DUE PROCESS LIMITATIONS ON PUNITIVE DAMAGES: WHY *STATE FARM* WON'T BE THE LAST WORD

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During the past fifteen years, the U.S. Supreme Court has decided no fewer than seven cases in which it was asked to overturn punitive damage awards on a variety of constitutional grounds.[1] Over the course of these decisions, the Due Process Clause has clearly emerged as the norm favored by the Court to test the procedures utilized by courts in imposing punitive damages, to evaluate the appropriateness of awarding such damages, and to calibrate the correct size of the award in a particular case.[2]

The tightening of constitutional constraints on the legitimacy and permissible size of the punitive damage awards follows a well-established pattern of federal oversight of state court decision-making that began shortly after the Fourteenth Amendment was adopted.[3] In its examination of state punitive damage awards, as with its prior pattern of due process inquiries, the Court first addressed purely procedural

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1. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); Honda Motor Co. v. Oberg, 512 U.S. 415 (1994); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

2. *See, e.g.*, *BMW*, 517 U.S. at 559; Cass R. Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2087 (1998) ("Hence a majority of recent Justices . . . have argued that the Due Process Clause requires constraints on jury discretion that will provide fair notice to potential defendants and limit the role of arbitrary or irrelevant factors.").

3. *See* Pennoyer v. Neff, 95 U.S. 714 (1877). Justice Field's expansive views of the procedural and substantive limits the Due Process Clause imposes upon state authority marked the start of a long and somewhat tortured tradition of Supreme Court intervention into the details of state court processes and decisions. Modern decisions reviewing state actions for due process violations commonly employ a balancing analysis under the rubric of fundamental fairness.

concerns,[4] then advanced into a substantive consideration of the constitutional adequacy of the principles or standards which cabin the discretion state courts exercise in reaching their punitive damages determinations.[5]

Although the primary purposes they serve may have changed over time, the functions of punitive damages today are commonly agreed to be the punishment and deterrence of extraordinarily wrongful, willful conduct that is variously characterized as malicious, outrageous, wanton, fraudulent or in deliberate disregard of the interests of others.[6] For almost all of the 125 years since the Fourteenth Amendment was adopted, punitive damages were regarded as so firmly imbedded in American legal culture that no special procedures or precise rules of law were deemed necessary to constrain state courts' imposition of such "exemplary" damages.[7] This *laissez faire* attitude toward possible constitutional infirmities of state law and procedures regarding punitive damages has rapidly been abandoned by the Supreme Court over the past fifteen years,[8] and a new paradigm, governing state court punitive damages awards and federal review of them, is in the process of being established.[9]

Positing that punitive damages today are more frequent and much

4. *See, e.g.*, *Haslip*, 499 U.S. at 1 (examining procedures by which the trial court awarded punitive damages and the appellate courts reviewed punitive damages).

5. *See BMW*, 517 U.S. at 559; *see also* Sunstein et al., *supra* note 2, at 2087 (noting that "a majority of the Supreme Court has converged" on the proposition that punitive damages awards unconstitutionally violate the "substantive dimension" of the Due Process Clause "when they are grossly excessive").

6. PROSSER AND KEETON ON TORTS 9-10 (5th ed. 1984). *But see* Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI-KENT L. REV. 163, 163-64 (2003) (noting the "variety of plausible purposes" for punitive damages, including compensation); David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 373-74 (1994) (explaining that "[a]lthough most courts refer only to 'punishment' and 'deterrence' as rationales for [punitive] damages, this masks the variety of specific functions that punitive damages actually serve," including such additional functions as education, compensation and law enforcement).

7. As a long-established part of the common law of torts, due process was thought to inhere in punitive damage awards because of the fact that the state practices and procedures for awarding punitive damages in appropriate cases antedated the inclusion of the Due Process Clause in the Bill of Rights and its subsequent application to state actions through the Fourteenth Amendment. *See Haslip*, 499 U.S. at 32-34 (Scalia, J., concurring).

8. *See* Susan R. Klein, *The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles*, 1997 U. ILL. L. REV. 453, 483 (decrying the "conspicuous absen[ce]" of any Court "deference to historical practice and legislative prerogatives" in its punitive damages due process jurisprudence).

9. *See* Sunstein et al., *supra* note 2, at 2093 (presciently describing the post-*BMW* "project of creating a detailed form of 'constitutional common law' to control punitive damages" that the Court might embark upon and, in any event, has "practically force[d] lower courts to begin to do").

larger than in the recent past,[10] the Court has repeatedly found it necessary to remind states of the unique nature of punitive damages and the heightened care with which such awards must be imposed.[11] Unlike compensatory damages, which serve to "redress the concrete loss" suffered by the plaintiff, punitive damages operate as "quasi-criminal" fines[12] imposed without the protections to which a defendant would be entitled in any criminal proceeding.[13]

While acknowledging states' legitimate authority to award such damages,[14] the Court has nevertheless developed increasingly exacting due process standards by which courts must assess punitive damages awards. Its most recent pronouncements on this subject, in *State Farm Mutual Automobile Insurance Co. v. Campbell,* reflect a Court doggedly determined to constrain state punitive damages awards. *State Farm* significantly curtails the scope of defendant conduct that a state may subject to punitive liability, and pointedly clarifies the rigorous three-guidepost analysis the Court set forth in its landmark decision in *BMW of North America, Inc. v. Gore,* [15] offering highly structured guidance on the outer limits of punitive damages awards.[16]

Part I of this article will trace the development of the evolving principles and requirements the Court is imposing on state awards of punitive damages, identifying notable undercurrents within the Court regarding this new and expanding application of the Due Process Clause. Part II will present a detailed analysis of *State Farm Mutual Automobile*

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10. *See* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982).

11. The Court has reversed or vacated the last four punitive damages cases it has considered. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); Honda Motor Co. v. Oberg, 512 U.S. 415 (1994); *see also* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 475 (1993) (O'Connor, J., dissenting) ("[T]ime and again, this Court and its Members have expressed concern about punitive damages awards 'run wild,' inexplicable on any basis but caprice or passion."); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 352 (2003).

12. *See Cooper*, 532 U.S. at 432; Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

13. *See State Farm*, 123 S. Ct. at 1520 ("Although [punitive damages] awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered.").

14. *See id.*; *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.").

15. *BMW*, 517 U.S. at 559. The three guideposts enumerated by the Court were: 1) "the degree of reprehensibility of the defendant's conduct," *id.* at 575; 2) the awards "ratio to the actual harm inflicted on the plaintiff," *id.* at 580; and 3) a comparison of the "punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct," *id.* at 583.

16. *State Farm*, 123 S. Ct. 1513; *see also infra* notes 82-115 and accompanying text.

Insurance Co. v. Campbell, which represents the Court's most ambitious attempt yet to provide guidance to states on how to approach the imposition of punitive damages and how to assess the appropriate size thereof. Finally, Part III of this article will examine recent lower court cases involving contested punitive damage awards as a means to identify and discuss several important issues left unresolved by *State Farm.* These issues include the relative significance of the "reprehensibility" factors, determining the appropriate ratio of punitive to compensatory damages, the relevance of a defendant's wealth in calculating punitive damages, and the aggregate punishment problem.

I. SUPREME COURT PUNITIVE DAMAGES JURISPRUDENCE PRE-*STATE FARM*

In 1989, the Court first signaled its willingness to consider due process limitations on punitive damages in *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*[17] While *Browning-Ferris* rejected the argument that the Excessive Fines Clause of the Eighth Amendment applied in the context of punitive damages awards,[18] the Court expressly reserved for future examination the argument that a state's imposition of punitive damages awards may violate the Due Process Clause of the Fourteenth Amendment.[19]

In 1991, in *Pacific Mutual Life Insurance v. Haslip*, the Court for the first time squarely addressed a due process challenge to a punitive damages award.[20] Acknowledging that the Due Process Clause does indeed impose substantive constraints on the amount of punitive damages, the Court nevertheless concluded that the specific award at issue was neither excessive nor arbitrarily imposed.[21] The *Haslip* opinion was devoted primarily to an assessment of the procedural protections Alabama had in place to guard against excessive or arbitrary punitive damages awards.[22] As for excessiveness, the Court found that

17. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

18. *Id.* at 263-64. Several scholars have contended that the Excessive Fines Clause ought to apply to such awards. *See, e.g.*, Stephen R. McAllister, *A Pragmatic Approach to the Eighth Amendment and Punitive Damages*, 43 U. KAN. L. REV. 761 (1995). This is particularly relevant in light of the "quasi-criminal" nature of punitive damages. *See, e.g.*, John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 151 (1986).

19. *Browning-Ferris*, 492 U.S. at 277; *see also id.* at 280 (Brennan, J., concurring) (emphasizing that the Court's decision in *Browning-Ferris* "leaves the door open" for future due process challenges).

20. Pacific Mut. Life Ins., Co. v. Haslip, 499 U.S. 1, 24 (1991).

21. *Id.* at 23.

22. The Court cited in particular Alabama's judicial review process, which "ensures that

the four-to-one (4:1) ratio of punitive to compensatory damages reflected by the award at issue placed it "close to the line" of constitutional propriety, but passed constitutional muster.[23]

Two years after *Haslip*, the Court considered yet another due process challenge to a punitive damages award. In *TXO Production Corp. v. Alliance Resources Corp.*, the Court approved a punitive damages award even more disproportionately related to the amount of compensatory damages.[24] In approving the award's 526:1 ratio, the Court interpreted its proportionality analysis to permit state courts to consider not only the actual harm caused as a result of defendant's conduct but also the "potential harm" to plaintiff, and even the "possible harm to other victims that might have resulted if similar future behavior were not deterred."[25] The Court upheld the award in *TXO* because of such potential harm, finding that if the defendant's fraudulent scheme had succeeded, the plaintiffs would have suffered far greater economic harm.[26]

Justice O'Connor wrote a lengthy and scathing dissenting opinion in *TXO*, decrying the Court's abandonment of its promise in *Haslip* "that punitive damages awards would receive sufficient constitutional scrutiny" to protect against excessive or arbitrary awards.[27] In particular, Justice O'Connor rebuked the Court for its failure to provide adequate guidance in determining the excessiveness of a punitive damages award, and its refusal to identify even "a single guidepost to help other courts find their way through [an] area"[28] so lacking in "objective criteria."[29] Justice O'Connor's dissent offered several such criteria on the question of excessiveness,[30] including "the relationship between the punitive damages award and compensatory damages," and comparison of the award to legislatively designated penalties and to

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punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Id.* at 22.

23. *Id.* at 23.

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

25. *Id.* at 460.

26. *Id.* at 462. The Court also found significant the fact that TXO's conduct toward the plaintiffs was "part of a larger pattern of fraud" affecting others. *Id.*

27. *Id.* at 472-73 (O'Connor, J., dissenting). In Justice O'Connor's view, the "monstrous[ly]" excessive award in *TXO* was directly attributable to the prejudicial use at trial of evidence demonstrating TXO's tremendous wealth, compounded by an emphasis on its status as a non-resident corporation. *Id.* at 493.

28. *Id.* at 480.

29. *Id.* at 483.

30. *TXO*, 509 U.S. at 481.

other punitive damages awards for similar conduct."[31]

In *Honda Motor Co. v. Oberg,* the next foray into the world of punitive damages, the Court struck down a provision of the Oregon Constitution that prohibited judicial review of the excessiveness of a punitive damages awards unless the reviewing court found "no evidence to support any punitive damages at all."[32] The Court held that the Due Process Clause required meaningful judicial review of punitive damages awards, emphasizing the crucial safeguarding function judicial review serves in protecting defendants against the "acute danger of arbitrary deprivation of property."[33]

Only two years later, in *BMW of North America, Inc. v. Gore,* the Court for the first time reversed an award of punitive damages on the ground that it was unconstitutionally excessive under the Due Process Clause, and articulated a three-part excessiveness analysis for lower courts to follow.[34] Writing for the majority, Justice Stevens explained that the Due Process Clause requires states to provide defendants adequate notice not only of the conduct that might subject them to liability for punitive damages, but also the severity of any penalty imposed as a result of that conduct.[35] A state's failure to provide such notice, resulting in an unconstitutionally excessive punitive damages award, can be established by analysis of three "guideposts" set forth in the Court's opinion.[36] The first (and most important) guidepost requires courts to evaluate "the degree of reprehensibility of the defendant's conduct."[37] The second guidepost focuses on the ratio between punitive and compensatory damages, seeking to ensure some degree of proportionality.[38] The final excessiveness guidepost compares the

31. *Id.* With respect to the Court's potential harm rationale for approving the "shockingly" disproportionate award, Justice O'Connor warned that interpreting "potential harm" to include harm to all possible present and future victims threatens to render meaningless any constraint on punitive damages. *Id.* at 484-85 (O'Connor, J., dissenting) ("Virtually any tort, however, can cause millions of dollars of harm if imposed against a sufficient number of victims."). In any event, Justice O'Connor concluded that the potential harm rationale could not sustain the award at issue because neither the jury nor the lower courts had meaningfully considered it. *Id.*

32. Honda Motor Co. v. Oberg, 512 U.S. 415, 426-27 (1994).

33. *Id.* at 432. Justice Ginsburg, joined by Justice Rehnquist, dissented in *Oberg* on the ground that Oregon's judicial review procedures did not violate "the due process limits indicated in *Haslip* and *TXO*." *Id.* at 438 (Ginsburg, J., dissenting).

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

35. *Id.* at 574.

36. Two of these "guideposts" bear more than a little resemblance to the "objective criteria" Justice O'Connor urged courts to consider in her *TXO* dissent. *See supra* notes 29-31 and accompanying text.

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

38. *Id.* at 581.

amount of punitive damages to any "civil or criminal penalties that could be imposed for comparable misconduct."[39]

In *BMW*, Alabama had imposed the $2 million punitive damages award at issue against BMW for its failure to disclose to a plaintiff that his car had been repainted prior to its sale. As an initial matter, Justice Stevens addressed the scope of defendant conduct that a state may legitimately seek to punish through an award of punitive damages. The jury in *BMW*, according to Justice Stevens, had improperly calculated the punitive damages award on the basis of harm to every purchaser nationwide who BMW failed to inform of the pre-sale repainting – even though such nondisclosure was expressly lawful in many states.[40] Justice Stevens emphasized the constitutional significance of the trial court's error: "We think it follows from these principles of state sovereignty and comity that . . . Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents."[41] The Court left for another day, however, the question of whether a state may base a punitive damages award on unlawful conduct in other states.[42]

While acknowledging that the Alabama Supreme Court had already limited the punitive damages award to punish BMW only for its conduct in Alabama (remitting the award from $4 million to $2 million), the Court held that even the remitted amount violated due process, concluding that the excessiveness of the award could be demonstrated under all three guideposts. First, with respect to reprehensibility, the Court found it significant that BMW's conduct was lawful in other states and had not been determined to be unlawful before the plaintiff's case. This indicated a low degree of culpability compared to a defendant who knowingly and repeatedly engaged in wrongful activity. Further, BMW's conduct resulted in purely economic harm and did not threaten the health or safety of its consumers, all of which suggested a lower degree of reprehensibility.[43]

Next, while the Court described the ratio analysis as a "significant" part of the excessiveness equation with a "long pedigree," it declined to set any definite ratio by which to evaluate punitive damage awards: "[W]e have consistently rejected the notion that the constitutional line

39. *Id.* at 583.

40. *Id.* at 572.

41. *Id.* at 572-73; *see id.* at 610 (Ginsburg, J., dissenting) (agreeing with majority that punitive damages award could not be based on out of state conduct).

42. *BMW*, 517 U.S. at 574 n.20; *see infra* notes 86-88 and accompanying text.

43. *BMW*, 517 U.S. at 575-80.

[between acceptable and unacceptable ratios] is marked by a simple mathematical formula."[44] The ratio of a "breathtaking" 500:1 ($2 million in punitive damages compared to $4,000 in compensatory damages) in the case at hand, however, led the Court to "raise a suspicious judicial eyebrow."[45] Further, the Court found none of the circumstances that might justify such a high ratio to be present in plaintiff's case.[46]

In a frustratingly inexact footnote alluding to others harmed by BMW's conduct, the Court opined that even if the plaintiff's compensatory damages could be extrapolated to each of the 14 Alabama consumers affected by BMW's nondisclosure ($4,000 x 14 = $56,000), the resulting ratio of punitive damages to total Alabama harm would still be an (apparently) unacceptable 35:1.[47] Such reasoning failed to shed any helpful light on the highly contentious subject of punitive damages in the context of conduct that affects a large number of people, as in mass torts.[48]

As in *TXO*, the Court acknowledged that a proper evaluation of the ratio between punitive and compensatory damages may require consideration of the harm that did not but might have resulted from defendant's conduct, referred to as the "potential" harm to the victim.[49] In *BMW*, however, the $4,000 compensatory damages awarded to the plaintiff for diminution of the value of his repainted car represented the only possible harm he could have sustained as a result of BMW's conduct. Although the Court in *BMW* also alluded to the fact that no "other BMW purchaser was threatened with any additional potential harm,"[50] it did not refer to the broader language of *TXO* that suggested consideration of "possible harm to other victims that might have resulted

44. *Id.* at 582; *see also* Sunstein et al., *supra* note 2, at 2092 (concluding that after *BMW*, "striking ratios are not (and should not be) decisive" in determining excessiveness of a punitive damages award).

45. *Id.* at 583.

46. *Id.* at 582. Such high ratios might be tolerated, the Court explained, "if, for example, a particularly egregious act has resulted in only a small amount of economic damages," or where "the injury is hard to detect or the monetary value of the noneconomic harm might have been difficult to determine." *Id.*

47. *Id.* at 582 n.35. In his concurring opinion, Justice Breyer repeatedly refers to $56,000 as the relevant amount of "past, present, or likely future harm" caused by BMW's conduct. *Id.* at 589-90 (Breyer, J., concurring).

48. *See infra* notes 189-198 and accompanying text.

49. *BMW*, 517 U.S. at 581 (citing *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993)).

50. *Id.* at 582.

if similar future behavior were not deterred."[51]

Finally, in its application of the third guidepost, the Court in *BMW* considered the $2,000 civil penalty that Alabama could have imposed based on BMW's conduct, and noted that similar penalties in other states reached only $10,000. In light of these statutes, the Court concluded that neither Alabama nor any other state had provided "an out-of-state distributor with fair notice that the first violation – or, indeed, the first 14 violations – of its provisions might subject an offender to a multimillion dollar penalty."[52]

BMW thus announced a three-guidepost test for excessiveness, albeit in the context of a case the Court considered quite easy.[53] Virtually none of the aggravating reprehensibility factors were present, the ratio of 500:1 was astonishingly high without any of the historically mitigating circumstances, and the comparable civil penalties Alabama might have imposed suggested the award was "tantamount to a severe criminal penalty" imposed without fair notice to BMW.[54]

Dissenting from the Court's decision, Justice Scalia railed against what he regarded as the illegitimate federalization of "yet another aspect of our Nation's legal culture (no matter how much in need of correction it may be)."[55] The Due Process Clause only guarantees "an opportunity to contest the reasonableness of a damages judgment in state court; but there is no federal guarantee a damages award actually *be* reasonable."[56] Moreover, Justice Scalia characterized the Court's guidepost analysis as offering no actual guidance at all.[57]

Justice Ginsburg also dissented in *BMW*, arguing that the Court "unnecessarily and unwisely ventures [further] into territory traditionally within the States' domain."[58] Rightly predicting the Court's need to revisit this subject, Justice Ginsburg strenuously objected to the Court's

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51. *TXO*, 509 U.S. at 460.

52. *BMW*, 517 U.S. at 584.

53. *See* Klein, *supra* note 8, at 484 (criticizing *BMW* for "holding that somehow the Court knows a grossly excessive punitive damage award when it sees one").

54. The Court also warned that excessive punitive damages awards "implicate[] the federal interest in preventing individual States from imposing undue burdens on interstate commerce" by using "the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation." *Id.* at 585.

55. *BMW*, 517 U.S. at 599 (Scalia, J., dissenting).

56. *Id.*

57. *Id.* at 606 ("The Court has constructed a framework that does not genuinely constrain, that does not inform state legislatures and lower courts—that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not 'fair.'").

58. *Id.* at 607 (Ginsburg, J., dissenting).

ill-conceived commitment to occasionally "correct" a state court's "misapplication" of *BMW's* vaguely articulated guideposts.[59]

The Court's opinion in *BMW* indeed left open several questions for lower courts to consider.[60] It failed to explore fully the scope of defendant conduct a state may legitimately punish, both in the state (harm to people other than the plaintiff) and outside the state (where defendant's out-of-state conduct is unlawful).[61] Moreover, because the Court found the award at issue to be dramatically excessive under each guidepost, *BMW* offered little guidance on how to resolve harder cases. For example, how high may a punitive damages award be when the conduct at issue implicates the more serious reprehensibility factors (such as indifference to health and safety),[62] and what ratio short of 500:1 will raise the Court's suspicious eyebrow?[63]

In the Court's next case, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, it had little opportunity to address any of these questions.[64] Rather, the Court "reiterated the importance" of its *BMW* guideposts by "mandat[ing] appellate courts to conduct *de novo* review

59. *Id.* at 612.

60. *See* Sunstein et al., *supra* note 2, at 2092 ("After *BMW*, and the unruly precedents on which it is based, the law governing constitutional constraints on punitive damage awards is in a state of considerable uncertainty and flux."); David Crump, *Evidence, Economics, and Ethics: What Information Should Jurors Be Given to Determine the Amount of a Punitive Damage Award?*, 57 MD. L. REV. 174, 213 (1998) (pointing out that *BMW* "only sets limits upon the states' abilities to assess punitive damages," and "does not tell us the best way for a state to go about the specific business of computing them"); *see also* Adam M. Gershowitz, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1283-84 (2000) (criticizing as overly broad the "flexibility of the *BMW* test [that] permits lower courts to ignore some guideposts . . . and create others guideposts, such as the defendant's wealth").

61. *See infra* notes 86-96 and accompanying text.

62. Courts after *BMW* grappled with the relative degree of a defendant's reprehensibility in cases involving conduct allegedly reflecting disregard for the health and safety of others. *See, e.g.*, Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35 (Tex. 1998) (discussing asbestos manufacturer's failure to warn of known health risks posed by product); Sand Hill Energy, Inc. v. Ford Motor Co., 83 S.W.3d 483, 513 (Ky. 2002) (Cooper, J., dissenting) (finding Ford's manufacture of allegedly defective transmissions, that resulted in a wrongful death action, insufficiently reprehensible to justify punitive damages award); Clark v. Chrysler Corp., 310 F.3d 461, 484 (6th Cir. 2002) (Nelson, J., dissenting in part) (doubting whether sufficiently reprehensible conduct could be shown by Chrysler's "recklessness in failing to equip the truck with a door latch that would have spared [the plaintiff] the inconvenience of buckling his seatbelt"); Romo v. Ford Motor Co., 122 Cal. Rptr. 2d 139, 165-66 (Cal. Ct. App. 2002) (upholding $290 million punitive damages award, in part, because Ford's "malicious conduct" "placed tens of thousands of lives at risk and actually claimed three such lives in the present case").

63. *See* Gershowitz, *supra* note 60, at 1283-84 (2000) (contending that *BMW's* "failure to announce a maximum ratio of punitive to compensatory damages permits lower courts to make up any ratio they see fit").

64. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001).

of a trial court's application of them to the jury's award."[65] In an interesting and somewhat controversial holding, the court ruled that *de novo* appellate review was appropriate because a jury verdict on the appropriateness and size of a punitive damage award was not a factual determination for purposes of requiring a deferential review.[66]

Justice Stevens, writing again for the majority as he did in *BMW*, also briefly addressed several indicia of the award's excessiveness.[67] First, the jury had been improperly instructed regarding the wrongfulness of some aspects of the defendant's conduct that were in fact lawful. The Court urged the appellate court on remand to consider the extent to which the jury's (and trial court's) assessment of reprehensibility might have been improperly predicated on lawful conduct.[68] Second, the Court cautioned the appellate court to re-examine the trial court's reliance on evidence regarding the "potential harm [the plaintiff] would have suffered had [the defendant] succeeded in its wrongful conduct," describing the trial court's assessment of that harm as "unrealistic."[69] Finally, the Court expressed doubt as to whether the defendant's conduct would have warranted multiple assessments of the relevant state sanction under Oregon's Unlawful Trade Practices Act, rather than a single statutory penalty of $25,000.[70]

II. EXPANDING THE *BMW* EXCESSIVENESS TEST: *STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY V. CAMPBELL*

In *State Farm*, the Court returned once again to the task of enforcing due process limitations on punitive damages awards, striking down a $145 million punitive damages award. In light of the numerous errors committed by the Utah Supreme Court in its interpretation of *BMW*'s guideposts, the Court in *State Farm* endeavored to provide

65. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1520 (2003) (describing the significance of *Cooper*).

66. *Cooper*, 532 U.S. at 437-41; *see also* Sebok, *supra* note 6, at 179-80 (discussing and critiquing this rationale).

67. *Cooper*, 532 U.S. at 441 (suggesting that its "own consideration of each of the three [*BMW*] factors reveals a series of questionable conclusions by the District Court that may not survive *de novo* review").

68. *Id.* at 441.

69. *Id.* at 442.

70. *Id.* On remand, the Ninth Circuit indeed remitted the punitive damages award from $4.5 million to $500,000, based on its assessment that Cooper's conduct was "more foolish than reprehensible"; the 90:1 ratio was "only somewhat less 'breathtaking'" than the one struck down in *BMW* and the potential harm evidence was speculative; and Cooper's conduct would only have resulted in a single, modest penalty. Leatherman Tool Group, Inc. v. Cooper Indus., Inc., 285 F.3d 1146, 1149-51 (9th Cir. 2002).

additional guidance regarding its due process excessiveness test.

Plaintiffs' claims against State Farm, their insurance company, stemmed from its mishandling of a lawsuit brought against Mr. Campbell by two drivers in a head-on collision allegedly caused by Mr. Campbell's negligence.[71] Representing Mr. Campbell, State Farm declined offers to settle these claims for the insurance policy limits despite a widely shared consensus that Mr. Campbell was indeed responsible for the accident. Moreover, State Farm assured the Campbells throughout that "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel."[72]

After a jury verdict against Mr. Campbell for almost $200,000 more than the settlement offers, however, State Farm refused to pay the full judgment because it was $135,000 in excess of Mr. Campbell's insurance policy limits.[73] Most damning, State Farm's counsel told plaintiffs to "put for sale signs on your property," even though State Farm had promised them it would protect their assets.[74] While State Farm ultimately paid the entire amount, the Campbells sued the insurance company for bad faith, fraud and intentional infliction of emotional distress.

At trial, the Campbells introduced extensive evidence of State Farm's nationwide policies and practices, urging the jury to punish State Farm for "what it's doing across the country."[75] Indeed, in addition to awarding the Campbells $2.6 million in compensatory damages (which the trial court remitted to $1 million),[76] the jury also awarded $145 million in punitive damages (which the trial court remitted to $25 million).[77]

On appeal, the Utah Supreme Court's application of the *BMW* guideposts led it to reinstate the jury's $145 million award of punitive damages. The Utah Supreme Court cited the high degree of reprehensibility reflected in State Farm's nationwide conduct, the need

71. Mr. Campbell, driving with his wife on a two-lane highway, made an unsafe pass into oncoming traffic, causing the driver of a car in the opposite lane (Todd Ospital) to lose control. The subsequent collision of Mr. Ospital's car with another car driven by Robert G. Slusher, resulted in Mr. Ospital's death and permanent injuries to Mr. Slusher. State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1517 (2003).

72. *Id.* at 1518 (quoting State Farm Mut. Auto. Ins. Co. v. Campbell, 65 P.3d 1134, 1142 (Utah 2001)).

73. *State Farm*, 123 S. Ct. at 1518.

74. *Id.* (quoting *State Farm*, 65 P.3d at 1142).

75. *Id.* at 1522.

76. *Id.* at 1519.

77. *Id.*

to set a high ratio because of the likelihood such misconduct rarely will be punished, and the significant civil and criminal penalties which could have applied.[78] The U.S. Supreme Court granted State Farm's petition for certiorari, characterizing as "neither close nor difficult"[79] its conclusion that the $145 million punitive damages award was excessive under each of its *BMW* guideposts.

State Farm's reprehensibility analysis offered little guidance on the relative degrees of reprehensibility that might warrant particularly high punitive damages awards, focusing instead on whether a defendant's conduct warranted any punitive liability at all. The Court emphasized that states must presume a plaintiff has been fully compensated, and therefore must base punitive damages awards only on conduct "so reprehensible" that a sanction beyond compensatory damages is required for "punishment or deterrence."[80] This cautionary reminder reflects the Court's rejection of any conception of punitive damages as serving compensatory goals.[81]

The reprehensibility guidepost of *BMW*, the Court held, set forth strict instructions for courts to consider five factors: whether a defendant's conduct reflects (1) "indifference to or a reckless disregard of the health or safety of others," (2) "intentional malice, trickery, or deceit" (as opposed to "mere accident"), or (3) "repeated actions" (as opposed to "an isolated incident"); (4) whether the harm inflicted was physical or economic; and (5) whether "the target of the conduct had financial vulnerability."[82]

Without ranking the relative reprehensibility of these factors, the Court noted that the presence of only one might not warrant punitive liability.[83] The absence of all of these factors makes any award of punitive damages "suspect."[84] The Court found the degree of

78. *Id.* (citing *State Farm,* 65 P.3d at 1153-54).

79. *State Farm*, 123 S. Ct. at 1521.

80. *Id.*

81. *See, e.g.*, Sharkey, *supra* note 11, at 390 (referencing the "now all-but-discredited historical conception of punitive damages as a supplement to individual compensatory damages"); Crump, *supra* note 60, at 182 ("In any event, the compensation rationale for punitive damages is dubious."). *But see* Sebok, *supra* note 6, at 163; Owen, *supra* note 6, at 373-74 (including compensation as one of the functions of punitive damages); Ellis, *supra* note 10, at 3.

82. *State Farm*, 123 S. Ct. at 1521. Some courts, after *BMW*, had speculated about whether the Court had included "intentional malice" as a permissible reprehensibility factor. *See, e.g.*, Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp., 345 F.3d 1366, 1371 (Fed. Cir. 2003) (finding helpful the Court's clarification in *State Farm* because "we did not originally consider intentional malice as a criterion of reprehensibility specifically mentioned in [*BMW*]").

83. *State Farm*, 123 S. Ct. at 1521.

84. *Id.*

reprehensibility in State Farm's conduct sufficient to warrant some punitive liability, even though it did not explicitly identify the reprehensibility factors on which it based this conclusion.[85]

The Court in *State Farm* also expanded on the federalism concerns it addressed in *BMW*, holding that Utah had impermissibly infringed upon the sovereignty of its sister states by punishing State Farm for conduct that occurred in other states. Whether other states would regard such conduct as lawful or unlawful, the Court ruled that no state has a legitimate interest in punishing conduct that occurs outside its borders.[86] Writing for the majority, Justice Kennedy emphasized the basic tenet of federalism "that each State may make its own reasoned judgment about what conduct is permitted or proscribed within it borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."[87] In order to legitimately adjudicate State Farm's conduct toward other people in other states, Justice Kennedy explained, those people would have to be included as parties and Utah courts would be required to apply the laws of the applicable states to their claims.[88]

Justice Kennedy acknowledged, however, that the Court's prior cases had established that a plaintiff could introduce out-of-state conduct to demonstrate the relative reprehensibility of a defendant's in-state conduct. First, such conduct may reveal the "deliberateness and culpability" of a defendant's actions.[89] Second, prior misconduct by a defendant (even in another state) may be relevant because "a recidivist may be punished more severely than a first offender."[90]

In *State Farm*, however, the Court held that neither of these justifications applied because the evidence of State Farm's other alleged misconduct failed to bear a sufficient relationship to the specific harm inflicted on the Campbells.[91] This evidence included State Farm's

85. *Id.* Clearly the Court found that State Farm acted with at least deceit, if not malice and trickery. And the Campbells were certainly financially vulnerable, although the opinion does not mention this factor.

86. *Id.* at 1522 ("Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction."); *see also* Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275, 305-09 (1999) (urging post-*BMW* that state sovereignty principles should preclude unlawful as well as lawful out-of-state conduct).

87. *State Farm*, 123 S. Ct. at 1523.

88. *Id.* at 1522 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)).

89. *Id.*

90. *Id.* at 1523.

91. *Id.* (stating that State Farm's other misconduct "had nothing to do with a third-party lawsuit [such as the Campbells']").

handling of other claims in other states and, even more off the mark, its employment practices.[92] For a "prior transgression" to be relevant as an aggravating factor in the reprehensibility analysis, the Court pointed out, the transgression must be "similar" to the conduct being punished.[93] Here, the Court found that the evidence of State Farm's other misconduct had no bearing on its dealings with the Campbells.

More fundamentally, the Court held that the punitive damages award upheld by the Utah Supreme Court violated due process because it punished State Farm for conduct "independent from the acts upon which liability was premised."[94] Any assessment of reprehensibility must be limited to the conduct that caused harm to the plaintiff. According to *State Farm*, due process does not permit a court to "adjudicate the merits of other parties' hypothetical claims against the defendant under the guise of the reprehensibility analysis."[95] *State Farm* thus walks a very fine line indeed, allowing courts to consider—but not punish—out-of-state conduct and harm to people other than the plaintiff and, even then, only when such evidence is sufficiently "similar" to the specific conduct that harmed the plaintiff.[96]

With respect to *BMW*'s second excessiveness guidepost, the Court reiterated its reluctance to set "a bright-line ratio" of punitive damages to plaintiff harm which a punitive damages award cannot exceed.[97] But despite this reluctance, *State Farm* sets forth a highly detailed ratio analysis for lower courts assessing the excessiveness of a punitive damages award, including extensive discussion of the factors that will justify ratios of 1:1, 4:1, or (in rare cases) awards in excess of 9:1.

Citing *Haslip* and *BMW*, the Court explained that most cases will warrant no more than a 4:1 ratio.[98] This 4:1 benchmark in part derives

92. *Id.* Justice Ginsburg, in dissent, took issue with the Court's characterization of this out-of-state conduct as irrelevant. She argued that the Campbells' experience with State Farm indeed "exemplifies and reflects an overarching underpayment scheme." *Id.* at 1530 (Ginsburg, J., dissenting).

93. *State Farm*, 123 S. Ct. at 1523.

94. *Id.*

95. *Id.* (noting that the Utah Supreme Court's overly broad punitive mission can be summed up in its acknowledgment that "[t]he harm is minor to the individual but massive in the aggregate").

96. *Cf.* Cordray, *supra* note 86, at 313 (warning of the "significant risk that once the jury is presented with evidence of the defendant's similar misconduct in other states, the jury will succumb to the temptation to punish the defendant directly for that conduct as well, rather than simply using the evidence to determine reprehensibility").

97. *State Farm*, 123 S. Ct. at 1524; *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 458 (1993).

98. *State Farm*, 123 S. Ct. at 1524 (noting that punitive damages awards "more than four times the amount of compensatory damages might be close to the line of constitutional impropriety"); *see also BMW*, 517 U.S. at 581; *Haslip*, 499 U.S. at 23-24.

from a long legislative history of imposing "double, treble or quadruple damages to deter and punish."[99] While the Court acknowledged that states are not necessarily bound by these ratios, it nevertheless urged courts to recognize the "obvious" point that such ratios "are more likely to comport with due process" than higher ratios, such as 500:1 (the ratio in *BMW*) or 145:1 (as in *State Farm*).[100]

The Court also asserted that its punitive damages "jurisprudence and the principles it has now established" indicate that due process rarely will be satisfied by a ratio in excess of 9:1.[101] Three factors set forth in *BMW*, according to *State Farm*, will justify a double digit ratio: "where 'a particularly egregious act has resulted in only a small amount of economic damages'"; "where 'the injury is hard to detect'"; or where "'the monetary value of noneconomic harm might have been difficult to determine.'"[102] None of these factors, according to the Court, were present in *State Farm*.

Indeed, the Court for the first time warned that the converse situation, where "compensatory damages are substantial," may dictate a punitive damages award no greater than the plaintiff's compensatory damages, in effect a 1:1 ratio.[103] While the Court offered no guidance on the amount of compensatory damages it will regard as "substantial,"[104] it had no trouble finding the Campbells' $1 million compensatory damages award to be "substantial" enough to trigger this 1:1 ratio limitation.[105] Unlike the 4:1 and 9:1 analyses, which the Court asserted its prior cases had already demonstrated, *State Farm's* 1:1 ratio based on "substantial" compensatory damages clearly reflects new territory.

In yet another new and provocative development, the Court noted that the "substantial" compensatory award here already contained a "punitive element" because it was based primarily on the emotional distress suffered by the Campbells.[106] Because such emotional distress

99. *State Farm*, 123 S. Ct. at 1524.

100. *Id.*

101. *Id.* at 1524 ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."). In her dissenting opinion, Justice Ginsburg harshly criticized the Court's characterization of its prior punitive damages cases as "established" law, pointing out that the first case invalidating a punitive damages award on due process grounds occurred as recently as 1996: "If our activity in this domain is now 'well-established,' it takes place on ground not long held." *Id.* at 1527 (Ginsburg, J., dissenting).

102. *Id.* at 1524 (quoting *BMW*, 517 U.S. at 582).

103. *Id.*

104. *See infra* notes 174-79 and accompanying text.

105. *State Farm*, 123 S. Ct. at 1526 (concluding that a punitive damages award "at or near" $1 million would be warranted).

106. *Id.* at 1525.

damages already seek to "condemn" a defendant for the "outrage and humiliation" suffered by plaintiffs, the Court suggested that punitive damages might be unnecessarily "duplicat[ive]."[107] This analysis is consistent with the argument for *de novo* review made in *Cooper* that at an earlier time punitive damage awards operated to provide compensation for elements of damages for which recovery was not permitted under traditional rules restricting actual damages.[108] It remains to be seen how serious the Court is about this particular limitation on punitive damages, but its potential implications for tort cases involving emotional distress could be quite significant.

State Farm also rejected each of the Utah Supreme Court's proffered justifications for its triple digit ratio. First, State Farm's misconduct in other states could only properly be considered in the reprehensibility analysis—and the Court reiterated its conclusion that the out-of-state conduct here had no relevance because of its insufficient nexus to the plaintiffs' harm.[109] With respect to the Utah Supreme Court's second justification, the Court found insufficient evidence in the record to support the assertion that a high ratio was warranted because State Farm's conduct affected other Utah citizens. Third, the Court emphasized that because a state must justify its punitive damages awards only with regard to the conduct that specifically harmed the plaintiff, a high punitive damages award could not be justified on the basis that a defendant will otherwise "be punished in only the rare case."[110]

Finally, the Court disapproved of Utah's reliance on the relative wealth of State Farm in justifying its high ratio: "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."[111] This statement appears to be somewhat at odds with the Court's approval in *TXO* of a state punitive damages procedure that expressly included the wealth of the defendant as a permissible factor for the jury to consider.[112] As in its treatment of out-of-state conduct and

107. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 908 cmt. c (1977)).

108. *See* Sebok, *supra* note 6.

109. *State Farm*, 123 S. Ct. at 1525.

110. *Id. But see* Richard Craswell, *Deterrence and Damages: The Multiplier Principle and Its Alternatives*, 97 MICH. L. REV. 2185, 2211-15 (1999) (urging that "the rate at which the probability of punishment declines is a key factor" in determining the proper amount of punitive damages).

111. *State Farm*, 123 S. Ct. at 1525.

112. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462 n.28 (1993) ("Under well-settled law, however, factors such as these [including net worth of the defendant] are typically considered in assessing punitive damages."); *see also* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991) (permitting an appellate court to consider the defendant's "financial position"). Yet the Court in *TXO* acknowledged that the enormous wealth of the defendant "increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special

harm to others, the Court here declined to declare such evidence inadmissible, but nevertheless imposed strict limitations on its relevance that will likely prove difficult for juries and courts to apply.

With respect to the third prong of the *BMW* excessiveness test, the Court pointedly observed that it "need not dwell long on this guidepost" because the relevant Utah statute would only have sanctioned State Farm with a $10,000 fine, "an amount dwarfed by the $145 million punitive damages award."[113] The Court's brief treatment of this third guidepost, however, included a warning to courts regarding comparisons to criminal sanctions, which its prior jurisprudence had explicitly authorized. The Court acknowledged that its opinions in both *BMW* and *Haslip* had permitted courts to consider relevant criminal penalties to demonstrate "the seriousness with which a State views the wrongful actions."[114] But the Court cautioned that criminal sanctions have little utility in determining the propriety of a particular amount of punitive damages: "Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award."[115]

Justice Ginsburg dissented in *State Farm*, as she did in *BMW,* on the basis that the Court's invalidation of the Utah Supreme Court's award represents an impermissible intrusion into the states' domain.[116] Justice Ginsburg specifically took issue with the Court's ratio instructions, which she regarded as imposing "numerical controls" that violate fundamental principles of federalism.[117] Indeed, Justice Ginsburg characterized the Court's decision in *State Farm* as representing a dangerously "swift conversion" of the flexible *BMW* guideposts to "instructions that begin to resemble marching orders."[118]

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concern when the defendant is a nonresident." *Id.* at 464. And Justice O'Connor partly based her dissenting opinion in *TXO* on her concerns about the possible prejudice this factor played in the jury's high award. *Id.* at 493 (O'Connor, J., dissenting).

113. *State Farm*, 123 S. Ct. at 1526. The Court also rejected Utah's reliance on "the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment" because such sanctions were impermissibly based on irrelevant out-of-state conduct. *Id.*

114. *Id.* at 1526 (citing *BMW*, 517 U.S. at 575; *Haslip*, 499 U.S. at 23).

115. *State Farm*, 123 S. Ct. at 1526 ("Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof.").

116. *Id.* at 1527 (Ginsburg, J., dissenting); *see also supra* note 101 and accompanying text.

117. *Id.* at 1531.

118. *Id.* Justices Scalia and Thomas also dissented from the Court's opinion in *State Farm*, in brief opinions reiterating their view that "excessive" punitive damages awards are not precluded by the Due Process Clause. *Id.* at 1526 (Thomas, J., dissenting); *id.* (Scalia, J., dissenting). Justice Scalia also reiterated his belief that the *BMW* guidepost analysis "is insusceptible of principled application." *Id.*

III. POST-*STATE FARM*: CONTINUING AMBIGUITIES AND UNRESOLVED QUESTIONS

Justice Kennedy's opinion in *State Farm* suggests a puzzlement bordering on incredulity that the Utah Supreme Court could have been so misguided in its application of the *BMW* guideposts,[119] a tone also present in Justice Stevens' discussion of the *BMW* guideposts in *Cooper*.[120] One suspects that the present majority of the Court in support of a substantive due process right to challenge the imposition of punitive damages awards has been disappointed by the failure of some lower courts to comprehend or adhere to its guidance, prompting a decision in *State Farm* that stakes out bolder and more detailed boundaries on permissible levels of punitive damages.

Yet it is clear from the questions left unanswered (and, in some cases, created) by *State Farm* that the Court inevitably will be forced to return to its task of elucidating those boundaries. This Part will briefly examine some of those open issues and the immediate aftermath of *State Farm* on lower courts.

A. Interpreting State Farm*'s Reprehensibility Instructions*

The Court in *BMW* and *State Farm* considered reprehensibility a vital factor in the due process excessiveness analysis, both in justifying any punitive damages at all and in calculating the acceptable size of an award, if one is imposed.[121] *BMW* suggested that reprehensibility, which the Court defined as referring to the "enormity" of the defendant's offense, may be the most important of the three guideposts.[122] The Court expanded on this theme in *State Farm* by enumerating five specific factors that courts may utilize in evaluating the degree of culpability a defendant's conduct may demonstrate.[123] While the Court's list may not exhaust the possibilities of flagrant conduct warranting punitive damages,[124] it is certainly unlikely that the absence

119. *See id.* at 1521 (referring to the proper application of *BMW*'s guideposts on the facts of *State Farm* as representing "neither [a] close nor difficult" case).

120. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 441 (2001) (referring to a "series of questionable conclusions" in the district court's application of *BMW* that the Ninth Circuit would do well to reconsider during its *de novo* review on remand).

121. *But see* Crump, *supra* note 60, at 233 (arguing that an approach "concentrating principally on blameworthiness confounds the accuracy of the process because of the greater difficulty of fixing and evaluating this philosophical abstraction").

122. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996).

123. State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1521 (2003).

124. *See, e.g.*, Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1043 (9th Cir. 2003)

of all of the enumerated factors would yield a defensible decision to award punitive damages. Beyond its suggestion, however, that a defendant's conduct may not be sufficiently reprehensible to warrant any punitive liability if only one of these factors is present,[125] *State Farm* offers little guidance as to the relative weight of these reprehensibility factors or how they may interact with each other to enhance the reasonableness of a particular punitive damages award.

Moreover, the Court's handling of the reprehensibility analysis in both *BMW* and *State Farm* suggests the possibility that the Court did not think the facts of either case warranted any award of punitive damages at all, but was unwilling to so rule, preferring to focus primary attention on the unjustifiable sizes of the awards. The Court's reprehensibility discussion appears more suited to a threshold determination of *whether* to impose punitive damages rather than providing any insight into how the relative degree of reprehensibility can inform the size of a particular award. Again, while the facts of *State Farm* struck the Court as reflecting conduct more reprehensible than that in *BMW*, neither case involved the kind of reprehensible conduct that might justify a high award even exceeding its proposed ratio scale.

Thus, it is hardly surprising that lower courts have continued to flounder somewhat in their attempts to apply the Court's imprecise instructions about the role reprehensibility plays in justifying and determining the proper size of punitive damage awards.[126] An open question of particular importance is the role of a reprehensibility factor so far absent from the Court's cases: the defendant's intentional disregard for the health and safety of others. Of the courts considering *State Farm*'s impact in such cases, some have taken the position that this factor justifies an award higher than 4:1, particularly if coupled with other factors, such as intentional malice, trickery or deceit.[127] This

(explaining that the "fraudulent business practices" in *BMW* and *State Farm* are significantly "different in kind from the reprehensibility of intentional discrimination on the basis of race or ethnicity").

125. *See supra* notes 82-84 and accompanying text.

126. *See, e.g.*, Asa-Brandt, Inc. v. ADM Inv. Serv., Inc., 344 F.3d 738, 747 (8th Cir. 2003) (explaining that "according to the hierarchy of reprehensiveness, [defendant's breach of fiduciary duty] was clearly more reprehensibile than the conduct in [*BMW*], and is at a similar level to the conduct in *State Farm*"); DiSorbo v. Hoy, 343 F.3d 172, 187 (2d Cir. 2003) (finding a punitive damages award excessive despite presence of each of *BMW*'s "aggravating factors"); Eden Elec., Ltd. v. Amana Co., 258 F. Supp. 2d 958, 974 (N.D. Iowa 2003) (reading *State Farm* to preclude a punitive damages award more than ten times compensatory damages "even where all the reprehensibile considerations are present").

127. *See* Bocci v. Key Pharm., Inc., 76 P.3d 669, 675 (Or. Ct. App. 2003). The Oregon Court of Appeals, however, declined to apply a ratio in excess of 4:1 in a case involving serious personal

confusion among lower courts is bound to persist until the Court articulates more clearly the relative significance of the reprehensibility factor in determining the amount of a punitive damages award, most likely in a case reflecting such highly reprehensible conduct that there is no question about punitive liability. Ultimately, the Court may have to articulate claim-specific categories of reprehensibility to help lower courts assess the relative reprehensibility in cases involving employment discrimination, product liability, environmental harms, or fraud cases. Further refinement of the reprehensibility factor may prove particularly critical if *State Farm*'s ratio instructions result in punitive damage awards that under-deter defendant misconduct by adhering too strictly to the Court's 4:1 benchmark or applying its 1:1 ratio too aggressively.

B. Implementing State Farm*'s Ratio Guidelines*

One of the loudest messages to emerge from *State Farm* is the Court's instruction regarding the constitutionally required relationship between the amount of a punitive damages award and the degree of harm caused by the defendant's conduct.[128] While the Court in *State Farm* purported only to be clarifying limitations its prior cases had already established, its proportionality analysis for the first time established a 4:1 benchmark ratio between punitive and compensatory damages, as well as factors that will justify upward or downward departures from that ratio. State and federal courts alike have responded to *State Farm's* ratio instructions, striking down[129] a host of punitive damages awards on

injury from a defective fishbowl because of the absence of other aggravating factors and "the Supreme Court's focus on ratios in the usual case." Waddill v. Anchor Hocking, Inc., 78 P.3d 570, 576 (Or. Ct. App. 2003) (remitting a punitive damages award from $1 million to $403,000 post-*State Farm*, reducing the ratio from 10:1 to 4:1).

128. *See supra* notes 97-105 and accompanying text. Applying *State Farm*'s ratio analysis, one district court explained that "whatever vagueness and tensions *State Farm* seems to reflect, to this [c]ourt the ruling's higher frequencies are quite audible." TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413, 450 (S.D.N.Y. 2003) (remitting multi-million punitive damages awards it found constitutionally excessive in light of high punitive to compensatory damages ratio).

129. Courts have grappled with the proper disposition of an excessive punitive damages award, variously granting a remittitur (permitting the plaintiff to accept the court's assessment of an acceptable punitive damages award or face a new trial), reducing such awards to the "constitutional maximum" or, in the case of appellate courts, remanding the award to the trial court for a new trial. *Compare* Bocci v. Key Pharm., Inc., 76 P.3d 669 (Or. Ct. App. 2003) (ordering remittitur of excessive punitive damages award) *and* BMW of N. Am. v. Gore, 646 So.2d 619, 629 (Ala. 1994) (same), *with* Johansen v. Combustion Eng., Inc., 170 F.3d 1320, 1331 (11th Cir. 1999) ("The court orders a remittitur when it believes the jury's award is *unreasonable* on the facts. A constitutional reduction, on the other hand, is a determination that the law does not permit the award [and the court therefore] has a mandatory duty to correct an unconstitutionally excessive verdict . . . .") *and* Roth v. Farner-Bocken Co., 667 N.W.2d 651, 671 (S.D. 2003) (remanding for new trial).

the basis that the ratios at issue reflected an unconstitutionally disproportionate amount of punitive damages.[130]

But to the extent Justice Ginsburg predicted that *State Farm*'s ratio analysis would amount to "marching orders" to state courts,[131] those orders certainly have not been uniformly received by lower courts. *State Farm*'s warnings about excessive punitive damages ratios may well have been loud, but they are far from clear.[132] This lack of clarity, to some degree, is simply a function of the Court's appropriate refusal to announce a *per se* ratio that would calculate the constitutionally precise amount of punitive damages in every case.[133] No such bright-line test could possibly be imposed, of course, because each case requires individualized assessment of both the wrongful conduct and the harm it caused.[134] As Judge Posner has explained: "The judicial function is to police a range, not a point."[135] But courts continue to struggle even with the assessment of a proper constitutional range of punitive damages in the wake of *State Farm.*

1. Identifying the *State Farm* "Benchmark"

State Farm's ratio instructions appear to reflect a set of punitive damages guidelines reminiscent of sentencing guidelines in criminal cases. The Court reiterated its approval of a 4:1 ratio between punitive

130. *See, e.g., TVT Records*, 279 F. Supp. 2d at 413; Waits v. City of Chicago, No. 01 C 4010, 2003 WL 21310277 (N.D. Ill. June 6, 2003); McClain v. Metabolife Int'l, Inc., 259 F. Supp. 2d 1225, 1237 (N.D. Ala. 2003); Eden Elec., Ltd. v. Amana Co., 258 F. Supp. 2d 958, 974-75 (N.D. Iowa 2003); *Roth*, 667 N.W.2d at 671; *Bocci*, 76 P.3d 669; Henley v. Philip Morris, Inc., 5 Cal. Rptr. 3d 42 (Cal. Ct. App. 2003); Diamond Woodworks, Inc. v. Argonaut Ins. Co., 135 Cal. Rptr. 2d 736 (Cal. Ct. App. 2003).

131. *See supra* note 118 and accompanying text.

132. *See, e.g.*, Parrish v. Sollecito, 280 F. Supp. 2d 145, 162 (S.D.N.Y. 2003) (describing *State Farm* as "signal[ing] unequivocally that the Due Process Clause serves to constrain jury and court discretion," but providing far "less clear" guidance to courts regarding "the assessment of how much is too much").

133. State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1524 (2003) (quoting *BMW*, 517 U.S. at 582) ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award."); *see also* Williams v. Kaufman County, 343 F.3d 689, 711 n.77 (5th Cir. 2003) (noting the "necessarily unscientific balancing of the factors laid out in [*BMW*]" as a significant factor in finding the amount of punitive damages awarded to be reasonable).

134. *State Farm*, 123 S. Ct. at 1524 ("The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff."); *cf.* Crump, *supra* note 60, at 212 (suggesting that ratio analysis can be defended on the ground that "actual damages provide a measure – albeit an exceedingly rough measure – of the actor's moral blameworthiness").

135. Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 678 (7th Cir. 2003).

and compensatory damages,[136] and then acknowledged specific factors that would warrant upward or lower departures from that benchmark.[137] The Court suggested that ratios exceeding 9:1 will rarely comport with due process,[138] while a ratio as low as 1:1 may "perhaps" be the "outermost limit" in cases involving "substantial" compensatory damages.[139] Although *State Farm*'s sliding scale ratio analysis will likely constrain some of the most disproportionate punitive damages awards, they also introduce several new interpretive challenges for lower courts to address.

The Court's cautionary language about ratios exceeding 9:1 seems to have resonated most pervasively among lower courts.[140] Several courts have recognized that double-digit ratios raise a "red flag,"[141] while others have called such awards "suspect" under *State Farm*.[142] Indeed, the vast majority of decisions reversing awards of punitive damages have involved double or triple digit ratios of punitive to compensatory damages.[143]

Some courts seem to have interpreted *State Farm*'s statements

136. *See State Farm*, 123 S. Ct. at 1524 (referencing double, treble and quadruple ratios, and its prior endorsements of a 4:1 ratio); *see also BMW*, 517 U.S. at 581; *Haslip*, 499 U.S. at 23-24.

137. *See supra* notes 102-03 and accompanying text.

138. *State Farm*, 123 S. Ct. at 1524. The Court identified three justifications for "ratios greater than those we have previously upheld." *Id.* This reference to the Court's prior ratios is not particularly illuminating, however, because it held that a 4:1 ratio in *Haslip* was "close to the line of constitutional impropriety," 499 U.S. at 23-24, while in *TXO* it approved a ratio of over 500:1 (or 10:1 pursuant to the Court's "potential harm" analysis).

139. *State Farm*, 123 S. Ct. at 1524.

140. *See, e.g.*, Eden Elec., Ltd. v. Amana Co., 258 F. Supp. 2d 958, 973 (N.D. Iowa 2003) ("accept[ing]" that post-*BMW* and *State Farm*, a punitive damages award "probably cannot exceed a 10:1 ratio"); Henley v. Philip Morris, Inc., 5 Cal. Rptr. 3d 42, 85 (Cal. Ct. App. 2003) ("As we read [*State Farm*], a double-digit ratio will be justified rarely, and perhaps never in a case where the plaintiff has recovered an ample award of compensatory damages.").

141. McClain v. Metabolife Int'l, Inc., 259 F. Supp. 2d 1225, 1231 (N.D. Ala. 2003); *see also* Jones v. Sheahan, No. 99 C 3669, 01 C 1844, 2003 WL 22508171, at *16 (N.D. Ill. Nov. 4, 2003) (double-digit ratios "raise[] a cautionary flag").

142. Werremeyer v. K.C. Auto Salvage Co., Inc., No. WD 61179, 2003 WL 21487311 (Mo. Ct. App. Jun. 30, 2003).

143. *See, e.g.*, Waddill v. Anchor Hocking, Inc., 78 P.3d 570, 576 (Or. Ct. App. 2003) (remitting 10:1 ratio to 4:1); Daka, Inc. v. McCrae, 839 A.2d 682 (D.C. 2003) (remitting 26:1 ratio to 5:1); Romo v. Ford Motor Co., 122 Cal. Rptr. 2d 139 (Cal. Ct. App. 2002) (remitting 58:1 ratio to 5:1); *Waits*, 2003 WL 21310277 (remitting 100:1 and 33:1 ratios to an average ratio of 1.5:1); *McClain*, 259 F. Supp. 2d at 1237 (reducing 20:1 ratio to 9:1 ratio); *Roth*, 667 N.W.2d at 671 (reversing punitive damages award reflecting a 20:1 ratio); *Henley*, 5 Cal. Rptr. 3d at 42 (remitting 17:1 ratio to 6:1); *Diamond Woodworks*, 135 Cal. Rptr. 2d at 761-62 (remitting 13:1 ratio to 3.8:1); Bocci v. Key Pharm., Inc., 76 P.3d 669 (Or. Ct. App. 2003) (remitting 45:1 ratio to 7:1). *But see, e.g.*, TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413 (S.D.N.Y. 2003) (remitting as excessive punitive damages awards reflecting a 6:1 ratio to achieve a 1:1 ratio); *Eden Elec*, 258 F. Supp. 2d at 974-75 (reducing 8:1 ratio to 4:1).

evincing particular concern about ratios higher than single digits as tantamount to the Court's approval of any award 9:1 or less.[144] The Ninth Circuit, for example, in *Zhang v. American Gem Seafoods, Inc.*, defended the constitutionality of a 7:1 ratio by declaring that "[w]e are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case."[145] *State Farm* clearly does not support such an interpretation, as evidenced by its detailed articulation of the factors warranting ratios higher than double digits and those that suggest a 1:1 ratio ceiling.[146] Due process cannot be satisfied by resort to such a sledgehammer approach, amounting to the virtual immunity from constitutional scrutiny of any award under a 10:1 ratio. While confusing and imprecise, *State Farm*'s proportionality instructions require a far more nuanced and fact-specific inquiry into the constitutionality of any award.

2. Factors Justifying Upward Departures from the *State Farm* Benchmark

While only a few courts have actually imposed punitive damages reflecting a 4:1 ratio post-*State Farm*,[147] most have acknowledged the need to identify circumstances that justify an upward departure from the 4:1 ratio.[148] One lower court summed up *State Farm* as holding that "in the usual case, i.e., a case in which the compensatory damages are neither exceptionally high nor low, and in which the defendant's conduct is neither exceptionally extreme nor trivial, the outer constitutional limit on the amount of punitive damages is approximately four times the

144. *McClain*, 259 F. Supp. 2d at 1231 (finding that 6:1 ratio "easily meets [*State Farm*'s] new ratio test," and may "presumptively pass[] muster under the Due Process Clause"); Haggar Clothing Co. v. Hernandez, No. 13-01-009-CV, 2003 WL 21982181 (Tex. App. Aug. 21, 2003) (approving 6.6:1 ratio in retaliatory discharge case as "within constitutional limits" apparently because the ratio did not exceed double-digits); Trinity Evangelical Lutheran Church v. Tower Ins. Co., 661 N.W.2d 789, 803 (Wis. 2003) (approving punitive damages ratio of 7:1 without any explanation of why the case warranted a ratio higher than 4:1); *cf.* Smith v. Fairfax Realty, Inc., 82 P.3d 1064, 1075 (Utah 2003) (referring to a 5:1 ratio as "well within the single digits discussed by the Supreme Court in *State Farm*").

145. Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1044 (9th Cir. 2003).

146. *See, e.g.*, *Bocci*, 76 P.3d 669 (rejecting plaintiff's argument that under *State Farm* any award that has only a single-digit ratio will satisfy due process).

147. Jones v. Sheahan, Nos. 99 C 3669, 01 C 1844, 2003 WL 22508171 (N.D. Ill. Nov. 4, 2003) (finding case warranted punitive damages ratio neither higher nor lower than 4:1); Parrish v. Sollecito, 280 F. Supp. 2d 145, 164 (S.D.N.Y. 2003) (referencing and enforcing the 4:1 "baseline" established by *State Farm*); *Eden*, 258 F. Supp. 2d at 974-75; *Diamond*, 135 Cal. Rptr. 2d at 762.

148. *See, e.g.*, *Bocci*, 76 P.3d at 669.

amount of compensatory damages."[149] Determining which cases are "usual" and which involve "exceptional" circumstances, of course, has not been an easy task.

Courts have cited each of the factors identified in *State Farm*[150] in justifying upward departures, authorizing ratios in excess of 4:1 (in some cases as high as 100:1),[151] where "the injury is hard to detect,"[152] or where "the monetary value of noneconomic harm might have been difficult to determine,"[153] or where a "particularly egregious act has resulted in only a small amount of economic[154] damages."[155]

With respect to the last factor, courts interpreting the requirement of a sufficiently "egregious act" have concluded that upward departures were warranted by conduct that reflected a disregard for the health[156] or

149. *Diamond*, 135 Cal. Rptr. 2d at 762; *see also* Waddill v. Anchor Hocking, 78 P.3d 570, 576 (Or. Ct. App. 2003) (referring to the Court's 4:1 ratio for the "usual" case).

150. *State Farm*, 123 S. Ct. at 1524 (quoting *BMW*, 517 U.S. at 582).

151. *Id. See, e.g.*, Lincoln v. Case, 340 F.3d 283 (5th Cir. 2003) (approving 100:1 ratio in case involving housing discrimination where compensatory damages were only $500).

152. *State Farm*, 123 S. Ct. at 1524. *See, e.g.*, Werremeyer v. K.C. Auto Salvage Co., Nos. WD 61179, WD 61210, WD 61245, 2003 WL 21487311, at *10 (Mo. Ct. App. Jun. 30, 2003) (justifying 13:1 ratio with reference to fact that "[t]he laws of chance would crack under the weight of a claim that the average consumer could have detected the kind of fraud perpetrated in this case"); *see also* Sunstein et al., *supra* note 2, at 2082 (justifying punitive damages where defendant "has been able to conceal his identity").

153. *See, e.g.*, Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672 (7th Cir. 2003); Jones v. Rent-A-Center, Inc., 281 F. Supp. 2d 1277 (D. Kan. 2003); S. Union Co. v. Southwest Gas Corp., 281 F. Supp. 2d 1090, 1105 (D. Ariz. 2003) (explaining that defendant's "unquantifiable breach of the public trust" warranted $60 million punitive damages award); Phelps v. Louisville Water Co., 103 S.W.3d 46 (Ky. 2003).

154. The Court's imprecise reference to "economic" rather than "compensatory" damages, *State Farm*, 123 S. Ct. at 1521-25, has not been interpreted as a limiting factor, as courts have invoked this upward departure rationale in a number of cases involving damages based on physical or personal (as opposed to "purely economic") harm. *See, e.g.*, *Mathias*, 347 F.3d at 672; *Phelps*, 103 S.W.3d at 46; Bocci v. Key Pharm., Inc., 76 P.3d 669 (Or. Ct. App. 2003); Henley v. Philip Morris Inc., 5 Cal. Rptr. 3d 42 (Cal. Ct. App. 2003); *cf.* Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1044 (9th Cir. 2003) (explaining that intentional discrimination on the basis of race or ethnicity reflects a very "different kind of harm, a serious affront to personal liberty").

155. *See, e.g.*, *Mathias*, 347 F.3d at 672; Williams v. Kaufman County, 343 F.3d 689, 711 n.75 (5th Cir. 2003) (upholding 150:1 ratio in civil rights case, finding *State Farm*'s ratio guidance to be "inapposite" in a case involving $100 in nominal damages); Lincoln v. Case, 340 F.3d 283 (5th Cir. 2003); *Jones*, 2003 WL 22132723; Parrish v. Sollecito, 280 F. Supp. 2d 145, 164 (S.D.N.Y. 2003); *Phelps*, 103 S.W.3d at 46; Bocci v. Key Pharm., Inc., 76 P.3d 669 (Or. Ct. App. 2003); Henley v. Philip Morris, Inc., 5 Cal. Rptr. 3d 42 (Cal. Ct. App. 2003); *see also* Sunstein et al., *supra* note 2, at 2083.

156. *See, e.g.*, *Mathias*, 347 F.3d at 672 (approving a 37:1 ratio because defendant exposed plaintiffs to a known bedbug infestation); *Phelps*, 103 S.W.3d at 46 (approving 11:1 ratio in case where teenagers were killed by defendant's negligence); *Bocci*, 76 P.3d at 669 (reducing punitive damages award ratio from 45:1 to 7:1 ratio due to defendant's fraudulent misrepresentations regarding the safety of a prescription drug); *Henley*, 5 Cal. Rptr. 3d. at 42 (reducing a punitive

dignitary interests[157] of others, or misconduct by a state official.[158] Most courts have interpreted "small," however, to be a relative rather than an absolute term. Compensatory damages ranging from $150,000 to $500,000 have been deemed sufficiently "small" to warrant the imposition of a ratio in excess of 4:1 (although less than 9:1).[159] Indeed, the district court in the *Exxon Valdez* case recently characterized compensatory damages of over $500,000,000 as small enough to warrant a high ratio, remitting its previously reversed punitive damages award of $5 billion to $4.5 billion.[160] Given this range of compensatory damages awards that few would consider "small" as an objective matter, further guidance, obviously short of an absolute number, is needed to help lower courts more uniformly and fairly determine when a higher ratio should be imposed based on this rationale.

"Potential" harm represents another factor acknowledged by the Court as justifying an otherwise high ratio of punitive to compensatory damages.[161] In *State Farm*, the Court reiterated its prior holdings that a punitive damages award (the denominator[162] in the ratio equation) should be compared to a nominator reflecting not only the harm reflected in a plaintiff's actual damages, but also the amount of "potential" harm that might have been caused by a defendant's conduct.[163] Determining both the likelihood[164] and the amount of such

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damages award that reflected a 17:1 ratio to 6:1, justifying its upward departure from 4:1 because of defendant's "extraordinarily reprehensible" conduct in tortiously manufacturing and marketing cigarettes).

157. *See, e.g.*, Lincoln v. Case, 340 F.3d 283 (5th Cir. 2003) (housing discrimination); *Jones*, 281 F. Supp. 2d at 1277 (sexual harassment claim).

158. *See, e.g.*, S. Union Co. v. Southwest Gas Corp., 281 F. Supp. 2d 1090 (D. Ariz. 2003) (illegal interference and cover-up by state corporation commissioner). *But see* Jones v. Sheahan, Nos. 99 C 3669, 01 C 1844, 2003 WL 22508171, at *16 (N.D. Ill. Nov. 4, 2003) (rejecting plaintiff's argument that sheriff's failure to adequately protect inmates from harm was sufficiently reprehensible to warrant the double-digit punitive damages ratios of 20:1 and 10:1).

159. *See, e.g.*, *Phelps*, 103 S.W.3d at 46 ($150,000 in compensatory damages justified 11:1 ratio resulting in a $2 million punitive damages award); *Bocci*, 76 P.3d at 669 ($500,000 in compensatory damages justified 6:1 ratio because of outrageousness of defendant's conduct). *But see Mathias*, 347 F.3d at 672 ($5,000 in compensatory damages).

160. *In re* Exxon Valdez, 296 F. Supp. 2d 1071 (D. Alaska 2004). The court explained that while the aggregate compensatory damages were high, the per plaintiff compensatory damages amounted only to $15,000.

161. *State Farm*, 123 S. Ct. at 1524-25; *see also supra* note 31 and accompanying text.

162. *In re* Exxon Valdez, 270 F.3d 1215, 1243 (9th Cir. 2001).

163. *State Farm*, 123 S. Ct. at 1524-25; *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993) (first acknowledging the concept of relevant "potential" harm).

164. *See, e.g.*, Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 442 (2001) (distinguishing between harm "likely" to occur and harm that might occur); Roth v. Farner-Bocken Co., 667 N.W.2d 651, 669 (S.D. 2003) (finding "unlikelihood of serious potential harm").

potential harm, however, are both "ordinarily arguable" and "somewhat indeterminate" endeavors,[165] which the Court failed squarely to address in either *State Farm* or *BMW*.[166] Its discussion of this factor in *Cooper*, however, puts lower courts on notice that a remote likelihood of such potential harm will not suffice to justify a high ratio.[167]

Despite this lack of guidance, lower courts have read the Court's *State Farm* opinion as adhering to its previous dictates regarding the relevance of potential harm, and have permitted punitive damages awards in amounts they would have deemed excessive absent this factor.[168] In order to take potential harm into account in justifying a larger than ordinary award, at the very least, courts should require a showing that the fact-finder relied on such theoretical impact in setting the award; a potential harm analysis should not be introduced *post hoc* to justify an otherwise excessive award.[169]

3. Factors Justifying Downward Departures from the *State Farm* Benchmark

While lower courts have readily applied *State Farm*'s grounds for permitting upward departures from the 4:1 ratio benchmark, only a few have even recognized *State Farm*'s guidance regarding downward departures.[170] The Court in *State Farm* suggested that the amount of punitive damages might be limited to reflect a ratio "perhaps only equal

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165. *Exxon Valdez*, 270 F.3d at 1243.

166. *See, e.g.*, S. Union Co. v. Southwest Gas Corp., 281 F. Supp. 2d 1090, 1104 (D. Ariz. 2003) (noting that while "[t]he use of potential harm in assessing the ratio continues throughout the Court's most recent decisions," neither *BMW* nor *State Farm* "involved an issue of potential harm").

167. *Cooper*, 532 U.S. 424 .

168. *See, e.g.*, Asa-Brandt, Inc. v. ADM Inv. Serv., Inc., 344 F.3d 738, 747 (8th Cir. 2003) (upholding $1.25 million punitive damages award as constitutionally reasonable because plaintiffs would have suffered multi-million dollars in damages "if [the defendant's] scheme had worked"); *S. Union Co.*, 281 F. Supp. 2d at 1104 (even though plaintiff did not recover compensatory damages for "speculative lost profits, the potential for such damage could be factored into the jury's decision to punish [the defendant]"); Trinity Evangelical Lutheran Church v. Tower Ins. Co., 661 N.W.2d 789, 803 (Wis. 2003) (determining that the ratio of punitive damages to harm reflected an acceptable 7:1 ratio when potential harm to plaintiff was considered); Simon v. San Paolo U.S. Holding Co., 7 Cal. Rptr. 3d 367, 391 (Cal. Ct. App. 2003).

169. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 483-87 (1993) (O'Connor, J., dissenting).

170. *See, e.g.*, TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413 (S.D.N.Y. 2003); Motorola Credit Corp. v. Uzan, 274 F. Supp. 2d 481 (S.D.N.Y. 2003); Roth v. Farner-Bocken Co., 667 N.W.2d 651, 671 (S.D. 2003). A California appeals court invoked *State Farm*'s "substantial" compensatory damages language, but interpreted it as instructing that "where a plaintiff has been fully compensated with a substantial compensatory damages award, any ratio over 4 to 1 is 'close to the line.'" Henley v. Philip Morris, Inc., 5 Cal. Rptr. 3d. 42, 85 (Cal. Ct. App. 2003).

to compensatory damages" when a plaintiff has been awarded "substantial" compensatory damages.[171] Indeed, in *State Farm* itself, the Court urged the Utah court on remand to consider a 1:1 ratio appropriate in light of the Campbells' "substantial" $1 million in compensatory damages.[172]

State Farm's downward departure reasoning reflects the Court's imposition of a new due process limitation on the imposition of punitive damages awards,[173] and its significance has yet to be fully explored. Again, as in determining the concept of "small" damages warranting upward departures, the Court in *State Farm* provided scant guidance regarding the relative or absolute amount of damages courts should regard as "substantial" enough to justify only a 1:1 ratio between punitive and compensatory damages. Some lower courts that have expressly addressed this factor have found that compensatory damages of $25,000[174] and $125,000[175] were "substantial" enough to warrant a downward departure to a 1:1 ratio.[176] But most courts have failed entirely to acknowledge this possible limitation on punitive damages awards, awarding compensatory damages ranging from $360,000[177] to $15 million[178] without any consideration of whether such compensatory awards were sufficiently "substantial" to justify a smaller amount of

171. *State Farm*, 123 S. Ct. at 1524; *cf.* Crump, *supra* note 60, at 224 (pointing out that a rigid ratio analysis will overcompensate "where the conduct is discoverable and results in high actual damage awards").

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

173. The Ninth Circuit recognized this basis for limiting a punitive damages award in a case decided pre-*State Farm*. *In re* Exxon Valdez, 270 F.3d 1215, 1244 (9th Cir. 2001). In *Exxon Valdez*, the Ninth Circuit remanded a $5 billion punitive damages award as unconstitutionally excessive, in part, because defendant's $3.4 billion "costs and settlements in this case are so large, a lesser amount is necessary to deter future acts." *Id.* Interestingly, the Ninth Circuit included consideration of Exxon's total "expenses," which included, in addition to the compensatory damages at issue, Exxon's clean up costs, other settlements, the fine and restitution imposed, and its casualty losses. *Id.*

174. Roth v. Farner-Bocken Co., 667 N.W.2d 651, 671 (S.D. 2003). *But see* Jones v. Sheahan, Nos. 99 C 3669, 01 C 1844, 2003 WL 22508171, at *16 (N.D. Ill. Nov. 4, 2003) (declaring that the compensatory damages award of $25,000 was not "substantial" enough to warrant only a 1:1 ratio).

175. *See* TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413 (S.D.N.Y. 2003).

176. *See also* Daka, Inc. v. McCrae, No. 00-CV-1270, 01-CV-227, 2003 WL 23018830 (D.C. Dec. 24, 2003) ($187,000); Motorola Credit Corp. v. Uzan, 274 F. Supp. 2d 481 (S.D.N.Y. 2003) ($2 million).

177. *See* Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1044 (9th Cir. 2003) (approving 7:1 ratio).

178. *See* Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp., 345 F.3d 1366, 1372 (Fed. Cir. 2003) (explaining that its "$50 million punitive award is barely above three times the compensatory award of $15 million in this case, . . . not even reaching the 4:1 ratio mentioned by the Court as a threshold where the punitive award may become suspect").

punitive damages.[179] At the very least, *State Farm* demands that courts consider the possibility of a downward departure when a case involves "substantial" compensatory damages, and the inconsistency of lower courts' interpretations of what constitutes "substantial" suggests the need for additional guidance from the Court.

C. Role of Defendant's Relative Wealth

In conventional tort theory, besides serving a retributive purpose, the imposition of a punitive damages award may also serve the public policy function of deterring the specific defendant from repeating the actionable wrong, and providing a disincentive to others to commit similar wrongs. This deterrent objective ordinarily allows a court to take into account the relative wealth of the defendant in fashioning a punitive damages award to assure the desired preventive effect.[180]

Over Justice O'Connor's impassioned dissent,[181] the Supreme Court approved in *TXO* a state court's imposition of an enormous punitive damages award where the defendant's wealth was one of the primary factors considered by the jury.[182] In striking down Utah's imposition of punitive damages in *State Farm*, however, the Court expressly rejected Utah's attempt to justify the size of its award on the basis of the substantial wealth of the defendant, saying such a rationale

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179. *See, e.g.*, DiSorbo v. Hoy, 343 F.3d 172, 187 (2d Cir. 2003) (remitting to $75,000 a punitive damages award of $1.275 million in a police brutality case without consideration of whether plaintiff's $250,000 compensatory damages award was sufficiently "substantial" to otherwise justify downward departure); S. Union Co. v. Southwest Gas Corp., 281 F. Supp. 2d 1090 (D. Ariz. 2003) (approving a 153:1 ratio despite compensatory damages of $390,000); Eden Elec., Ltd. v. Amana Co., 258 F. Supp. 2d 958, 974-75 (N.D. Iowa 2003) (reducing punitive damages award from 8:1 to 4:1 ratio in case involving $2 million in compensatory damages); Advocat, Inc. v. Sauer, 111 S.W.3d 346 (Ark. 2003) (approving $63 million punitive damages award where plaintiff was awarded $5 million in compensatory damages, explaining that the resulting 14:1 ratio – incorrectly described by the court as 4:1 – is not "breathtaking"); Romo v. Ford Motor Co., 122 Cal. Rptr. 2d 139 (Cal. Ct. App. 2003) ($5,000,000 compensatory damages award).

180. *See, e.g.*, Smith v. Fairfax Realty, Inc., 82 P.3d 1064, 1072 (Utah 2003) (ruling that a defendant's wealth can be "either an aggravating or a mitigating factor in determining the size of a punitive damage award, since punitive damages should be tailored to what is necessary to deter the particular defendant, as well as others similarly situated, from repeating the prohibited conduct"). *But see* Sunstein et al., *supra* note 2, at 2085 ("On a conventional view about optimal deterrence, however, wealth and income are irrelevant": "[A] punitive damages award should encourage a defendant to engage in optimal behavior, whatever its wealth.").

181. *See TXO*, 509 U.S. at 472-73 (O'Connor, J., dissenting); *see also supra* notes 27-31 and accompanying text.

182. *See id.* at 461; *see also Eden*, 258 F. Supp. 2d at 975 (noting that in pre-*BMW* cases, the Court permitted juries to "consider the defendant's wealth in determining punitive damages," although "the wealth of the wrongdoer must not be unduly emphasized").

could not validate an "otherwise unconstitutional" award.[183]

This apparent inconsistency with the *TXO* decision may be confusing to lower courts, but it highlights the Court's seemingly narrow focus on the punishment feature of punitive damages,[184] almost to the exclusion of the well-settled deterrence function of such awards.[185] Logically, if two defendants commit the same reprehensible act, causing the same actual harm, and subject to the same criminal or civil fine, a higher punitive damages award would be justified to deter repeated wrongdoing by the wealthier of the two defendants.[186] An amount that might be sufficient to deter a less wealthy defendant could very well be written off as simply a cost of doing business by a much wealthier corporation, undermining the achievement of the deterrence goals of punitive damages. And it is certainly true that for the less wealthy of the two, a punitive damages award calculated irrespective of wealth risks overdeterrence or potentially bankrupting the defendant by an award that might only sting the wealthier but devastates the less wealthy defendant. It is uncertain whether or when the Court will provide more explicit guidance on the propriety of taking the defendant's wealth into account for the purpose of achieving effective deterrence,[187] but *State Farm* is clearly not being read by lower courts as foreclosing consideration of wealth as a factor in deciding on the appropriate size of a punitive damages award believed to be otherwise within constitutional parameters.[188]

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183. State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003).

184. The Ninth Circuit, considering the case remanded to it by the Supreme Court in *Cooper*, noted that the "potential deterrent effect of a punitive damages award is not mentioned expressly in the [*BMW*] criteria, although it has continued to be considered in post-[*BMW*] cases. Here, we acknowledge that the evidence would support a finding that a substantial punitive award might be necessary to have a sufficient economic effect on Cooper to create deterrence." Leatherman Tool Group v. Cooper Indus., Inc., 285 F.3d 1146, 1152 (9th Cir. 2002); *see also Eden*, 258 F. Supp. 2d at 975 (concluding that due process required it to "throw into the balance and otherwise take into account [the defendant's] net worth" when evaluating the amount of a punitive damages award).

185. *See, e.g.*, Sunstein et al., *supra* note 2, at 2082 (discussing "traditional view" of punitive damages as serving deterrence goals).

186. *See, e.g.*, *Eden*, 258 F. Supp. 2d at 974 (explaining that "an award that would effectively punish and deter General Motors or Bill Gates would have to be many, many times greater than an award which would adequately punish and deter, say, the local one-store druggist"). *But see* Sunstein et al., *supra* note 2, at 2085 ("On a conventional view about optimal deterrence, however, wealth and income are irrelevant." "[A] punitive damages award should encourage a defendant to engage in optimal behavior, whatever its wealth.").

187. *Cf.* Sunstein et al., *supra* note 2, at 2085 (pointing out the "particularly important dispute" regarding "whether, on economic grounds, the wealth or income of the defendant should matter").

188. *See, e.g.*, Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 677 (7th Cir. 2003) (reasoning that *State Farm* did not preclude consideration of the wealth of a defendant to the extent that factor "enables the defendant to mount an extremely aggressive defense against suits such as

D. The Aggregate Punishment Problem

One of the most significant questions left open after *BMW* and *State Farm* is the proper calculation of, and the constitutional limitations on, punitive damages for harm that affects multiple people. Courts and commentators for decades have agonized over the policy aspects of the aggregate punishment problem: how to achieve deterrence and punishment goals in a case involving defendant conduct that affected large numbers of people.[189] If one punishes too lightly, a defendant alleged to have caused harm to many may well be undeterred from continuing the misconduct. Yet if courts impose significant punitive damages awards in every case brought by a plaintiff affected by the misconduct, the aggregate punitive damages liability may far exceed legitimate state interests in punishment and deterrence.[190]

Although *BMW* itself involved a fraud perpetrated against 14 people in Alabama, the Court was frustratingly opaque about how to determine punitive damages in such cases. In a footnote, for example the Court observed that whether one looked to the ratio of the punitive damages award to Dr. Gore's harm ($4,000) or to all the harms imposed on the Alabama citizens affected by BMW's misconduct ($56,000), the punitive damages award must be seen as disproportionate.[191] So the Court evaded the question of which measure courts ought to use in calculating punitive damages in such mass tort cases – should a court assess the punitive damages award vis-à-vis the harm done to the plaintiff alone or should it compare the award to the full scope of harm inflicted on everyone affected by the misconduct? Given the

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this and by doing so to make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case"); *Eden*, 258 F. Supp. 2d at 974 (concluding that "if the punitive damages award is to have any punitive or deterrent effect – the stated rationale of such damages – then it is apparent that [the defendant's] wealth and financial condition *must* be taken into consideration"); *cf.* Smith v. Fairfax Realty, Inc., 82 P.3d 1064 (Utah 2003)

189. *See, e.g.*, Gary T. Schwartz, *Punitive Damages Awards in Product Liability Litigation: Strong Medicine or Poison Pill?*, 39 VILL. L. REV. 415, 423-31 (1994); Dennis Neil Jones et al., *Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 ALA. L. REV. 1, 3-4 (1991); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 152 (1986); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 55 (1983); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982); Laura J. Hines, *Obstacles to Determining Punitive Damages in Class Actions*, 36 WAKE FOREST L. REV. 889, 892-98 (2001).

190. *See, e.g.*, Seltzer, *supra* note 189, at 55.

191. *BMW*, 517 U.S. at 582 n.35.

constitutional implications of excessive punishment, this question looms large in mass tort cases. And not only must a court choose whether to take into account harm done to persons other than the plaintiff, it must also consider the implications of prior punitive damages awards based on the same misconduct. If deterrence and punishment goals have been met by prior awards, must a court deny any punitive damages in subsequent cases?

State Farm offers some tantalizing hints about the Court's views on the question of aggregate punitive damages, but offers no clear guidance. While the Court ultimately rejects (over Justice Ginsburg's objections) Utah's characterization of State Farm's conduct in its handling of other claims as sufficiently "similar" to play any role at all in the proper calculation of punitive damages in the Campbells' case,[192] it noted that truly similar conduct would be "relevant" to the state's determination of reprehensibility.[193] Yet the Court in *State Farm* articulated an arguably individualistic approach to punitive damages, emphasizing that "a defendant should be punished for the conduct that harmed the plaintiff,"[194] and criticizing the Utah courts for punishing State Farm for harm that was "minor to the individual but massive in the aggregate."[195] The Court explained that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant,"[196] and warned that such punishment "creates the possibility of multiple punitive damages awards for the same conduct."[197]

As with the wealth of defendant and out-of-state conduct factors, therefore, the Court seems to be suggesting some role in the punitive damages analysis for "similar" conduct that harms multiple persons not before the court, but firmly cautions against actually punishing such conduct or permitting such factors to justify an otherwise excessive award. In other words, *State Farm* may be interpreted as holding that a court may not actually punish a defendant for harm to others, but may take such harm into account in calculating a punitive damages award in the case of a particular plaintiff "similarly" harmed. This may make some sense, but courts and juries will likely experience great confusion and uncertainty as they tread the fine line between "relevant" harm that

192. State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1523 (2003).
193. *Id.* at 1523-24.
194. *Id.* at 1523.
195. *Id.*
196. *Id.*
197. *Id.*

may be taken into account and the prohibition against actually punishing that conduct.

Moreover, to the extent the Court has chosen to limit punishment of a defendant's conduct based solely on the harm to the plaintiff, it may ultimately balk at setting aggregate punitive damages limitations. If every mass tort punitive damages award is properly and constitutionally calculated to punish only the harm to a particular plaintiff, then it would seem every mass tort plaintiff could recover punitive damages awards for the same conduct – because prior plaintiffs would only have been awarded punitive damages based on their own harm. Again, this may be a workable approach to preventing excessive aggregate punitive damages awards in mass tort cases, but it may also tolerate high punitive damages awards in each case (based on a reprehensibility analysis that includes "similar" harms) that in aggregate produce excessive punitive damages awards. In any event, given the lower courts' frequent encounters with such mass tort cases and the thorny issues such cases raise,[198] it seems highly likely the Court will one day be forced to address more squarely the aggregate punishment problem and provide greater guidance.

IV. CONCLUSION

The rightful function of punitive damages in punishing and deterring tortfeasors guilty of extraordinary wrongs has been a source of disagreement among American judges and legal scholars since early in the nineteenth century.[199] The requirement that punitive damages should be reasonably proportional to the seriousness of a defendant's offense is deeply rooted in common law torts jurisprudence.[200] Recent Supreme Court decisions subjecting state court punitive damage awards to constitutional scrutiny under the Due Process Clause of the Fourteenth Amendment, however, have interjected a new and perplexing dimension to this longstanding debate.

In applying the tenets of the modern concept of due process to the frequent and often large punitive damage awards imposed by state courts

198. *See, e.g.*, Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 677 (7th Cir. 2003) (upholding identical $186,000 punitive damages awards for two plaintiffs in bedbug infested hotel, and recognizing likely jury calculation of damages based on the 191 rooms in the hotel); *In re* Exxon Valdez, 296 F. Supp. 2d 1071 (D. Alaska 2004) (imposing $4.5 billion punitive damages award in mandatory class action).

199. PROSSER & KEATON, TORTS 9-10 (5th ed. 1984).

200. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 478 (1993) (O'Connor, J., dissenting).

today, the Court has found it necessary to create a substantial new body of constitutional law.[201] The Court has insisted on reliable state judicial review processes to correct arbitrary or excessive awards, examined critically state courts' justifications for imposing punitive damages, and announced a complicated set of standards for assessing whether the size of a specific punitive damage award is excessive.

This article has sought to describe and explain the series of cases through which this new constitutional analysis has evolved, focusing in particular on the impact of the *State Farm* case, the Court's most recent incursion into this dense thicket of punitive damage principles and procedures. Although the Court obviously intended *State Farm* to clarify past ambiguities and provide practical guidance to lower courts considering punitive damage claims, an examination of a number of recent lower court cases reveal that it fell seriously short in this endeavor. Moreover, *State Farm* raises new questions about the demands of due process in the context of punitive damages, and it fails to address several important issues left unresolved by its earlier cases. Even after *State Farm*, the Court's application of due process norms to punitive damages remains very much a work in progress.

201. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 24-28 (1991) (Scalia, J., dissenting).