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GORE'S METAMORPHOSIS IN *STATE FARM V. CAMPBELL*: WHEN GUIDEPOSTS MAKE A DETOUR

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I. INTRODUCTION

A tragic event happened near the small town of Huntington, Texas, on Highway 69. A tractor-trailer veered onto the right shoulder of the highway.[1] The driver attempted to correct his course by steering in the opposite direction.[2] However, he ended up passing the center line and jack-knifing into oncoming traffic.[3] Becky Vogler and her 3-year-old daughter were driving toward the tractor-trailer at the time.[4] In an attempt to avoid the tractor-trailer, Vogler abandoned her lane of traffic and steered half of the car off of the highway.[5] The attempt was futile as the tractor-trailer smashed into the front of her car.[6] The force of the impact spun the car around to where the passenger side hit the truck.[7] The truck then ran over the roof of the car from the front to the back.[8] Both Mrs. Vogler and her young daughter were dead when they were removed from the vehicle.[9] The jury found the defendants liable in the wrongful death action, and gave the plaintiffs compensatory, but not punitive, damages.[10]

In Connecticut, plaintiffs sued the manufacturer of a fuel tank for the Blackhawk military helicopter.[11] The jury found that the manufacturer had a duty to warn the military of the problems with their fuel tanks.[12] They found the manufacturer breached that duty when they had actual knowledge that there was a problem with their fuel tanks and did not report it to the military.[13] The jury found for the plaintiffs, awarding them $22.9 million in compensatory damages, but no punitive damages.[14]

Even more startlingly, a person ordered breakfast and a cup of water from a Hardee's drive-thru in North Carolina.[15] After leaving the drive-thru, he drank the water and immediately felt a burning sensation in his throat.[16] He vomited several times and went to the hospital.[17] It was later

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1. Vogler v. Blackmore, 352 F.3d 150, 152 (5th Cir. 2003).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 153.
7. *Id.*
8. *Id.*
9. *Id.* at 152-153.
10. *Id.* at 153.
11. Densberger v. United Techs. Corp., 297 F.3d 66, 68-69 (2d Cir. 2002).
12. *Id.* at 69.
13. *Id.* at 71.
14. *Id.* at 69.
15. Lindsey v. Boddie-Noell Enters., Inc., 555 S.E.2d 369, 371 (N.C. Ct. App. 2001), *rev'd* 565 S.E.2d 668 (N.C. 2002).
16. *Id.*

found out that the water contained cleaning solution, which caused the plaintiff's discomfort.[18] The plaintiff also introduced evidence that during 1994 and 1997, at least twenty-five similar incidents had occurred.[19] Even with all of this evidence, the jury decided to award $32,500 in compensatory damages and *no* punitive damages.[20]

A common theme runs through all of the aforementioned cases. In the vast majority of cases, no punitive damages are awarded, even when the facts themselves seem particularly egregious. Of the small amount of cases that do award punitive damages, only 1-2% could be considered "grossly" excessive.[21] People who want punitive damage reform argue against these facts, stating that punitive damages are routinely awarded in large amounts and are threatening to bankrupt both large and small businesses.[22] Even though they state that the frequency and size of those awards have been rapidly increasing, they have yet to produce any sound evidence that supports their theories.[23] People who do not want tort reform, however, cite cases like the ones above, arguing that punitive damages are supposed to punish individuals and corporations for their reckless or malicious wrongdoing and to keep them as law abiding citizens by deterring them with the threat of such an expensive punishment.[24]

Responding to the pressure of deep-pocketed corporations, the U.S. Supreme Court has reviewed punitive damages several times. Prior to the most recent examinations, the Court narrowed its focus to making sure that states had sufficient procedures enacted to protect the defendant from an excessive jury award.[25] In *Honda v. Oberg*, the Court further protected defendants by finding that excessive punitive damage awards violate substantive due process.[26] The Court limited punitive damage effectiveness

17. *Id.*

18. *Id.*

19. *Id.* at 375. The North Carolina Court of Appeal pointed to this very evidence when they reversed the trial court by saying that the jury was prejudiced. *Id.*

20. *Id.* at 372.

21. Author's assertion.

22. Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 3-4 (1990) [hereinafter Daniels & Martin].

23. *Id.* at 4.

24. *Id.* at 7. It is, of course, unnecessary to say that the majority of cases are against corporations and not individuals. Since that is the case, this paper primarily focuses on the corporate defendant.

25. *See, e.g.*, Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (upholding a punitive damage award when the defendant has the full benefits of the forum state court's procedures); *see also* TXO Prod. Corp v. Alliance Res. Corp., 509 U.S. 443 (1993) (plurality opinion).

26. Substantive due process requires, under the Due Process Clause of the Fifth Amendment and applicable to the states via the Fourteenth Amendment, that legislation must be "fair and reasonable in context" and must further a legitimate governmental purpose. BLACK'S LAW

even more by giving lower courts guideposts when analyzing punitive damage awards in *BMW of North America, Inc. v. Gore*[27] and *de novo* review[28] of punitive damages in *Cooper Industries v. Leatherman Tool Group*.[29] Not surprisingly, *State Farm* continued this war on punitive damages.[30]

This paper discusses the significance of *State Farm v. Campbell* and how it removes what little effectiveness punitive damage awards were left with after *Leatherman*.[31] Part II briefly explores the past of punitive damages and explains the modern jurisprudence of punitive damages in America. Part III sets forth *State Farm v. Campbell*. Part IV, Section A argues that *State Farm* has removed the deterrence function from punitive damages because the Court has given corporations all the tools they need to make an effective cost/benefit analysis. Furthermore, *State Farm* has removed the punishment function from punitive damages because it has instituted a ratio system without thought to an optimal level of deterrence. Part IV, Section B explores whether and when a state has an interest in punishing unlawful out-of-state conduct and attempts to provide a solution to that question, which has been left unanswered by the Court.

DICTIONARY 517 (7th ed. 1999). Justice Scalia believes that there are no substantive due process guarantees in the Constitution. *See* BMW of N. Am. v. Gore, 517 U.S. 559, 598-99 (1996) (Scalia, J. dissenting) ("I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against 'unfairness'—neither the unfairness of an excessive civil compensatory award, nor the unfairness of an 'unreasonable' punitive award."); Honda Motor Co. v. Oberg, 512 U.S. 415 (1994).

27. 517 U.S. at 559.

28. An appellate court typically reviews a trial court's decision based on a clearly erroneous standard. Under the clearly erroneous standard, a trial court's judgment will be reversed only if the appellate court strongly believes that an error has been committed. BLACK'S LAW DICTIONARY 245 (7th ed. 1999). However, with *de novo* review, an appellate court puts aside the trial court's decision and reviews the evidence and law anew. *Id.* at 94.

29. 532 U.S. 424, 436 (2001).

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

31. President Clinton vetoed a bill that would have capped punitive damages to the lesser of $250,000 or twice economic damages. H.R. 956, 104th Cong. (1st Sess. 1996). It is interesting to note that as of writing this article, a bill to put punitive damage caps on medical malpractice has already passed the House and awaits Senate action. *See* Lawrence M. O'Rourke, *Congress Heads Back to Work*, THE NEWS & OBSERVER (Raleigh, NC), January 19, 2004 at A3.

II. LEGAL BACKGROUND OF CASE

A. PRE-*HASLIP* PUNITIVE DAMAGES COMMON LAW: A BRIEF HISTORY[32]

The history of punitive damages can be traced back to the ancient Code of Hammurabi of 2000 B.C.[33] Theft, unfair judicial decisions, and cheating agents all had multiple damages attached to them by the code.[34] Roman law inherited the multiple damages concept, and provided multiple damage remedies for usury, dishonesty, and theft.[35]

Punitive damages have played their part in English law as well. The first English cases to award punitive damages were *Wilkes v. Woods*[36] and *Huckle v. Money*.[37] In *Wilkes*, John Wilkes was the publisher of a newspaper that was supposedly publishing libel about the King.[38] On a general warrant only, the King had his men search Wilkes' house and seize his property.[39] In *Huckle*, Huckle was a printer for Wilkes' paper.[40] He was arrested and treated very well by the constables, but he brought an action for false imprisonment and trespass.[41] He was awarded two hundred pounds in exemplary damages.[42] It was in these cases that punitive damages were born in the English system and given their resolute purpose: to deter and punish conduct.[43]

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32. There are numerous law review articles that treat the complete history of punitive damages sufficiently enough that to repeat it here would not be very helpful. For a very good in-depth analysis about the history of punitive damages, *see* Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages As Punishment For Individual, Private Wrongs*, 87 MINN. L. REV. 583, 614-29 (2003) [hereinafter Colby]; Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 54-60 (2002); Michael L. Rustad & Thomas H. Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269 (1993) [hereinafter *Historical Continuity*].

33. Colby, *supra* note 32, at 614 & n.100; LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES §1.0 (4th ed. 2000 & Supp. 2003).

34. SCHLUETER & REDDEN, *supra* note 33, at §1.1.

35. *Id.* at §1.2.

36. Wilkes v. Woods, 98 Eng. Rep. 489 (K.B. 1763).

37. Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763).

38. *Wilkes*, 98 Eng. Rep. at 489.

39. *Id.* at 490.

40. *Huckle*, 95 Eng. Rep. at 768.

41. *Id.* at 768-69.

42. *Id.* at 769.

43. *See Wilkes*, 98 Eng. Rep. at 498 ("[A] jury ha[s] it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the . . . person, but likewise as a punishment to the guilty, to deter from any such proceeding in the future, and as . . . proof of the detestation of the jury to the action itself."); *Huckle*, 95 Eng. Rep. at 769 ("[The jury did] right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to produce evidence, is worse than the Spanish Inquisition . . . .").

Punitive damages came with the English to America as well. The first reported American case, *Genay v. Norris*, punished a doctor for giving the plaintiff a "reconciliation" drink filled with medicine that purposefully caused the plaintiff pain.[44] Another early case was *Coryell v. Colbaugh*.[45] *Coryell* punished the defendant for getting the plaintiff's daughter pregnant out of wedlock.[46]

Modernly, punitive damages in general, and large punitive awards specifically, have been attacked as unconstitutional in a variety of ways.[47] *Browning-Ferris* was the first case to attack punitive damages awards as being unconstitutional based on the Eighth Amendment.[48] In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal*, Browning-Ferris was competing with Kelco Disposal for waste disposal services.[49] Browning-Ferris (BFI), a national company, slashed their prices by forty percent in order to drive newly minted Kelco out of business.[50] Kelco lost thirty percent of its profits due to BFI's price scheme.[51] Kelco brought a lawsuit against BFI alleging antitrust violations in the District Court of Vermont.[52] The jury returned a verdict for $51,000 in compensatory damages and $6 million in punitive damages.[53] BFI appealed up to the United States Supreme Court, alleging that punitive damages violated the Eighth Amendment's excessive fines clause.[54] The Court in *Browning-Ferris* decisively removed the Eighth Amendment from the punitive damages playing field by holding that the Eighth Amendment only applies to criminal, and not civil, cases.[55] However, the Supreme Court all but invited a challenge on the excessiveness of punitive damages under the Due Process Clause of the Fourteenth Amendment.[56] They did not have to wait

44. *Historical Continuity*, *supra* note 32, at 1290-91 (citing Genay v. Norris, 1 S.C.L. (1 Bay) 6 (1784)).

45. Coyrell v. Colbaugh, 1 N.J.L. 90 (1791).

46. *Id.*

47. *See* Clarence Morris, *Punitive Damages In Tort Cases*, 44 HARV. L. REV. 1173 (1931) (arguing that ridiculing punitive damages is unfounded without evidence that shows a continuing and substantial arbitrariness in awards).

48. *See* U.S. CONST. amend. VIII ("[E]xcessive fines [shall not] be imposed."); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

49. *Id.* at 260-61.

50. *Id.* at 261.

51. *Id.*

52. *Id.*

53. *Id.* at 262.

54. *Id.* at 275-76.

55. *Browning-Ferris*, 492 U.S. at 277.

56. *Id.* at 283 (O'Connor, J., concurring in part and dissenting in part) ("[N]othing in the Court's opinion forecloses a due process challenge to awards of punitive damages or the method by which they are imposed, and I adhere to my comments . . . regarding the vagueness and

long to get that challenge.

B. *HASLIP* AND ITS PROGENY: PROCEDURAL DUE PROCESS

In *Pacific Mutual Life Insurance. Co. v. Haslip*, the U.S. Supreme Court finally accepted the challenge that it had been hinting was available to appellants in *Browning-Ferris*.[57] In *Haslip*, an employee of Pacific Mutual, Lemmie Ruffin, sold health and life insurance to the city for the benefit of its employees.[58] Ruffin packaged health insurance from another company with life insurance from Pacific Mutual, a common practice in the industry.[59] Ruffin arranged with the other company to send its billings to him at Pacific Mutual's office.[60] The city sent Ruffin a check for the premiums, which were automatically deducted out of employees' paychecks.[61] Ruffin was supposed to send these payments to the other company, but instead "misappropriated most of them."[62] Cleopatra Haslip was a city employee and a participant in the health plan.[63] She was hospitalized.[64] On discharge, Haslip had to make a payment on her hospital bill because the hospital could not verify her health coverage.[65] Her doctor then placed her account with a collection agency for lack of payment.[66] The agency received a judgment against Haslip, which negatively affected her credit report.[67] Haslip brought suit against Pacific Mutual and Ruffin based on fraud and respondeat superior.[68] The Court found Pacific Mutual liable for Ruffin's actions and reviewed the record only to consider whether the punitive damages awarded were unconstitutional.[69]

The Court carefully reviewed the procedural protections that the

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procedural due process problems presented by juries given unbridled discretion to impose punitive damages.") (citation omitted).

57. 499 U.S. 1, 24 (1991) (Scalia, J., concurring) (citing *Browning-Ferris*, 492 U.S. at 276-77).

58. *Id.* at 4.

59. *Id.* at 4-5 ("This packaging . . . was not unusual . . . [because] it tended to boost life insurance sales by minimizing the loss of customers who wished to have both health and life protection.").

60. *Id.* at 5.

61. *Id.*

62. *Id.*

63. *Id.* at 4-5.

64. *Id.* at 5.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 5-6.

69. *Id.* at 18.

Alabama Supreme Court used to scrutinize punitive damage awards.[70] The Court adopted a general principle that, even though there is no "mathematical bright line," a punitive damage award can be analyzed by looking to "general concerns of reasonableness and adequate guidance from the court."[71] After deciding that Alabama's procedures were reasonable and sufficiently protected defendants from unwarranted punitive damages, the Court dismissed Pacific Mutual's due process challenge.[72]

Two years after *Haslip* was decided, the U.S. Supreme Court granted certiorari in another punitive damage controversy: *TXO Production Corp. v. Alliance Resources Corp.*[73] In 1984, TXO geologists concluded that an area of land apparently owned by Alliance would be "extremely profitable" if they could get the oil and gas rights from Alliance.[74] TXO offered Alliance a very lucrative deal for the oil and gas rights and Alliance accepted the offer.[75] Alliance agreed in the assignment of its rights to TXO that it would "return the consideration paid to it if TXO's attorney determined that 'title had failed.'"[76]

Shortly after the signing of this agreement, TXO's attorneys discovered a 1958 deed which left all of the oil and gas rights in the hands of Virginia Crews Coal Company.[77] TXO advised Alliance of the "'distinct possibility' that its 'leasehold title fails.'"[78]

Even though TXO knew that any "clouding of title" done by Virginia Crews at this point would be frivolous, TXO tried to encourage them that they had an interest in the land purchased from Alliance.[79] Once that failed, TXO paid Virginia Crews to hand them a quitclaim deed. Shortly afterward, TXO recorded that deed without telling Alliance.[80] TXO also tried to encourage another predecessor of title to execute a false affidavit.[81]

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70. *See Haslip*, 499 U.S. at 17-23.
71. *Id.* at 18.
72. *Id.* at 23-24 (The Court reasoned out that Pacific had the "full panoply of Alabama's procedural protections," and therefore, "Pacific Mutual's due process challenge must be, and is, rejected."). *Haslip's* weaknesses were almost as significant as its holding. The general rule the Court adopted "provide[d] no guidance as to whether any *other* procedures are sufficiently 'reasonable,' and thus perpetuates the uncertainty that our grant of certiorari . . . was intended to resolve." *Id.* at 24 (emphasis in original) (Scalia, J., concurring).
73. 509 U.S. 443, 446 (1993).
74. *Id.* at 447.
75. *Id.*
76. *Id.* at 447-48 (footnote omitted).
77. *Id.*
78. *Id.*
79. *Id.* at 448-49.
80. *Id.* at 449.
81. *Id.*

Once TXO recorded the deed, they contacted Alliance and implied that they had acquired the interest in Alliance's land from Virginia Crews.[82] TXO arranged a meeting "to renegotiate the royalty arrangement."[83] When negotiations failed, TXO commenced this litigation. TXO was held liable on a countersuit of slander of title and the jury awarded Alliance $19,000 in compensatory damages and $10 million dollars in punitive damages.[84] The U.S. Supreme Court granted certiorari and affirmed the judgment.[85]

The Supreme Court again emphasized the procedural safeguards that West Virginia had in place to protect "wild" juries.[86] The Supreme Court reasoned that the state Supreme Court's three part "reasonable relationship test" along with that court's observations in another punitive damages case, *Garnes v. Fleming*'s (*Fleming Landfill*), procedurally protected TXO in light of *Haslip*.[87] Moreover, the Court implied that even though TXO's 526 to 1 ratio of punitive to compensatory damages might normally "jar one's constitutional sensibilities," the facts that: (1) TXO acted in bad faith; (2) the amount of money at stake; and (3) the scheme TXO "employed . . . was part of a larger pattern of fraud, trickery and deceit," persuaded the Court to uphold the award.[88]

C. *HONDA MOTOR CORP. V. OBERG*: SUBSTANTIVE DUE PROCESS

Up to this point, the U.S. Supreme Court had only focused on procedural due process – the state court's verdict would be upheld if the state courts' processes reasonably protected the defendant from passion and prejudice. However, in *Honda Motor Corp. v. Oberg*, the Court took due process a step further by identifying a substantive due process protection as well.[89] In *Honda*, Oberg drove a "three-wheeled all-terrain vehicle" manufactured by defendant that overturned while he was driving it, causing

82. *TXO*, 509 U.S. at 449.
83. *Id.*
84. *Id.* at 451.
85. *Id.* at 453.
86. *See id.* at 459-61.
87. *Id.* at 453 ("(1) [T]he potential harm that TXO's actions could have caused; (2) the maliciousness of TXO's actions; and (3) the penalty necessary to discourage TXO from undertaking such endeavors in the future") (quoting 419 S.E.2d 870, 889 (W. Va. 1992)); *Id.* at 459 ("[As] a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.") (quoting Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 909 (W. Va. 1991)).
88. *TXO*, 509 U.S. at 462 ("The punitive damages award in this case is certainly large, but in light of [the factors above] . . . we are not persuaded that the award was . . . 'grossly excessive.'").
89. 512 U.S. 415, 420 (1994).

him permanent injury.[90] The jury awarded Oberg $919,390.39 for compensatory damages (which was reduced by twenty percent due to Oberg's contributory negligence) and $5 million in punitive damages.[91] Honda appealed, claiming the punitive damage award violated the Due Process Clause because the Oregon courts could not correct errors in excessive verdicts.[92] Both the Oregon Court of Appeals and the Oregon Supreme Court affirmed the judgment.[93]

The Court concluded that Oregon violated the Due Process Clause by ignoring a "well-established" common law protection against arbitrary property deprivations.[94] The U.S. Supreme Court reasoned that ever since *Haslip*, "the Constitution impose[d] a substantive limit on the size of punitive damage awards."[95] The Court found in common law precedent considerable evidence that there must be judicial review of punitive damages to see whether the award was grossly excessive.[96] Needless to say, this "substantive" protection handed down by the Supreme Court was vague at best. It was not until *BMW of North America v. Gore* that the Court articulated standards to guide lower courts.[97]

D. *BMW V. GORE* AND *LEATHERMAN V. COOPER*: GUIDEPOSTS ERECTED

BMW v. Gore was the first time the U.S. Supreme Court decided to identify "guideposts" to aid both federal and state courts in deciding whether a punitive damage award was grossly excessive.[98] Gore purchased a supposedly brand new car from BMW, but shortly thereafter, Gore discovered that the car had been repainted.[99] BMW acknowledged its nationwide policy that if one of their cars was damaged in transport and that damage was under 3% of its value, they would repair it and resell it as

90. *Id.* at 418.

91. *Id.*

92. *Id.*

93. The Oregon Supreme Court believed that there was sufficient procedural direction that provided at least as much guidance as Alabama did in *Haslip*. *Id.* Oregon had an amendment to the constitution in 1910 that said that Oregon courts could not re-examine any fact found by the jury unless "the court can affirmatively say there is no evidence to support the verdict." *Id.* at 427 n.5.

94. *Id.* at 430.

95. *Id.* at 420.

96. *See id.* at 424-26 (citing nineteenth-century cases and treatises which state that the award is evidence itself of the jury's partiality, passion, and prejudice).

97. 517 U.S. 559 (1996).

98. *Id.* at 574-75.

99. *Id.* at 563. Alabama had jurisdiction over this case because Gore purchased the vehicle at a Birmingham, Alabama dealership. *Id.*

brand new.[100] If, however, the car's damage was above 3% of its value, they would repair it and put it into company use and sell it later as a used car.[101] The jury found BMW guilty of fraud and awarded Gore $4,000 in compensatory damages and $4 million in punitive damages.[102] BMW moved in post trial to set aside the jury's punitive damage verdict because they believed that the jury punished them for lawful out-of-state conduct and for actions that were not unlawful in Alabama at the time.[103] The trial judge denied the motion.[104] On appeal, the Alabama Supreme Court held that punitive damages were appropriate, but decreased the punitive damage award to $2 million because it believed that the jury improperly calculated punitive damages by punishing BMW for lawful out-of-state conduct in contrast to punishing BMW for their unlawful actions in Alabama.[105]

The U.S. Supreme Court concluded that the jury's punitive award was "grossly excessive."[106] The Court adopted three guideposts for determining whether a punitive damages award would violate the Due Process Clause: (1) the defendant's degree of reprehensibility; (2) the ratio between compensatory and punitive damages; and (3) sanctions of comparable misconduct.[107] The Court, when analyzing degree of reprehensibility, took into consideration the enormity of the defendant's offense.[108] When analyzing the ratio guidepost, the Court again refused to enter into any mathematical formula, but it did say that the ratio must bear a reasonable relationship to the actual or probable harm the defendant created.[109] Third, the Court looked at comparable statutes in the state that could punish the defendant.[110] When looking at comparable criminal and civil statutes, the state court should "accord 'substantial deference' to legislative judgments

100. *Id.* at 563-64.

101. *Id.*

102. *Gore*, 517 U.S. at 565.

103. *Id.*

104. *Id.* at 566.

105. *Id.* at 567 & n.11. In evidence, the trial court found that BMW had sold 983 "refinished" cars as new and 14 of those were sold in Alabama. It is unclear, though, how the Alabama Supreme Court calculated the punitive damages. The Supreme Court seems to believe that they should have only calculated those 14 cars in Alabama. However, if Alabama was allowed to punish unlawful out-of-state conduct, then they could theoretically punish more than just those 14 cars. *Id.* at 564.

106. *Id.* at 575.

107. *See id.* at 575-84.

108. *Id.* at 573-76. The Court also drew a connection between the degree of reprehensibility of punitive damages and criminal law. In relevant parts, it stated in *Solem v. Helm*, that violent crimes are more serious than nonviolent crimes, and therefore, more serious transgressions should be punished more severely. 463 U.S. 277, 293-94 (1983).

109. *Id.* at 579-83.

110. *Id.* at 584-85.

concerning appropriate sanctions for the conduct at issue."[111] The Court also emphasized that a state has no interest in punishing the defendant for lawful out-of-state conduct.[112]

In addition to the guideposts set out in *Gore*, the Court provided further direction to lower courts by defining how punitive damage awards should be reviewed by lower courts. In 2001, the U.S. Supreme Court granted certiorari in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[113] In *Leatherman*, Cooper advertised its own multifunction tool by modifying Leatherman's multifunction tool's handles and passing the tool off as its own.[114] A jury found Cooper liable for violating the Trademark Act of 1946 and awarded Leatherman $50,000 in compensatory damages and $4,500,000 in punitive damages.[115] On appeal, the Ninth Circuit upheld the punitive damages award, holding that the District Court "did not abuse its discretion in declining to reduce the amount of punitive damages."[116] The Supreme Court reversed the decision, holding that "constitutional issue[s] merit *de novo* review."[117]

The Supreme Court again looked at criminal protections because punitive damages are "quasi-criminal" in nature.[118] The Supreme Court reasoned, when analyzing the Eighth Amendment's Excessive Fines clause, that "whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate."[119] The Court further believed that *de novo* review was appropriate because "[i]ndependent review is . . . necessary if appellate courts are to maintain control of, and to clarify, . . . legal principles."[120] The Court finally concluded that "'*de novo* review tends to unify precedent' and 'stabilize the law.'"[121]

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111. *Id.* at 583 (O'Connor, J., concurring in part and dissenting in part) (citing *Browning-Ferris*, 492 U.S. at 300). This also brings up the question of whether or not state punitive damage statutes would be accorded the same deterrence. *See infra* Part IV.A.2.

112. *Gore*, at 573 & n.20 (leaving open the question of whether a state has an interest in punishing unlawful out-of-state conduct.). *See infra* Part IV.B.

113. Cooper Indus., Inc. v. Leatherman Tools Group, Inc., 532 U.S. 424 (2001).

114. *Id.* at 427-28.

115. *Id.* at 429.

116. *Id.* at 431 (citations omitted).

117. *Id.*

118. *See Leatherman*, 532 U.S. at 432-43 (analyzing various criminal cases). *See also Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting) ("punitive damages are quasi-criminal punishment").

119. *Id.* at 435 (citing United States v. Bajakajian, 524 U.S. 321, 336-37 (1998)). *See also supra* notes 49-56 and accompanying text (*Browning-Ferris* held that the Eighth Amendment was to be used only in criminal proceedings).

120. *Id.* at 436 (citing Ornelas v. United States, 517 U.S. 690, 696 (1996)).

121. *Id.* (citing *Ornelas*, 517 U.S. at 697-98).

Even though this *de novo* review was arguably binding on only lower federal courts, many state appellate courts took this opportunity as an invitation to institute *de novo* review in their own review of punitive damage decisions.[122] With *Gore* and *Leatherman*, it seemed that there were extensive protections, both procedural and substantive, to ensure that punitive damage awards would not be able to violate the Due Process clause. However, punitive damage awards still remained in the limelight, requiring the Supreme Court to further clarify its *Gore* guideposts in *State Farm Mutual Automobile Insurance Co. v. Campbell*.[123]

III. *STATE FARM V. CAMPBELL*

A. THE FACTS

In 1981, Curtis Campbell[124] was driving and decided to pass six vans traveling ahead of him and his wife.[125] Todd Ospital was driving from the opposite direction and swerved off the highway to miss hitting Campbell head on.[126] Ospital lost control of the vehicle and collided with another vehicle driven by Robert Slusher.[127] That accident left Ospital dead and Slusher permanently disabled.[128] In an ensuing wrongful death and tort action, Campbell proclaimed his innocence.[129] However, it was determined early on in that litigation that Campbell's unsafe pass caused the accident. Campbell's insurer, State Farm, "decided to contest liability and declined offers by Slusher and Ospital's estate to settle the claims for the policy limit of $50,000."[130] State Farm ignored one of its own investigators and decided to take the case to trial, "assuring the Campbells that 'their assets were safe, that they had no liability for the accident, that [State Farm]

122. *See, e.g.*, MIC Life Ins. Co. v. Hicks, 825 So. 2d 616, 622 (Miss. 2002) (following *Leatherman v. Cooper*, the state court reviewed punitive damages *de novo* when a constitutional issue is raised); *see also* Leisinger v. Jacobson, 651 N.W.2d 693, 696 (S.D. 2002). Even though the Supreme Court supposedly narrowly tailored its standard of review to only constitutional issues (i.e. through the Due Process Clause), it is difficult to see when a defendant cannot appeal a punitive damages award based on the Due Process Clause.

123. *State Farm*, 538 U.S. at 412.

124. This litigation spanned, in various forms, over a 20 year time period. *See id.* During that time, Ms. Campbell was involved in the bad-faith insurance action only, i.e., against State Farm, and not in the accident litigation between Campbell, Slusher, and Ospital.

125. *Id.*

126. *Id.*

127. *Id.* at 412-13.

128. *Id.* at 413.

129. *Id.*

130. *Id.* The $50,000 policy limit would have been split between Slusher and Ospital's estate so that each of them would be paid $25,000. *Id.*

would represent their interests, and that they *did not* need to procure separate counsel."[131] State Farm lost the Campbell's case, and the jury concluded that Campbell was completely at fault.[132] They returned a verdict in the amount of $185,849, much more than the settlement Slusher and Ospital's estate offered before trial.[133]

State Farm refused to cover any damages in excess of the $50,000 policy.[134] Its counsel told the Campbells that they "may want to put for sale signs on [their] property to get things moving."[135] State Farm also did not post a supersedeas bond[136] to allow Campbell to appeal this judgment.[137] Instead, Cambell had to obtain separate counsel in order to appeal the judgment.[138] In 1984, during the pendency of Campbell's appeal, Campbell, Slusher, and Ospital came to an agreement that Slusher and Ospital would not pursue their judgment against Campbell in exchange for Campbell suing State Farm for bad faith.[139] Moreover, Campbell would have to allow Ospital and Slusher to participate in all major decisions of the claim.[140] In addition, Campbell could not sign any settlement agreement without Slusher's and Ospital's agreement to the terms and, once Slusher and Ospital agreed, they "would receive 90 percent of any verdict against State Farm."[141] Five years later, in 1989, the Utah Supreme Court denied Campbell's appeal.[142] State Farm decided to pay the entire $185,849 judgment against Campbell.[143] Campbell, however, proceeded with his lawsuit, alleging bad faith, fraud, and intentional infliction of emotional distress.[144]

State Farm requested and, over Campbell's objection, was granted a bifurcated trial.[145] In the first phase, the jury found that State Farm's choice

131. *Id.* (citing Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1142 (Utah 2001)) (emphasis added).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. A supersedeas bond is a bond that stays the execution of a judgment during appeal. BLACK'S LAW DICTIONARY 171 (7th ed. 1999).

137. *State Farm*, 538 U.S. at 413.

138. *Id.*

139. *Id.*

140. *Id.* at 413-14.

141. *Id.* at 414.

142. Slusher v. Ospital, 777 P.2d 437, 445 (Utah 1989).

143. *State Farm*, 538 U.S. at 414.

144. *Id.*

145. Initially the trial court granted State Farm's summary judgment motion because State Farm had paid the excess judgment against the Campbells, but the Utah Court of Appeals reversed and allowed this litigation to continue. *See id.* (citing Campbell v. State Farm Mut.

not to settle Ospital's and Slusher's claims was "unreasonable because there was a substantial likelihood of an excess verdict."[146] The second phase was to determine State Farm's liability for "fraud and intentional infliction of emotional distress, as well as compensatory and punitive damages."[147]

Before the second phase of the trial commenced, the Supreme Court decided *Gore*. Based on that decision, State Farm moved to exclude evidence of dissimilar out-of-state conduct.[148] The trial court refused.[149] During the second phase of the trial, State Farm argued that "its decision to take the case to trial was an 'honest mistake' that did not warrant punitive damages."[150] To rebut this argument, Campbell introduced extensive evidence that State Farm's decision was part of a national scheme to meet its fiscal goals by deciding to cap payouts on claims company-wide.[151] The jury awarded Campbell $2.6 million in compensatory damages and $145 million in punitive damages.[152] The trial court reduced the compensatory and punitive damage award to $1 million and $25 million, respectively.[153]

On appeal, the Utah Supreme Court, focusing in large part on the evidence concerning State Farm's nationwide scheme, reinstated the $145 million punitive damages award.[154] Running through the *Gore* test, the Utah Supreme Court concluded that: (1) State Farm's conduct in using the national scheme was reprehensible; (2) the ratio between compensatory and punitive damages was not unwarranted considering the wealth of the defendant and the low probability of detecting the defendant's wrong; and (3) that the award was not excessive when considering the other alternatives: $10,000 for each fraud act in Utah, the disgorgement of State Farm's profits, and imprisonment.[155]

Auto. Ins. Co., 840 P.2d 130 (Utah Ct. App. 1992)).

146. *State Farm*, 538 U.S. at 414.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 414-15.

151. *Id.* at 415. On objection to this information, the trial court decided that this evidence was admissible "to determine whether State Farm's conduct . . . was sufficiently egregious to warrant punitive damages." *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 415-16.

B. THE U.S. SUPREME COURT ELIMINATES THE PURPOSE OF PUNITIVE DAMAGES

The U.S. Supreme Court applied the *Gore* test and concluded that the Utah Supreme Court incorrectly reinstated the jury's punitive damages award.[156] The Court, when considering the reprehensibility guidepost, outlined a number of new factors that a court should consider in determining that reprehensibility.[157] Applying the reprehensibility guidepost to Campbell's facts, the Court conceded that State Farm's handling of Campbell's claim "merit[ed] no praise."[158] However, the Court was notably concerned about using "this case . . . as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country."[159] The Court stated that the Utah Supreme Court's opinion made it clear "that State Farm was being [punished] for its nationwide policies rather than for the conduct direct[ly] toward the Campbells."[160] The Court said that Campbell molded this case as needed punishment for State Farm's nationwide dealings.[161]

The Court concluded, as it did in *Gore*, that a state "cannot punish a defendant for conduct that may have been lawful where it occurred."[162] Even though much of the evidence that the trial court admitted was lawful in the jurisdictions where it occurred, Campbell argued that it was probative to the extent where it demonstrated State Farm's motives toward its clients.[163] The Supreme Court disagreed, stating that "[l]awful out-of-state conduct may be [relevant] when it demonstrates [State Farm's] deliberateness and culpability," but "that conduct *must have a nexus* to the specific harm suffered by the plaintiff."[164]

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156. *State Farm*, 538 U.S. at 419-20.

157. *Id.* at 419. This court elaborated on *Gore's* factors. These new factors included whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

158. *Id.*

159. *Id.* at 420.

160. *Id.* at 419-20.

161. *Id.* at 420. The Supreme Court cited Campbell's counsel's opening statement as framing the case on a national level.

162. *Id.* at 421 (citing *Gore*, 517 U.S. at 572).

163. *Id.* at 422.

164. *Id.* (emphasis added). It is also notable that the Supreme Court required an instruction to the jury that states that it "may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction." Again, the Supreme Court left open the question of whether a State has an interest in punishing unlawful out-of-state conduct. *See supra* note 112 and accompanying text.

The Supreme Court also found that State Farm was not a "recidivist."[165] It stated that Campbell provided little evidence that State Farm "repeated misconduct" similar to Campbell's injury.[166] The Court was careful to state that evidence "need not be identical to have relevance in the calculation of punitive damages," but that the evidence must have some connection to the case at bar.[167]

The Court then radically changed the state of punitive damage law when it considered *Gore*'s second guidepost: the ratio between actual or potential harm to the plaintiff and the punitive damage award.[168] The Court articulated that it refused to impose "a bright-line ratio" where exceeding that ratio would be unconstitutional, while in the same paragraph proposing that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[169] The Court also concluded that the Utah Supreme Court incorrectly relied upon two facts to raise the ratio higher. First, the Utah Supreme Court relied on the fact that State Farm would be rarely punished.[170] Second, it reinstated the jury's verdict only by relying on State Farm's assets.[171]

The Court proceeded to the third *Gore* guidepost, which looked at the disparity between the punitive damages award and the "civil penalties authorized or imposed in comparable cases."[172] The Court did not dwell on this point. It held that the Utah Supreme Court's list of possible criminal and civil sanctions applied to its reasoning of punishing State Farm for its nationwide policies.[173] The only relevant civil sanction, the Court said, was a $10,000 fine for an act of fraud, which was "dwarfed by the $145 million punitive damages award."[174] The Supreme Court, after applying the *Gore* factors, reversed the Utah Supreme Court and remanded the case for

165. *State Farm*, 538 U.S. at 423.

166. *Id.*

167. *Id.* at 423-24.

168. *Id.* at 425.

169. *Id.* at 425. The Supreme Court set out that this particular rule is "not binding," only instructive. It wanted to make sure that courts understood that "ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" *Id.* (citation omitted).

170. *Id.* at 427.

171. *Id.* The Court makes a special point to say that State Farm's insured must rely on State Farm's assets in order to get their claims paid. This might have played a major part in the Court's motive in overturning the award. However, a thorough analysis into this aspect of the Court's opinion, its significance, and a thorough analysis on the structure of mutual insurance companies is beyond the scope of this article.

172. *Id.* at 428.

173. *Id.*

174. *Id.* (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 65 P.3d 1134, 1154 (Utah 2001)).

proceedings that were not inconsistent with its opinion.[175]

C. JUSTICE GINSBERG'S DISSENT – TORT REFORM BELONGS TO THE STATES

Justice Ginsberg stated that the U.S. Supreme Court should not have replaced the Utah Supreme Court's judgment with its own, considering the ample amount of evidence on record.[176] She specifically looked at the numerous times that State Farm altered Campbell's documents to make it look like they were justified in not settling Campbell's claims and that State Farm intentionally targeted "'the weakest of the herd' – the elderly, the poor, and other consumers" in an effort to underpay their claims.[177] State Farm also purposefully obstructed discovery of key documents, including manuals which explain the scheme.[178] Justice Ginsberg questioned the Court's disregard of these facts.[179]

Justice Ginsberg also had a problem with the Court's issuance of its single-digit multiple rule.[180] While she believed that it was okay for a state's legislature or state's high court to set punitive damage caps, she believed that the Court's rule was inappropriate. She thought that the "judicial decree imposed on the States by this Court under the banner of substantive due process . . . [is] boldly out of order."[181]

IV. THE IMPLICATIONS OF *STATE FARM V. CAMPBELL*

A. *STATE FARM'S* SINGLE-DIGIT RATIO EXPLORED

Assuming the Court was correct in its disposition, the U.S. Supreme Court should have applied the *Gore* guideposts to *State Farm*, and held the verdict as violative of due process without further elaboration. The Court, having already found that most of the evidence in *State Farm* was based on out-of-state conduct that was lawful in the jurisdictions in which it took place, could have reversed *State Farm* on that alone and remanded it back to the Utah Supreme Court.[182] However, the Court felt it necessary to adopt

175. *State Farm*, 538 U.S. at 429.
176. *Id.* at 430-38 (Ginsburg, J., dissenting).
177. *Id.* at 433.
178. *Id.* at 434.
179. *Id.* at 435-36.
180. *Id.* at 438 (Ginsburg, J., dissenting).
181. *Id.*
182. *Id.* at 422.

a sweeping rule[183] that single-digit ratios are the only ratios that will pass constitutional muster.[184] This posited rule lends itself to two specific criticisms:[185] (1) The rule removes the deterrence function of punitive damages because it allows defendants to effectively make a cost-benefit analysis; and (2) it removes the punishment function of punitive damages because the fixed ratio is too rigid to take into account the optimal level of deterrence.[186]

1. The Deterrence Function of Punitive Damages Removed

The deterrence function of punitive damages has been removed by issuing this new ratio rule. Corporations are now effectively able to make a cost-benefit analysis on every decision and can now effectively decide whether or not to violate the law.[187] Judge Frank Easterbrook and Professor

183. The U.S. Supreme Court says that this rule is not binding. However, the Court spent so much time fleshing out different scenarios of ratios that it is highly doubtful on appeal to the U.S. Supreme Court, that a greater ratio would survive its review. *See id.* at 425 (stating that since there is no rigid benchmark ratio, ratios "greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulting in only a small amount of economic damages .... The converse is also true .... When compensatory damages are substantial ... perhaps [a lesser amount of punitive damages] equal to compensatory damages" will pass constitutional muster); *see also* Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 676 (7th Cir. 2003) ("The Supreme Court [in *State Farm*] did not ... lay down a 4-to-1 or single-digit-ratio rule—it said merely that 'there is a presumption against an award that has a 145-to-1 ratio.'") (citation omitted). Moreover, cases interpreting *State Farm* have considered the single-digit multiplier as a firm rule. *See* Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 800-06 (Cal. Ct. App. 2003) (analyzing *State Farm*'s requirements and interpreting the single digit multiplier as a limit to punitive damage awards).

184. *State Farm*, 538 U.S. at 425.

185. There are other criticisms not focused on in this article. Namely, the general criticism to be made is that a ratio between punitive and compensatory damages does not make sense, considering the different roles that compensatory and punitive damages play. *See* Malco, Inc. v. Midwest Aluminum Sales, Inc., 109 N.W.2d 516, 521 (Wis. 1961) (stating that "[t]he test of excessiveness [of punitive damages] does not ... depend upon some arbitrary proportion. Compensatory damages are given in attempt to make [the victim] whole .... Punitive damage is given ... to punish the wrongdoer for his malice and to deter others .... *Punitive damage ought to serve its purpose.*") (emphasis added). There are other criticisms that could be made that have been well-covered by other authors. For instance, there has not been a comprehensive study on how many times juries award unusually high punitive damages to base a need for such a large-scale tort reform. The best study so far seems to have come from a law review article that did a study of different trial awards in selected cities between 1981-1985. *See generally* Daniels & Martin, *supra* note 22 (criticism).

186. Daniels & Martin, *supra* note 22.

187. There have been strong opinions that support corporations making cost/benefit analyses. For example, Judge Posner in *Mathias* believes that a defendant must have notice of how much the fines will be against them in order to make "a determination on how to act." *Mathias*, 347 F.3d at 676. However, if there is supposed to be effective notice to the defendant of how much the fines will be, and, assuming *arguendo*, that the single digit multiplier rule satisfies this notice,

Daniel Fischel recognize that, except for a few truly prohibitive actions, the law is only a tax upon various activities.[188] For example, if a person violates a law, they understand that there is a set price for that violation, and for their ability to violate that law they will have to pay that violation tax.[189]

Under this "law-as-price" theory,[190] a corporation or person may violate any law and pay the tax associated with that law. A good example is a person driving a vehicle on a road with a speed limit. The person understands the purpose and nature of the speed limit, but they speed anyway. For example, their thought process is that, "I understand that speeding is against the law, but I'm really late for work and if I get caught then the ticket will only be $150." It is expected that since a corporation's purpose is to maximize profits for its shareholders,[191] then it is the directors' jobs to make a cost/benefit analysis similar to the speeding driver. Furthermore, it is arguably a breach of fiduciary duty if directors do not make this analysis.[192]

However, a cost-benefit analysis is directly at odds with the purpose of punitive damages, which is to deter future conduct of the tortfeasor. The effectiveness of the deterrence portion of punitive damages is its unpredictability. If punitive damages can become so predictable to allow a corporation to make a cost-benefit analysis, then the corporation could internalize the value of human life.

For example, take a corporation that manufactures parking brakes. It costs $50 to manufacture one parking brake. Assume that the corporation sells each parking brake for $500. After selling one million parking brakes, it comes to their attention that the parking break is faulty. The parking brake will engage by itself without any fault of the driver, causing the brakes to lock and the driver to lose control of the car. The corporation does an internal study based on the cost of recalling one million parking

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it is difficult to see why *Mathias* held that a ratio of 37.2 to 1 punitive to compensatory damages was constitutional. Therefore, it seems that Judge Posner's ideal "notice" would be adequate instruction like the criminal sentencing guidelines to both judges and jury. *See id.*

188. Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1168 n.36 (1982).

189. *Id.* at 1156.

190. This term has been coined by Cynthia Williams. Cynthia A. Williams, *Corporate Compliance With The Law In The Era Of Efficiency*, 76 N.C. L. REV. 1265 (1998) ("I call the underlying conception of law . . . the 'law-as-price' view of law.") [hereinafter Williams].

191. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders.").

192. *But see* Williams, *supra* note 190 (arguing against the "law-as-price" theory because it does not take into account social costs to the corporation).

brakes versus the probability of an accident of this type, the amount it might have to pay out in legal fees, lawsuits, and settlements, and the probability of a lawsuit due to the parking brake.

Before *State Farm*, an analysis on this type of tort, products liability, would be difficult due to the chance of being inflicted with a heavy punitive damage award. After *State Farm*, a corporation can accurately calculate how much it may have to pay out in a lawsuit and thus make a decision on whether it should recall the parking brakes or put its customers at risk of being injured or dying in an accident caused by its parking brake. It is needless to say that the purpose of punitive damage awards was to discourage this type of analysis by not allowing corporations to put a price tag on human injuries.[193]

It is evident that not only do corporations make a cost-benefit analysis every day, but that courts recognize and approve of these decisions. The Ninth Circuit has concluded that "[a] manufacturer of an innovative but untried product, such as the self-tightening parking brake in this case, faces much more risk selling it in Nevada than in Alaska [due to Nevada's laws]."[194] The court also stated that "[a] national company . . . limits its sales according to variations in risk."[195]

It could also be argued that *State Farm*'s single-digit ratio is nothing more than an arbitrary guess at what the "proper" amount of punitive damages to award is. From an economic standpoint, the general rule of "optimal deterrence"[196] is that society, through its representatives in the legislature, decides that the damage to the social good is $X.[197] $X will only be the accurate damage value if it is set above "the external social costs of the conduct at issue, *because* of the possibility of nondetection or nonprosecution."[198] The Seventh Circuit Court of Appeals embraces the "optimal level" of deterrence theory as well as the necessity to include in it

193. Sandra N. Hurd & Frances E. Zollers, *State Punitive Damages Statutes: A Proposed Alternative*, 20 J. LEGIS. 191, 200 (1994) [Hurd & Zollers].

194. White v. Ford Motor Co., 312 F.3d 998, 1017 (9th Cir. 2002).

195. *Id.*

196. *See* Easterbrook & Fischel, *supra* note 188. Optimal deterrence, when applying it to punitive damages, refers to an efficient balance between the importance society places in preventing the like harm to the plaintiff and the corporation's interest in violating the law.

197. See David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 40-41 (1979). For purposes of this subject, since the Supreme Court has effectively legislated from the bench and deemed that almost every punitive damage award will not pass constitutional muster unless it conforms to this single-digit ratio rule, they have taken the place of the legislature in this matter.

198. *Id.* at 41 (emphasis in original).

the possibility of nondetection or nonprosecution.[199]

The Utah Supreme Court in *State Farm* recognized the necessity of this as well. It found that it was necessary to punish State Farm so severely because they would only be punished "in one out of every 50,000 cases as a matter of statistical probability . . . ."[200] Unfortunately, the U.S. Supreme Court quickly dismissed these findings as "defend[ing] a departure from well-established constraints on punitive damages."[201]

It is clear, however, that the Justices do not make any kind of balance between the social good and the protections to a corporation when adopting the single-digit ratio.[202] In fact, the Court makes vague references to notions of fairness, past legislative history, and guarantees of due process.[203] Because of the difficulty of determining what damages at their "optimal deterrence"[204] level should be, the issue is best left to legislatures and lobbyists to determine.

2. The Punishment Function of Punitive Damages Removed

The other function of punitive damages is to punish the defendant and teach them never to do the wrong again.[205] In order to effectively do that, the punishment must be calculated such that the defendant is punished for the likelihood of escaping detection of their wrongdoing, the wealth of the defendant, and the ability of the defendant to pay such an award.[206]

For example, consider the hypothetical of the corporation above who

199. "[I]f a wrong causes $5,000 injury and is redressed one time in five, the optimal damages are $25,000. That redresses the injury to victims as a whole and the injurer then can decide what precautions are appropriate." Perez v. Z Frank Oldsmobile, Inc., 223 F.3d 617, 621 (7th Cir. 2000). In response to an argument of possible multiple damages against a defendant, *see infra* Part IV.A.2.

200. *State Farm*, 538 U.S. at 426 (quoting Campbell v. State Farm, 65 P.3d 1134, 1153 (Utah 2001).

201. *Id.* at 427.

202. It could be argued that the Court indeed does make a cost-benefit analysis by looking at whether the corporation is a recidivist, and increasing the punitive damages award if it is. However, since whether the defendant is a recidivist is only one factor of many under one of the three guideposts, it seems very insignificant in proportion to the adoption of this rule. *See id.* at 423-26.

203. *See id.* at 419-24.

204. *See infra* note 244 and accompanying text.

205. *See* WILLIAM L. PROSSER & W. PAGE KEETON, THE LAW OF TORTS § 2 (5th ed. 1984 & Supp. 1988).

206. The low detection of probability has been a particular concern of federal courts even after *State Farm*. *See* Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 676 (7th Cir. 2003) (stating even though punitive damages should be proportional to the defendant's wrongdoing, this principle is "modified when the probability of detection is very low . . . .").

manufactures and sells defective parking brakes. Assume that the net worth of this corporation is $26 million. Through statistical study, it is determined that the probability of the brake engaging by itself is 1 in 1000. Since the corporation has sold 1 million parking brakes, it is safe to say that there could be approximately 100 possible lawsuits due to the defective parking brake. Out of those 100 lawsuits, 40 of them do not attribute the accident to the parking brake or decide not to pursue action against the corporation. In addition, the corporation settles 55 of those possible lawsuits for an average of $10,000. The remaining 5 are determined to bring the lawsuit to trial. After discovery, assume that 4 out of the 5 settle for the higher sum of $20,000. Therefore, the probability of the company being detected of their wrongdoing and punished is one in a million. The legislature, when issuing such a law, must look at these types of scenarios and take them into account when coming up with a statute, especially such a statute as punitive damages.

In order to discover the "optimal level" of deterrence, it is useful to analyze state legislature's answers to the punitive damage problem.[207] State legislatures have answered the punitive damage question in one of two general ways.[208] Either a state will cap damages at a certain amount regardless of the claim,[209] or cap damages at a ratio of punitive damages to compensatory damages but carve out exclusions for certain torts.[210]

It seems the first way that legislatures have dealt with punitive damages has no relation to punishing a defendant for the wrongs that it has committed. These punitive damage caps appear to be the result of the pressures of lobbying groups inaccurately quoting juries awarding extremely high punitive damages on a regular basis[211] or convincing state legislatures that business competitiveness can only be accomplished when corporations can predict their liabilities.[212] These perceived problems with

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207. Not every state has enacted a statute capping punitive damages, and not every state that has enacted a punitive damage statute has been included in this case note.

208. There are, of course, exceptions to this generality. For instance, Colorado's punitive damage capping statute provides for a set 1:1 ratio of compensatory to punitive damages, but allows a judge to raise that ratio up to 3:1. in cases of willful or wanton behavior during the pendency of the action or where such behavior is continued during the pendency of the action. *See* COLO. REV. STAT. § 13-21-102 (2003).

209. *See, e.g.*, VA. CODE ANN. § 8.01-38.1 (2003) (capping punitive damages at $350,000); IND. CODE § 34-51-3-4 (2003) (capping punitive damages at the greater of three times compensatory damages or $50,000).

210. *See, e.g.*, OKLA. STAT. tit. 23, § 9.1 (2003) (generally capping punitive damages at a ratio, but no cap will be used if a jury finds by clear and convincing evidence that an insurer intentionally and maliciously breached its duty to its insured).

211. Daniels & Martin, *supra* note 22, at 14.

212. Hurd & Zollers, *supra* note 193, at 195-196.

punitive damages have led to state legislatures being more aggressive against "runaway" juries.[213]

While subject to the above argument, the second way that legislatures have dealt with punitive damage awards seems to be a much better solution than the first. The majority of legislatures that have enacted punitive damage statutes recognize that a punitive damages cap should not be inflexible, and should be discarded when its purpose is outweighed by other social goods. For instance, an Alabama punitive damages statute makes a distinction between small businesses and large corporations.[214] They limit small business damages to the greater of ten percent of the business' net worth or $50,000.[215] The statute also has a general exception to their fixed ratio of compensatory damages to punitive damages in actions of wrongful death or any intentional infliction of physical injury.[216] Similarly, a Nevada punitive damage statute sets a standard ratio of punitive damages to compensatory damages, but does not apply the ratio cap for claims of products liability or bad faith insurance.[217] For both Alabama and Nevada, their optimal level of punishment is moderate for most torts.[218] However, they see great societal damage in claims of wrongful death and products liability, respectively.[219] The Alabama and Nevada legislatures have recognized that the damage to their citizens is severe enough to set aside punitive damages caps in favor of alternatives such as those mentioned above.[220]

The Supreme Court, however, has unilaterally applied a single digit ratio without the similarly detailed analysis of the states above.[221] Without that kind of analysis, the Supreme Court has tossed aside the valid state societal concerns that states took into consideration while making exceptions to their statutes. In fact, the Supreme Court's decision in *State Farm* has the effect of invalidating any exception a state has created in their

213. The validity of the perception of runaway juries is itself challenged. *See* Daniels & Martin, *supra* note 22, at 14 (stating "[p]roponents of chang[ing] punitive damage laws] generally use . . . horror stories and anecdotes about jury verdicts involving punitive damages, and aggregate data on the frequency and size of these awards."). In fact, an amicus brief for *Pacific Mutual* even claimed that research data that comprised of two counties was "a comprehensive analysis of jury verdicts in the United States." *Id.* at 27. As Daniels and Martin put it, "[s]uch generalizations are inappropriate and unfounded . . . ." *Id.*

214. ALA. CODE § 6-11-21 (2003).

215. *Id.* at § 6-11-21(a)-(c).

216. *Id.* at § 6-11-21(j).

217. NEV. REV. STAT. 42.005(2) (2003).

218. *Id.* at 42.005(1)(a)(b) (2003).

219. *Id.* at 42.005(2)(a)(d) (2003).

220. *Id.* at 42.005(2) (2003).

221. *See supra* Part IV.A; NEV. REV. STAT. 42.005(2) (2003).

statutes that does not conform to a single-digit multiplier rule.

B. STATES' INTEREST IN PUNISHING UNLAWFUL OUT-OF-STATE CONDUCT

1. A State Does Have an Interest in Punishing Out-Of-State Conduct

The *State Farm* Court left open the question of whether a state has the power and interest to punish a defendant for unlawful out-of-state conduct. Considering that the Supreme Court went above and beyond reversing the Utah Supreme Court by positing the single digit ratio test,[222] it is significant that the Supreme Court did not answer this question.

Lower courts have already tried to answer this question. The Ninth and Tenth Circuit Courts of Appeals have decided that a state does not have an interest in punishing a defendant for unlawful out-of-state conduct.[223] On the other hand, Florida and Texas state courts have decided that a state *does* have that interest.[224] An analysis of these lower court cases dealing with whether a state could punish out-of-state conduct might help to flush out the issues.

The Ninth Circuit in *White v. Ford* specifically elaborated on its reasons for holding that a state does not have an interest in punishing a defendant for unlawful out-of-state conduct. The court decided that this decision "made sense" for two reasons. First, "the core conduct in *BMW* [*v. Gore*], consumer fraud, would likely be wrongful to some degree in all states . . . and [when] the *BMW* court pointed to [this, it] was in [the] part in *how* the conduct is sanctioned rather than *whether* it is permitted."[225] Second, and most important to the court, the states have a "distinction in policy."[226] The court reasoned that Nevada "effectively imposed $70 million in punitive damages, in part to protect Alaskans, among others, from failure to warn of defects in pickup trucks."[227] The court then went into a stifling business argument by stating that "[a] manufacturer of an innovat[ive] but untried product . . . faces much more risk selling it in

222. *See supra* Part IV.A (arguing that the Supreme Court should have decided *State Farm* without adopting the single digit multiplier rule).

223. White v. Ford Motor Co., 312 F.3d 998, 1015-20 (9th Cir. 2002); Continental Trend Res. v. OXY USA Inc., 101 F.3d 634, 637 (10th Cir. 1997), *cert. denied*, 520 U.S. 1241 (1997).

224. Owens-Corning Fiberglass Corp. v. Ballard, 739 So. 2d 603 (Fla. Dist. Ct. App. 1998), *aff'd*, 749 So. 2d 483 (Fla. 1999); Corning v. Thompson, No. 05-98-00231-CV, 2000 WL 764930, at *4 (Tex. App. June 14, 2000) (not designated for publication).

225. *White*, 312 F.3d at 1017.

226. *Id.*

227. *Id.*

Nevada than in Alaska."[228] Based on that risk, the court implied that a national company may "limit its sales."[229] Essentially, therefore, the court said that Nevada's policy arguably places much more emphasis on safety than Alaska's, and defines why federalism exists: so that a state can not regulate and impose an undue burden on a sister state.[230]

Florida, however, takes a different approach. In *Owens-Corning v. Ballard*, the Florida District Court of Appeal analyzed the Tenth Circuit case of *Continental Trend Resources v. OXY USA* and did not find that decision either "helpful or persuasive."[231] The court decided that where a "defendant's conduct is considered tortuous in all 50 states, as here, the same due process concerns implicated in *BMW* do not arise here."[232] Even though this part of the decision was dicta, the Florida Supreme Court arguably affirmed it.[233]

At least one federal court has agreed with Florida's conclusion. In *Jiminez v. Chrysler Corp.*, the District Court of South Carolina upheld a large punitive damage award when part of the evidence was due to out-of-state conduct.[234] In fact, the court concluded that "Chrysler sales outside South Carolina *do* affect the citizens of South Carolina insofar as they affected Chrysler's decision to recall minivans . . . on a national basis."[235]

The issues that are drawn from these cases seem to pit state sovereignty[236] against punishing and deterring the defendant for their wrongs. Even though the issues seem clear, they are actually very cloudy. For instance, even though state sovereignty appears to be clear-cut and the state's power should stop at its border, the Supreme Court does believe that a court should consider under its reprehensibility guidepost evidence of

228. *Id.*

229. *Id.* at 1017-18.

230. *Id.* This argument goes to the heart of state sovereignty, considered in Part IV.B.2, *infra*.

231. *Owens*, 739 So. 2d at 606.

232. *Id.*

233. *See Owens*, 749 So. 2d 483, 490 (Fla. 1999) (Overton, J., dissenting) ("I find this State . . . has absolutely no constitutional authority or jurisdiction to impose the penalty of punitive damages for a defendant's conduct that occurred outside this state."). Even if the majority vaguely affirms the whole opinion, Justice Overton took the position that this dicta (by the appellate court) was being decidedly affirmed by the majority.

234. Jiminez v. Chrysler Corp., 74 F. Supp. 2d 548, 582 (D.S.C. 1999), *rev'd on other grounds*, 269 F.3d 439 (4th Cir. 2001).

235. *Id.* at 585 (emphasis added).

236. State sovereignty is "the right of a state to self-government; the supreme authority exercised by each state." BLACK'S LAW DICTIONARY 1418 (7th ed. 1999). Since each state has the right to self-govern itself, it is natural that any state would want to punish any defendant for any wrongdoing in its state.

out-of-state conduct.[237]

2. State Sovereignty Affecting Out-of-State Punitive Damages

The state sovereignty issue is that a state should not be allowed to consider out-of-state conduct in punishing a defendant because its power should stop at its borders. This argument has already been dismissed when relating to evidence of *lawful* out-of-state conduct because the Supreme Court believes it is admissible to show reprehensibility of the defendant.[238] However, since the question remains open for *unlawful* out-of-state conduct, a deeper analysis of the state sovereignty argument is necessary.

State sovereignty rests on the idea of federalism. Each state has an "inherent sovereign authority to govern its citizens within its territorial borders, subject only to the supreme authority of the federal government."[239] This sovereign authority is limited to adopting laws that only affect citizens within its own territorial jurisdiction.[240]

The Supreme Court has not adjudicated state sovereignty frequently, but has occasionally granted certiorari in this area. For instance, in *Healy v. The Beer Institute*,[241] the Court decided that state regulation which proceeded beyond its borders and affected another state's economic activity was unconstitutional under the Dormant Commerce Clause.[242] The Court stated that precedent showed "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce . . . ."[243] The Court laid out three

237. Richard Murphy believes that the dichotomy between looking at lawful/unlawful conduct is irrelevant: "[I]t is difficult to see how a state could use its own punitive damages law to punish and deter out-of-state conduct regardless of its legality where it occurred" when the court cites precedent to the effect that "states cannot give their laws extraterritorial application generally." Richard Murphy, *Superbifurcation: Making Room for State Prosecution in the Punitive Damages Process*, 76 N.C. L. REV. 463, 490 n.133 (1998).

238. *See supra* Part II.C.-D. (*Gore* and *State Farm* allows the use of lawful out-of-state conduct for consideration under the reprehensibility guidepost).

239. Margaret M. Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275, 292-93 & n.71 (1999).

240. *See id.* at 293.

241. *See* Healy v. Beer Inst., 491 U.S. 324 (1989).

242. U.S. CONST. art. I § 8, cl. 3 (stating "[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes"). Furthermore, the dormant aspect of the Commerce Clause is a gloss on the Commerce Clause itself that prevents any state from regulating interstate commercial activity even when Congress is silent as to the regulated activity. *See also* BLACK'S LAW DICTIONARY 263 (7th ed. 1999).

243. *Healy*, 491 U.S. at 335-36 (footnotes omitted). The Court believed that "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property [either by legislation or by judicial jurisdiction] would offend sister States and exceed the inherent limits of the State's power." *Id.* at 337 n.13 (quoting Edgar v. MITE Corp., 457 U.S. 624, 643 (1982) (plurality

"propositions" in this area.[244] First, the "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State . . . ."[245] Second, "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature."[246] Third, "the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation."[247]

From analyzing the Court's emphasis on state sovereignty in cases like *Healy*, it would seem that a state would never have an interest in looking beyond its borders. However, the Supreme Court has encouraged just this sort of thing in criminal law. In *Lockyer v. Andrade*[248] and *Ewing v. California*[249] the Court upheld California's "three strikes" statute.[250] California's "three strikes" statute takes into account both the defendant's felonious crimes committed in California as well as any offense committed in another jurisdiction.[251] The statute states that if the defendant has two or more prior felony convictions, then they are sentenced to a mandatory term of not less than twenty-five years to life.[252] The California statute, therefore, has the effect of punitively punishing defendants for unlawful out-of-state conduct.[253]

It seems, then, that the Supreme Court is willing to allow states to punish unlawful out-of-state conduct in certain areas of the law and not in

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opinion) (quoting Shaffer v. Heitner, 433 U.S. 186, 197 (1977)) (alteration in original).

244. *Healy*, 491 U.S. at 336.

245. *Id.* (quoting *Edgar*, 457 U.S. at 642-43).

246. *Id.*

247. *Id.*

248. *See* Lockyer v. Andrade, 538 U.S. 63 (2003).

249. *See* Ewing v. California, 538 U.S. 11 (2003).

250. *See generally* CAL. PENAL CODE § 667 (West 2003).

251. *See id.* § 667(a)(1).

252. *See id.* § 667(e)(2)(A)(ii).

253. It is conceded that the Supreme Court was not faced with this portion of the "three strikes" statute to decide whether it was constitutional or not on these grounds. *See Lockyer*, 538 U.S. at 63; *Ewing*, 538 U.S. at 11. However, it has generally been held that states can look to other state's convictions of the defendant while considering whether they are recidivists, and, therefore, deserve a longer sentence. *See, e.g.*, Jones v. White, 992 F.2d. 1548, 1569 & n.23 (11th Cir. 1993), *cert. denied*, 510 U.S. 967 (1993) (using previous out-of-state convictions to raise a repeat offender's mandatory sentence for his current crime does not violate the Eighth Amendment).

others. Since punitive damages are quasi-criminal in nature, it would make sense that cases like *Lockyer* and *Ewing* should be followed in the area of punitive damage law: *i.e.*, allowing states to punish out-of-state conduct. This dichotomy reflects the confused and inconsistent nature of this area of law.

3. A Solution to the Out-of-State Conduct Dilemma

Besides possible Congressional legislation, a middle-ground between these two theories would be appropriate. The U.S. Supreme Court should posit a rule that allows any court to punish unlawful out-of-state conduct, but at the same time requiring that court to apply the forum state's laws regarding punitive damages where that unlawful out-of-state conduct took place. This would keep state sovereignty sacred while at the same time allowing a court to punish and deter the wrongdoer.[254]

It is well founded in criminal law that "[a] State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of *its* own laws."[255] Of course, this naturally assumes that the case will be presented to the state to enforce its laws. Unlike criminal law, where, once caught, there is a very high chance that the criminal will be prosecuted, civil law can offer no such guarantees.

In fact, it is more likely that the defendant will very rarely be punished. As the Utah Supreme Court found in *State Farm*, the defendant would be "punished at most in one out of every 50,000 cases as a matter of statistical probability . . . ."[256] Therefore, it is very logical to assume that a state will only get one shot, and, in the rare case, two or three, to vindicate both its and another state's interest in punishing the defendant. In addition, a complete solution must encompass this idea in order to successfully balance the social good and the necessary protections of the defendant.

As an example, consider a corporate defendant that decides to enact a national scheme to cap payouts to its insured. It realizes the low probability that it will be detected and, with *State Farm*'s holding, knows that the most it will pay out in punitive damages will be a single digit multiple of compensatory damages. After denying thousands of claims by

254. Recall in Part IV.A.1, *supra*, that a state would have an interest in punishing unlawful out-of-state conduct because, if for no other reason, the likelihood that the defendant would be punished in relation to the number of times the defendant has committed the harm is slim.

255. Heath v. Alabama, 474 U.S. 82, 93 (1985).

256. Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1153 (Utah 2001), *rev'd*, 538 U.S. 408 (2003).

thousands of people, plaintiff *X* finally brings suit against the corporation. *X*, proves her case by showing evidence of the national scheme put in place by the defendant corporation, and is awarded compensatory damages. In addition, under this solution, when awarding punitive damages, the jury must be instructed to look at where the corporate defendant does business and where it has enacted its scheme, then apply the forum state's punitive damage laws when punishing the defendant corporation for its out-of-state conduct. The court will award the plaintiff the punitive damage award, and the case will become res judicata for any other punitive damage claims. Naturally, this would not block any other plaintiff's claims for compensatory damages.

Of course, as with any solution, this solution opens itself up to criticism. One such criticism is the possibility of a defendant facing multiple damages by the same conduct. However, this would be unfounded, considering the case that does punish the defendant would represent res judicata against subsequent actions for the same conduct through the Full Faith and Credit Act.[257]

Another such criticism would be that this allows a "windfall" to one plaintiff who wins the "litigation lottery." Unfortunately, this criticism oversimplifies modern punitive damages jurisprudence and confuses the purpose of punitive damages. First, punitive damages' purpose is to deter and punish the *defendant*. The purpose of punitive damages is *not* to compensate the plaintiff. Because the money has nowhere else to go, it goes to the plaintiff. In order to combat this concern, however, some states have enacted statutes that take half of the punitive damages award and put that money in the state's coffers.[258] These statutes would, of course, be considered by the court punishing unlawful out-of-state conduct.

VI. CONCLUSION

State Farm's new ratio guidelines hamstring the punitive damages doctrine as modern jurisprudence currently views it because it allows corporations to make an effective cost/benefit analysis in every decision regarding defective, or possibly defective, products. Furthermore, unlike some commentators suggest,[259] a corporation has *no* social duty. In fact, its primary duty is to maximize profits for its shareholders.

State Farm again left open whether a state has an interest in punishing

257. *See* 28 U.S.C. § 1738 (1994).

258. Even though it may be questionable that a state does this, it is beyond the scope of this article to discuss the constitutionality of this issue.

259. *See generally*, Williams, *supra* note 190.

defendants for unlawful out-of-state conduct. The Supreme Court, when faced with this issue, should adopt a rule stating that a state does have an interest in punishing a defendant for unlawful out-of-state conduct, but when it does so should apply the particular state's laws regarding punitive damages when punishing that defendant. This rule would be simple to apply, would appropriately deter defendants from all unlawful conduct, and would keep state sovereignty intact.