENTITY THEFT IS LIMITED; HOWEVER, THE FULL EXTENT IS UNKNOWN 6 (2007), *available at* http://www.gao.gov/cgi-bin/getrpt?GAO-07-737 ("[I]t may be up to a year or more before stolen data are used to commit a crime.").

vividly apparent. It is hard to imagine how a reviewing court could accurately consider the potential harm to all plaintiffs, ex post facto, to apply this guidepost.

Also contrary to commentators' suggestions, aggregation should have no bearing on the application of this guidepost.[201] The argument that a larger dollar amount of potential liability results in a stronger excessiveness claim, oversimplifies the issue. The amount of potential liability is not the only factor in the equation. If plaintiffs in a FACTA class action can prove that a defendant company willfully violated the credit card truncation requirement, in some cases up to 3.4 million times,[202] a penalty within the range Congress deemed appropriate would not be unconstitutionally excessive because of its size alone. The second guidepost weighs proportionality not size.[203] The sheer number of plaintiffs likely would have some bearing on the "reprehensibility" assessment of the first guidepost.[204] It is hard to argue for constitutional sympathy in a case where a consumer protection statute has been willfully violated to such an extent.

C. *Guidepost #3: Civil or Criminal Sanctions for Comparable Conduct.*

Finally, the Court instructed that courts must compare the punitive awards with civil or criminal penalties available for similar conduct.[205] It is instantly apparent that application of this guidepost to statutory penalty awards is a circular proposition.[206] Still, commentators suggest that this guidepost is workable despite the

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201. *See* Scheuerman, *supra* note 6, at 125. Professor Scheuerman argues that those courts which have expressed willingness to apply the *BMW* guideposts to statutory penalties are incorrect to focus only on the "addition effect" of class actions. *Id.* at 125 n.177 (citing *In re* Napster, Inc. Copyright Litig., 2005 WL 1287611, at *11 (N.D. Cal. June 1, 2005)). The "addition effect" refers to the fact that class actions collect plaintiffs' separate suits, adding the potential liability of the defendant vis-à-vis each plaintiff together. *Id.* at 109 n.26. Professor Scheuerman argues that the courts should also consider the "amplification effect" (that the chances of success are higher for each plaintiff in a class action because one jury, rather than many separate juries, decides the entire controversy) when applying the *BMW* guideposts to statutory penalties. *Id.*; *see also* Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1881 (2006) (discussing the "addition" and "amplification" effects of class actions). This assessment, however, would be unmanageable, because even if it were a relevant factor, courts have no way of calculating any difference in the chance of success.

202. *See* Spikings v. Cost Plus, Inc., No. CV 06-8125-JFW (AJWx), 2007 U.S. Dist. LEXIS 44214, at *11-12 (C.D. Cal. May 29, 2007).

203. *See BMW*, 517 U.S. at 580.

204. *See id.* at 576-77.

205. *Id.* at 583.

206. As one commentator explained, "One hardly can compare the statutory damage regime to itself." Samuelson & Wheatland, *supra* note 134, at 473.

fact that it has been largely ignored by the courts.[207] There are three possibilities of how this could work: (1) comparing the penalty award with "the statutory penalty itself,"[208] (2) comparing the award to other statutory schemes,[209] or (3) comparing the award to applicable criminal sanctions for the same conduct.[210]

First, comparing the award to its own statutory range is a tautological exercise. The third guidepost is premised on the notion that legislative determinations are entitled deference.[211] The commentators argue that the third guidepost should apply to statutory penalty awards granted pursuant to statutes where Congress did not sufficiently deliberate as to the penalty range.[212]This application would root out arbitrariness rather than excessiveness. The third guidepost as applied to the typical punitive damage award requires a comparative test, whereas this suggested test would be self-questioning. And, as discussed previously, a competent congressional determination is to be assumed, not second-guessed.[213] Commentators also suggest that courts could compare the award in the current case with other awards granted under the same scheme.[214] This approach would defeat the purpose of the guidepost because courts would then be deferring not to congressional determinations, but to jury implementations of penalties pursuant to the statutory scheme.

Second, comparing a statutory penalty award to an authorized award in a similar statute would only be possible in rare cases. In circumstances where there are state and federal statutes that provide for civil penalties for the same conduct, concededly, this comparison would be possible. While Congress may consider sanctions available in the states, and vice versa, neither is bound to follow them. The *BMW* Court did not intend that one statutory penalty scheme be used to cast constitutional doubt on another.[215] The third guidepost is rooted in the deference that legislatures

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207. *See* Scheuerman, *supra* note 6, at 135-36; Evanson, *supra* note 12, at 632.

208. Scheuerman, *supra* note 6, at 135. Others suggest that courts should compare the award to others under the statute. *See* Evanson, *supra* note 12, at 632-35. This neglects the fact that it is the "substantial deference" due *legislative* determinations underlying this guidepost. *See BMW*, 517 U.S. at 583.

209. *See* Evanson, *supra* note 12, at 632.

210. *See BMW*, 517 U.S. at 583.

211. *See id.*

212. *See* Scheuerman, *supra* note 6, at 136-43; Evanson, *supra* note 12, at 632-34.

213. *See supra* text accompanying notes 87, 103-06.

214. *See, e.g.*, Evanson, *supra* note 12, at 632.

215. The Court stated that "reviewing court[s] . . . 'accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.'" *BMW*, 517 U.S. at 583 (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part, dissenting in part)).

should be afforded[216] and provides no mechanism to determine which statutes are due more or less deference.

Finally, looking to criminal statutes for the same conduct presents similar problems. Notwithstanding the aforementioned problems associated with using one statute to invalidate another,[217] sufficiently comparable criminal statutes will likely only be found within the same statutory scheme.[218] And where Congress sets the civil and criminal penalties simultaneously, it is hard to argue that one is due deference and the other is arbitrary based solely on their relation to one another. Additionally, egregious conduct that rises to the level of criminal liability would likely make application of the third guidepost unnecessary, as the *BMW* Court explained that the first guidepost is the "most important indicium of reasonableness."[219]

VI. CONCLUSION

The crux of the commentators' argument is that applying the *BMW* guideposts to statutory penalty awards is a common sense solution to the problem of unfairly large awards.[220] However much sense this approach makes at first glance, the differences between punitive and statutory damages erect insurmountable barriers—that is, if logical consistency and legislative deference are principles the Court intends to continue to promote. At bottom, the over-extension of a doctrine which courts have found difficult to implement, even for its intended purpose, is patently unwise.[221]

A wiser solution is to push Congress to amend statutory penalty schemes that have proven the most problematic. Some commentators agree.[222] Congress is undoubtedly aware that large awards can result from statutory damages aggregated by class actions. As a result, many statutes with statutory penalty schemes currently have class-

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216. *See id.*

217. *See supra* notes 205-06 and accompanying text.

218. For example, while the FCRA utilizes both civil and criminal penalties, the qualifying conduct does not overlap, except for the most egregious violations of the Act. *See* 15 U.S.C. § 1681n (2006) (civil liability for willful noncompliance of any violation under the code); 15 U.S.C. § 1681q (2006) (criminal liability for obtaining consumer information under false pretenses).

219. *BMW*, 517 U.S. at 575.

220. *See generally* Scheuerman, *supra* note 6; Samuelson & Wheatland, *supra* note 134; Evanson, *supra* note 12.

221. *See supra* note 19.

222. *See, e.g.*, Evanson, *supra* note 12, at 633 ("In fact, the best solution may be for Congress to amend the statute to somehow sever the unconstitutional applications."); J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525, 527-28 (2004) (suggesting that Congress should amend the copyright laws in a similar fashion).

action caps, limiting liability in cases where statutory damages are aggregated.[223] Congress, and not the courts, should weigh the purposes underlying each scheme with the danger of large awards and determine whether amendment is warranted.

In the meantime, defendants faced with purportedly excessive penalties are not left without any avenue of redress. The *Williams* standard,[224] albeit a very deferential one, is still good law and in use by courts today.[225] Furthermore, a defendant seeking to have a penalty reduced that falls within the statutory range for conduct he does not deny should bear this burden. In a nation of laws, Congress is entitled to enact enforcement mechanisms that ensure that its laws are followed, or at least that there is a high cost for disregarding them. There is no substantive right to be free from penalties set by Congress. While there are limits on excessive penalties, those limits have traditionally been applied deferentially. The *BMW* guideposts are not designed to permit such deference and thus their use should be confined to the limited context of reviewing punitive damage awards.

223. *See supra* note 124 and accompanying text.

224. St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 66-67 (1919) (holding that a penalty award should be affirmed unless it is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.").

225. *See, e.g.*, Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 587 (6th Cir. 2007).