State Farm and Punitive Damages: Call the Jury Back

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INTRODUCTION

The jury sits at the center of our democratic republic, of our constitutional system of checks and balances, and of the guarantees of liberty set out in our Bill of Rights. If this proposition seems remarkable, it is because Americans' right to trial by jury in civil cases has been reduced to a shadow of the powerful voice of the people that the Founding Fathers had in mind. Voices as different as Justice Hugo Black and Chief Justice William Rehnquist have warned that the civil jury has suffered a "gradual process of judicial erosion."[1]

Nowhere does the civil jury speak louder than when it awards punitive damages against a defendant who has violated our common understanding of acceptable behavior. The jury verdict speaks as the conscience of the community. Indeed, the doctrine of punitive damages is closely intertwined with our constitutional right to trial by jury.

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1. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 339 (1979) (Rehnquist, C.J., dissenting) (quoting Galloway v. United States, 319 U.S. 372, 407 (1943) (Black, J., dissenting)).

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I. JURY AWARDS OF PUNITIVE DAMAGES AS AN EXERCISE IN DEMOCRACY

A. Jurors, Heroes of the Common Man

The history of the jury has been filled with "violence and passion."[2] The knights who confronted King John at Runnymeade, it is believed, demanded at sword-point the right to trial by a jury of their peers.[3] In the centuries that followed, the jury became a tool of the Crown as the king fought to extend his authority over the nobles and the church.[4]

The 17th and 18th Centuries, however, saw the jury on occasion speak out, the voice of the people raised up against oppression. This was "the heroic age of the English jury" when "trial by jury emerged as the principal defense of English liberties."[5] Edward Bushel and fellow jurors refused to convict Quaker William Penn in 1670, defying a judge who threatened, fined and jailed them without food or water. They were hailed as heroes, forcing Parliament at last to prohibit judges from punishing juries who returned a "wrong" verdict.[6] The jury's acquittal of seven Anglican bishops accused of seditious libel in 1688 was cheered so loudly in the streets that the judge could not be heard in his own courtroom and led to the passage of the English Bill of Rights.[7] The jury also spoke out with the voice of the people in civil cases. The most remarkable – one that was fresh in the minds of the drafters of the Constitution – was a lawsuit brought by John Wilkes.

Wilkes was a colorful populist member of Parliament, a protégé of opposition leader William Penn. His campaign for electoral reform

2. Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, The Seventh Amendment, And The Politics Of Jury Power*, 91 COLUM. L. REV. 142, 146 (1991).

3. The jury right has been traced to Chapter 29 of the Magna Carta. WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND *350, Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform,* 25 HOFSTRA L. REV. 377, 391 (1996).

4. *See* JOHN P. DAWSON, A HISTORY OF LAW JUDGES 293-94 (1960); *see generally* LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY (1973).

5. J. M. BEATTIE, *London Juries in the 1690s*, *in* TWELVE GOOD MEN AND TRUE 214 (J.S. Cockburn & Thomas A. Green eds., 1988).

6. The story of Bushel's Case is rendered in lively detail in JOHN GUINTHER, THE JURY IN AMERICA ch. 1 (1988).

7. *See* the dramatic account in 1 J. KENDALL FEW, IN DEFENSE OF TRIAL BY JURY 144-47 (1993).

made him a hero to the disenfranchised working and lower class crowds of London. His defense of the rights of the American colonists made him immensely popular in America as well.[8] His biting criticism of the government, however, won him no friends in the administration. Wilkes' criticism of the Prime Minister, published anonymously in issue No. 45 of *The North Briton* finally provoked Secretary of State Lord Halifax in 1762 to issue a blatantly illegal general warrant to round up the usual suspects. Forty-nine suspected authors, printers and publishers were caught in the dragnet.[9] Wilkes and the others fought back in court. The ensuing controversy was the Watergate of its time.

The jury awarded Wilkes 1,000 pounds;[10] and another jury returned a verdict of 300 pounds in favor of Huckle, his printer.[11] The Crown settled many of the lawsuits brought by other victims of the scandal. By the time all the judgments were satisfied, the government had paid out an estimated 100,000 pounds.[12] The scene outside the court when the verdict was announced was jubilant. Some in the crowd confronted the jurors, demanding to know why they had not awarded even more. The Crown, of course, had a different view of the matter. The defense moved to reduce the verdict, arguing that the award greatly exceeded the actual damage to Wilkes.

The Lord Chief Justice Pratt responded: "[A] jury shall have it in their power to give damages for more than the injury received as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."[13] Thus the remedy of punitive damages was established at common law.[14] As to the appropriate amount, Chief Justice Pratt

8. On Wilkes popularity in America, *see generally* RAYMOND W. POSTGATE, THAT DEVIL WILKES (1929); GEORGE F.E. RUDE, WILKES AND LIBERTY (1962).

9. *See* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 43 (1937).

10. Wilkes v. Wood, Lofft 1, 98 Eng.Rep. 489 (C.P.1763)

11. Huckle v. Money, 2 Wils. 205, 95 Eng.Rep. 768 (C.P.1763)

12. Lasson, *supra* note 9, at 45.

13. Wilkes, 98 ENG. REP. 489, 498-99.

14. The notion of requiring the perpetrator of criminal or unacceptable conduct to pay the victim a defined penalty, often a multiple of the victim's loss, has been traced back to the legal codes of ancient civilizations. *See, e.g.,* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reforms,* 39 VILL. L.REV. 363, 368 (1994); Michael Rustad and Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers,* 42 AM. U.L. REV. 1269, 1285-86 (1993); *and see* District Judge Marrero's thoughtful discussion in TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413, 418-20 (S.D.N.Y. 2003). For the present discussion, however, the defining feature of punitive damages is the role of citizen juries to express the moral outrage of the man in the street and to tailor the penalty, if there is to be one, to the facts and

explained, "it is very dangerous for the Judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages."[15] At its inception, the doctrine of punitive damages was rooted in the common law tradition which accorded broad discretion to the jury in the assessment of damages.[16]

Across the Atlantic, the colonists followed Wilkes's running battle with the British government with intense interest.[17] The American press devoted so much attention to his trials, tribulations and speeches that "one may go to almost any issue of any newspaper between 1763-1775 and read of John Wilkes."[18] Judge Pratt's decision was widely acclaimed in newspaper accounts and pamphlets appearing throughout the colonies, even before the official case reports were published.[19] Historian Pauline Maier has written that, "between 1768 and 1770 no English political figure evoked more enthusiasm in America than the radical John Wilkes."[20]

> [T]he cry of 'Wilkes and Liberty' echoed loudly across the Atlantic Ocean as wide publicity was given to every step of Wilkes's public career in the colonial press... The reaction in America took on significant proportions. Colonials tended to identify their cause with that of Wilkes. They saw him as a popular hero and a martyr to the struggle for liberty.... They named towns, counties, and even children in his honour.[21]

circumstances of each individual case.

15. Huckle, 2 Wils. at 207, 95 Eng. Rep. at 769.

16. *See* L. SCHLUETER & K. REDDEN, PUNITIVE DAMAGES 6-9 (2d ed. 1989) ("Lord Camden's recognition of the jury's unfettered discretion in awarding damages was firmly rooted in English legal tradition."). Prior to 1791, English courts asserted their authority to set aside a jury award that was so high as to indicate that the jury acted out of passion or prejudice or was irrational. In Leith v. Pope, 2 Black. W. 1327, 1328, 96 Eng. Rep. 777, 778 (C. P. 1779), the jury's verdict for 10,000 pounds for malicious prosecution was upheld because of the outrageousness of the misconduct. The court added, "in cases of tort the Court will not interpose on account of the largeness of damages, unless they are so flagrantly excessive as to afford an internal evidence of the prejudice and partiality of the jury." *Id*. In 1764, one English court declared that "there is not one single case (that is law) in all the books to be found, where the Court has granted a new trial for excessive damages in cases for torts." Beardmore v. Carrington, 95 Eng. Rep. 790, 793 (C.P. 1764).

17. Stephan Landsman, *The Civil Jury in America: Scenes From an Unappreciated History*, 44 HASTINGS L.Q. 579, 591 (1993).

18. CLINTON ROSSITER, SEED-TIME OF THE REPUBLIC 527 n.158 (1953).

19. Thomas Y. Davies, *Recovering The Original Fourth Amendment*, 98 MICH. L. REV. 547, 564-65 & n.25 (1999).

20. PAULINE MAIER, FROM RESISTANCE TO REVOLUTION 162 (1972).

21. Powell v. McCormack, 395 U.S. 486, 531 (1969) (quoting 11 LAWRENCE H. GIPSON THE BRITISH EMPIRE BEFORE THE AMERICAN REVOLUTION 222 (1956)).

Colonial assemblies even sent campaign donations to Wilkes.[22] "Treatises extolling the jury flooded the market" in America as well as England, celebrating the jury "as a bulwark of liberty, as a means of preventing oppression by the Crown."[23] *Wilkes v. Wood* "was probably the most famous case in late eighteenth century America."[24]

B. The Jury in America

The jury, a district judge has written in a spirited defense, "entered out national life as an institutional hero."[25] The American colonists relied on the jury to resist royal oppression. Colonial governors used criminal prosecutions and civil forfeitures to enforce the hated Stamp Act and other unpopular tax laws. Colonists successfully appealed to local juries, not only to acquit them of the taxes, but even to award damages against officials for having the temerity to try to collect them.[26] England responded by removing many cases to jury-free vice-admiralty courts, where cases were decided by judges beholden to the Crown. [27] The colonists also complained against appellate review by the Privy Council in London, which claimed the authority to overturn verdicts of colonial juries and judgments of colonial courts.[28] Repeated interference with the colonists' right to jury trial was "one of the important grievances leading to the break with England."[29] Dean Roscoe Pound declared: "The fight over jury rights

Examples include Wilksboro, N.C., Wilkes-Barre, Pa. and Camden, N.J. And, less happily, John Wilkes Booth. Wilkes and Lord Camden became "folk heroes in the colonies." *See* Akhil Reed Amar *The Bill Of Rights As A Constitution*, 100 YALE L.J. 1131, 1177 (1991).

22. Stephan Landsman, *The Civil Jury in America: Scenes From an Unappreciated History*, 44 HASTINGS L.Q. 579, 591 (1993).

23. Austin Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 676 (1918).

24. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772 (1994). Actually, the Wilkes affair generated a clutch of decisions dealing with the illegality of general searches and punitive damages. In addition to Wilkes and Huckle were Money v. Leach, 19 How. St. Tr. 1001, 97 Eng. Rep. 1075 (C.P. 1764); Beardmore v. Carrington, 19 How. St. Tr. 1405, 95 Eng. Rep. 790 (C.P. 1764); and Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (C.P. 1765).

25. WILLIAM L. DWYER, IN THE HANDS OF THE PEOPLE 70 (2002).

26. Renee B. Lettow, *New Trial For Verdict Against Law: Judge Jury Relations In Early Nineteenth Century America,* 71 NOTRE DAME L. REV. 505, 517 (1996).

27. *See* ROSCOE POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 69-72 (1957).

28. 1 HOMER CAREY HOCKETT, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 55 (1939) (The Privy Council reviewed some 265 colonial cases).

29. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 340 (1979) (Rehnquist, J., dissenting).

was, in reality, the fight for American independence."[30]

After independence, many new Americans were understandably worried that oppression by the Crown would be replaced with oppression by the new national government. Punitive damages, exemplified in the *Wilkes* case, represented power in the hands of the people to punish and deter those officials who exceeded the law. As Professor Akil Amar explains, tort actions against overreaching police and government officials were seen as the primary enforcement mechanism for individual rights.[31] It was the colonists' desire to preserve that authority which gave impetus to the adoption of the Seventh Amendment, and thus to ratification of the Constitution itself.[32]

When the Constitutional Convention delegates emerged from their closeted deliberations in Philadelphia, they failed to include a Bill of Rights with the right to trial by jury in civil cases. That omission very nearly doomed ratification of the entire Constitution.[33] Fear that civil cases would be put in the hands of federal judges led to widespread demand for an explicit guarantee.[34] The Anti-federalists rejected the Federalist argument that Congress would protect the rights of the people. Common people could depend only on themselves, sitting as jurors.[35] The *Wilkes* verdict was cited in the ratification debates in support of the need for constitutional protection of the civil jury.[36] Ultimately, as Justice Story recounts, the Federalists' commitment to adopt a Bill of Rights, including jury trials in civil cases, won support

30. Pound, *supra* note 27, at 72.

31. Amar, *The Bill Of Rights as a Constitution*, *supra* note 21, at 1178-81.

32. *See* Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, and the Politics of Jury Power,* 91 Colum. L. Rev. 142 (1991).

33. Edith Guild Henderson, *The Background of the Seventh Amendment,* 80 HARV. L. REV. 289, 295-98 (1966); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment,* 57 MINN. L. REV. 639, 672 n.89 (1973).

34. *See* Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 450-51 (1996) (Scalia, J., dissenting).

35. *See* the Anti-federalist writings quoted in Scheiner, *supra* note 32, at 145-57 and Amar, *The Bill Of Rights As A Constitution*, *supra* note 21, at 1187-88. This view is echoed by the Court in Newport v. Fact Concerts, Inc., 453 U.S. 247, 269-70 (1981). By "allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute [42 U.S.C. § 1983] directly advances the public's interest in preventing repeated constitutional deprivations." *Id*. *See also* Carlson v. Green, 446 U.S. 14, 22 n.9 (1980) ("punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are violated but the victim cannot prove compensable injury").

36. *See, e.g.,* Pennsylvania and the Federal Constitution 1778-1788, 781-82 (John B. McMaster & Frederick D. Stone, eds. 1988) (statement of Robert Whitehall to the Pennsylvania ratifying convention).

for the new constitution.[37] The opinion of the Lord Chief Justice in *Wilkes v. Wood* "profoundly influenced" the drafters of the Bill of Rights.[38]

American courts quickly adopted the doctrine of punitive damages.[39] Juries were typically instructed "not to estimate the damage by any particular proof of suffering or actual loss; but to give damages for example's sake, to prevent such offenses in [the] future."[40] The remedy also took on a distinctively American tone, punishing oppression by those in positions of authority against the weak and powerless.[41] With the industrial revolution and the growth of corporations as the dominant organizing form for the economy, punitive damages against corporations became an important means for ordinary Americans to send a message to economic power that certain misconduct is unacceptable.[42]

Early juries exercised extraordinary power. They could be called upon to decide issues of law as well as fact.[43] They might recall witnesses or ask additional questions of a witness, even after deliberations had begun.[44] Most importantly, trial by jury was not seen as a mere procedural device. The jury was an important political institution for self-government.[45] The Seventh Amendment reflected the founders' conviction that juries – not judges – expressed both the common sense and the conscience of the people.[46]

37. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 445 (1830).

38. City of W. Covina v. Perkins, 525 U.S. 234, 247 (1999) (Thomas, J., concurring). *See also* Boyd v. United States, 116 U.S. 616, 626-27 (1886) (influence on the text of the Fourth Amendment).

39. The earliest reported case was Genay v. Norris, 1 S.C.L. (1 Bay) 6 (S.C. 1784).

40. Coryell v. Colbaugh, 1 N.J.L. 77 (N.J. 1791).

41. *See* TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413, 419-22 (S.D.N.Y. 2003); Rustad and Koenig, *supra* note 14, at 89-96.

42. *Id*.

43. *See, e.g.,* Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794), an unusual instance of a jury trial in the Supreme Court, where the first Chief Justice, John Jay, instructed the jurors that they had the authority "to determine the law as well as the fact in controversy."

44. Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1185 n.31 (1995).

45. *See* a powerful presentation of this point in Vikram David Amar, *Jury Service As Political Participation Akin To Voting*, 80 CORNELL L. REV. 203 (1995).

46. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting) "Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, . . . and thus keep the administration of law in accord with the wishes and feelings of the community." *Id*. *See also* Granfinanciera, S. A. v. Nordberg, 492 U.S. 33, 82 (1989) (White, J., dissenting) (a principal rationale for the Seventh Amendment was that "juries serv[e] as popular checks on life-tenured judges."). Punitive damages in particular, the Court has recognized, represent the community's

As an exercise in democracy the civil jury was an impressive success, according to the most famous tourist to visit America. Alexis de Tocqueville astutely recognized that the jury is, above all, "a political institution" and "a gratuitous public school" in which Americans learned self-government by governing themselves. "I do not know whether the jury is useful to those who have lawsuits," he reported, "but I am certain it is highly beneficial to those who judge them." In his view, "the main reason for the practical intelligence and political good sense of the Americans is their long experience with juries in civil cases."[47]

It was not to last. The ink was scarcely dry on the Seventh Amendment when powerful forces laid siege to the authority of the civil jury. Ironically, the most damaging attacks came from that branch of government charged with protecting the Bill of Rights, the judiciary. Judges aggressively used directed verdicts, new trial orders, commenting on the evidence and other devices to subjugate juries.[48] As the Industrial Revolution built up a head of steam, it produced prosperity for some, but death and injury for many others. Jurists tended to side with corporate defendants who complained that jurors were too sympathetic to maimed workers and too unsophisticated to understand that America's fledgling industries needed protection from liability awards.[49] Judges invented and ruthlessly applied substantive doctrines, most notably contributory negligence, to keep cases from reaching the jury at all.[50]

And yet, the men in black robes did not question the jury's authority to assess punitive damages in amounts it deemed appropriate.[51] To the Supreme Court, it was a "well-established principle of the common law" that the amount of punitive damages "has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case."[52] Punitive damages would long remain

condemnation of "reprehensible conduct." IBEW v. Foust, 442 U.S. 42, 48 (1979).

47. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 293-96 (Bradley rev. ed. 1945). *See also* Amar, *The Bill of Rights as a Constitution*, *supra* note 22, at 1185-89 (1991).

48. *See generally* Lettow, *supra* note 26.

49. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 467-87 (2d ed. 1985).

50. See Wex S. Malone, *The Formative Era of Contributory Negligence,* 41 ILL. L. REV. 151, 159-64 (1946).

51. Lettow, *supra* note 26, at 547-51.

52. Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1852). The Court consistently reaffirmed that the amount of punitive damages was a matter within the discretion of the jury. *See* Missouri Pacific R. Co. v. Humes, 115 U.S. 512, 521 (1885); Barry v. Edmunds, 116 U.S. 550, 565 (1886).

"a part of traditional state tort law."[53]

II. ECONOMIC SUBSTANTIVE DUE PROCESS COMES BACK

A. Rising Opposition to Unpredictable Punitive Damages

Intense corporate opposition to punitive damages began in the 1960s, when courts authorized awards of punitive damages in product liability cases and insurance bad faith cases.[54] Mass marketers of products and services that affected millions of people faced the prospect of multiple, potentially ruinous punitive awards. An integral part of the tort reformers' campaign to limit such awards was their claim that juries routinely handed down outrageously large punitive damage verdicts against corporate defendants.[55]

One laudable byproduct of this campaign was to prompt researchers to look beyond the few headline-grabbing verdicts to get a truer picture of the civil justice system at the trial level. The result was an unprecedented number of independent, objective studies of jury verdicts. The empirical evidence overwhelmingly demonstrated that punitive damages were awarded infrequently and were modest in amount.[56] In the area of products liability, a particular focus of the tort reformers, juries rendered only about 355 punitive damages verdicts between 1965 and 1985.[57] Moreover, courts appeared willing and able to protect defendants from unfairly large awards.[58] Those

53. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984).

54. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967) (product liability); Royal Globe Ins. Co. v. Superior Court, 23 Cal. 3d 880, 153 Cal. Rptr. 842, 592 P.2d 329 (1979) (insurance bad faith). *See* Victor E. Schwartz, Mark A. Behrens and Joseph P. Mastrosimone, *Reigning In Punitive Damages "Run Wild": Proposals for Reform By Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1008-09 (1999) (identifying this development as a turning point for opponents of punitive damages).

55. On the tort reformers' tactics *see* Stephen Daniels and Joanne Martin, *Punitive Damages, Change, and the Politics of Ideas: Defining Public Policy Problems,* 1998 WIS. L. REV. 71.

56. *See generally* Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data,* 78 IOWA L. REV. 1 (1992) (summarizing major empirical studies).

57. MICHAEL RUSTAD, DEMYSTIFYING PUNITIVE DAMAGES IN PRODUCTS LIABILITY CASES: A SURVEY OF A QUARTER CENTURY OF TRIAL VERDICTS (Roscoe Pound Foundation, 1991).

58. *See* M. Peterson, S. Sarma, M, Shanley, *Punitive Damages: Empirical Findings* viii (RAND Institute for Civil Justice 1987). A study of product liability verdicts found that courts reduce punitive damages to a greater extent than compensatory awards. U.S. GENERAL ACCOUNTING OFFICE, PRODUCT LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES 47 (Sept. 1989). When juries err, the GAO concluded, "The tort system . . . appears to be correcting these errors." *Id*.

tort reformers who pay attention to empirical evidence acknowledge that routinely large punitive damage awards are not a widespread problem.[59]

The greater concern for corporate defendants is the unpredictability of such awards.[60] Business practices and corporate decisions require cost planning and consideration of potential liability exposure. Unpredictable punitive damage awards are an unwelcome wild card.

This argument received a cool reception in state courts in the 1980s. Many took the view expressed by the Maine Supreme Court that "the lack of any precise formula by which punitive damages can be calculated is one of the important assets of the doctrine."[61] As the New Jersey Supreme Court explained:

Anticipation of these damages will allow potential defendants, aware of dangers of a product, to factor those anticipated damages into a cost-benefit analysis and to decide whether to market a particular product. The risk and amount of such damages can, and in some cases will, be reflected in the cost of a product, in which event the product will be marketed in its dangerous condition.[62]

Thus, "[i]f punitive damages are predictably certain, they become just another item in the cost of doing business."[63] That result defeats the purpose of punitive damages in deterring misconduct and turns them into a user fee that permits defendants to continue their misconduct for a price. A classic example is the Ford Pinto. An internal memo predicted that 180 people would be burned to death and another 180 severely injured by fuel-fed fires, and that the hazard could be eliminated for less than $11 per car. Ford management nevertheless determined that it was more profitable to pay damages than to fix the car.[64] In other situations, such as fraud, a defendant

59. *See* George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825 (1996).

60. For example, one company challenging the constitutionality of punitive damages told the Supreme Court that jury awards are "capricious in the same way that being struck by lightning is." Brief of Petitioners at 28, Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc., 492 U.S. 257 (1989) (No. 88-556).

61. Tuttle v. Raymond, 494 A.2d 1353, 1359 (Me. 1985).

62. Fischer v. Johns-Manville Corp., 103 N.J. 643, 664, 512 A.2d 466, 477 (1986).

63. Palmer v. A.H. Robins Co., 684 P.2d 187, 218 (Colo. 1984); *see also* Leonen v. Johns-Manville Corp., 717 F. Supp. 272, 284 (D.N.J. 1989). "Rather than remove dangerous products from the market, manufacturers may instead accept the risk of paying limited punitive damages." *Id.*

64. Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 813, 174 Cal. Rptr. 348, 384 (1981). *See also* Ford Motor Co. v. Durrill, 714 S.W. 329 (Tex. Ct. App. 1986). *See* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products,* 49 U. CHI. L. REV. 1, 56 n.264 (1982) (reproducing the internal Ford memo).

who can predict the amount of punitive damages may calculate that the misconduct remains profitable because of the low probability of getting caught.[65]

The ability of the jury to tailor its decision to the facts and circumstances of a particular case, rather than impose a predetermined penalty, is not a vice, but a virtue. The Supreme Court has stated, "the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that build discretion, equity and flexibility into a legal system."[66]

The most direct means of imposing predictable limits on punitive damage awards is through state legislation. During the 1980s, the tort reformers put on a well organized and lavishly financed campaign throughout the country.[67] Bills were introduced in every state legislature to cap punitive damage awards. Some considered such measures several times.

The campaign largely failed. Most states imposed some restrictions on punitive damages, such as raising the plaintiff's burden of proof to clear and convincing evidence and allowing bifurcated proceedings. However, only nine imposed substantive limits on the amounts of punitive awards.[68] This was not enough. Manufacturers, insurers and other nationwide enterprises wanted nationwide predictability.

They turned next to the Supreme Court, launching a steady stream of cert petitions in punitive damages cases and asking the Court to impose caps as a matter of federal constitutional law.

B. The Court's Path

The Supreme Court's path toward imposing federal constitutional limits was not a straight one. At the start, the tort reformers were looking at an uphill fight. The Court had not only upheld the jury's broad discretion in assessing punitive damages,[69] and upheld a

65. *See, e.g.,* Bankers Life & Cas. Co. v. Crenshaw, 483 So. 2d 254, 271 (Miss. 1985). Dorsey D. Ellis, Jr., *Fairness and Efficiency In the Law Of Punitive Damages*, 56 S. CAL. L. REV. 1, 25-27 & 33 (1982).

66. McKlesky v. Kemp, 481 U.S. 279, 331 (1987) (internal quotation omitted).

67. Daniels and Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990). *See generally* Demarest and Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest*, 18 ST. MARY'S L.J. 787 (1987).

68. *See* AMERICAN TORT REFORM ASSOCIATION, TORT REFORM ACCOMPLISHMENTS, 1986-1989 18-20 (1989).

69. *See* Barry v. Edmunds, 116 U.S. 550, 565 (1886) and cases at n.41.

substantial punitive damages verdict,[70] but the Court had recently held that "the Constitution presents no general bar to the assessment of punitive damages in a civil case."[71] In addition, the Court's increasingly strong regard for federalism signaled reluctance to interfere with state court judgments in matters of state law.[72]

Finally, there was the institutional imperative: the Court cannot sit as a super court of appeals for all manner of punitive damages verdicts from the state and federal courts. The Court made it clear that the Due Process Clause is not "a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court."[73] Nor is it "a font of tort law to be superimposed upon whatever systems may already be administered by the States."[74]

The tort reformers chose a novel argument: unlimited and unpredictable punitive verdicts violate the Excessive Fines Clause of the Eighth Amendment.[75] The Court in *Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc.*, squarely rejected the argument, holding that the Excessive Fines Clause, like the rest of the Eighth Amendment, was directed solely at the government's prosecutorial powers in criminal cases, and did not apply to private civil lawsuits.[76] In addition, the Court declined the invitation by "petitioners and their amici... to craft some common law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages."[77] Not only are such limits matters of state law, but in view of "the strictures of the Seventh Amendment," the Court would not "take steps which ultimately might interfere with the

70. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984) (upholding a $10 million punitive damage award).

71. Curtis Pub. Co. v. Butts, 388 U.S. 139, 159 (1967).

72. *See* Justice O'Connor's eloquent defense of federalism in *Gregory v. Ashcroft*, 501 U.S. 452, 457-64(1991) and in *New York v. United States*, 505 U.S. 144, 155-59 (1992).

73. Missouri Pacific Ry. Co. v. Humes, 115 U.S. 512 (1885).

74. Daniels v. Williams, 474 U.S. 327, 332 (1986) (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

75. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

76. 492 U.S. 257 (1989). The Court had twice previously declined to reach the Eighth Amendment argument. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988). Despite the clarity of the Court's holding, defendants continue to claim entitlement to the constitutional protections accorded to criminal defendants. *See, e.g.*, Roman Catholic Bishop of Oakland v. Superior Court, No. B179053, 2005 WL 995200 at *8 (Cal. Ct. App. Apr. 28, 2005) (prohibition against *ex post facto* law does not apply to punitive damages, which are not criminal punishment).

77. *Browning-Ferris Indus. of Vermont,* 492 U.S. at 279.

proper role of the jury."[78]

Justice O'Connor dissented in exasperation that "[a]wards of punitive damages are skyrocketing." She warned that "manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market," citing the amicus brief of the Pharmaceutical Manufacturers of America.[79] Justices Brennan and Marshall, in a concurring opinion, offered a silver lining to the tort reformers, suggesting that jury awards might be limited as a matter of substantive due process, in the same way the Court had at one time limited civil fines imposed by legislature.

The tort reformers took the hint and argued in *Pacific Mutual Life Ins. Co. v. Haslip*[80] for substantive limits on punitive damage awards as a matter of due process. The Court could not go so far. Justice Blackmun wrote that the common-law procedure of allowing juries in their discretion to decide the amount of punitive damages necessarily comports with due process.[81] However, the Court indicated for the first time that there existed some outer limit beyond which punitive damages would be arbitrary and shocking.[82] As for a predictable limit, however, the Court declared: "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."[83]

The Court retreated from substantive limits in *TXO Production Corp. v. Alliance Resources Corp*.,[84] emphasizing instead procedural due process. Alliance owned mineral rights in West Virginia and claimed that TXO, a large oil and gas developer, had filed a baseless claim to the rights in an attempt to defraud the Alliance. Because Alliance had thwarted the scheme, compensatory damages were only $19,000. The Supreme Court upheld the jury's punitive award of $10 million, a ratio of 526 to 1, because TXO's slander of title could potentially have cost the owner millions of dollars in lost royalties.

78. *Id*. at 280 n.26.

79. A few months later, the same PMA took out full page ads in the Washington Post and other major publications boasting that the research and development budgets of U.S. pharmaceutical firms have "doubled every five years since 1970" and that "nearly half of the new medicines that achieved worldwide acceptance over a 12-year period originated in the United States." *Innovations In Medicine*, WASH. POST, Nov. 17, 1989.

80. 499 U.S. 1 (1991).

81. *Id.* at 15-18.

82. *Id.* at 18.

83. *Id*.

84. 509 U.S. 443 (1993).

Justice Stevens's plurality opinion restated that the Due Process Clause "imposes substantive limits beyond which penalties may not go."[85] At the same time, however, he emphasized that "we do not suggest that a defendant has a substantive due process right to a correct determination of the 'reasonableness' of a punitive damages award."[86] Indeed, the Court reaffirmed the historic deference to the jury, which "must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it."[87] As for judicial review, the Court wrote:

Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable.[88]

In *Honda Motor Co. v. Oberg*,[89] the Court again focused on procedural due process, holding that a defendant is entitled to appellate review of punitive damage awards for excessiveness.[90] Ominously, however, the Court held that this right trumps both the state's constitutional guarantee of trial by jury and the historic deference at common law to the jury as the final arbiter of the amount of punitive damages.[91]

C. A Return to Lochner

In 1996, the Court again changed course. In *BMW of North America, Inc. v. Gore*,[92] the Court for the first time overturned a punitive damage award as constitutionally excessive. BMW sold a car to Dr. Gore as "new" when in fact it had been repainted due to acid rain damage during transit from the factory. The jury found BMW liable for fraud, awarding $4,000 in compensatory damages and $4 million in punitive damages, which the Alabama Supreme Court remitted to $2 million.

Justice Stevens, again writing for the Court, upheld the Alabama Supreme Court's ruling that the jury was not entitled to punish or deter BMW's similar conduct toward customers in other states "that

85. *Id.* at 454.
86. *Id*. at 458 n.24.
87. *Id*. at 457.
88. *Id.* at 430.
89. 512 U.S. 415 (1994).
90. *Id.* at 430.
91. *Id*. at 432-35.
92. 517 U.S. 559 (1996). Tort reformers were generally disappointed that the Court's decisions had not resulted in predictable limits on punitive damages. *See* George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 837 (1996). "Indeed, we have stark evidence of its failure." *Id.*

was lawful where it occurred and that had no impact on Alabama or its residents."[93]

In reviewing the amount of the award, the Court offered three "guideposts" to ensure that a defendant had adequate notice "not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[94] Presumably, sufficient advance notice would satisfy the tort reformers' insistence upon predictability. As indicia of "the reasonableness of a punitive damages award" the Court looked to "the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases."[95]

Those guideposts will be considered in detail in Part III, but two important shifts in the Court's thinking are evident. First, the Court clearly aimed at increasing the role of reviewing courts – state courts, at least – in not only setting aside excessive jury awards but in picking a number that is reasonable in amount. The Court did not require that juries, the traditional arbiters of reasonableness, be informed of the Court's guideposts. They were erected to guide reviewing courts. Secondly, the Court based this new judicial role on economic substantive due process. The Court in *TXO* was more explicit in the setting forth the due process basis for substantive limits on punitive damages.[96] The plurality there cited five *Lochner*-era[97] decisions, none of which reviewed jury verdicts, but which reviewed the amounts of penalties or fines authorized by legislatures.[98] In

93. *BMW,* 517 U.S. at 573.

94. *Id.* at 574.

95. *Id*. at 575.

96. *See TXO*, 509 U.S. at 454. Oddly, the word "substantive" does not even appear in the majority opinion in *BMW*. The Court focuses on a defendant's "notice" of potential liability, a watchword of *procedural* due process. Justices Scalia and Ginsburg, in separate dissenting opinions, pull aside the mask and criticize the majority's venture back into the realm of economic substantive due process. *See* 517 U.S. at 600-01 (Scalia, J., dissenting) and 517 U.S. 612 (Ginsburg, J., dissenting) (criticizing the majority's invasion of the states' traditional domain armed only with "a vague concept of substantive due process.").

97. So named for *Lochner v. New York,* 198 U.S. 45 (1905), which struck down a law regulating the hours of bakery workers, ushering in an era of judicial negation of progressive and New Deal legislation that came to an unlamented end in *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937).

98. See *TXO,* 509 U.S. at 454. *See also*:
Seaboard Air Line R. Co. v. Seegers, 207 U.S. 73, 78 (1907), upheld a $50 statutory penalty on a common carrier for a lost shipment valued at $1.75. Although it "may be large as compared with the value of the shipment," it served in part "as compensation of the claimant for the trouble and expense of the suit." *Id*. at 77-78.

Justice Scalia's view, the majority decision, "though dressed up as a legal opinion, is really no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive award" "simply because it was 'too big.'"[99]

Few doctrines have been as firmly rejected by the Court as economic substantive due process.[100] *Lochner,* "one of the most ill-starred decisions that [the Court] ever rendered,"[101] stands as a cautionary reminder:

> As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint.[102]

In particular, the Court has stated most emphatically, the Due Process Clause must not be used "to impose federal duties that are

St. Louis, I.M. & S.R. Co. v. Williams, 251 U.S. 63 (1919) upheld a statutory penalty of $75 plus costs of suit against the railroad for each of two schoolgirls who were overcharged in their fares by 66 cents. Significantly, the court stated that the penalty need not "be confined or proportioned to [actual] loss or damages" but rather "considered with due regard for the interests of the public." *Id.* at 66-67.
Standard Oil Co. of Ind. v. Missouri, 224 U.S. 270, 286 (1912) upheld a penalty under a Missouri anti-trust statute amounting to $50,000. The Court pointed out that there is no due process review of the amount of damages imposed by the state court under fair procedures. *Id.* at 287.
In *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482 (1915), the Court set aside a $6,300 penalty imposed under an Arkansas statute for discriminatory pricing and service, not because of the amount of the penalty, but due to the absence of any requirement that the state show intentional or reckless wrongdoing. *Id*. at 491.
Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909), upheld $1.6 million in penalties imposed under a Texas anti-trust statute. The Court found the penalty not excessive, solely on the basis of the great wealth of the defendant. *Id*. at 112.

99. *BMW,* 517 U.S. at 600 (Scalia, J., dissenting).

100. *See, e.g.,* Ferguson v. Skrupa, 372 U.S. 726, 730- 31 (1963). "We emphatically refuse to go back to the time when courts 'used the Due Process Clause to strike down state laws, regulatory of business or industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.'" *Id.* (quoting Williamson v. Lee Optical, 348 U.S. 483, 488 (1955)).

101. WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 205 (1987).

102. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977). Justice White, writing for the Court in *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986), warned: The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses.

analogous to those traditionally imposed by state tort law."[103] Nor should it "supplant traditional tort law in laying down rules of conduct to regulate liability for injuries."[104] The Court therefore,

> has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmakers in this uncharted area are scarce and open-ended.[105]

Permitting federal appeals judges to determine for themselves the amount of punitive damages, one scholar predicted, "would be Lochnerism on a massive scale."[106]

D. Undercutting the Jury

One obstacle remained to assigning appellate judges the task of deciding the appropriate amount of punitive damages. In *BMW*, the Court did not overturn a jury verdict, but rather an award of punitive damages entered by the Supreme Court of Alabama.[107] Federal courts stand on different ground. The Re-Examination Clause of the Seventh Amendment provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[108] Justice Story ventured that this provision is "more important" than the first part of the Amendment.[109] The Re-Examination Clause was designed to prevent "the indirect impairment of the right of trial by jury through judicial re-examination of fact-findings of a jury other than as permitted in 1791."[110] A federal court may not, "according to its own estimate of the amount of damages which the plaintiff ought to have recovered,... enter an absolute judgment for any other sum than that assessed by the jury."[111] Thus, the Court indicated in *Browning-Ferris*, the "strictures of the Seventh Amendment" precluded a federal court from picking a number to substitute for a jury's award of punitive

103. Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992).
104. County of Sacramento v. Lewis, 523 U.S. 833, 848 (1998) (quoting Daniels v. Williams, 474 U.S. 327, 332 (1986)).
105. *Collins*, 503 U.S. at 125; Washington v. Glucksberg, 521 U.S. 702, 720 (1997).
106. Alan Howard Scheiner, *Judicial Assessment Of Punitive Damages, The Seventh Amendment, And The Politics Of Jury Power*, 91 COLUM. L. REV. 142, 182 (1991).
107. *See BMW*, 646 So. 2d 619.
108. U.S. CONST. amend. VII.
109. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830).
110. Colgrove v. Battin, 413 U.S. 149, 152 n.6 (1973).
111. Kennon v. Gilmer, 131 U.S. 22, 30 (1889). Nor, for the same reason, may a federal appellate court order the district court to enter judgment for such an amount. Hetzel v. Prince William County, 523 U.S. 208 (1998).

damages.[112]

The Court struck a damaging blow to the jury in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[113] holding that the Seventh Amendment did not preclude *de novo* review of a punitive damage verdict by a federal appellate court. The Court swept aside settled constitutional understanding in an almost offhand fashion. It did not look to common-law practice in 1791, which has historically served as the measure of the right "preserved" by the Seventh Amendment.[114] Nor did the Court inquire into the original intent of the drafters. Rather, the Court merely quoted from an earlier dissent by Justice Scalia: "Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury."[115] Justice Scalia offers no authority for this novel proposition, which appears inconsistent with his thinking elsewhere.[116] Furthermore, it was squarely rejected by the majority in *Gasperini*.[117]

A supporting rationale offered in *Cooper*, that punitive damages have "evolved" in the years since the Seventh Amendment was adopted, is no more persuasive.[118] The purposes of punitive damages – to punish and deter unacceptable misconduct – remain the same as when the Lord Chief Justice stated them in *Wilkes v. Wood*. In any

112. 492 U.S. at 280 n.26. *Accord*, Defender Indus., Inc. v. Northwestern Mut. Life Ins., 938 F.2d 502, 507 (4th Cir. 1991) (en banc) (holding that the Seventh Amendment protects the right to a jury determination of punitive damages); O'Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1447-48 (10th Cir. 1987) (same); McKinnon v. City of Berwyn, 750 F.2d 1383, 1391-92 (7th Cir. 1984) (same).

113. 532 U.S. 424 (2001).

114. *See, e.g*., Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 348 (1998); Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 449 (1996).

115. *Cooper Industries,* 532 U.S. at 437 (quoting Gasperini, 518 U.S. at 459 (1996) (Scalia, J., dissenting) (citation omitted)).

116. *See* Tull v. United States, 481 U.S. 412, 228 (1987) (Scalia, J. concurring in part and dissenting in part). "I can recall no precedent for judgment of civil liability by jury but assessment of amount by the court. Even punitive damages are assessed by the jury when liability is determined in that fashion." *Id*.

117. *Gasperini,* 518 at 435 n.18. "[T]he question whether an award of compensatory damages exceeds what is permitted by law is not materially different from the question whether an award of punitive damages exceeds what is permitted." *Id*. Indeed, the Court subsequently held that where the Seventh Amendment guarantees the right to a jury trial on liability, it also guarantees a jury determination of damages. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998). The Court left no doubt that its Seventh Amendment holding encompassed punitive damages, citing not only *Huckle v. Money* and *Wilkes v. Wood,* but also the early American cases upholding punitive damage awards, *Genay v. Norris*, 1 S.C.L. 6, 7 (1784) and *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791). 523 U.S. at 353.

118. *Cooper*, 532 U.S. at 437 n.11.

event, the Court has consistently read the constitutional command that the right to trial by jury "be preserved" as guaranteeing the jury right as it existed in 1791.[119] It does not evolve. As Justice Scalia himself stated: "It is not for us, much less for the Courts of Appeals, to decide that the Seventh Amendment's restriction on federal-court review of jury findings has outlived its usefulness."[120]

Reliance on so slim a reed to sweep away such an important constitutional protection is certainly not faithful to the Court's own oft-repeated admonition that

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.[121]

Perhaps, under the heading of unintended consequences, the Court's evisceration of the sanctity of jury findings may clear the way for judges to *increase* punitive damage awards that are inadequate for their purpose. The sole obstacle to additur, the Supreme Court held in 1935, was the Reexamination Clause, which, under "the established practice and the rule of the common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to increase the amount of damages awarded by a jury."[122] As of yet, no reported case has put the Court's narrowing of the Seventh Amendment to this test.

The Court expressed supreme confidence that allowing appellate judges to reexamine punitive damage verdicts using the *BMW* guideposts would finally result in predictability and even uniformity. *De novo* review would "unify precedent and stabilize the law" and "the general criteria set forth in *Gore*... will acquire more meaningful content through case by case application at the appellate level."[123] The Court quoted Justice Breyer's confident concurrence in *BMW*:

"Requiring the application of law, rather than a decision maker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform treatment of similarly situated persons that is the essence of law itself."[124]

119. *See* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998).
120. *Gasperini*, 518 U.S. at 449 (Scalia, J., dissenting).
121. Dimick v. Schiedt, 293 U.S. 474, 486 (1935) (quoted in Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959) and in Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565 (1990)).
122. Dimick v. Schiedt, 293 U.S. 474, 482 (1935).
123. *Cooper*, at 436.
124. *Id*. (quoting *BMW*, 517 U.S., at 587 (Breyer, J., concurring)).

III. STATE FARM: LOOPHOLES AND LOOSE ENDS

A. Finally, Precision and Predictability?

Perhaps the *BMW* majority truly believed they had finally gotten a handle on the problem of uncontrolled punitive damages. Justice Scalia, however, warned in a scathing dissent that the majority's guideposts "mark a road to nowhere."[125] These "crisscrossing platitudes yield no real answers in no real cases.... [They do] 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.'"[126]

The ensuing years proved Justice Scalia correct. Shortly after the *BMW* decision, Professor George Priest, a leading tort reform theorist, foresaw "serious questions as to how effective this form of comparison will prove in practice."[127] Reprehensibility, he noted, "is a very vague concept and hardly susceptible of careful measurement" and the ratio between the compensatory and punitive damages elements "is an odd judicial principle" in that less blameworthy conduct can cause huge loss, while "many repugnant and reprehensible actions generate little harm."[128] Another commentator concluded that the "guideposts" were "far too subjective and malleable to be meaningful" and the standard amounted to no more than "how offended are the reviewing justices?"[129] A survey of decisions following *BMW* found that reviewing courts applying the guideposts did little more than simply "substitute a jury's finding with that of a judge."[130]

The Supreme Court eventually felt compelled to enter the fray once again, in *State Farm Mutual Automobile Insurance Co. v. Campbell*.[131] In the underlying action, State Farm refused to settle an automobile accident claim against Campbell, its insured, within policy limits. Campbell was held liable for a judgment far in excess of his coverage. Though State Farm ultimately paid the judgment, the

125. *BMW,* 517 U.S. at 605 (Scalia, J., dissenting).
126. *Id*. at 606.
127. George L. Priest*, Punitive Damages Reform: The Case of Alabama,* 56 LA. L. REV. 825, 838 (1996).
128. *Id.*
129. Neil B. Stekloff, *Note and Comment, Raising Five Eyebrows: Substantive Due Process Review of Punitive Damages Awards After BMW v. Gore*, 29 CONN. L. REV. 1797, 1817 & 1819 (1997).
130. Christine D'Ambrosia, Note, *Punitive Damages in Light of BMW of North America, Inc. v. Gore: A Cry for State Sovereignty*, 5 J.L. & POL'Y 577, 604 (1997).
131. 538 U.S. 407 (2003).

Campbells suffered a year of emotional distress. Much of the evidence at trial described State Farm's treatment of the Campbells as part of a decades-long, nation-wide program of fraudulent practices.[132] In an exhaustive opinion, the Utah Supreme Court upheld an award of $1 million in compensatory damages (as reduced by the trial judge) and reinstated the jury's verdict of $145 million in punitive damages.[133]

The Court granted review to fix "the imprecise manner in which punitive damages systems are administered" and the lack of "[e]xacting appellate review."[134] In a 6-3 decision, the Court set aside the punitive award as a violation of substantive due process. At the center of *State Farm's* prescription for reasonable punitive damage awards is the Court's elaboration on the three "guideposts" set out in *BMW*: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[135]

Much of the Court's opinion addresses evidence under the reprehensibility guidepost concerning State Farm's national scheme to limit payouts on claims.[136] The Court held that plaintiffs were improperly allowed to use evidence of fraudulent practices that were not directed at the Campbells and which were dissimilar to the Campbells' allegations of mistreatment. The Court emphasized that a defendant "should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."[137] Still, the Court found that State Farm's mistreatment of the Campbells warranted punishment, and the Court elaborated on the application of the *BMW* guideposts to ensure "the reasonableness of a punitive damages award."[138] Tort reformers quickly hailed the decision as a landmark victory that finally imposed new, clear limits on punitive damages.[139] The remainder of this Part III will examine *State Farm's*

132. *Id.* at 415.
133. Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134 (Utah 2001).
134. *State Farm,* 538 U.S. at 418.
135. *Id.* at 418.
136. *Id.* at 415.
137. *Id.* at 423.
138. *Id.* at 418-19.
139. *See, e.g.,* Press Release, American Insurance Association, U.S. Supreme Court Remands, Instructs Lower Courts to Use New Punitive Damages Standards in Personal Injury Cases (May 20, 2003), *available at* http://www.aiadc.org/dochandler.asp?file=/outbound/pubaffairs/PA_9968_9690.htm&root=\\webdb1 (last visited March 3, 2005) (calling the case a "landmark ruling" that "laid down clear law"); Press

guideposts and their application by lower courts in the two years since the Court handed down its decision.

The notion that *State Farm* established any new rule or standard for the excessiveness of punitive damages appears to be based on little more than wishful thinking. The Court itself viewed its decision as an application of "the principles outlined in *BMW*" that was "neither close nor difficult."[140] The lower courts appear to have taken the Supreme Court at its word. District Judge Holland, presiding over the massive punitive damages claims arising out of the Exxon Valdez disaster, stated that *State Farm*, "while bringing the *BMW* guideposts into sharper focus, does not change the analysis."[141] One state supreme court justice bluntly opined that "*State Farm* was not a significant decision" and "did little more than reiterate the standards of review established in prior cases."[142] For this reason, federal appellate courts have applied *State Farm* in cases that were already on appeal and even briefed at the time *State Farm* was announced. The decision did not represent an "intervening change in the law" that would excuse a party's failure to raise relevant excessiveness arguments.[143]

Justice Kennedy's majority opinion in *State Farm* focuses almost exclusively on the responsibility of reviewing courts not only to set aside awards that shock the judicial conscience, but also to identify an appropriate amount of punitive damages that satisfies constitutional concerns of reasonableness. Absent from the Court's discussion is any mention of deference to the jury. Indeed, Justice Kennedy takes some gratuitous swipes at Americans who sit in the jury box. Their "wide discretion in choosing amounts," he states, "creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local

Release, U.S. Chamber of Commerce, Supreme Court Limits Size & Appropriateness of Punitive Damage Awards; $145 Million Utah Ruling Held Unconstitutional (Apr. 7, 2003), *available at* http://www.uschamber.com/nclc/news/alerts/alert030407.htm (last visited March 23, 2004) ("a major victory for the business community's long-standing concern over unfair . . . punitive damages awards").

140. *State Farm,* 538 U.S. at 418.

141. *In re* the Exxon Valdez, 296 F. Supp. 2d at 1076. *See also* Label Systems Corp. v. Aghamohammadi, 270 Conn. 291, 335, 852 A.2d 703, 731 n.32 (Conn. 2004) (*State Farm's* discussion of ratios "was not a dramatic or novel extension of the court's prior case law.").

142. Boyd v. Goffoli, 608 S.E.2d 169, 188-89 (W. Va. 2004) (Starcher, J, concurring).

143. American Trim, L.L.C. v. Oracle Corp, 383 F.3d 462, 477-78 (6th Cir. 2004). *See also* Union No. 38 v. Pelella, 350 F.3d 73, 90 (2d Cir.2003) (similar).

presences."[144] He voices concern that jury decisions may be "so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim."[145]

If either accusation were true, of course, justice would require overturning the verdict altogether, rather than simply recalibrating the amount. The fact is that State Farm agents in communities across the country give the company a great deal of local presence, and nothing indicates that the Utah jury acted out of bias. Certainly the Utah Supreme Court's lengthy opinion laying out the evidence of State Farm's shabby treatment of its policyholders and reinstating the jury's award was neither arbitrary nor whimsical. The Supreme Court's expression of low regard for the jury, combined with its extended discussion of the guideposts to be applied by courts on *de novo* review, suggests a Court promoting federal judges as the new consciences of the community.

A full two years after the Court announced its opinion, approximately 160 state and federal court decisions have looked to *State Farm* in dealing with questions of the constitutional excessiveness of particular awards. Courts have applied the *State Farm* factors not only to jury verdicts, but also to punitive damage awards in bench trials[146] and in the decisions of arbitrators.[147]

Overall, the case outcomes indicate that unusually large awards are likely to be reduced, both post-trial and on appeal. However, when it

144. *State Farm,* 538 U.S. at 518.

145. *Id.*

146. *See, e.g.*, Votto v. Am. Car Rental, No. CV010456354S, 2003 WL 21716003 (Conn. Super. Ct. June 6, 2003) (*State Farm* applied to bench trial) (unpublished); Corch Const. Co. v. Assurance Co. of Am., 64 Pa. D. & C.4th 496 (Pa. Ct. Comm. Pl. 2003) (bench trial); *In re* Kaufman, 315 B.R. 858, 869 (N.D. Cal. 2004) (Bankruptcy court); *cf.*, Willow Inn, Inc. v. Public Service Mutual Ins. Co., 399 F.3d 224, 231 (3d Cir. 2005) (*State Farm* guideposts applied in appeal from bench verdict, but greater deference may be accorded to a district judge than a jury).

147. *See, e.g.,* Birmingham News Co. v. Horn, No. 1020552, 2004 WL 1293993 (Ala. June 11, 2004) (*State Farm* ratio applied to arbitration award of punitive damages); Sawtelle v. Waddell & Reed, Inc. 6 Misc.3d 487, 789 N.Y.S.2d 857 (N.Y. Sup. Ct. 2004) (similar); Haldeman v. DeLuca, No. CV970060279S, 2003 WL 21493968, 35 Conn. L. Rptr. 60 (Conn. Super. Ct. 2003) (unpublished) (similar); *but see* Stark v. Sandberg, Phoenix, & Von Gontard, P.C., 381 F.3d 793, 803 (8th Cir. 2004) (the court refused to reduce arbitration award of $6 million in punitive damages on award of $2,000 in compensatory damages to borrowers for lender's violation of the Fair Debt Collection Practices Act. The court observed that arbitration provides almost none of the protections of due process and that the lender, who had insisted on arbitration, "got exactly what it bargained for."); Medvalusa Health Programs, Inc. v. MemberWorks, Inc., No. 17116, 2005 WL 1115924 at *5 (Conn.) (Conn. 2005) (due process limits on punitive damages do not apply to private arbitrator decisions because there is no state action).

comes to picking the appropriate amount of punitive damages, judges often appear to render what Justice Scalia belittled as a "subjective assessment of the 'reasonableness' of the award" that is no more precise or predictable than that of the jury.[148]

A. Reprehensibility: Judges as Super Jurors.

"[T]he most important indicium of the reasonableness of a punitive damages award," the *State Farm* Court emphasized, "is the degree of reprehensibility of the defendant's conduct."[149] However, if punitive damages represent "an expression of... moral condemnation,"[150] then assessing the reprehensibility of the defendant's conduct would seem to be best suited to the jury, the "conscience of the community." Historically, this has been the jury's responsibility, and a large body of empirical research indicates that the jury has done its job well.[151]

Even those who are otherwise highly critical of allowing jurors to assess punitive damages agree that American juries are well suited to determining the degree of reprehensibility of a defendant's misconduct. One well-publicized study presented a variety of hypothetical cases to mock juries.[152] Although the "jurors" were given only a short time to consider the facts and no opportunity to deliberate with other jurors, the respondents were in surprisingly close agreement on the kinds of conduct that deserve to be punished with punitive damages and the relative reprehensibility of the

148. *BMW,* 517 U.S. at 599 (Scalia, J., dissenting).
149. *State Farm*, 538 U.S. at 419 (quoting *BMW*, 517 U.S. at 575).
150. *Cooper*, 532 U.S. at 432.
151. A survey of the growing body of empirical findings, conducted under the auspices of the Division of Research at the Federal Judicial Center, found that "doubts about jury competence expressed by jury critics stand in sharp contrast to the judgments of scholars who conduct research on jury decisionmaking." Joe S. Cecil, Valerie P. Hans, and Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 728, 744-45 (1991). To the contrary, "empirical evidence consistently points to the general competence of the jury" in ordinary cases. *Id*. at 745. Indeed, the Federal Judicial Center's own study concluded that "the overall picture of the jury that emerges from available data indicates that juries are capable of deciding even very complex cases." *Id*. at 764. Researchers also found "high rate of agreement between judges and juries" on questions of liability and damages in civil cases. *Id*. at 746. *See also* NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS AWARDS 175-182 (1995) (summarizing empirical studies on judge-jury agreement in cases involving complex scientific evidence).
152. *See* Cass R. Sunstein, Daniel Kahneman, David Schkade, *Assessing Punitive Damages (With Notes On Cognition And Valuation In Law)*, 107 YALE L.J. 2071 (1998). The study was funded in part by Exxon, which is challenging a large punitive damages award arising out of the Exxon Valdez oil spill. *See* In re the Exxon Valdez, 296 F. Supp. 2d 1071 (D. Alaska 2004).

misconduct.[153] Where they differed was on the precise dollar amount that ought to be assessed.[154]

Significantly, the researchers concluded that judges are no better equipped to perform this task than ordinary citizen jurors:

> Judges are not likely to be able to capture the community's sentiments with respect to either dollar awards or punitive intent.... The most important point is that judges too are likely to have difficulty in mapping normative judgments onto dollar amounts, and... there is likely to be a continuing problem of erratic judgments or the use of anchors that introduce arbitrariness of their own.[155]

Nevertheless, the *State Farm* Court endeavored to achieve greater precision in administering punitive damages by instructing courts to consider five factors to evaluate "the *degree* of reprehensibility of the defendant's conduct" in a particular case:[156]

1) the harm caused was physical as opposed to economic;
2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;
3) the target of the conduct had financial vulnerability;
4) the conduct involved repeated actions or was an isolated incident; and
5) the harm was the result of intentional malice, trickery, or deceit, or mere accident.[157]

Each of these factors, it is evident in the opinions of lower courts, is fairly malleable. Moreover, *State Farm* gives no clue as to how these factors combine to add up to a defendant's "degree of reprehensibility." Many reviewing courts appear to use the reprehensibility factors as a scorecard on which plaintiff's rating of 0 to 5 may lead to an adjustment in the amount of punitive damages recoverable. The wide variation in the application of these factors by the courts suggests that the Supreme Court has achieved neither predictability nor precision nor "uniform treatment of similarly

153. Participants were given ten scenarios of about 200 words each describing personal injury lawsuits against medium and large corporations. They were asked how outrageous they found the defendant's behavior on a scale of 0 to 6, and a dollar amount of punitive damages they would award. Sunstein, *supra* note 152, at 2095. Participants were in close agreement with respect to the degree of outrageousness of the misconduct and the scaled level of punishment deserved. *Id*. at 2097-98.

154. *Id.* at 2099-2100.

155. *Id.* at 2127-28. Instead, the researchers recommend that the job of picking a number for the amount of punitive damages be turned over to "technocratic" experts. *Id.* at 2079.

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

157. *Id.* The Court gleaned these factors from its opinion in *BMW*, 517 U.S. at 576-577, adding "intentional malice."

situated persons."[158]

1. Physical As Opposed To Economic Harm.

Most would agree that a defendant who willfully or with gross negligence inflicts serious physical injury is deserving of punishment. But is a defendant who causes "mere" economic harm *necessarily* less reprehensible? Consider *Shiv-Ram, Inc. v. McCaleb,* where a motel guest struck her ankle on a sharp piece of metal jutting out from the bed frame, causing "a goose egg" and "a speck of blood."[159] The Alabama Supreme Court upheld a punitive damage award of $500,000 against the owner, who had only recently acquired the motel, for failure to inspect for such hazards. It is at least questionable whether the motel's reprehensibility exceeds that of a defendant who intentionally and illegally ruined a small business that took a lifetime to build,[160] or who subjected an employee to sexual harassment over a long period.[161] It is difficult to justify giving points to such defendants on the reprehensibility scorecard solely because the damage they caused was not physical.

For this reason, some courts have applied this factor broadly to include cases where the plaintiff has suffered some physical harm, though it is not the gravamen of the cause of action. In *Haggar Clothing Co. v. Hernandez*,[162] for example, where plaintiff was fired in retaliation for filing a workers compensation claim, the Texas court ruled that "the harm caused to Hernandez was physical."[163] Similarly, in *Young v. Daimlerchrysler Corp.,* where the jury found that defendant discriminated against plaintiff by failing to transfer her to a position that met her disability restrictions, the district court stated "the greatest harm caused to Young was physical and mental."[164] In *Bowen & Bowen Const. Co. v. Fowler*,[165] a homebuyer sued the builder-seller for failure to correct a problem with standing water on the property. The court stated that defendant had caused physical and economic harm, citing evidence of the "the physical toll

158. *See supra* note 124.
159. 892 So. 2d 299 (Ala. 2003).
160. *E.g.,* Eden Electrical, LTD. v. Amana Co., 258 F. Supp. 2d 958 (N.D. Iowa 2003), *aff'd,* 370 F.3d 824 (8th Cir. 2004).
161. *See, e.g.,* Baker v. John Morrell & Co., 266 F. Supp. 2d 909 (N.D. Iowa 2003); Pollard v. E.I. DuPont de Nemours, Inc., No. 95-3010 ML, 2003 WL 23849733 (W.D. Tenn. Oct. 22, 2003).
162. No. 13-01-009-CV, 2003 WL 21982181 (Tex. Ct. App. Aug. 21, 2003).
163. *Id.* at *7.
164. 2004 U.S. Dist. LEXIS 22812, 2004 WL 2538640, * 2 (S.D. Ind. 2004).
165. 265 Ga. App. 274, 593 S.E.2d 668 (2004).

this problem had taken" on the elderly plaintiff. [166]

In *Bocci v. Key Pharmaceuticals, Inc.*,[167] an asthma patient who suffered brain damage caused by theophylline sued the drug maker and his prescribing physician. The physician cross-claimed against the manufacturer, alleging that the company knowingly and falsely promoted the drug as safe. Upholding an award of punitive damages to the physician, the court indicated that the reprehensibility of the defendant was increased by the fact that the harm involved personal injury, though not injury to the physician. The court stated, "the first factor in *State Farm* does not, by its terms, limit the scope of the evaluation to the single person in favor of whom punitive damages were awarded."[168]

In *United States v. Zhang*,[169] the Ninth Circuit stated that while purely economic harm is less likely to warrant substantial punitive damage awards, "intentional discrimination is a different kind of harm, a serious affront to personal liberty."[170]

2. Indifference to health and safety

"Indifference to or a reckless disregard of the health or safety of others" is a factor most relevant to personal injury causes of action such as marketing dangerous products,[171] failure to eliminate a hazardous railroad crossing,[172] or failure to remedy a bedbug infestation in motel rooms.[173] The broad phrasing focuses on the potential danger to the public and is not limited to the particular plaintiff.[174]

166. *Id.,* 593 S.E.2d at 671.
167. 189 Or. App. 349, 76 P.3d 669 (2003).
168. *Id*., 76 P.3d at 674.
169. 339 F.3d 1020 (9th Cir. 2003).
170. *Id.* at 1043.
171. *E.g*., Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594 (8th Cir. 2005) (cigarettes); Williams v. Philip Morris Inc., 193 Or.App. 527, 92 P.3d 126 (Ore. Ct. App. 2004) (cigarettes) Boeken v. Philip-Morris, Inc., No. B152959, 2005 WL 737511 (Cal. Ct. App. April 1, 2005) (cigarettes), Romo, 6 Cal. Rptr. 3d 793 (automobile), McClain v. Metabolife Int'l Inc., 259 F. Supp. 2d 1225 (N.D. Ala. 2003) (diet pills); Suffix, USA, Inc. v. Cook, 128 S.W.3d 838 (Ky. Ct. App. 2004) (weed trimmer); Waddill v. Anchor Hocking, Inc., 190 Or.App. 172, 78 P.3d 570 (Ore. Ct. App. 2003) (fishbowl).
172. *E.g.*, Union Pacific R.R. Co. v. Barber, 356 Ark. 268, 149 S.W.3d 325 (Ark. 2004) (railroad knew that overgrowth of vegetation at crossing created a risk of serious injury or death).
173. Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672 (8th Cir. 2003).
174. *See Bocci*, 189 Or. App. 349. Manufacturer of asthma medication "acted in wanton disregard for the health and safety of others in knowingly and falsely promoting its product as safe," though plaintiff was the prescribing physician, rather than a patient. *Id*.

Again, there is room for courts to construe this factor broadly to emphasize the reprehensibility of conduct whose direct impact is primarily economic. For example, in *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*,[175] an employer sued its workers compensation carrier for fraudulent denial of benefits to an injured worker, leaving the employer liable. In the view of the court of appeal, "Argonaut demonstrated absolute indifference to the health and safety of the maimed employee."[176] In *DeNofio v. Soto*,[177] where a builder breached its contract to build a house for plaintiff and left a large pit on the property, the court found that "Soto's conduct demonstrated complete indifference to the safety of others in the vicinity."[178]

In a case that resembles *State Farm*, but extends this factor beyond what the *State Farm* Court likely had in mind, the Idaho Supreme court upheld punitive damages against an automobile liability insurance carrier for bad faith failure to settle or defend a claim against its insured.[179] The court stated that defendant exhibited indifference to or reckless disregard for plaintiff's health or safety: "Myers was deprived of a driver's license which placed her in physical danger of incarceration under Idaho's criminal laws if she were caught driving without a license."[180]

Courts have tended to elevate the reprehensibility of employment discrimination to a level above merely economic torts. One court, for example, ruled that such conduct evinces "an indifference to or a reckless disregard of the health – at least the psychological health" of employees.[181]

175. 109 Cal.App.4th 1020, 736 (Ct. App. 2003). *See also* Hangartner v. Provident Life & Accident Ins. Co., 373 F.3d 998 (9th Cir. 2004) (insurer who wrongfully discontinued disability insurance benefits displayed reckless disregard for plaintiff's physical well-being).

176. *Id.*at 760.

177. No. Civ.A. 00-5866, 2003 WL 21488668 (E.D. Pa. June 24, 2003).

178. *Id.* at *2; *see also Bowen & Bowen Const. Co*., 265 Ga. App. 274. In homebuyer's suit for fraud and breach of contract for builder's failure to correct drainage problem, defendant left standing water on the property for over two years, in reckless disregard of health and safety of others. *Id.*

179. Myers v. Workmen's Auto Ins. Co., 140 Idaho 495, 95 P.3d 977 (Idaho 2004).

180. *Id.*at 992.

181. Daka v. McCrae, 839 A.2d 682 (D.C. 2003). *See also* Haggar Clothing Co. v. Hernandez, No. 13-01-009-CV, 2003 WL 21982181, at *7 (Tex. Ct. App. Aug. 21, 2003) (discrimination against disabled worker "evinced an indifference or reckless disregard for Hernandez's health and safety"); Parrish v. Sollecito, 280 F. Supp. 2d 145, 164 (S.D.N.Y. 2003) (indifference to sexual harassment "is reprehensible behavior and does affect the health and safety of employees with regard to their general well-being").

3. Financial vulnerability

The fact that the plaintiff was in a financially vulnerable position is most relevant to economic torts, such as fraud, that specifically target those who are economically vulnerable.[182] However, this factor is sufficiently vague to provide courts with support for their preexisting views of the defendant's reprehensibility. For example, the California Court of Appeal held that a young couple of very modest means who had been defrauded by a used car dealer as to the true cost of the car was entitled to punitive damages nearly ten times the amount they lost.[183]

By comparison, in *Alfa Life Ins. Corp. v. Jackson*,[184] a couple was defrauded by a trusted insurance agent as to the true cost of life insurance policies. The husband was illiterate and his wife had only a high school education. However, according to the court,

"the record does not indicate that the Jacksons were financially vulnerable."[185] The court reduced the punitive damages for intentional fraud from 50 times the actual damages to a ratio of 3-1.

Workers who are victims of employment discrimination are often in a financially vulnerable position. In *Parrish v. Sollecito*,[186] where a female employee was fired in retaliation for complaining of sexual harassment, the court noted plaintiff's financial vulnerability because she was divorced and depended on her job.[187] However, in

182. Boyd v. Goffoli, 608 S.E.2d 169, 182 (W. Va. 2004) (the targets of defendant's fraudulent conduct were financially vulnerable in that they "quit decent jobs to become commercial truck drivers based on Appellant's representations."); Kemp v. American Tel. & Tel. Co., 393 F.3d 1354, 1364 (11th Cir. 2004) (defendant illegally collected telephone gambling debts on its phone bills and targeted financially vulnerable people); Cass v. Stephens, 156 S.W.3d 38, 76 (Tex. Ct App. 2004) (in dispute between former business partners, defendant took advantage of the fact that his partner had become unable to handle his financial affairs, which fell to his wife, "a housewife unacquainted with the oil and gas business").

183. Angel v. YFB Helmet, Inc., No. 00CC12922, 2004 WL 1058180 (Cal. Ct. App. April 30, 2004) (unpublished). Observing that plaintiffs could barely afford a $1,500 down payment on a 7-year-old Honda and that defendant failed to raise a defense on the issue of reprehensibility, Judge William Bedsworth wrote for the court, "Apparently, [defendants] were unable to make this conduct sound any better than we can. That reinforces our conclusion that $42,000 is a reasonable figure." *Id.* at *3.

184. No. 1001854, 2004 WL 1009367 (Ala. May 7, 2004).

185. *Id.* (The court's decision has been withdrawn and replaced by 2005 WL 32413 (Ala. Jan. 7, 2005), which did not address this issue). Compare Je Park v. Mobil Oil Guam, No. CVA03-001, 2004 WL 2595897 (Guam Nov. 16, 2004) (individual with a business degree was not financially vulnerable).

186. 280 F. Supp. 2d 145 (S.D.N.Y. 2003).

187. *Id.* at 163. *See also* Haggar Clothing Co. v. Hernandez, No. 13-01-009-CV, 2003 WL 21982181, at *7 (Tex. Ct. App. Aug. 21, 2003) (Tex. Ct. App. 2003)

Richardson v. TriCom Pictures & Productions, Inc.,[188] where plaintiff was similarly fired from her $30,000-a-year job in retaliation for complaining of sexual harassment, the district court found no evidence "that Richardson was financially vulnerable to a significant degree."[189]

Some courts have found this factor present where the defendant did not take advantage of a financially vulnerable plaintiff, but rather left the plaintiff in a financially precarious position. In *Boeken v. Philip-Morris, Inc.*, for example, plaintiff had been earning $200,000 a year, but became financially vulnerable when he was diagnosed with lung cancer and became unable to work.[190] In another tobacco liability case, a different California court suggested a broader interpretation of this factor in cases that are not economic in nature. "In other cases, such as this one, it makes sense to ask whether and to what extent the defendant took advantage of a known vulnerability on the part of the victim to the conduct triggering the award of punitive damages, or to the resulting harm."[191] In that case, defendant's advertising "exploited the known vulnerabilities of children," reflecting a high degree of reprehensibility.[192]

Companies may be deemed financially vulnerable, particularly where an insurer's bad faith refusal to pay for insured losses threatens the business.[193]

(worker fired in retaliation for filing workers compensation claim deemed financially vulnerable); Young v. Daimlerchrysler Corp. (N.D. Ind. 2004) (worker with a disability was financially vulnerable because without her job she would be forced to apply for Social Security disability benefits much lower than her wages.); Pollard v. E.I. DuPont de Nemours, Inc., No. 95-3010 ML, 2003 WL 23849733, at *2 (W.D. Tenn. Oct. 22, 2003). (W.D. Tenn. 2003) (plaintiff in Title VII suit alleging sexual harassment over a prolonged period was financially vulnerable).

188. 334 F. Supp. 2d 1303 (S.D. Fla. 2004).

189. *Id.* at 1324.

190. Boeken v. Philip-Morris, Inc., No. B152959, 2005 WL 737511, at 32 (Cal. Ct. App. April 1, 2005). *See also* DeNofio v. Soto, No. Civ.A. 00-5866, 2003 WL 21488668, at *2 (E.D. Pa. June 24, 2003). (where builder failed to complete home construction, "plaintiffs were left financially vulnerable by defendant's actions [because] they would have been liable for injury caused to others by the condition on their property").

191. Henley v. Philip Morris, 112 Cal. App. 4th 198, 5 Cal. Rptr. 3d 42 (2003).

192. *Id*. at 8.

193. *See* Willow Inn, Inc. v. Public Service Mutual Ins. Co., 399 F.3d 224, 232 (3d Cir. 2005) (plaintiff is "a modest family-run business, and is not an enterprise with the resources to have had its premises repaired professionally without the benefit of insurance proceeds."); Diamond Woodworks, Inc. v. Argonaut Ins. Co., 109 Cal. App. 4th 1020, 135 Cal. Rptr. 2d 736, 760 (Ct. App. 2003) (workers compensation carrier wrongfully refused to pay benefits to an injured worker, leaving employer potentially liable to the worker; "Diamond was not General Motors"). Compare, Eden Electrical, LTD. v. Amana Co., 258 F. Supp. 2d 958, 970 (N.D. Iowa 2003), aff'd, 370 F.3d 824 (8th Cir. 2004) (plaintiff, "a large,

In litigation involving environmental damage caused by an oil spill from the wrecked tanker Exxon Valdez, the district court noted that while "commercial fishermen may not have been financially vulnerable targets, the subsistence fishermen certainly were" and Exxon knew that they relied on the fisheries in Prince William Sound[194]

Actions in which the defendant has deliberately or with gross negligence inflicted physical injury, courts have treated the financial status of the plaintiff as not particularly relevant to the reprehensibility of defendant's conduct.[195] Other courts, perhaps seeking to emphasize the reprehensibility of defendant's conduct, have taken account of this factor. In *Romo v. Ford Motor Co.*,[196] where three family members were killed and others injured when their Ford Bronco rolled over, the court, emphasizing Ford's "extremely reprehensible" conduct, stated that the victims "were financially vulnerable relative to defendant's financial resources."[197] Likewise, in a suit by abortion providers against activists who had posted plaintiffs' names and addresses on a Web site, exposing them to threats of violence, the court indicated that defendants targeted plaintiffs' financial vulnerability, and "intended to scare the plaintiffs sufficiently to cause them to quit performing abortions out of fear for their lives."[198]

4. Repeated actions

Whether "the conduct involved repeated actions or was an isolated incident" could indicate that a defendant who harms the plaintiff through a series of bad acts is deemed more reprehensible than one who accomplishes the same result in one fell swoop. Thus, some courts have found it significant that the defendant's misconduct toward plaintiff consisted of a chain of actions.[199] In three cases

successful enterprise" was not financially vulnerable); *cf.* Interclaim Holdings Ltd. v. Ness, Motley, Loadholt, Richardson & Poole, No. 00 C 7620, 2004 WL 725287, at *17 (N.D. Ill. Apr. 1, 2004) (Plaintiff "was financially vulnerable in that it was in precarious financial position and on the verge of bankruptcy at the time" defendant law firm deprived it of potential income; nor is it required that defendant know of the plaintiff's financial circumstances).

194. *In re* the Exxon Valdez, 296 F. Supp. 2d at 1095.

195. *See* Waddill v. Anchor Hocking, Inc., 190 Or.App. 172, 78 P.3d 570 (2003) (injury caused when defective fishbowl shattered); Craig v. Holsey, 264 Ga. App. 344, 590 S.E.2d 742 (2003) (injury caused by intoxicated driver).

196. 113 Cal.App.4th 738, 793 (2003).

197. *Id.* at 807.

198. Planned Parenthood v. American Coalition of Life Activists, 300 F. Supp. 2d 1055, 1060 (D. Ore. 2004).

199. *See* Bowen & Bowen Const. Co. v. Fowler, 265 Ga. App. 274, 593 S.E.2d

involving cancer caused by cigarettes, appellate courts stated that the advertising and sales of cigarettes to plaintiff was repeated over the course of decades.[200]

The Third Circuit has called this a misinterpretation of the *State Farm* factor. In the court's view, "repeated conduct" does not refer to "a pattern of contemptible conduct within one extended transaction," but rather "specific instances of similar conduct by the defendant in relation to other parties." This interpretation echoes the Supreme Court's instruction in both *State Farm* and *BMW* that "a recidivist may be punished more severely than a first offender" and "repeated misconduct is more reprehensible than an individual instance of malfeasance."[201] Other courts have applied the "repeated actions" factor in this fashion.[202]

5. Intentional Malice, Trickery or Deceit

State Farm's fifth factor in assessing reprehensibility is whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." Harm which is the result of mere accident, of course, does not warrant punitive damages at all. Trickery or deceit appears most frequently – though not exclusively – in cases involving fraud or misrepresentation.[203]

668 (2004) (In home buyer's suit for fraud and breach of contract, involving failure to cure severe drainage problem, where defendant builder had failed to respond to repeated complaints); Angel v. YFB Helmet, Inc., No. 00CC12922, 2004 WL 1058180 (Cal. Ct. App. April 30, 2004) (unpublished) (fraud in connection with the sale of a used car involved repeated misrepresentations by dealer).

200. *See* Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594, 603 (8th Cir. 2005) ("the sale of this defective product occurred repeatedly over the course of many years"); Boeken v. Philip-Morris, Inc., No. B152959, 2005 WL 737511, at 35 (Cal. Ct. App. April 1, 2005) (marketing of known dangerous product over many years indicated the "extremely reprehensible" conduct of the defendant); Henley v. Philip Morris, 112 Cal. App. 4th 198, 5 Cal. Rptr.3d 42 (2003) (similar).

201. *State Farm*, 538 U.S. at 423 (quoting *BMW*, 517 U.S. at 577).

202. Craig v. Holsey, 264 Ga. App. 344, 590 S.E.2d 742, 747-48 (2003) (injury by drunk driver who had repeatedly driven under the influence of drugs on other occasions); Boyd v. Goffoli, 608 S.E.2d 169, 182 (W Va. 2004) (defendant, charged with operating a fraudulent scheme promising to obtain Pennsylvania driver's licenses for plaintiffs, indicated that it had done so "all the time"). *See also* Hangartner v. Provident Life & Accident Ins. Co., 373 F.3d 998, 1014 (9th Cir. 2004) (insurer's wrongful termination of disability insurance benefits "was part of a general corporate policy and not an isolated incident.").

203. *See, e.g.,* Bosley v. Special Devices, No. 03-16627, 2005 WL 1006775 (9th Cir. May2, 2005) (securities fraud); Kapelanski v. Johnson, 390 F.3d 525 (7th Cir. 2004) (investment fraud); Conseco Finance Servicing Corp. v. North American Mortgage Co., 381 F.3d 811 (8th Cir. 2004) (unfair competition and misappropriation of trade secrets); Kemp v. American Tel. & Tel. Co., 393 F.3d 1354 (11th Cir. 2004) (illegally including gambling fees on phone bills); TVT

Malice is a term whose meaning is famously unclear. Generally, whether the defendant acted with malice is a question left to the jury. This may be an exceptionally appropriate area to test Justice Breyer's assertion that substituting appellate judges for jurors will unify precedent and "assure the uniform treatment of similarly situated persons."[204]

For example, in *Union Pacific RR v. Barber*,[205] where the railroad was found to have allowed a hazardous condition to continue at a crossing despite prior accidents at the site, the Arkansas Supreme Court held that the railroad was guilty of malicious intent for putting profits over public safety.[206] By contrast, in *Boerner v. Brown & Williamson Tobacco Co.,*[207] the Eighth Circuit noted that, although defendant exhibited a callous disregard for the adverse health consequences of smoking, "there is no evidence that anyone at American Tobacco intended to victimize its customers."[208]

In *Eden Electrical, Ltd. v. Amana Co.*,[209] a business fraud case, the Eighth Circuit found malicious intent based on statements by defendant's employee threatening to "kill" plaintiff's business.[210] But in *Community Bank v. Archie*,[211] another business dispute, the Mississippi Supreme Court ruled that a statement by the bank's employee that the bank intended to put plaintiff out of business was not sufficiently malicious to warrant an award of punitive damages at all.

In a suit by a motorist who was injured by an intoxicated driver, the Georgia Court of Appeals held that defendant had engaged in willful and wanton misconduct, and that evidence that defendant continued to drive under the influence of alcohol or marijuana after the accident was admissible to show reprehensibility in "that he

Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413 (S.D.N.Y. 2003) (fraud and tortuous interference with contractual relations); Henley v. Philip Morris, 112 Cal. App. 4th 198, 5 Cal. Rptr. 3d 42 (2003). (misrepresentation in marketing of cigarettes); Bocci v. Key Pharmaceuticals, Inc., 264 Ga. App. 344, 76 P.3d 669 (2003) (drug manufacturer's misrepresentation of safety of its product); *cf*. Bogle v. McClure, 332 F.3d 1347 (11th Cir. 2003) (defendant "intentionally discriminated against the Librarians on the basis of race and used trickery and deceit to cover it up").

204. *See* note 124.

205. 356 Ark. 268, 325 (Ark. 2004).

206. *Id.*; 149 S.W.3d at 347.

207. 394 F.3d 594 (8th Cir. 2005).

208. *Id.* at 603. *See also Id.* at 604-05 (Bye, J., concurring) (criticizing the court's characterization of defendant's "less culpable state of mind.").

209. 370 F.3d 824 (8th Cir.2004).

210. *Id.* at 829.

211. No. 2001-CA-01657-SCT, 2004 WL 1277167 (Miss. June 10, 2004).

consciously drove under the influence of drugs, and that he did not even change this wanton conduct after the accident."[212] The Indiana Court of Appeals, however, in a case brought by a motorist who was injured in a head-on collision with a drunk driver, held that driving while intoxicated is not willful and wanton misconduct and that evidence of subsequent drunk driving by defendant was not admissible to show malice.[213]

6. Trial misconduct

The Court in *State Farm* did not explicitly foreclose the use of other factors that may be relevant to a defendant's reprehensibility. Some courts, for example, have considered litigation misconduct by a defendant. Trial judges have pointed to false trial testimony as indicative of a defendant's reprehensibility.[214] Other courts have considered the destruction of documents or concealment of information during discovery.[215]

Although misconduct during the litigation is understandably offensive to the judicial temperament, it is less relevant to the reprehensibility of the defendant's actions toward the plaintiff and treads close to punishing a defendant for being "an unsavory individual or business."[216] In any event, the prospect that reviewing courts in various jurisdictions may add new and different factors to the list dims the outlook for more predictable punitive damage awards.

B. Ratio: Fun With Fractions

1. Is There a Line, Where is it, and How Bright?

Reprehensibility may be "the most important indicium of

212. Craig v. Holsey, 264 Ga. App. 344, 590 S.E.2d 742, 747-48 (2003).

213. Wohlwend v. Edwards, 796 N.E.2d 781, 786-88 (Ind. Ct. App. 2003); *cf.* Gober v. Ralphs Grocery Co. 27 Cal. Rptr. 3d 298, 308 (Cal. App. 2005) (in sexual harassment case, evidence of defendant's subsequent misconduct toward others is generally not admissible to show reprehensibility).

214. Eden Electrical, LTD. v. Amana Co., 258 F. Supp. 2d 958, 965 (N.D. Iowa 2003), *aff'd*, 370 F.3d 824 (8th Cir. 2004); Corch Const. Co. v. Assurance Co. of America, 64 Pa. D. & C.4th 496, 522 (Pa. Ct. Comm. Pl. 2003).

215. Cass v. Stephens, 156 S.W.3d 38 (Tex. Ct App. 2004) (defendant destroyed documents to foil plaintiff's lawsuit); *Union Pacific Railroad*, 356 Ark. 268 (intentional destruction of evidence); Gibson v. Total Car Franchising Corp., 223 F.R.D. 265, 275 (M.D.N.C. 2004) (due to "irrefutable evidence that TCFC had concealed that information during discovery, the degree of reprehensibility in this case is very high").

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

reprehensibility,"[217] but the Court's second guidepost factor has attracted a great deal of judicial attention as well. *State Farm*, like *BMW*, instructs courts to consider "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award."[218]

Thus framed, this guidepost is unremarkable. Historically, courts have long required that punitive damages be proportioned to the gravity of the harm caused by the defendant.[219] An important corollary to that principle is that this harm is not necessarily measured by the jury's compensatory damages award.[220] In the seminal cases of *Wilkes* and *Huckle*,[221] for example, Justice Pratt emphasized the outrageous invasion of the plaintiffs' rights using an illegal warrant, not the minor compensable damages the King's messengers may have caused while executing it.[222] American decisions through the 19th Century upheld punitive awards to punish socially abhorrent misconduct that resulted in little or no compensable injury.[223] At common law, many jurisdictions permitted

217. *Id.* at 419.
218. *Id.*
219. *See BMW*, 517 U.S. at 581 n.32 (citing 19th Century decisions that required "some proportion to the real damage sustained," "proportion to the injuries received," and "proportion to the actual damages sustained").
220. Gagnon v. Continental Casualty Co., 211 Cal. App. 3d 1598, 1603-04, 260 Cal. Rptr. 305 (1989) (although "compensatory damages are a convenient measure of the injury or damages suffered by a plaintiff," this mathematical ratio "has little inherent meaning" and the focus should be on the nature and degree of the actual harm suffered by the plaintiff); Wehrman v. Liberty Petroleum Co., 382 S.W.2d 56, 66 (Mo. Ct. App. 1964) (punitive damages must bear some relation to plaintiff's injury, but not to the amount allowed by way of compensation).
221. *See supra* notes 10-11 and accompanying text.
222. *Huckle v. Money* upheld an award of exemplary damages of £300 to Wilkes' printer who was falsely imprisoned for six hours by an official who "used him very civilly by treating him with beef-steaks and beer, so that he suffered very little or no damages." 95 Eng. Rep. at 768. The Lord Chief Justice Pratt rejected the contention that the award was excessive in comparison to the printer's small pecuniary loss. *Id*. Rather, the court measured the award in proportion to the violation of the plaintiff's important, though nonpecuniary rights: "To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour." *Id.* at 768-69.
223. *See* Day v. Woodworth, 54 U.S. 363, 371, 13 How. 363, 14 L.Ed. 181 (1851) (it is "well-settled" that where "the wrong done to the plaintiff is incapable of being measured by a money standard," the jury may award exemplary damages according to "the degree of moral turpitude or atrocity of the defendant's conduct"); Restatement (Second) of Torts § 908, cmt. c (1965) ("In the earliest cases in which punitive damages were allowed, the plaintiffs suffered no substantial harm, or at least no physical or financial harm appeared."); David G. Owen, *Punitive Damages in Products Liability Litigation,* 74 MICH. L. REV. 1257, 1296 (1976) (19th Century punitive damage decisions aimed to rectify

jury awards of punitive damages even in the absence of a compensatory damage award, so long as the plaintiff could show genuine injury.[224]

The Supreme Court has "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."[225] In *State Farm* the Court "decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed."[226] Yet, in almost the next breath, the Court seems to suggest exactly that.

If Justice Kennedy, writing for the majority, intended to bring some mathematical precision to the second guidepost, his pronouncement is frustratingly Delphic.

[I]n practice, *few* awards exceeding a single-digit ratio between punitive and compensatory damages, *to a significant degree*, will satisfy due process. In Haslip, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages *might be close to the line*[227] of constitutional impropriety.... While *these ratios are not binding*, they are instructive. They demonstrate what should be obvious: Single-digit multipliers *are more likely* to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1... or, in this case, of 145 to 1.

Nonetheless, because *there are no rigid benchmarks* that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process... The converse is also true, however. When compensatory damages are *substantial,* then a lesser ratio, *perhaps* only equal to compensatory damages, can reach the outermost limit of the due process guarantee. *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.*[228]

No fair reading of this passage supports the notion that the Court has established 10-1 as the new substantive due process ceiling on

uncompensated injury); Rustad & Koenig, *supra* note 14.

224. *See* WILLIAM PROSSER, LAW OF TORTS 14 & nn.9 & 10 (4th ed. 1971); JAMES D. GHIARDI AND JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE §5.37 (1985).

225. *BMW* at 582. *See also TXO,* 509 U.S. at 458; *Haslip*, 499 U.S. at 18 ("we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.").

226. 538 U.S. at 424.

227. Presumably, this is the line that, the Court has stated, cannot be drawn.

228. *State Farm, 538* U.S. at 425-26 (emphasis added).

punitive damages. There is nothing talismanic about either the 10-1 or 4-1 ratios. They simply happened to be the ratios attributed to the two awards the Court has upheld under substantive due process analysis.[229] Moreover, as the italicized portions suggest, the Court left plenty of room for reviewing courts to maneuver around the numerical markers to reach the result that meets their own notions of justice. Justice Kennedy had already made clear his own view of trying to reduce the Due Process Clause to an exercise in simple math:

> The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards; it does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions.... When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award.[230]

Some courts have treated *State Farm's* discussion of ratios as cautionary. As the Fifth Circuit explained, "the ratio merely gives the Court an idea whether the size of the award is suspect."[231] Or, as a district court stated, when the ratio exceeds 9-1, "a red flag goes up."[232] Viewed differently, *State Farm* can be seen as announcing a rebuttable presumption against awards with high ratios, calling for a closer judicial look.[233] As the Eighth Circuit explains:

> It is not that such a ratio violates the Constitution. Rather, the mathematics alerts the courts to the need for special justification. In the absence of

229. The Court in *TXO* characterized the ratio of punitive to compensatory damages as 526-1. 509 U.S. at 453. However, the amount of harm TXO's tortious conduct could have caused was estimated at between $5 million and $8.3 million by plaintiff, but could have been "closer to $4 million, or $2 million, or even $1 million." *Id*. at 462. Later, in *BMW*, the Court recalibrated *TXO*, stating that the relevant ratio, when potential harm is taken into account, was about 10-1. 517 U.S. at 581. In *Haslip*, the jury returned a general verdict and the allocation between compensatory and punitive damages was disputed. The Court apportioned them in a 4-1 ratio, based on its own best estimate. 499 U.S. at 6 n.2.

230. TXO, 509 U.S. at 467 (Kennedy, J., concurring).

231. Lincoln v. Case, 340 F.3d 283, 293 (5th Cir. 2003) (internal quotation omitted). *See also* Atkinson v. Orkin Exterminating Co., Inc., 361 S.C. 156, 604 S.E.2d 385, 390 n.7 (S.C. 2004) ("The *State Farm* Court used the word 'guidepost' to emphasize its intent to create a guide, not a bright-line rule."); Bourne v. Haverhill Golf & Country Club, Inc., 58 Mass. App. Ct. 306, 91 N.E.2d 903, 916 (Mass. Ct App. 2003) (The Supreme Court "eschewed" rigid benchmarks but "mused" that single-digit multipliers are more likely to comport with due process).

232. McClain v. Metabolife Int'l Inc., 259 F. Supp. 2d 1225, 1231 (N.D. Ala. 2003).

233. Atkinson v. Orkin Exterminating Co., Inc., 361 S.C. 156, 604 S.E.2d 385, 393 (S.C. 2004).

> extremely reprehensible conduct against the plaintiff or some special circumstance such as an extraordinarily small compensatory award, awards in excess of ten-to-one cannot stand.[234]

Courts have therefore upheld ratios well into the double digits where they are warranted by highly reprehensible conduct on the part of the defendant. Physical injury actions include *Williams v. Philip Morris Inc*.,[235] an action for the death of a smoker from lung cancer. The Oregon Court of Appeals upheld punitive damages of $79.5 million, a 96-1 ratio. The court emphasized that *State Farm* does not establish a bright-line limit and that "it is difficult to conceive of more reprehensible misconduct" than exhibited by the tobacco company in this case.[236]

The court in *Mathias v. Accor Economy Lodging, Inc*.,[237] upheld punitive damages in a ratio of about 37-1 against a motel that subjected its guests to an infestation of bedbugs. In an opinion that has attracted a great deal of attention,[238] Judge Posner wrote for the Seventh Circuit that the motel had refused to fumigate, despite frequent complaints from bitten guests, until the infestation reached "farcical proportions."[239]

In *Craig v. Holsey*,[240] the Georgia Court of Appeals let stand a punitive damage ratio of 22-1 in favor of a plaintiff who was injured in an automobile accident caused by defendant, who was driving under the influence of alcohol and marijuana. The court noted that defendant was on probation for another offense at the time of the accident and that he continued to drive under the influence of alcohol and drugs even after the accident in this case.[241]

Courts have upheld even higher ratios in non-physical injury cases. *Kemp v. American Tel. & Tel. Co.,*[242] was a RICO class action by ATT customers who were billed illegally for fees they incurred using a telephone gambling service. The court allowed compensatory damages of $115 and remitted punitive damages to $250,000, a ratio of 2,173-1. In *Southern Union Co. v. Southwest Gas Corp.*,[243] a state corporation commissioner's illegal interference with a corporate

234. Williams v. Conagra Poultry Co., 378 F.3d 790, 799 (8th Cir. 2004).
235. 193 Or.App. 527, 92 P.3d 126 (2004).
236. *Id*. 92 P.3d at 145.
237. 347 F.3d 672 (7th Cir. 2003).
238. *See, e.g.,* Colleen P. Murphy, *The 'Bedbug' Case and State Farm v. Campbell*, 9 ROGER WILLIAMS U. L. REV. 579 (2004).
239. 347 F.3d at 675.
240. 264 Ga. App. 344, 590 S.E.2d 742 (2003).
241. *Id.,* 590 S.E.2d at 747-48.
242. 393 F.3d 1354 (11th Cir. 2004).
243. 281 F. Supp. 2d 1090 (D. Ariz. 2003).

merger led to a compensatory award of $390,072 and punitive damages of $60 million, a ratio of about 153 to 1. In *Lincoln v. Case*,[244] where a prospective tenant sued a landlord under the Fair Housing Act for racial discrimination, the district court reduced the jury's punitive award to $55,000, a 110-1 ratio to the compensatory damages.[245] In *Schwigel v. Kohlman*,[246] a business dispute, a Wisconsin appellate court upheld a ratio of 30-1. A federal district court in *Jones v. Rent-A-Center Inc.,*[247] a sexual harassment case, upheld a ratio of 29-1.

Other courts have read *State Farm* as imposing a much more rigid ceiling on constitutionally permissible awards. Perhaps the most restrictive view has been taken by the California courts of appeal. For example, in *Henley v. Philip Morris Inc*.,[248] a suit by a smoker who developed lung cancer, the jury's $50 million punitive damage award was cut in half by the trial judge and reduced again by the court of appeal, applying *State Farm*. The First District Court of Appeal emphasized that "*all five* of the subfactors in *State Farm* point to a high degree of reprehensibility."[249] In particular, the company deliberately marketed cigarettes to teenagers while concealing their danger and addictive nature. As a result, "millions of youngsters, including plaintiff, were persuaded to participate in a habit that was likely to, and did, bring many of them to early illness and death. Such conduct... warrants something approaching the maximum punishment consistent with constitutional principles."[250] Nevertheless, the court stated that under *State Farm*,

> [A] double-digit ratio will be justified rarely, and perhaps never in a case where

244. 340 F.3d 283 (5th Cir. 2003).

245. *See also* Planned Parenthood v. American Coalition of Life Activists, 300 F. Supp. 2d 1055, 1060 (D. Ore. 2004) (suit by abortion providers under the Freedom of Access to Clinic Entrances Act against anti-abortion activists who placed plaintiffs in danger of physical violence by posting their identities on a Web site; punitive damages awarded in ratios up to 32-1); Mission Resources, Inc. v. Garza Energy Trust, No. 13-02-136-CV, 2005 WL 1039648 (Tex. Ct. App. May 5, 2005) (in landowner's suit alleging subsurface trespass by oil and gas developer on adjacent land, 20 to 1 ratio upheld); Stack v. Jaffee, 306 F. Supp. 2d 137 (D. Conn. 2003) (intentional failure to investigate charges of police misconduct, resulting in compensatory damages of $2,000 and punitive damages remitted to $27,000); Hollock v. Erie Insurance Exchange, 842 A.2d 409 (Pa Super. Ct. 2004) upholding $2.8 million in punitive damages, a 10-1 ratio, for bad faith refusal to pay workers compensation benefits).

246. No. 04-0588, 2005 WL 434781 (Wis. Ct. App. Feb. 23. 2005).

247. 281 F. Supp. 2d 1277 (D. Kan. 2003).

248. 5 Cal. Rptr. 3d 42 (Ct. App. 2003), rev. dism'd, 18 Cal. Rptr.3d 873 (2004), cert. den., 2005 WL 637215 (Mar. 21, 2005).

249. *Id.* at 82.

250. *Id.* at 81-82.

> the plaintiff has recovered an ample award of compensatory damages. Indeed, where a plaintiff has been fully compensated with a substantial compensatory award, any ratio over 4 to 1 is "close to the line."[251]

The court reduced the punitive award to $9 million, a 6-1 ratio.[252]

The Fifth District Court of Appeal ordered an even more drastic reduction in *Romo v. Ford Motor Co*.,[253] involving the deaths and injuries suffered by the Romo family when their Bronco rolled over as the driver swerved to avoid another car. The court found Ford's conduct in willfully ignoring the dangerous design of the Bronco, disregarding its own safety standards, and creating the false appearance of a safe roll bar, resulting in the deaths of three people, was "extremely reprehensible."[254] Despite some misgivings concerning *State Farm's* narrower view of punitive damages compared to that historically followed by California courts,[255] the court remitted the total punitive damages in this case from $290 million to $23.7 million, a ratio of 9-1.

2. Manipulating the denominator

Regardless of whether they view ratios as a bright line or rather fuzzy, courts have not felt hemmed in by numerology. Ratios may pose as objective measurements, but courts have found ways to recalibrate them to achieve desired outcomes.

a. Nominal damages

An obvious circumstance where slavish adherence to ratios makes no sense is in cases where the jury has awarded only nominal compensatory damages. Where a defendant has violated the plaintiff's constitutional rights, for example, the misconduct may be reprehensible and the invasion of plaintiff's rights substantial, but the

251. *Id.* at 85. Compare the similar interpretation of *State Farm* by the Fourth District Court of Appeal in Diamond Woodworks, Inc. v. Argonaut Ins. Co., 109 Cal. App. 4th 1020, 135 Cal. Rptr. 2d 736, 762 (Ct. App. 2003):

> [I]n 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 amount of compensatory damages.

252. *Id.* at 86.

253. 6 Cal.Rptr.3d 793, 113 Cal.App.4th 738 (Ct. App. 2003).

254. *Id.* at 806. In fact, the court had earlier equated Ford's conscious disregard for safety to involuntary manslaughter. Romo v. Ford Motor Co., 122 Cal. Rptr. 2d 139, 164 (Ct. App. 2002).

255. The court found the logic of using single-digit multipliers in cases involving large corporate defendants "far from obvious." *Romo* 6 Cal. App. 4th at 803.

harm cannot be reduced to a compensable dollar amount. Often the jury will award a token amount, typically $1, as nominal damages. In such cases, the Supreme Court has indicated, "punitive damages may be the only significant remedy available in some § l983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury."[256]

The Court in *State Farm* advised that higher ratios may be permissible where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."[257] Thus courts have ignored very high ratios to uphold punitive awards sufficient to serve the purposes of punishment and deterrence.[258] In the words of one district judge, although the Supreme Court called the 500-1 ratio in *BMW* "breathtaking,"[259] in cases involving nominal damages, "a much higher ratio can be contemplated while maintaining normal respiration."[260]

Nominal damages are not reserved exclusively for constitutional rights cases. Plaintiffs for strategic or other reasons may not ask the jury for significant compensatory damages. For example, in *Wolf v. Wolf,*[261] plaintiff sued his former wife for tortious interference with his custody rights in his daughter. The jury awarded compensatory damages of $1. However, because plaintiff "specifically asked for only one dollar to remove any appearance to Ashley that he was motivated by money," the jury award "is therefore not an accurate indicator of the actual harm caused by the defendant."[262] The court concluded that punitive damages of $25,000 was "well within constitutional parameters."[263] In *Tate v. Dragovich,*[264] the court

256. Carlson v. Green, 446 U.S. 14, 22 n.9 (1980).

257. 538 U.S. at 425.

258. *E.g.,* DiSorbo v. Hoy, 343 F.3d 172, 187 (2nd Cir. 2003) (lawsuit under § 1983 alleging excessive force by police officer resulted in $650,000 punitive damages and $1 nominal damages); Williams v. Kaufman County, 352 F.3d 994, 1016 (5th Cir. 2003). In a § 1983 suit against a sheriff for unjustifiable strip searches, the court stated that the ratio analysis "could not be used when only nominal damages were awarded." *Id*. *State Farm* instead requires only "a standard of reasonableness." *Id. See also* Local Union No. 38 v. Pelella, 350 F.3d 73, 88-90 (2nd Cir. 2003) (discussing nominal damages rule).

259. 517 U.S. at 583.

260. Sherman v. Kasotakis, 314 F. Supp. 2d 843, 874 (N.D. Iowa 2004) (upholding award to restaurant patrons against owner for racial discrimination of $1 each in nominal damages and $12,000 in punitive damages).

261. 690 N.W.2d 887 (Iowa 2005).

262. *Id.* at 895.

263. *Id.* at 896. *See also* Tyco International, Inc. v. John Does 1-3, 2003 WL 23374767 (S.D.N.Y. Aug. 29, 2003). In a suit against individuals who launched an unsuccessful spam attack against the company's computers, U.S. Magistrate recommends $1 in nominal damages and $10,000 in punitives, noting that,

upheld $10,000 in punitive damages awarded to a state prisoner for harassment by prison employees. The jury awarded plaintiff $1 in nominal damages, because the Prison Litigation Reform Act prohibited recovery of compensatory damages.

Nor are nominal damages necessarily a *de minimis* dollar amount. In *Myers v. Workmen's Auto Ins. Co.*,[265] where the insurer failed to defend and settle two automobile accident claims against its insured, the Idaho Supreme Court affirmed judgment on a jury verdict of $735 in nominal damages and $300,000 in punitive damages. The court rejected the use of mathematical ratios in cases involving nominal damages and held that the nominal damages awarded in this case were not excessive.[266] The Fifth Circuit pointed out that "we have awarded $2000 in nominal damages and cited as guidance state courts that have awarded between $500 and $5000 in nominal damages for commercial disputes."[267]

b. Potential damages

State Farm's second guidepost calls upon courts to compare punitive damages not only to the actual harm, but also to the "potential harm suffered by the plaintiff."[268] The Court cites to its *TXO* decision, where the Court explained that the potential harm that might have been caused by a defendant's misconduct could warrant a punitive damages ratio into the triple digits:

> For instance, a man wildly fires a gun into a crowd. By sheer chance, no one is injured and the only damage is a $10 pair of glasses. A jury reasonably could find only $10 in compensatory damages, but thousands of dollars in punitive damages to teach a duty of care. We would allow a jury to impose substantial punitive damages in order to discourage future bad acts.[269]

In *TXO* itself, where plaintiff was able to thwart defendant's fraudulent scheme, the Court upheld punitive damages 526 times the compensatory award because the scheme could have deprived plaintiff of millions in royalties. The Court subsequently recalculated

although the company probably suffered some compensable harm, it did not ask for compensable damages in its complaint. *Id.* at *3-4.

264. No. CIV.A.96-4495, 2003 WL 21978141 at *9 (E. D. Pa. Aug. 14, 2003).

265. 95 P.3d 977 (2004).

266. *Id.* at 989-90.

267. Williams v. Kaufman County, 352 F.3d 994, 1015 n.70 (5th Cir. 2003).

268. 538 U.S. at 424.

269. *TXO*, 509 U.S. at 459-60 (quoting Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 902 (1991)). The hypothetical is taken from the classic explication in Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1181 (1931).

the denominator in *TXO* to arrive at a ratio of about 10-1.[270]

A similar situation faced the Eighth Circuit in *Asa-Brandt, Inc. v. ADM Investor Services, Inc.*,[271] an action by grain producers against grain elevators and others involved in grain delivery contracts. The court upheld a punitive award of nearly $1.25 million and nominal compensatory damages for breach of fiduciary duty. The court stated that "if [defendant's] scheme had worked, the Farmers would have been required to pay Wesley sums totaling more than $3.9 million." Thus the punitive damages awarded were only "a fraction of the harm likely to result" from defendant's conduct.[272]

Determining the exact value of the potential harm may present problems, as the Court in *TXO* discovered,[273] but such difficulties should not preclude consideration of potential harm under this guidepost. In another case that bears some close resemblances to *State Farm*, *Trinity Evangelical Lutheran Church and School v. Tower Ins. Co.,*[274] plaintiff accused its auto liability insurance carrier of bad faith in refusing to reform its policies covering teacher vehicles. Trinity faced exposure for a $490,000 liability judgment, which the insurer ultimately paid. The Wisconsin Supreme Court upheld a punitive damage award of $3.5 million against the carrier in addition to stipulated compensatory damages of $17,570. Counting the potential cost to plaintiff due to the insurer's conduct, the court stated, the ratio was becomes a single-digit 7-1.[275]

In *Craig v. Holsey*,[276] where a drunk driver was liable for injuries in an auto accident, resulting in $8,801 in compensatory damages. Upholding punitive damages of $200,000, the court noted that, "Holsey could have died as a result of Craig's driving under the influence" and that "awards for wrongful death can easily approach or exceed the amount of punitive damages awarded in the present case."[277]

270. *See BMW*, 517 U.S. 559, 581 & n. 34.
271. 344 F.3d 738 (8th Cir. 2003).
272. *Id.* at 747.
273. *See* 509 U.S. at 460-61, and note 230.
274. 661 N.W.2d 789 (Wis. 2003).
275. *Id.* at 803. *Cf.* Willow Inn, Inc. v. Public Service Mutual Ins. Co., 399 F.3d 224 (3d Cir. 2005). In a suit for bad faith of insurer to timely pay property damage claim, the court of appeals disagreed with the district judge that the possibility of nonpayment of Willow's claim was potential harm. *Id.* Instead, the court looked to the Willow's attorney fees and expenses to enforce its rights as the appropriate denominator. *Id.* at 234-36.
276. 590 S.E.2d 742 (Ga. Ct. App. 2003).
277. *Id.* at 748.

c. "Substantial" damages

In *State Farm*, the Court suggested that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[278] The Court twice noted that the Campbells' $1 million award for emotional distress was "substantial."[279]

Is the Court speaking of "substantial" in the absolute sense or relative to the plaintiff's harm? The Court's insistence that the Campbells' substantial damages constituted "complete compensation"[280] suggests the Court meant "substantial" relative to the harm. The Court provides no guidance, however, as to what objective yardstick a reviewing court might use to second-guess the jury's finding.[281] More importantly, the question whether the plaintiff received substantial compensatory damages is wholly unconnected with either the state interest in punishing and deterring misconduct or the defendant's right to notice of potential punishment.

"Substantial" is, of course, sufficiently vague to serve as rationale for courts looking to reduce what they perceive as generous jury verdicts. For example, compensatory damages of $25,000 has been found both substantial[282] and not.[283] Where compensatory damages have been deemed substantial, some courts have followed the suggestion in *State Farm* to reduce punitive damages to a 1-1 ratio.[284]

278. 538 U.S. at 425.

279. *Id.* at 426 & 429. This emphasis may indicate that the Justices perhaps felt that the Campbells were overly compensated.

280. 538 U.S. at 426.

281. Consequently, judicial analysis on this point often reflects little more than a subjective reaction to a particular verdict. In one case involving racial harassment, for example, this was the entirety of the Eighth Circuit's analysis:

Mr. Williams received $600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, we find that due process requires that the punitive damages award on Mr. Williams's harassment claim be remitted to $600,000.

Williams v. Conagra Poultry Co., 378 F.3d 790, 799 (8th Cir. 2004).

282. Roth v. Farner-Bocken Co., 667 N.W.2d 651, 670-71 (S.D. 2003) (invasion of privacy in employer's opening and copying plaintiff's personal mail; $25,000 compensatory damages was substantial and punitives could not exceed that amount); *see also* Blust v. Lamar Advertising Co., 813 N.E.2d 902, 916 (Ohio Ct. App. 2004) (where landowner sued billboard company for trespass and wrongful destruction of trees on the property, the Ohio court reversed a $2.2 million punitive award, finding that the conduct was not highly reprehensible and that the $32,000 compensatory award for the loss of 34 trees was substantial).

283. Jones v. Sheahan, No. 99 C 3669, 2003 WL 22508171, at *16 (N.D. Ill. 2003) (inmate suit against jail officials for failure to protect plaintiff from attack by other inmates; $25,000 compensatory damages for injuries was not "substantial" under *State Farm*, but "neither was it penurious").

284. Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594, 603 (8th Cir.

In other decisions, courts have ordered reduction of punitive damages only to a ratio of about 4-1.[285]

One might expect that a half-billion dollar award would qualify as substantial on any yardstick. Not necessarily, according to District Judge Holland, presiding over a suit by commercial and subsistence fishermen, landowners and others for economic damage caused by the Exxon Valdez oil spill:

> Here, there are 32,677 claimants. Using the $513,147,740 as the measure of [compensatory] damages... the plaintiffs' average share of the total recovery is $15,704.... The court is unpersuaded that the damages in this case were "substantial." Rather, this is a case in which the economic damages recovered by the average plaintiff was relatively small.[286]

2005) (in suit for the cancer death of a smoker, "we conclude that the [$15 million] punitive damages award is excessive when measured against the substantial compensatory damages award" of $4 million; due process dictates a ratio of approximately 1-1); TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413, 450 (S.D.N.Y. 2003) (where recording company sued competitor for breach of contract, tortious interference with contractual relations, and fraud, the jury award for compensatory damages was not only substantial, but complete compensation for economic injury, requiring reduction of punitive damages to about 1-1); Waits v. City of Chicago, No 01 C 4010, 2003 WL 2131077, at *6 (N.D. Ill. June 6, 2003) (where an arrestee was beaten by police while handcuffed and received $15,000 in compensatory damages for injuries, the district court ruled that the jury's $2 million punitive award was grossly excessive. Stating that compensatory damages were substantial, the district court ruled that the facts warranted a punitive award at or near the amount of compensatory damages).

285. *See, e.g.,* Stogsdill v. Healthmark Partners, LLC, 377 F.3d 827, 833 (8th Cir. 2004) (medical malpractice suit against nursing home for wrongful death; in view of substantial compensatory damages of $500,000, court reduces punitives to 4-1 ratio); Fresh v. Entertainment U.S.A. of Tennessee, Inc., 340 F. Supp. 2d 851, 859-60 (W.D. Tenn. 2003) (assault by bar employees; in view of substantial compensatory damages of $179,402, punitives reduced to a ratio of 4-1); Bogle v. McClure, 332 F.3d 1347 (11th Cir. 2003) (where librarians brought a § 1983 suit alleging racial discrimination in employment in the public library system, the court affirms $3.5 million in compensatory damages for emotional distress and approximately $13.3 million in punitive damages). Although the librarians "received substantial compensatory damages," the ratio of 4-1 did not violate due process. *Id. See also* Eden Electrical, LTD. v. Amana Co., 258 F. Supp. 2d 958 (N.D. Iowa 2003), aff'd, 370 F.3d 824 (8th Cir. 2004) (a business dispute between a manufacturer of home appliances and its distributor, noting that "the Plaintiff has received a substantial compensatory damages award" of $2.1 million, the district court reduced punitive damages to a ratio of 4.76-1). *Cf.* Conseco Finance Servicing Corp. v. North American Mortgage Co., 381 F.3d 811 (8th Cir. 2004) (in a commercial dispute, where Conseco received a large compensatory award of $3.5 million, and in the absence of extremely reprehensible conduct, punitive damages would be reduced to a 2-1 ratio); Henley v. Philip Morris, *supra*, at note 27 ("where a plaintiff has been fully compensated with a substantial compensatory award, any ratio over 4 to 1 is 'close to the line'").

286. In re the Exxon Valdez, 296 F. Supp. 2d at 1104.

d. Uncompensated Harm

The converse of the Campbells' situation, where substantial damages constituted "complete compensation," is the case where the jury's compensatory award leaves the actual harm suffered by plaintiff uncompensated or under-compensated.

The second guidepost, as enunciated by the Court in both *BMW* and *State Farm*, calls upon reviewing courts to compare the punitive damages award with the *injury* suffered by the plaintiff. This focus on the plaintiff's actual injury, rather than the jury award of compensation, falls squarely within common-law principles applied on judicial review for excessiveness that were well developed by the time the Due Process Clauses were adopted. American decisions during the 19th Century, as the *BMW* Court noted, reviewed punitive damage awards for a reasonable relationship to the "actual injury" or harm.[287] Common law courts rejected any ratio of punitive to compensatory damages, largely because punitive damages were often awarded for harms that were not compensable. Indeed, as the Court acknowledged, "[u]ntil well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time."[288] In

287. The Court's text referred to the relation between punitive and compensatory damages, but its supporting footnote makes clear that the comparison is to actual damage or injury:

See, e.g., Grant v. McDonogh, 7 La. Ann. 447, 448 (1852) ("[E]xemplary damages allowed should bear some proportion to the real damage sustained"); Saunders v. Mullen, 729, 24 N.W. 529 (Iowa 1885) ("When the actual damages are so small, the amount allowed as exemplary damages should not be so large"); Flannery v. Baltimore & Ohio R. Co., 15 D.C. 111, 125 (1885) (when punitive damages award "is out of all proportion to the injuries received, we feel it our duty to interfere"); Houston & Texas Central R. Co. v. Nichols, 9 Am. & Eng. R.R. Cas. 361, 365 (Tex. 1882) ("Exemplary damages, when allowed, should bear proportion to the actual damages sustained"); McCarthy v. Niskern, 22 Minn. 90, 91 92 (1875) (punitive damages "enormously in excess of what may justly be regarded as compensation" for the injury must be set aside "to prevent injustice").

517 U.S. at 581 and n.32.

288. *Cooper*, 532 U.S. at 437 n.11. Indeed, many scholars studying 18th and 19th Century decisions have concluded one of the early purposes of punitive damages was "to allow the jury to compensate victims who suffered mere hurt feelings, wounded dignity, or insult. None of these were legally compensable at common law." 1 LINDA L. SCHLUETER AND KENNETH R. REDDEN, PUNITIVE DAMAGES 8 (2d. ed. 1989). *See also* JAMES D. GHIARDI AND JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE §1.02 at 4-5 (1989) (suggesting that punitive damages were based both on the reluctance of 18th Century courts to recognize nonpecuniary harm as a legal "injury" in personal injury cases and the desire "to compensate the plaintiff for those damages which, at the time, were not legally compensable.").

such actions for exemplary damages, Justice Grier wrote for the Court in 1851,[289] "the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances." Where plaintiff has suffered uncompensated harm, compensatory damages are not an accurate measurement of the plaintiff's actual damages.[290]

It is true that punitive damages have "evolved somewhat" and "the types of compensatory damages available to plaintiffs have broadened."[291] Still, there remain areas of the law in which compensatory awards leave plaintiffs uncompensated or undercompensated for actual injury.[292]

Judicial review of such verdicts for excessiveness at common law looked at the proportionality of exemplary damages to keenly felt, if uncompensated, insults to honor and dignity, reflecting the belief that outrageous conduct "must be redressed if plaintiffs are to be fully compensated and defendants are to bear the social costs of their acts." Dorsey D. Ellis, Jr., *Fairness and Efficiency In The Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 16 (1982); *See also* Note, *Exemplary Damages in the Law of Torts,* 70 HARV. L. REV. 517, 519 (1957) (suggesting that the theory of punitive damages originated, in part, as "courts began to explain large verdicts awarded by juries in aggravated cases as compensation to the plaintiff for mental suffering, wounded dignity, and injured feelings"). The American punitive damage cases took on a distinctively American coloration. Many involved oppression of vulnerable persons, including women, by persons in positions of power or authority, and punitive damages were upheld precisely because such harms as emotional distress, embarrassment, or damage to reputation were not compensated. Rustad & Koenig, *supra* note 14, at 1293-94.

289. Day v. Woodworth 54 U.S. (13 How.) 363, 371 (1851).

290. As the court of appeal explained in Gagnon v. Continental Casualty Co., 260 Cal. Rptr. 305 (1989), "compensatory damages are a convenient measure of the injury or damages suffered by a plaintiff. Consequently, the 'reasonable relation' rule is usually applied by calculating the ratio between the amount of the punitive and compensatory damages." However, the court observed, in some circumstances compensatory damages do not present an accurate measure of plaintiff's harm.
Thus, to meaningfully apply the 'reasonable relation' rule, the trier of fact (and reviewing court) should not focus on some bottom-line amount of an award of compensatory damages but on the nature and degree of the actual harm suffered by the plaintiff.
Id. at 1604.

291. *Cooper*, 532 U.S. at 437 n.11. *See also* Note, *Exemplary Damages in the Law of Torts,* 70 HARV. L. REV. 517, 520 (1957) (As the law now permits compensatory damages for intangible harm, such as mental distress, "courts today are led to speak of exemplary damages exclusively in terms of punishment and deterrence.").

292. For example, in Neal v. Farmers Ins. Exch., 582 P.2d 980 (Cal. Ct. App. 1978). Plaintiff brought a bad faith claim against her automobile insurer for failure to pay uninsured motorist benefits. *Id.* The jury awarded $9,573 for pecuniary costs, but because plaintiff died prior to trial, no damages for emotional distress were recoverable. *Id.* at 985. Upholding punitive damages of $749,011, the California Supreme Court did not limit its consideration to the "relatively modest" compensatory award. Rather, "we think it likely that absent this limitation plaintiff would have recovered a substantial additional amount in compensation for

No one would dispute, for example, that killing a person inflicts a grievous harm. Nevertheless, wrongful death cases, which are statutory, notoriously undercompensate this harm. Some state wrongful death statutes impose a ceiling on recoverable damages, regardless of the severity of the actual loss.[293] In many jurisdictions wrongful death recoveries are limited to economic loss and do not include damages for pain and suffering that the victim might have recovered. [294] Courts reviewing punitive awards in such cases have taken uncompensated harm into account. The court of appeal in *Romo v. Ford Motor Co*.,[295] offers this compelling analysis:

> It would be unacceptable public policy to establish a system in which it is less expensive for a defendant's malicious conduct to kill rather than injure a victim. Thus, the state has an extremely strong interest in being able to impose sufficiently high punitive damages in malicious-conduct wrongful death actions to deter a "cheaper to kill them" mind set,... [T]he proportionality inquiry must focus, in any event, on the relationship of punitive damages to the harm to the deceased victim, not merely to compensatory damages awarded.[296]

State Farm leans in this direction as well. The Court recognized that higher ratios may be required in cases the compensatory award may not reflect actual harm, such as "where 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.'"[297] "In sum," the Court stated, "courts must ensure that the measure of punishment is both reasonable and

emotional distress suffered by Mrs. Neal . . . In these circumstances we cannot allow the apparent disproportion between recoverable compensatory damages and the total award as reduced to lead us to nullify the award." *Id.* at 992.

293. *See* STUART M. SPEISER, CHARLES F. KRAUSE AND JUANITA M. MADOLE, RECOVERY FOR WRONGFUL DEATH AND INJURY §3.6 (3d ed. 1992).

294. *See, e.g.*, CAL. CODE OF CIV. PROC. § 377.34:

[T]he damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.

and *see generally* SPEISER ET AL., *supra* note 294, at ch. 3.

295. 6 Cal.Rptr.3d 793 (Cal. Ct. App. 2003).

296. *Id.* at 811. *See also* Phelps v. Louisville Water Co., 103 S.W.3d 46 (Ky. 2003). The court upheld a $2 million punitive damages verdict for the wrongful deaths of two teenage boys in an auto accident, despite "the relatively small amount of compensatory damages awarded for each boy's loss of income ($150,000)," which was all that could be recovered under the statute. *Id.* at 54.

297. 538 U.S. at 425 (quoting *BMW*, 517 U.S. at 582). In its discussion of the reprehensibility factor, the Court remarked that "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded . . . to achieve punishment or deterrence." 538 U.S. at 419. The context plainly indicates that the Court intended to emphasize that punitive damages have no compensatory purpose, not that courts may not consider uncompensated harm under the second guidepost.

proportionate to the amount of harm to the plaintiff *and* to the general damages recovered."[298]

Courts have done so in cases where statutory limitations on compensatory awards have left plaintiff with uncompensated harm. In *Simon v. San Paolo U.S. Holding Co., Inc.*,[299] plaintiff entered into a contract to purchase a building in Los Angeles for his business for $1.1 million, but the owner sold the property to another buyer. The building was appraised at $1.5 million. In plaintiff's action for fraud, however, plaintiff was awarded compensatory damages of only $5,000 in out-of-pocket expenses because California law does not permit benefit-of-the-bargain damages in fraud cases involving real property. The court of appeal upheld the jury's punitive damages verdict of $1.7 million. The court ruled that, when plaintiff's actual but uncompensated harm of $400,000 is taken into account, the ratio is 4-1.[300]

Similarly, in *Hollock v. Erie Ins. Exch.*,[301] plaintiff sued her insurer for bad faith refusal to pay a legitimate claim, but Pennsylvania law limited her compensatory damages to attorney fees and costs. The Pennsylvania court upheld a $2.8 million punitive award, more than ten times compensatory damages, noting that the compensatory damages did not reflect that "Hollock suffered an invasion of a 'legitimate health interest' to serve Erie's financial goals and was subjected to unwarranted surveillance and unnecessary litigation."[302]

Courts should also take into account uncompensated harm in cases involving violation of hard-to-quantify constitutional rights or where plaintiff has not sought full compensation for actual harm.[303]

C. Other Penalties

State Farm's third "guidepost" is the difference between the punitive damages awarded by the jury and the civil penalties

298. *Id.* at 426 (emphasis added).
299. 7 Cal. Rptr.3d 367 (Ct. App. 2003), rev. granted, 86 P.3d 881, 11 Cal.Rptr.3d 510 (Cal. Mar 24, 2004).
300. *Id.* at 388-90.
301. 842 A.2d 409 (Pa. 2004).
302. *Id.* at 420-21. *See also* MacGregor v. Mallinckrodt, Inc., 373 F.3d 923 (8th Cir. 2004) (upholding $300,000 punitive damage award in employment discrimination suit under Title VII, the court states that the appropriate denominator in the ratio analysis includes not only compensatory damages of $1, but also economic damages consisting of lost wages and benefits of $68,802, and lost stock options of $102,000); Tate v. Dragovich, No. CIV.A.96-4495, 2003 WL 21978141 at *9 (E.D. Pa. Aug. 14, 2003) (upholding a $10,000 in punitive damages award to a state prisoner for harassment by prison employees where the Prison Litigation Reform Act prohibited recovery of compensatory damages).
303. *See supra* notes 256-267 and accompanying text (under nominal damages).

authorized or imposed in comparable cases."[304]

1. Criminal sanctions

The Court in *BMW* included possible criminal penalties under this guidepost.[305] The Court in *State Farm* dropped this factor, stating that "the criminal penalty has less utility.... and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award."[306]

The Court's reasoning for discounting the utility of comparison to possible criminal penalties under the third guidepost is open to question. The purpose of the guideposts, as the Court stated in *BMW*, is to ensure that "a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[307] The fact that particular criminal sanctions prescribed by statute may be rarely imposed does not diminish their status as "legislative judgments concerning appropriate sanctions for the conduct at issue."[308]

A more compelling objection to relying on criminal penalties for this purpose is that the criminal law relies heavily on imprisonment. Comparing incarceration to a punitive award is difficult,[309] and in the case of corporate defendants, irrelevant. Because incarceration is the primary penalty, monetary sanctions are often grossly inadequate compared to the harm. An example is perhaps the only criminal prosecution tried to verdict of a manufacturer for marketing a dangerous product. Following the deaths of three young women in a post-collision fire in their Ford Pinto, an Indiana prosecutor indicted and tried the company on three counts of negligent homicide. The maximum penalty facing Ford was $1,500 per death.[310]

State Farm's retreat has led to some confusion as to whether comparison to criminal penalties is no longer appropriate. A number

304. 538 U.S. at 418.
305. 517 U.S. at 583.
306. 538 U.S. at 428. Although Justice Kennedy emphasized the greater constitutional protections afforded criminal defendants, it is worth noting that most of these protections are not applicable in the sentencing phase of criminal proceedings.
307. 538 U.S. at 417; *BMW* 517 U.S. at 574.
308. *BMW* 517 U.S. at 583.
309. *But cf.,* Bardis v. Oates, 14 Cal. Rptr. 3d 89, 106 (Cal. Ct. App. 2004) (in dispute between real estate developers, court notes that comparable criminal penalties include substantial prison terms).
310. Ford was acquitted. *See* Joseph R. Tybor, "How Ford Won Pinto Trial," National Law Journal, Mar. 24, 1980, at 1. *See also*, Rustad and Koenig, *supra* note 14, at 1328 n. 296. *Cf.* Ind. Code Ann. § 35-50-2-3 (Michie 2003) (authorizing 45-65 year sentence and up to $10,000 fine as sentence for murder).

of courts have taken the position, following *State Farm*, that criminal statutes applicable to the defendant's conduct may be relevant to demonstrate the state's view of the reprehensibility of the conduct, but provide little assistance under the third guidepost.[311] Other courts have made use of such comparisons.[312]

Courts have complained that the quest for truly comparable criminal sanctions can be "quixotic."[313] For example, on remand of *Cambell*, the Utah court pointed out that "while a $10,000 fine for fraud may appear modest in relationship to a multi-million dollar punitive damages award, it is identical to the maximum fine which may be imposed on a person in Utah for the commission of a first degree felony, the classification assigned our most serious crimes."[314] In other instances comparable penalties simply cannot be found.[315]

311. *See* Kemp v. American Tel. & Tel. Co., 393 F.3d 1354, 1364 (11th Cir. 2004); Trinity Evangelical Lutheran Church and School v. Tower Ins. Co., 661 N.W.2d 789, 803 (Wis. 2003); Diamond Woodworks, Inc. v. Argonaut Ins. Co., 135 Cal. Rptr. 2d 736, 759 n.33 (Cal. Ct. App. 2003) (comparable civil and criminal statutes largely unhelpful, so that court must rely on the other two guideposts); Simon v. San Paolo U.S. Holding Co., 7 Cal. Rptr. 3d 367, 393 n.16 (Cal. Ct. App. 2003) (comparable criminal penalties have little utility under third guidepost, but relevant to reprehensibility); Streetscenes, L.L.C. v. ITC Entertainment Group, Inc., No. B168835, 2004 WL 2668695, at *5 n.5 (Cal. Ct. App. Nov. 23, 2004) (unpublished) (comparable criminal penalties have little utility following *State Farm*); *but see*, Rhone-Poulenc Agro, S.A., 345 F.3d 1366, 1372 (Fed. Cir. 2003) (*State Farm* does not prohibit comparisons with criminal sanctions).

312. *See* Stogsdill v. Healthmark Partners, LLC, 377 F.3d 827, 834 (8th Cir. 2004) (in medical malplractice wrongful death action against nursing home, $5 million punitive damage award reduced, based in part on comparable criminal penalty of $10,000); DiSorbo v. Hoy, 343 F.3d 172, 187-88 (2d Cir. 2002) ($200.000 punitive damage award against police who battered female arrestee was excessive as compared with $1,000 penalty for criminal assault); Cass v. Stephens, 156 S.W.3d 38, 76 (Tex. Ct. App. 2004) (reducing punitive damages in fraud case to $300,000, court notes that comparable criminal fine was $10,000); *In re* the Exxon Valdez, 296 F. Supp. 2d at 1108 (upholding punitive damages for oil spill, court finds that Exxon faced criminal fines totaling over $5.1 billion for violations of federal environmental laws); Henley v. Philip Morris, Inc., 112 Cal.App.4th 198, 5 Cal.Rptr.3d 42, 84 n.21 (2003) (penalty for furnishing cigarettes, multiplied by the number of separate offenses).

313. Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409, 419 (Utah 2004).

314. *Id. See also* Schwigel v. Kohlman, No. 04-0588, 2005 WL 434781 (Wis. Ct. App. Feb. 23. 2005) (Wis. Ct. App. 2005) (where the comparable criminal penalty for conversion of property did not reflect defendant's outrageous conduct in threatening and verbally abusing plaintiff and his family, the court refused to limit punitive damages to the amount of the statutory fine).

315. Asa-Brandt, Inc. v. ADM Investor Services, Inc., 344 F.3d 738 (8th Cir. 2003); Williams v. Kaufman County 352 F.3d 994 (5th Cir. 2003).

2. Civil Penalties

Regarding comparable civil penalties, the *State Farm* Court gave little guidance as to how closely a punitive award must conform to the civil sanction. In *State Farm* itself, the Court noted that "most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud"[316] Yet, the Court strongly suggests that the appropriate punitive damage award in the case was equal to the Campbells' compensatory damages, $1 million, which which is 100 times the civil penalty.

Courts following *State Farm* are more likely to view the civil penalty as the maximum for punitive damages. For example, in *Lincoln v. Case*,[317] where prospective tenants sued a landlord for refusal to rent based on racial discrimination, in violation of the Fair Housing Act, the court reduced the punitive damages to $55,000 to conform to the maximum civil penalty.[318]

A few courts have included within this guidepost comparison with punitive damage awards rendered in other cases. This interpretation is doubtful. The Court did not engage in such a comparison in either *BMW* or *State Farm*. Moreover, the Court had already rejected such a comparative test in *TXO*:

> [Punitive damage] awards are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make.... [W]e are not prepared to enshrine petitioner's comparative approach in a 'test' for assessing the constitutionality of punitive damages awards.[319]

316. 538 U.S. at 428.

317. 340 F.3d 283 (5th Cir. 2003).

318. *Id.* at 294. *See also* Blust v. Lamar Advertising Co., 813 N.E.2d 902 (Ohio Ct. App. 2004) (landowners brought trespass action against billboard company for destruction of 34 trees on their property; setting aside the punitive award, the court cites an Ohio statute that which authorizes the recovery of treble damages for the reckless destruction of brush or trees); *cf.*, *Union Pacific*, 356 Ark. at 305-06 (upholding $25 million punitive damage award for fatal accident at grade crossing and noting that daily civil penalty against railroad for permitting overgrowth of vegetation at crossing would have cumulated to $9.9 million); *Mathias*, 347 F.3d at 677 (bedbug infestation at motel could have resulted in small civil penalty, but also loss of license).

319. 509 U.S. at 458. *See also* Interclaim Holdings Ltd. v. Ness, Motley, Loadholt, Richardson & Poole, No. 00 C 7620, 2004 WL 725287, at *17 (N.D. Ill. Apr. 1, 2004) ("The mere fact that other juries in other cases involving different facts--and in some cases different jurisdictions--returned smaller punitive damages awards does not establish that this verdict is unconstitutionally excessive."). Identifying other cases involving truly comparable facts may itself be difficult. *See,*

Cases where comparable punitive damage awards have been decisive in the *State Farm* analysis have involved lawsuits against law enforcement officers and have generally served to reduce the award.[320]

3. What About Caps?

As the Court has observed, "A good many States have enacted statutes that place limits on the permissible size of punitive damages awards."[321] Most impose a monetary ceiling or limit punitive damages to a multiple of compensatory damages.[322] Similarly, Congress has placed limits on punitive damages recoverable in Title VII employment discrimination suits.[323] Punitive damage caps are conspicuous by their absence in *State Farm*'s discussion of the third guidepost.

The Court may have thought it self-evident that its decision was directed at punitive damages assessed in amounts entirely within the discretion of the jury and without legislative definition. A statutory declaration of the maximum punitive damage award certainly satisfies a defendant's due process right to notice of the amount of potential punishment. Thus, where the jury returns a verdict under the cap, or the trial judge is obliged to reduce the verdict to the statutory maximum, there is no federal constitutional issue of excessiveness.[324]

Courts have ruled that the *State Farm* guideposts are not applicable to civil penalties fixed by statute.[325] Nevertheless, several courts have

e.g., Mission Resources, Inc. v. Garza Energy Trust, No. 13-02-136-CV, 2005 WL 1039648, at *10 (Tex. Ct. App. May 5, 2005) ("Apparently, appellees are the first plaintiffs in Texas to have successfully asserted a cause of action for subsurface trespass by hydraulic fracture stimulation treatment of an oil and gas well.").

320. Waits v. City of Chicago, , No 01 C 4010, 2003 WL 2131077, at *7 (N.D. Ill. June 6, 2003) (excessive force by police, court reduced $2 million in punitive damages to $45,000 as "in line with comparable cases"); Stack v. Jaffee, 306 F. Supp. 2d 137 (D. Conn. 2003) (Police misconduct; $200,000 punitive damages remitted to $27,000 on basis of comparable cases); *but see* Moreland v. Dieter, 395 F.3d 747, 753 (7th Cir. 2005) ($27.5 million punitive damages for death of jail detainee upheld where other cases with smaller awards were "either quite dated or factually distinguishable.").

321. *Cooper*, 532 U.S. at 433.

322. *See BMW*, 517 U.S., at 614-19 (Ginsburg, J., dissenting) (appendix listing state statutory caps on punitive damages) and Cooper, 532 U.S. at n.6.

323. 42 U.S.C. § 1981a(b)(3)(d) limits punitive damage awards to $300,000 against large employers and $50,000 against smaller ones. *See, e.g.,* Baker v. John Morrell & Co., 266 F. Supp. 2d 909, 960 & n.13 (N.D. Iowa 2003).

324. *Cf. Cooper*, 532 U.S. at 433 ("When juries make particular awards within those [statutory punitive damage] limits, the role of the trial judge is "to determine whether the jury's verdict is within the confines set by state law").

325. *See* Accounting Outsourcing, LLC v. Verizon Wireless Personal Communications, L.P., 329 F. Supp. 2d 789, 808-09 (M.D. La. 2004) (*State Farm*

undertaken *State Farm's* excessiveness analysis of punitive damage verdicts that were subject to statutory caps.[326] Courts have also addressed the relevance of the cap on punitive damages in Title VII to awards in discrimination cases brought under other statutes.[327]

In summary the Court in *State Farm* does not appear to have fixed "the imprecise manner in which punitive damages systems are administered," or provided clear guidance for courts to conduct "[e]xacting appellate review."[328] District Judge Acker, sitting in the Northern District of Alabama, surely spoke for many of his brethren:

> The court hoped that *State Farm* would provide help for ruling on Metabolife's claim that the punitive damages imposed in these cases are excessive. Now the court is not sure that the wait was worth it.[329]

IV. TIME FOR A NEW DIRECTION

A. Jurors: Better than Judges, and Different

Anyone reading the growing body of cases applying *State Farm* must be impressed with the trappings of objectivity: the reprehensibility scorecard, the calculation of ratios to several significant decimal places, and the precise measurement of

guideposts do not apply to monetary civil fines set federal consumer protection statutes); Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 460 (D. Md. 2004) (Copyright infringement and unfair competition; Excessiveness analysis does not apply to statutory damages; Marriage of Chen, 290 Ill. Dec. 69, 820 N.E.2d 1136, 1152 (Ill. Ct. App. 2004) (*State Farm* inapplicable to state statutory penalty).

326. *See* Baker v. John Morrell & Co., 266 F. Supp. 2d 909 (N.D. Iowa 2003) (Title VII employment discrimination suit); Parrish v. Sollecito, 280 F. Supp. 2d 145 (S.D.N.Y. 2003) (Title VII case); Citizens National Bank v. Allen Rae Investments, Inc., 142 S.W.3d 459, 486 (Tex. Ct. App. 2004) (court undertakes *State Farm* analysis although jury award was less than state statutory cap); *but cf.*, Rodriguez-Torrez v. Caribbean Forms Mfg., Inc, 399 F.3d 52, 65 n.11 (1st Cir. 2005) (in Title VII employment discrimination case, "a punitive damages award that comports with a statutory cap provides strong evidence that a defendant's due process rights have not been violated.").

327. United States v. Zhang, 339 F.3d 1020, 1045 (9th Cir. 2003) (In suit under 42 USC 1981 for employment discrimination on basis of Chinese nationality, court declined to reduce $2.6 million punitive damages on the basis of comparison to the $300,000 cap in Title VII); *but see,* Sherman v. Kasotakis, 314 F. Supp. 2d 843, 875-76 (N.D. Iowa 2004) (restaurant patrons sued owner for racial discrimination in violation of the Civil Rights Act of 1964 under 42 U.S.C. § 2000a and 42 U.S.C. § 1981; the fact that the punitive damages were less than the caps imposed by Title VII indicates they were not excessive).

328. 538 U.S. at 418.

329. McClain v. Metabolife Int'l Inc., 259 F. Supp. 2d 1225, 1229 (N.D. Ala. 2003).

comparable penalties. A closer reading, however, gives the inescapable impression that these trappings are often little more than stage props and costumes, employed to present judicial subjectivity in respectably objective clothing.

State Farm added greater detail to the *BMW* guideposts. But, as two scholars have concluded, despite the Court's desire "to illuminate a path for lower courts to follow, the Court's guideposts have not produced a workable and predicable test for determining the constitutionality of large punitive awards."[330] Justice Kennedy's opinion in *State Farm* has produced what Justice Kennedy warned against in *TXO*:

> A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution. This type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend.[331]

Judge Posner, with refreshing honesty, concludes that, in spite of the Court's efforts, "it is inevitable that the specific amount of punitive damages awarded whether by a judge or by a jury will be arbitrary."[332]

One might ask, then, whether the Court's substitution of one arbitrary decision-maker for another ought to be of great concern. Judge Posner himself observes that juries may actually make more rational decisions than judges. The arbitrariness of juries is tempered somewhat by the trial judge, who filters out unreliable and prejudicial evidence. There is no similar check on judges.[333]

More fundamentally, not only did the Framers intend the Seventh Amendment as a check on the power of the judiciary, reflecting the colonists' bitter experience with autocratic judges,[334] they also expected that "the jury would reach a result that the judge either

330. Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the BMW/State Farm Guideposts*, 37 U. MICH. J.L. REFORM 441, 466 (2004).

331. 509 U.S. at 466-67 (Kennedy, J., concurring in part).

332. Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672, 687 (7th Cir. 2003).

333. *See* Richard A. Posner*, An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1494 (1999). "If judges as well as jurors are prone to make cognitive errors or be overcome by emotion, trial by jury may actually proceed more rationally than trial by judge, since in a bench trial there is no gatekeeper protecting the trier of fact from confusing or excessively prejudicial evidence." *Id.*

334. *See* POUND, *supra* note 27; *see also* Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 832-35 (1980).

could not or would not reach."[335] The Anti-federalists, who threatened to block ratification unless the jury right were guaranteed expressly, often quoted Blackstone:

> The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias toward those of their own rank and dignity; it is not to be expected from human nature that the few should always be attentive to the interests and good of the many.[336]

One Anti-federalist pamphleteer warned: "Judges, unencumbered by juries, have been ever found much better friends to... those who wish to enslave the people."[337] That included those selected in faraway Washington to sit on the federal bench.

Comparison of the outcomes in cases involving application of *State Farm* gives at least an appearance of a judiciary making subjective decisions regarding punitive damages that reflect its own class.

For example, in *Eden Electrical, Ltd. v. Amana Co.,*[338] essentially a business dispute in which an appliance distributor sued an appliance manufacturer for fraud and breach of its exclusive distributor contract. The Eighth Circuit, declaring that "the Court can hardly think of a more reprehensible case of business fraud," upheld a $10 million award, with a ratio of 4.5-1.[339] The same court in *Boerner v. Brown & Williamson Tobacco Co.*, [340] reviewed an award for the wrongful death of a smoker, "a most painful, lingering death following extensive surgery." The court reduced the jury's punitive damage award to a ratio of approximately 1-1 to the $4 million

335. Wolfram, Charles W., *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 671 (1973); *see also* Paul B. Weiss, *Reforming Tort Reform: Is there Substance to the Seventh Amendment,* 38 CATHOLIC U. L. REV. 737, 747 (1989).

336. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 683 (1978) (J.W. Ehrlich ed., 1959) (1783). *See* Stephan Landsman, *The Civil Jury in America: Scenes From an Unappreciated History,* 44 Hastings L.Q. 579, 600 (1993).

337. 3 The Complete Anti-Federalist 49 (An Old Whig) (Herbert J. Storing, ed. 1981).

338. 370 F.3d 824 (8th Cir. 2004).

339. Similarly, in *Diesel Mach. Co. v. B.R. Lee Industries, Inc*., 328 F. Supp. 2d 1029, 1050 (D.S.D. 2003), a dealer's suit against a manufacturer for wrongful termination of their exclusive dealership agreement, the court held that a, punitive damage award with a ratio of 6.5-1 was not excessive given the high reprehensibility of defendant's conduct.

340. 394 F.3d 594 (8th Cir. 2005).

compensatory damages. Judge Bye, writing separately, highlighted the contrast:

> I have trouble reconciling a reduction in this award with our affirmance in *Eden*. . . . *Eden* involved purely economic harm. This case not only involves personal injury rather than economic harm, but personal injury of a very serious nature—a wrongful death. . . . We have more reason to be outraged by American Tobacco's callous disregard for Mary Jane Boerner's life than we would, for example, if it had intentionally pilfered all her money.[341]

Bardis v. Oates[342] was a dispute between two former business partners, both powerful real estate developers. The court, stating that "fraud and breach of fiduciary duty are universally deplored throughout our society," approved punitive damages at a ratio of 9-1. The court explained that "our case is a stronger candidate for a high punitive damages verdict than *Romo II*,"[343] where Ford's willful disregard for safety in the design of its Bronco resulted in the deaths of three family members, and where the court of appeal reduced punitive damages to a 5-1 ratio.

In *Fulton v. Gavlick*,[344] a lawyer's former clients brought suit alleging that the lawyer stole funds from estates. As a result, after the deaths of their loved ones, "they endured years of deceptions and lies, causing them additional emotional pain and financial losses, not to mention substantial legal fees incurred in trying to get the estates settled and their property, that their deceased loved ones intended for them to have, returned." The court awarded compensatory damages only for the amounts of the money that was stolen and punitive damages in a 1-1 ratio. By comparison, in *Motherway, Glenn & Napleton v. Tehin*,[345] where an attorney sued his co-counsel, alleging that defendant had cheated him out of his portion of a lawsuit settlement, the district court, emphasizing the reprehensibility of defendant's conduct, awarded punitive damages in a ratio of 4.75-1 to compensatory.

In *Richardson v. TriCom Pictures & Productions, Inc.*,[346] a former sales employee alleged that she was subjected to various acts of physical and verbal sexual harassment by her immediate supervisor and fired by defendant in retaliation for complaining of the harassment. The federal district court reduced the jury's punitive

341. *Id.* at 605 (Bye, J., concurring).
342. 14 Cal. Rptr. 3d 89 (Cal. Ct. App. 2004).
343. *Romo*, 6 Cal. Rptr. 3d 793.
344. 63 Pa. D. & C.4th 250 (Pa. Ct. Comm. Pl. 2003).
345. No. 02 C 3693, 2003 WL 21501952 (N.D. Ill. June 26, 2003).
346. 334 F. Supp. 2d 1303 (S.D. Fla. 2004).

damages award to a 1-1 ratio to plaintiff's back pay award.[347] In *Bourne v. Haverhill Golf & Country Club, Inc.*,[348] female members of the country club asserted gender discrimination in that they were given more limited access to the course than male members. The court upheld awards of punitive damages up to ratios of about 4-1. The court emphasized that, "Playing golf was not one of the unalienable rights of 1776, but it is naive not to recognize the degree to which golf links and the country club are the locale for developing professional and business contacts. Golf and the country club lubricate the advance of careers."[349]

B. Is a Revitalized Jury in Our Future?

The above examples could be multiplied. Such juxtapositions may not be entirely fair, since they may be explainable and distinguishable on some basis. But that is largely the point. Judges are obliged to explain their decisions in neutral terms if they are to claim legitimacy. Jurors, on the other hand, come into the civil justice system vested with legitimacy by federal and state constitutions and by over 200 years of service as the conscience of the community. In our political system, an individual jury really has no past and no future. Chosen randomly from a cross-section of Americans, jurors have no financial interest in the case and no ideological agenda; no professional ambitions or political aspirations. The jury is the black box of our justice system. We insist upon fair procedures, reliable evidence, and clear instructions so that we may have confidence in the outcome. That has been the mark of fundamental fairness and due process of law. Despite decades of vicious attacks by tort reformers representing those who would benefit from reducing the jury's role, Americans continue to accept the decisions made by juries.

We may accept that the Supreme Court is genuinely concerned that "out-of-control" punitive damage awards pose a significant danger. Yet it is implausible that juries, who have shouldered the responsibility for assessing punitive damages since the first days of the Republic, are inherently inimical to due process. Indeed, the Justices early on had a handle on the problem of the perceived

347. *See also* Pollard v. E.I. DuPont de Nemours, Inc., No. 95-3010 ML, 2003 WL 23849733, at *5 (W.D. Tenn. Oct. 22, 2003) (district court awarded punitive damages in a 2-1 ratio to plaintiff who "suffered substantial mental and economic harm as a result of the lengthy campaign of harassment and intimidation that DuPont failed to stop and which ultimately led to the conclusion of Plaintiff's employment with DuPont.").

348. 791 N.E.2d 903 (Mass. Ct. App. 2003).

349. *Id.* at 915.

arbitrariness of large punitive damage awards. The problem did not lie with jurors themselves or with the discretion they exercise as part of the common-law method of imposing punitive damages.[350] Rather, as the Court repeatedly stated, the fault lies with the lack of guidance to juries in the proper exercise of their responsibilities. As Justice Blackmun wrote for the majority in *Haslip*, "unlimited jury discretion - *or unlimited judicial discretion for that matter* - in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."[351] In that case, the Court concluded that the jury instructions "reasonably accommodated Pacific Mutual's interest in rational decision-making and Alabama's interest in meaningful individualized assessment of appropriate deterrence and retribution."[352]

Although the majority in *TXO* determined that the issue of the adequacy of jury instructions was not properly preserved,[353] Justice O'Connor pointedly argued that "many courts continue to provide jurors with skeletal guidance that permits the traditional guarantor of fairness – the jury itself – to be converted into a source of caprice and bias."[354] In her view, "it cannot be denied that the lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict."[355] Even in *State Farm*, the Court cautioned that "[v]ague instructions, or those that merely inform the jury to avoid 'passion or prejudice,'... do little to aid the decision-maker."[356]

Nevertheless, *State Farm*, like *BMW*, posted its guideposts for the guidance of reviewing judges. If indeed these considerations are essential to due process, "one would think that due process would require the assessing jury to be instructed about them."[357] Justice

350. The Court in *Haslip* agreed with "every state and federal court that has considered the question" that "the common law method for assessing punitive damages does not in itself violate due process." 499 U.S. at 17.

351. 499 U.S. at 18 (emphasis added). Justice O'Connor added that "most common-law punitive damages instructions" have an "open-ended, anything-goes quality" that can allow "the vindictive or sympathetic passions of juries." 499 U.S. at 49 (O'Connor, J., dissenting).

352. 499 U.S. at 20.

353. *TXO,* 509 U.S. at 463.

354. *TXO*, 509 U.S. at 500-01 (O'Connor, J., dissenting). Even prior to *Haslip*, Justice Brennan complained that "punitive damages are imposed by juries guided by little more than an admonition to do what they think is best." Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan, J., concurring).

355. *TXO*, 509 U.S. at 475 (O'Connor, J., dissenting).

356. 538 U.S. at 418.

357. *BMW*, 517 U.S. at 602 (Scalia, J., dissenting) (referring specifically to the state's interest in punitive damages).

O'Connor has cut to the heart of the matter:

> By giving these factors to juries, the State would be providing them with some specific standards to guide their discretion. This would substantially enhance the fairness and rationality of the State's punitive damages system.[358]

Justice Breyer's statement, adopted by the Court in *Cooper*, that the essence of justice is similar treatment of those similarly situated is not entirely complete. Justice also consists in the dissimilar treatment of the dissimilarly situated. Predictability has many virtues, but so does the ability of juries to tailor their verdicts to the facts and circumstances of the case before them.

CONCLUSION

State Farm will not be the last word from the Court. The Court will face a choice. It might continue on the path of transferring responsibility for assessing punitive damages into the hands of reviewing judges, leaving the jury as little more than an advisory panel, a decorative reminder of past glory. Or it could – and should – reassert its faith in the common sense and abilities of Americans who sit solemnly in jury boxes across the nation every day.

Such faith has surely not faded entirely. The Court has recently reaffirmed the jury's role in assuring fairness and community values in criminal prosecutions, including the punishment of criminal defendants.[359] Those same Americans sit as jurors in civil actions. The answer to jury problems lies in clear instructions and sensible procedures.[360] It does not lie in erasing the Seventh Amendment.

358. *Haslip*, 499 U.S., at 57 (O'Connor, J., dissenting) (referring to factors established by the Alabama court).

359. United States v. Booker, 125 S. Ct. 738 (2005) (striking down the mandatory provision of federal Sentencing Guidelines). One district court has noted the obvious anomaly in the Court's treatment of 6th Amendment and 7th Amendment juries:

> There seems to be a difference in the court's view of the sanctity of jury findings in civil cases and its necessary constitutional role in criminal cases. In civil cases, due process seems to limit the role of the jury as a fact finder. In criminal cases, due process seems to enhance the role of the jury as a fact finder.

U.S. v. Hankins, 329 F. Supp. 2d 1225, 1232 (D. Mont.2004).

360. *See* Sandra Day O'Connor, *Juries: They May Be Broken, But We Can Fix Them*, Federal Lawyer 20, 23-24 (June 1997).