COMMENT

NECESSARY PROTECTION: AN EXAMINATION OF THE *STATE FARM V. CAMPBELL* STANDARDS TEST AND WHY ECONOMICALLY EFFICIENT RULES DO NOT WORK AT THE INTERSECTION BETWEEN DUE PROCESS AND PUNITIVE DAMAGES

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I. INTRODUCTION

In 1994, a District Court of New Mexico awarded a woman $160,000 in compensatory damages and $2.7 million in punitive damages because of the burns caused after the woman spilled a cup of McDonald's coffee on herself.[1] In 1996, the Alabama Supreme Court awarded $4 million dollars in punitive damages in light of $4,000 worth of cosmetic damage to a doctor's BMW.[2] And in 2000, a Florida Circuit Court awarded $145 billion in punitive damages, the largest such award in American history, against cigarette companies in a class action suit after hearing evidence from only three claimants without any information as to who the other members of the class were, how many there were, or the extent of their injuries.[3] As the disparity between punitive damages awards and the related compensatory awards increased and the grounds

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[1] Liebeck v. McDonald's Rests., P.T.S., Inc., No. CV-93-02419, 1995 WL 360309, at *1 (D.N.M. Aug. 18, 1994) (this case eventually settled out of court for an undisclosed amount).

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

[3] Liggett Group, Inc. v. Engle, 853 So. 2d 434, 450–51, 453 (Fla. Dist. Ct. App. 2003), *rev'g* Engle v. R.J. Reynolds Tobacco, No. 94-08273 CA-22, 2000 WL 33534572 (Fla. Cir. Ct. Nov. 6, 2000).

upon which they were rewarded became increasingly vague, questions began to stir. When are punitive damages awards too high? At what point does the punishment fail to fit the crime and instead operate as a windfall to the plaintiff while unlawfully depriving defendants of their property without due process of law? How are courts to ascertain the propriety of the punitive damages awards granted by juries?

In response to these and similar cases, the United States Supreme Court began to use the Due Process Clause of the Fourteenth Amendment as a means to test the appropriateness of punitive damages awards imposed by state courts.[4] In 1996, and in light of ever increasing punitive awards, the Court set forth a test composed of three factors by which an award of punitive damages becomes excessive and violates due process.[5] In 2003, that test was further clarified giving lower courts more and more direction as to how the Due Process Clause places substantive limits on punitive damages awards.[6] These judicial decisions, however, have not gone uncontested.

This Note will examine the Supreme Court's 2003 application of the Due Process Clause to place substantive limitations on punitive damages awards in civil cases. It will consist of nine parts. Part II very briefly examines the elements and purpose of both the Due Process Clause and punitive damages awards. Part III tracks the Supreme Court cases leading up to *BMW of North America Inc., v. Gore*, the case in which the Supreme Court laid down its guidelines for examining punitive damages awards.[7] Part IV discusses the *BMW* factors and shows how the *BMW* Court used those factors to overrule a $4 million punitive damages award as excessive.[8] Part V provides a detailed analysis of the next major judicial excursion into the punitive damages and due process intersection, the Court's decision in *State Farm*.[9] This Part also discusses how the Court further clarified application of the *BMW* factors in a case that overturned a $145 million punitive damages award as violating due

[4] *See infra* notes 30–37 and accompanying text.

[5] *See BMW*, 517 U.S. at 574–75. Briefly stated, those factors are: the degree of reprehensibility of the defendant's behavior, the relation of the punitive award to any compensatory award, and the similarity in the punitive award and any available criminal or civil sanctions. *Id.*

[6] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003).

[7] *BMW*, 517 U.S. at 574.

[8] *Id.* at 585–86.

[9] 538 U.S. 408 (2003).

process.[10] Part VI discusses the need for *BMW* and *State Farm*, emphasizing the general trend towards higher awards and the many problems caused by excessive punitive damages awards. Part VII assesses some of the strengths of the *BMW/State Farm* test while arguing against those that believe that *State Farm* was wrongly decided. It is my position that *State Farm* (a) adequately protects a defendant's due process rights in providing him with the requisite notice regarding wrongful conduct and the potential sanctions that flow from such conduct; (b) has not abrogated state control over punitive awards; (c) has not eviscerated the power of punitive damages by couching such awards in terms of the harm to the individual plaintiff, but rather allows punitive damages to remain a powerful jurisprudential tool; and (d) does not mandate a single-digit ratio between punitive and compensatory awards. Part VIII refutes the argument that *State Farm* ignores the economic reality of litigation through its use of a balancing test rather than some bright-line mathematical formula. It is my contention that a mathematical approach to punitive awards is infeasible given the circumstantial analyses that both due process and the imposition of punitive damages awards require. This argument leads to my final point, Part IX, which examines the *BMW/State Farm* test in light of the long-running rules versus standards debate. Here, I posit that bright-line rules would affect arbitrary and capricious punitive awards thereby further violating the defendant's due process. Moreover, standards like the *BMW/State Farm* guideposts are more apt to protect all of the parties' interests and indeed such standards are the only means of adequately balancing the many contending forces where due process and punitive awards intersect.

II. THE CROSSROADS BETWEEN DUE PROCESS AND PUNITIVE DAMAGES

A. Elements and Purpose of Due Process

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[11] As the Supreme Court noted more than a century ago, "[i]t would be

[10] *Id.* at 418–20.

[11] U.S. CONST. amend. XIV, § 1.

difficult and perhaps impossible to give [the terms used in the Clause] a definition, at once accurate, and broad enough to cover every case."[12] Some parameters, however, are well-established. "[T]he point of due process—of the law in general—is to allow citizens to order their behavior"[13] and to protect individuals from arbitrary state action.[14] Thus, due process requires adequate notice of the conduct that is to be punished as well as notice of the severity of any resultant punishments.[15] A determination of what due process requires in each instance is a heavily fact-laden enterprise turning on the circumstances of each case.[16] And, as will be shown, due process "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor"[17] because such punishments constitute an arbitrary deprivation of property when they are not logically tied to the severity of the crime as evinced by the harm suffered on that individual plaintiff.[18]

B. The Purpose of Punitive Damages

The use of punitive damages has a long heritage and a dual purpose.[19] Punitive damages and compensatory damages serve different functions; that is, punitive damages "are aimed at deterrence and retribution" while compensatory damages "'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.'"[20] Because punitive awards are based on the conduct of the defendant, "every

[12] Mo. Pac. Ry. Co. v. Humes, 115 U.S. 512, 519 (1885).

[13] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting).

[14] *See generally* Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966) (noting that due process requires that defendants be protected "against arbitrary and discriminatory" punishment, in this case, in the form of court costs).

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

[16] *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (setting forth a three part, circumstance-laden examination to determine what process is due in administrative agency proceedings).

[17] State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

[18] *Id.* at 416–18.

[19] *See* Leila C. Orr, Note, *Making a Case for Wealth-Calibrated Punitive Damages*, 37 LOY. L.A. L. REV. 1739, 1741–49 (2004) (placing emphasis on wealth calibrated punitive damages and noting that "[i]n Roman times, the statutory remedy of multiple damages functioned in much the same way as punitive damages; both provide for an award in excess of actual harm"); *see also* Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1285 (1993) (noting that punitive awards go back at least as far as the Hindu Code of Manu, Hammurabi's Code, and the Bible).

[20] *State Farm*, 538 U.S. at 416 (quoting Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001)).

assessment of punitive damages is circumstantial."[21] Punitive damages are imposed as a tool to punish "outrageous, malicious, and wanton conduct" and to deter "similar conduct in the future."[22] As such, punitive damages should only be awarded in the case where, after compensating the plaintiff, the defendant's actions are so egregious as to require "further sanctions."[23] Such sanctions are said to arise from a state's interest in protecting its citizens from harmful or deceitful trade practices or other similar deceitful and egregious conduct.[24] Historically, then, the states have had considerable control over punitive damages.[25] But recently, the Supreme Court has begun to express concern in the size and imposition of some punitive awards.[26]

Such concern arises when these awards are so large and so excessive that they bear no relation to the harm committed.[27] In those instances, the state fails to inform the defendant, first, of the specific conduct that is to be punished, and second, the extent that such conduct will be punished.[28] In this manner, the state's action loses all legitimacy and is said to violate the defendant's due process.[29] Two questions, then, must be answered. First, to what extent may awards grow without violating due process and rendering illegitimate the state's action? And second, how are courts to discern such a limitation in light of the fact that both the use of punitive awards and a proper due process analysis are heavily predicated upon circumstance? The Supreme Court began its journey to tackle these questions in 1989 and reached its destination with the *BMW/State Farm* test.

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[21] Elizabeth J. Cabraser, *The Effect of* State Farm v. Campbell *on Punitive Damages in Mass Torts and "Common Course of Conduct" Litigation: What Does the Immediate Post-*State Farm *Jurisprudence Reveal?*, SK042 ALI-ABA 1725, 1733 (2005).

[22] Dayna H. Kamimura, Note, *Punishment and Deterrence: Merely a Mantra; A Casenote on* State Farm v. Campbell, 26 U. HAW. L. REV. 229, 229 (2003).

[23] *State Farm*, 538 U.S. at 419.

[24] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568, 585 (1996) (citing City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266–67 (1981); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)).

[25] *See generally* Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1299 (2005) [hereinafter Rustad, *Iron Cage*] (noting the "significant variation among the states in the availability of punitive damages" with some states omitting them completely while others place substantive caps on the amounts awardable).

[26] *See infra* notes 30–37 and accompanying text.

[27] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting).

[28] *BMW*, 517 U.S. at 574.

[29] State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003).

III. EARLY APPLICATION OF THE DUE PROCESS CLAUSE TO PUNITIVE DAMAGES AWARDS

The Supreme Court began its relatively short march towards *BMW/State Farm* when in the 1989 case of *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,[30] the Court, after rejecting the claim that the Eighth Amendment's Excessive Fines Clause[31] applied to punitive damages awards, expressly reserved for a later date a discussion of the application of the Due Process Clause to punitive damages.[32] The Court further opened the door in 1991 when it took a procedural approach to due process analysis of punitive damages in *Pacific Mutual Life Insurance Co. v. Haslip*.[33] Here, noting that a punitive award of more than four times the compensatory award may come "close to the line" of constitutionality, the Court upheld the award on procedural grounds because Alabama's procedures safeguarded against the imposition of excessive damages.[34] Ostensibly using its procedural analysis, the Court, in its 1993 *TXO Production Corp. v. Alliance Resources Corp.* decision, upheld a punitive damages award 526 times greater than the compensation granted because of the potential harm that could have resulted had the defendant succeeded in its wrongful plans, which were laden with "fraud, trickery and deceit."[35] The Court again emphasized that as long as the procedures implementing the punitive award were fair, the "product of that process is entitled to a strong presumption of validity."[36] Three years later, the Court began its substantive analysis of punitive damages, setting forth its punitive damages/due process test in *BMW v. Gore*.[37]

IV. THE *BMW* GUIDEPOSTS

In *BMW*, the Supreme Court, for the first time, struck down a punitive damages award as grossly excessive and in violation of

[30] 492 U.S. 257 (1989).

[31] The Eighth Amendment, in its entirety, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[32] *Kelco*, 492 U.S. at 277.

[33] 499 U.S. 1, 23 (1991).

[34] *Id.* at 23–24.

[35] 509 U.S. 443, 462 (1993).

[36] *Id.* at 457.

[37] 517 U.S. 559 (1996).

substantive due process.[38] Here, respondent, Dr. Gore, purchased a BMW automobile he believed to be brand new only to later discover that it had been repainted by the distributor because of pre-delivery damage.[39] Dr. Gore alleged that BMW's failure to disclose the paint job amounted to fraud, and he sued claiming $500,000 in compensatory and punitive damages.[40] The jury awarded Dr. Gore $4,000 in compensation and $4 million in punitive damages which was subsequently lowered to $2 million by the Alabama Supreme Court on appeal because the jury improperly based its punitive award on the number of BMW sales similar to Dr. Gore's in other jurisdictions.[41]

The United States Supreme Court reversed the Alabama Supreme Court and found the jury award excessive and in violation of the Due Process Clause.[42] After first analyzing Alabama's interest in imposing a punitive damages award against BMW,[43] the Court set forth three guideposts by which courts must assess the propriety or potential excessiveness of a punitive damages award.[44] Those guideposts include "the degree of reprehensibility" of the defendant's conduct, "the disparity between the harm or potential harm suffered . . . and [the] punitive damages award," commonly referred to as the "ratio" requirement, and the disparity between the sanction imposed and "civil penalties authorized or imposed" in similar cases.[45]

A. Reprehensibility

By and large, the most important of the *BMW* factors is the degree of reprehensibility of the defendant's actions since the amount of punitive damages imposed should reflect "'the enormity

[38] *Id.* at 585–86.

[39] *Id.* at 562–63.

[40] *Id.* at 563.

[41] *Id.* at 566–67.

[42] *Id.* at 585–86.

[43] *Id.* at 568. The Court noted that although a state may certainly prohibit deceitful trade practices and may require full disclosure of any defect in merchandise affecting its value, "the States need not, and in fact do not, provide such protection in a uniform manner." *Id.* at 569. Indeed, for reasons further enumerated below, Dr. Gore's attempt to get BMW to change its disclosure practices via the punitive damage awards would infringe "principles of state sovereignty and comity" central to the scheme of the United States Constitution. *Id.* at 572. However, because the Alabama Supreme Court properly limited its interest to BMW's consumers in Alabama, the Court then moved on to discuss its three excessiveness guideposts. *Id.* at 573–75.

[44] *Id.* at 574–75.

[45] *Id.* at 575.

of [the] offense.'"[46] According to the Court, some conduct can be defined as more reprehensible than other actions, particularly: (1) where physical harm results; (2) if the harm is economic, where it was suffered by a particularly vulnerable target; (3) where there is evidence that the defendant acted intentionally or with reckless disregard for the safety of others; or (4) where such conduct was recidivistic in nature.[47]

BMW's conduct fit none of these "aggravating factors" in that the harm caused was purely economic, Dr. Gore was not particularly susceptible to economic injury, the harm did not result from any reckless disregard for Dr. Gore's safety, and there was no evidence of the type of deliberately repetitive and morally reprehensible behavior that would otherwise warrant a substantial punitive damage award.[48] Indeed, BMW's "omission of a material fact" was less reprehensible than the conduct committed in *Haslip* and *TXO* particularly because BMW made a good-faith assessment that no duty to disclose existed.[49]

B. Ratio

The second *BMW* guidepost is the ratio of punitive damages awarded to the actual harm suffered by the plaintiff.[50] Here, the Court discussed the long history of such a comparison and explained that the use of 2:1, 3:1, and 4:1 ratios have been used since the late thirteenth century.[51] The Court also noted that the $2 million punitive award here was 500 times larger than the actual harm suffered by Dr. Gore and expressed its consistent rejection of any "constitutional line . . . marked by a simple mathematical formula" by which punitive damages could be measured.[52] Rather, the Court again focused on what it called the "general concer[n] of reasonableness" that must enter into this constitutional equation[53]

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[46] *Id.* (quoting Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851)).

[47] *Id.* at 576–77 ("[A] recidivist may be punished more severely than a first offender [because the readings] recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance."); *see* Gryger v. Burke, 334 U.S. 728, 732 (1948) (deciding that a fourth offense "is considered to be an aggravated offense because [it is] a repetitive one").

[48] *BMW*, 517 U.S. at 576–80.

[49] *Id.* at 579–80 (noting that in *TXO* and *Haslip*, "deliberate false statements, acts of affirmative misconduct, [and] concealment of evidence of improper motive" were all present).

[50] *Id.* at 580.

[51] *Id.* at 581.

[52] *Id.* at 582.

[53] *Id.* at 583 (alteration in original) (internal quotations marks omitted) (quoting TXO

and concluded that "[w]hen the ratio is a breathtaking 500 to 1, . . . the award must surely 'raise a suspicious judicial eyebrow.'"[54]

C. Civil and Criminal Sanctions

The third and final "indicium of excessiveness" is a comparison of punitive damages awards and the civil and criminal penalties available to punish such conduct.[55] The purpose of this prong of the test is to give deference to legislative decisions on the matter of sanctions where such decisions have been made.[56] In Alabama, the maximum fine that could have been imposed on BMW for its failure to disclose would have been $2,000.[57] According to the Court, a $2,000 fine is not the type of sanction which would give notice to BMW that its actions could be subjecting it to a multi-million dollar lawsuit.[58]

In light of the fact that BMW's actions fit none of the aggravating factors found to increase the level of reprehensibility, the huge disparity between the punitive award and that of compensation and the very small civil sanctions possible, the Court reversed the 500:1 award as grossly excessive and in violation of due process.[59]

V. *STATE FARM V. CAMPBELL*

In April 2003, the Supreme Court ventured once again into the realm of substantive due process limitations on punitive damages awards with its *State Farm Mutual Automobile Insurance Co. v. Campbell* decision.[60] In part due to a multitude of errors committed by the Utah Supreme Court in interpreting the *BMW* guideposts, the *State Farm* Court attempted to provide further guidance to its *BMW* test.[61] Since the *State Farm* case, as an explication and derivation of the *BMW* test, which is the focus of this Note, the facts and analysis of the case will be laid out in detail.

Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 458 (1993)).

[54] *Id.* (citing and quoting *TXO*, 509 U.S. at 481 (O'Connor, J., dissenting)).

[55] *Id.*

[56] *Id.* (stating that "a reviewing court . . . should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue" (internal quotation marks omitted) (quoting Browning-Ferris Indus. Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part))).

[57] *Id.* at 584.

[58] *Id.*

[59] *Id.* at 585–86.

[60] 538 U.S. 408 (2003).

[61] *Id.* at 420–24.

In 1981, Curtis Campbell and his wife were driving down a highway in Utah when he moved into the oncoming lane of a two-lane highway to pass six vehicles ahead of him.[62] In an effort to avoid the impending collision, Todd Ospital swerved onto the shoulder where he then lost control of the vehicle colliding with a third party motorist, Robert Slusher.[63] Slusher was rendered permanently disabled, and Ospital was killed.[64]

Despite Campbell's insistence to the contrary, it became evident in the subsequent civil action that he was the cause of the crash.[65] Regardless, State Farm, Campbell's insurance company, contested liability, declining to accept a $50,000 settlement (the policy limit).[66] Indeed, State Farm, ignoring the advice of one of its own investigators, brought the case to trial "assuring the Campbells that 'their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel.'"[67] A jury found Campbell liable and awarded $185,849 to the plaintiffs.[68]

After State Farm originally refused to cover the amount in excess of the policy,[69] Campbell, Ospital's estate, and Slusher all agreed to pursue a bad faith, fraud, and intentional infliction of emotional distress action against State Farm[70]—an action that was bifurcated by the trial court, the second phase dealing with, inter alia, the imposition of punitive damages.[71] Twice, once prior to the Supreme Court's *BMW* decision and again after, State Farm moved to exclude evidence of its alleged out-of-state conduct pertaining to unrelated cases.[72] Both times the trial court denied the motion.[73]

In the punitive damages phase of the trial (the second phase), the Campbell's introduced evidence that State Farm's refusal to settle was part of its national financial plan, known as the "Performance,

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[62] *Id.* at 412.

[63] *Id.* at 412–13.

[64] *Id.* at 413.

[65] *Id.*

[66] *Id.*

[67] *Id.* (alteration in original) (quoting the Utah Supreme Court opinion from which this case was appealed, *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1142 (Utah 2001)).

[68] *Id.*

[69] *Id.* Eventually, State Farm did cover the excess $135,849, but only after State Farm's counsel advised Campbell to "put for sale signs on [his] property." *Id.*

[70] *Id.* at 413–14.

[71] *Id.* at 414.

[72] *Id.*

[73] *Id.*

Planning and Review, or PP & R policy," designed to cap company payouts.[74] The trial court admitted such evidence in order "to determine whether State Farm's conduct . . . was indeed intentional and sufficiently egregious to warrant punitive damages."[75] The Supreme Court noted, however, that most of this evidence "bore no relation to third-party automobile insurance claims," the type at issue in the *Campbell* action.[76] The jury awarded Campbell $2.6 million in compensation and $145 million in exemplary damages, which was then reduced by the trial court to $1 million and $25 million respectively.[77]

On Appeal to the Utah Supreme Court, the $145 million punitive damages award was reinstated with that Court purporting to apply the *BMW* guideposts.[78] The Utah Court, however, relied heavily on evidence of the PP & R policy, State Farm's extreme wealth, and testimony of the statistical probability that State Farm would be punished in, at best, one of every 50,000 cases.[79]

The case then made its way to the United States Supreme Court where, concerned with the often imprecise manner in which punitive damages are imposed,[80] the Supreme Court reapplied the *BMW* factors and found the jury's $145 million punitive damages award excessive and in violation of State Farm's due process.[81] Perhaps as a tip-of-the-hat to how it thought the *BMW* factors are to be applied, the Court noted that this case was "neither close nor difficult."[82]

Regarding reprehensibility, the Court clarified and confirmed the five elements to be used by the lower courts when examining the severity of the defendant's harmful conduct to determine punitive awards.[83] They include: (1) whether the harm was physical or economic (physical harm is generally considered more egregious); (2) whether the defendant's conduct displayed a reckless disregard or indifference to the safety and health of others; (3) whether the

[74] *Id.* at 415 (internal quotation marks omitted) (quoting Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1143 (Utah 2001)).

[75] *Id.* (internal quotation marks omitted) (quoting *Campbell*, 65 P.3d at 1143).

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 418. The *State Farm* Court noted concern over the admissibility of evidence unrelated to the proper amount of punitive damage to be imposed, vague jury instructions, and the broad discretion left to the jury in choosing award amounts. *Id.*

[81] *Id.* at 429.

[82] *Id.* at 418.

[83] *Id.* at 419.

plaintiff was financially vulnerable; (4) whether the defendant's conduct was an isolated event or repeated misconduct; and (5) whether the harm suffered resulted from some form of malice, trickery, or deceit as opposed to a mere accident.[84] Although no one factor is dispositive, the absence of all factors makes a punitive award "suspect."[85]

One of the most significant points that the *State Farm* Court made under the reprehensibility factor discussion was the territorially-based evidentiary limitations.[86] Noting that State Farm's actions were by no means praiseworthy, the Court found that the case was used as a means to condemn, and ultimately to alter, State Farm's nationwide practices and not as a means to punish for conduct *specific* to the Campbells.[87] This extraterritorial evidence, namely, that of the PP & R policy regarding out-of-state and unrelated claims, did not fall within the ambit of the "reprehensibility" guidepost.[88] Allowing evidence of the PP & R policy would give this Utah court the power to impose judgment on actions that may be legal in other states.[89] This would directly conflict with federalism and state sovereignty, which otherwise preclude a state from punishing a defendant for lawful or unlawful acts committed in another state's jurisdiction.[90]

The Court did not, however, place an absolute bar on all evidence of out-of-state conduct, but rather opined that such "conduct must have a nexus to the specific harm suffered by the plaintiff."[91] Here, however, the Utah courts imposed punitive damages to punish State Farm for conduct unrelated to Campbell.[92] According to the Supreme Court, this violated the hallmark of due process; in other words, due process requires that a defendant be punished for conduct harming the plaintiff at issue and not for the arbitrary

[84] *Id.*

[85] *Id.*

[86] *Id.* at 421–23.

[87] *Id.* at 420.

[88] *Id.* at 420–24.

[89] *Id.* at 421–22.

[90] *See id.* The Court noted that "'[l]aws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States.'" *Id.* at 421 (quoting Huntington v. Attrill, 146 U.S. 657, 669 (1892)); *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 (1996) ("We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.").

[91] *State Farm*, 538 U.S. at 422.

[92] *Id.*

reason that he is of an unsavory character.[93]

Turning to the second guidepost, the Court again expressed its disapproval of any mathematical formula to determine the proper ratio between the harm suffered and the punitive damages awarded, requiring instead that the punishment be both "reasonable" and "proportionate" to the injury suffered.[94] The Court then further clarified which ratios are more likely to comport with due process; that is, those that are generally single-digit and perhaps no more than 4:1.[95] However, since there is no bright-line rule by which punitive damages awards must comport, the Court provided several examples of instances that may require ratios greater than those previously upheld; namely, where a particular vile act results in minor economic harm, where detection of the injury is difficult, or where the non-pecuniary value of the harm is difficult to determine.[96]

The Campbell award failed this second prong for several reasons including: a presumption against a 145:1 ratio, the lack of any physical harm, and the substantial $1 million award in light of the minor economic harm to the Campbells for what amounted to merely an eighteen month period where State Farm failed to settle the claim against the Campbells.[97] Indeed, since very little actual harm occurred at all, much of the distress complained of was "the outrage and humiliation" caused by State Farm's treatment of the Campbells and the humiliation resulting in the substantial $1 million compensatory award.[98] Thus, the compensation largely covered an element normally reserved for punitive damages, the condemnation of such outrageous action.[99] For this reason, the

[93] *Id.* at 423. Indeed, the Court noted that due process barred courts from adjudicating hypothetical claims of other parties against the defendant, which the Court had "no doubt the Utah Supreme Court did." *Id.* The Court distinguished the recidivist concept laid out in *BMW* by noting that to meet the recidivist element, the Campbells needed to bring forth evidence of conduct similar to that which resulted in their injuries. *Id.* They failed to do so, but rather introduced evidence such as State Farm's investigation into one of its employee's personal life and the potential effect of State Farm's actions on the entire insurance market and its consumers. *Id.* at 423–24.

[94] *Id.* at 424–26. The Court stated that it "decline[s] again to impose a bright-line ratio which a punitive damages award cannot exceed." *Id.* at 425. Rather, "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Id.* at 426.

[95] *Id.* at 425 (noting that "few awards exceeding a single-digit ratio . . . will satisfy due process" and that perhaps an award exceeding the 4:1 ratio in *Haslip* may be improper).

[96] *Id.*

[97] *Id.* at 426.

[98] *Id.*

[99] *Id.*

Court implied that a further sanctioning of State Farm for such conduct via punitive damages would condone inequity as it would be the equivalent of a punitive award imposed multiple times for the same conduct.[100]

Lastly, the Court only very briefly examined the third *BMW* guidepost, that is, the difference between the punitive award and any potential civil and criminal penalties.[101] Here, the only relevant sanction would have been a $10,000 fine for fraudulent behavior, an amount that clearly pales in comparison to the $145 million punitive award.[102]

VI. THE NEED FOR *BMW*/*STATE FARM*: SUBSTANTIVE GUIDELINES IN THE IMPOSITION OF PUNITIVE DAMAGES

Despite some assertions that gargantuan punitive damages awards are mere "horror stories"[103] and that no real crisis in punitive awards exists,[104] punitive awards in the United States have been on the rise.[105] As Robert Levy notes:

> According to the *National Law Journal*, the largest punitive award in 2002 was $28 billion. Five verdicts exceeded $500 million and 22 exceeded $100 million. The total of the top 100 verdicts for 2002 was nearly three-and-a-half times the total for 2001. Longer term, 38 verdicts topped $20 million in 1991; 66 verdicts were more than $20 million in 1996. But in 2002, *$20 million did not make the top 100 list*.[106]

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[100] *Id.* at 426–28 (noting that "[c]ompensatory damages . . . already contain this punitive element" of condemnation (citing RESTATEMENT (SECOND) OF TORTS § 908 cmt. c (1977) ("In many cases in which compensatory damages include an amount for emotional distress . . . there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.")).

[101] *Id.* at 428.

[102] *Id.*

[103] *See* Ansley C. Tillman, Note, *Unwarranted Entry: An Examination of the Supreme Court's Decision to Enter the Punitive Damages Arena*, 24 REV. LITIG. 473, 485–87 (2005) (noting the existence of a media campaign, funded in part by Aetna Insurance Company, that discusses the problems of, inter alia, frivolity, delay, cost, and litigiousness within the civil justice system along with "well-circulated horror stories in order to create an overall image to present to the public of a crisis").

[104] *See* Michael L. Rustad, *The Incidence, Scope, and Purpose of Punitive Damages: Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 69 (arguing that "[e]very empirical study of punitive damages demonstrates that there is no nationwide punitive damages crisis").

[105] Robert A. Levy, *The Conservative Split on Punitive Damages:* State Farm Mutual Automobile Insurance Co. v. Campbell, *in* CATO SUP. CT. REV. 2003–2004, at 162 (James L. Swanson ed., 2003) (noting a general trend of increasing punitive damages awards).

[106] *Id.* (second emphasis added) (citing David Hechler, *Tenfold Rise in Punitives*, NAT'L. L.

Such a rise in punitive damages led Justice O'Connor to note that "[a]s little as 30 years ago, punitive damages awards were 'rarely assessed' and usually 'small in amount,'" but recently, "the frequency and size of such awards have been skyrocketing."[107] Moreover, "[p]unitive damages are a powerful weapon. . . . Imposed indiscriminately, . . . they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into [this] category."[108]

The harmful effects of arbitrarily imposed punitive damages awards are not limited to the individual defendant's purse.[109] Rather, such awards, particularly when implemented against corporate defendants, negatively affect the entire American economy.[110] That is, when punitive awards are too large, not only do costs increase and products become unavailable, but such arbitrary awards make it "impossible to discern any relevant incentives from the pattern of damage awards, leaving businesses only to guess at what business practices will not instigate damage claims."[111] Such unpredictable awards may press business organizations to avoid rational cost-benefit analysis because such analysis in decision-making could "later be interpreted by a jury as evidence that the firm knew it was producing a risky product and 'traded profits for lives.'"[112] Without some limitation on the potential awards, American businesses may live in fear; on the one hand, they are required to increase profits for their shareholders while at the same time they become concerned that the necessary weighing of interests and costs could leave them liable beyond any reasonable expectation.[113] Indeed, this could force some businesses to cease their practice altogether or to pass the inflated costs resulting from punitive damages awards onto the consumer,[114]

J., Feb. 3, 2003, at C3).

[107] TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) (quoting Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2 (1982)).

[108] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting).

[109] *See* Levy, *supra* note 105, at 161–62 (discussing, briefly, the potential effects the overuse of punitive damages awards could have on American business as a whole).

[110] *See id.*

[111] *Id.* at 161 (quoting C. Boyden Gray, *Damage Control*, WALL ST. J., Dec. 11, 2002, at A18).

[112] Paul H. Rubin et. al., BMW v. Gore*: Mitigating the Punitive Economics of Punitive Damages*, 5 SUP. CT. ECON. REV. 179, 191 (1997).

[113] *See* Steven B. Hantler et al., *Is the "Crisis" in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121, 1134 (2005) (noting that as far back as 1967, Judge Friendly feared the effects of "overkill" resulting from multiple punitive damages).

[114] *See* Colbern C. Stuart III, Note, *Mean, Stupid Defendants Jarring Our Constitutional*

neither of which are particularly helpful to the economy. Further still, large punitive damages awards may force small businesses into bankruptcy, thereby damaging the "backbone" of American industry.[115]

Arbitrarily imposed punitive awards also have a negative impact on at least one of the twin aims of punitive awards and thereby also affect due process. That is, arbitrarily imposed damages awards leave the defendants guessing as to how severely similar conduct in the future will be penalized[116] and may, in fact, leave the defendant bewildered as to what conduct is being sanctioned.[117] Any deterrent effect punitive damages have, then, is abrogated completely, for without knowledge of the exact harm one is being punished for or an indication as to how severe such punishment will be, a defendant cannot adequately conform her behavior to society's wishes.[118] Thus, if substantive strictures by which courts must confine their punitive awards are not emplaced, these awards will have the effect of destroying an otherwise important civil justice utensil.

A similar problem is that of multiple punitive damages levied against a single defendant for the same misconduct.[119] Such awards

Sensibilities: Due Process Limits on Punitive Damages After TXO Production v. Alliance Resources, 30 CAL. W. L. REV. 313, 316 (1994) (adding that some risky behavior is productive and allowing excessive punitive awards could cause some business to cease its activities in the particular industry in question).

[115] *See, e.g.*, Note, *"Common Sense" Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1774 (1996) [hereinafter *Common Sense Legislation*] (contending that legislation designed to cap punitive awards at "the greater of $250,000 or three times a plaintiff's economic damages—would not prevent runaway damage awards from forcing viable companies out of businesses"). Additionally, such arbitrary punitive damages awards can spur the filing of meritless lawsuits, often referred to as "jackpot justice." *See, e.g.*, *id.* (proposing a forfeiture of punitive damages to a third party to "solve the problem of plaintiffs bringing meritless suits and receiving a windfall to which they are not entitled"); Hantler, et al., *supra* note 113, at 1130. Huge awards may even impede the ability of other plaintiffs, with viable claims to compensation, to bring suit. Witness the Florida District Court of Appeal's decision in *Liggett Group, Inc. v. Engle*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003), *rev'g* Engle v. R.J. Reynolds Tobacco, No. 94-08273 CA-22, 2000 WL 33534572 (Fla. Cir. Ct. 2000). There, the lower court awarded $145 billion, the largest punitive damages award in American jurisprudential history, and an award more than 11,000 times the compensatory damages of $12.7 million and eighteen times the defendant's worth. *Id.* at 456–57. The Florida District Court of Appeal, applying *BMW/State Farm*, reversed the decision as an excessive punitive award noting "[s]mokers with viable compensable claims will have no remedy if the bankrupting punitive award in the instant case is upheld." *Id.* at 458.

[116] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417–18 (2003).

[117] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting) (stating that since the purpose of due process is to allow citizens to intelligently order their behavior, "[a] State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim").

[118] *See id.*

[119] *See State Farm*, 538 U.S. at 423 ("Punishment on these bases creates the possibility of

serve neither a compensatory nor a deterrent function and can often be assessed against a corporate defendant thousands of times.[120] And since these awards most often accompany compensatory damages, there is little need to punish a defendant multiple times once the plaintiffs have been made whole and the defendant adequately punished for the wrongful conduct.[121] Indeed, to do so renders obsolete the due process protection constitutionally afforded to civil defendants.

And there are the numerous problems resulting from the reality that the fact-finder, usually a jury, has vast discretion in determining the extent of any punitive damages award.[122] That discretion, taken together with the multitude of means by which juries can be influenced by outside or extralegal sources, greatly implicates a defendant's due process. For instance, consider the oft-cited jury hindsight bias,[123] the use of shortcuts in decision-making (flipping a coin or the "quotient verdict" whereby jurors award a sum "by adding the amounts each juror thought appropriate and dividing by the number of jurors"),[124] as well as many possible prejudices, errors, and misunderstandings improperly taken into consideration during the decision-making process.[125] Quite often, inquisitions into the means by which a jury makes deliberative award decisions is barred.[126] That prohibition, taken in conjunction

multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains."); *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 609 (7th Cir. 1997) ("[I]t could be argued that a piling on of awards by different courts for the same act might result in excessive punishment for that act."); Hantler et. al., *supra* note 113, at 1133.

[120] *See* Hantler et. al., *supra* note 113, at 1133 n.54 (noting how a "'single design error . . . [can result] in tens, hundreds or thousands of personal injury lawsuits with accompanying punitive damages claims'" (quoting Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 51 (1983))).

[121] *See id.* at 1133–34.

[122] *Haslip*, 499 U.S. at 18 ("One must concede that 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.").

[123] *E.g.*, Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1140 (2005) (noting that juries, as well as judges, fall prey to "extralegal factors" in decision-making, including the hindsight bias); Kimberly Eberwine, Note, *Hindsight Bias and the Subsequent Remedial Measures Rule: Fixing the Feasibility Exception*, 55 CASE W. RES. L. REV. 633, 633 (2005) (noting the "great financial risk and danger to the defendant" posed by the hindsight bias).

[124] CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 6.11 (3d ed. 2003).

[125] *Id.*

[126] *E.g.*, FED. R. EVID. 606(b) ("[A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions . . . .").

with the many problems cited above regarding the discretion of juries, makes even more necessary the need for some protection against arbitrary decisions. Indeed, without some framework by which such awards must conform, even loosely, there is no way to correctly ascertain why a plaintiff is awarded what she is awarded.

As compared to criminal defendants, increased protections regarding punitive awards are necessary given the lower level of protections afforded civil defendants.[127] Although punitive awards serve the same basic purpose as criminal penalties, defendants in civil cases "have not been accorded the protections applicable in a criminal proceeding. This increases [the court's] concerns over the imprecise manner in which punitive damages systems are administered."[128] Thus, further protections are needed to safeguard civil defendants in ways similar to criminal defendants because both forms of punishment deprive the defendant of his otherwise constitutionally protected rights.[129]

And arbitrarily imposed punitive damages awards infringe a defendant's constitutionally protected right to due process.[130] As noted above, due process requires that a defendant 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."[131] Because the possible range of punitive awards is huge (from nothing to billions of dollars), without a clear relationship to the actual harm suffered, a defendant is not provided with notice of either what conduct is to be punished or to what extent that conduct will warrant punishment.[132] Without some form of guidance, then, defendants may be forced to suffer "arbitrary deprivation[s] of

[127] *See* Levy, *supra* note 105, at 161 ("Paradoxically, most states set no limit on punitive damages for civil acts, yet punishment for criminal acts is strictly limited. One would think that the goal of deterrence would be more compelling in the criminal sphere . . . .").

[128] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003).

[129] *Id.* And as the Court later notes, "[g]reat care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process . . . ." *Id.* at 428.

[130] *Id.* at 417.

[131] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996); *see also* discussion *supra* Part IA.

[132] *BMW*, 517 U.S. at 574. The application of the Due Process Clause to punitive damages awards, so as to hinder grossly excessive punishment, is not a concept predicated on new theoretical grounds. As Justice Breyer's concurring opinion in *BMW* notes, "[t]his constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion." *Id.* at 587 (Breyer, J., concurring).

property" resulting from these excessive punishments.[133] It follows, then, that a fact-finder's complete discretion in punitive awards could conflict with the stated purpose of due process; that is, to allow citizens to organize their behavior.[134] Thus, the *BMW/State Farm* standards test becomes necessary in order to meet the basic requirements of due process while still leaving room for courts and juries to impose punitive damages, thereby safeguarding the state's legitimate interest in punishment and deterrence.

VII. THE EFFECTS OF THE *BMW/STATE FARM* TEST

Not surprisingly, a slew of scholarly articles were written after *State Farm*, both condoning and condemning the Court's decision.[135] The remainder of this Note will discuss some of the benefits of the *State Farm* ruling while refuting the arguments of some of its detractors. I posit that in couching punitive awards within the sphere of effect surrounding the harm suffered by the plaintiff, *State Farm* adequately and properly protects the defendant's due process rights. Moreover, I argue that the *BMW/State Farm* test does not abrogate state power to set punitive controls; but rather, the evidentiary limitations are a necessary means to confine state power within its own borders. Likewise, *State Farm* does not eviscerate the role of punitive damages in our civil justice system nor is *State Farm* a single-digit ratio mandate. Lastly, I believe that the Supreme Court correctly understood that a rule-based analysis in the punitive damages and due process realm would be insufficient, and thus the Court properly implemented its

[133] *State Farm*, 538 U.S. at 417 (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting)).

[134] *Haslip*, 499 U.S. at 59.

[135] *See, e.g.*, Garrett T. Charon, Note, *Beyond a Bar of Double-Digit Ratios:* State Farm v. Campbell*'s Impact on Punitive Damages Awards*, 70 BROOK. L. REV. 605, 621–23 (2005) (arguing that *State Farm* is necessary to cure the many problems remaining after *BMW* and is the best available method to protect a defendant's due process rights while carefully avoiding excessive interference with states' rights and legitimate interests); Kamimura, *supra* note 22, at 246 (claiming that the *State Farm* Court ignored the policy based purpose of deterrence and concluding that after *State Farm*, "a state court can no longer deter a corporation from acting unlawfully within its borders by awarding punitive damages"); Orr, *supra* note 19, at 1748 (urging the need to compute wealth at the punitive damages stage because of the "diminishing marginal utility of money" that would otherwise allow wealthy defendants to harm with impunity); Tillman, *supra* note 103, at 474 (contending that *State Farm* was unnecessary because empirical data fails to prove any "crisis" in the punitive damages field and indeed the state legislatures were effectively dealing with any actual problems); Rustad, *Iron Cage*, *supra* note 25, at 1301–03 (arguing that punitive damages reform specifically, and tort reform more generally, is often unnecessary and has the effect of limiting the role of the jury as decisionmaker).

BMW/State Farm standards.

A. State Farm *Adequately Protects a Defendant's Due Process Rights*

Although *State Farm* is not perfect, it does address many of the concerns, highlighted above, that arise from the use of punitive damages. First, in expressly requiring that juries couch punitive damages in terms of the particular harm suffered to the particular plaintiff in the case,[136] defendants are given notice as to what harm is at issue, that is, they know *what* they are being punished for. With *State Farm*'s limitations in place, courts can no longer punish a single defendant in an attempt to deter the occurrence of future *possible* harm to a multitude of plaintiffs or to "make-up" for harm that has gone unpunished.[137] And because of the extraterritorial limitations *State Farm* set forth, the concern over the multiple punitive damages problem may very well disappear because defendants may no longer be punished multiple times across state lines for the *same* conduct.[138]

Similarly, through use of the reprehensibility requirement, defendants are penalized based on the level of harm they have committed, not on some hypothetical assumption of harm.[139] Now, the punishment has a better chance of fitting the "enormity of [the] offense."[140] Whereas before juries could take in all the many extralegal matters that can, and often do, go into deliberations, now they are limited to a very specific factual setting.[141] Certainly this will not stop a juror from considering, for example, the amount of money he believes a large corporation to have, but it will allow more

[136] *State Farm*, 538 U.S. at 422.

[137] *Id.* at 422–23. Indeed, some commentators seem to think this should be the goal of due process limitations. *See* Richard H. Tilghman IV, *Rethinking Constitutional Limitations on Punitive Damages: Providing Economically Efficient Incentives to Prevent Nursing Home Abuse*, 54 DEPAUL L. REV. 1007, 1020 (2005). Tilghman's argument, which will be presented more fully in Part VII, would have the Court use an "enforcement rate" in computing punitive damages which would take into account the "probability that a defendant will not be held liable for one's wrongful conduct." *Id.* at 1024.

[138] *State Farm*, 538 U.S. at 421–23.

[139] *Id.* As noted by the *State Farm* Court, "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' *hypothetical claims* against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here." *Id.* at 423 (emphasis added).

[140] Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851) (noting that this doctrine is centuries old).

[141] *State Farm*, 538 U.S. at 422–23 (confining a court's analysis to the facts surrounding this particular plaintiff).

courts to overturn awards that fail to fit within the *State Farm* parameters.[142]

In setting forth general guidelines in the form of the ratio requirement and the similar civil and criminal sanctions requirement,[143] *State Farm* provides defendants with a loose parameter within which awards levied against them will be imposed. In other words, defendants now have some kind of *notice*, something lacking when jury discretion is not controlled. This, of course, does not mean that all defendants will know *exactly* how severe the punishments will be, but rather gives the defendant a glimpse into the process by which such awards are given. Realistically, as will be discussed in greater detail in Part VIII, this is all that could be asked of a test when due process and punitive damages come into play.

Importantly, it appears that *State Farm* has caused lower courts to question large punitive awards,[144] particularly when the defendant's conduct does not meet the majority of the reprehensibility factors.[145] It is this very skepticism that shows *State Farm*'s usefulness. By requiring courts to pursue an in-depth examination of the defendant's conduct and the subsequent award, courts are less likely to impose large awards that do not bear a relation to the wrongful conduct.[146] When courts apply *State Farm*, there should be a greater likelihood that the punitive damages imposed reflect the defendant's misconduct, thereby avoiding due process concerns. And when the punishment fits the crime, the defendant cannot claim due process violations. Moreover, that

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[142] *See, e.g.*, *infra* notes 145–46.

[143] *State Farm*, 538 U.S. at 424–28.

[144] *See* Laura Clark Fey et al., *The Supreme Court Raised Its Voice: Are the Lower Courts Getting the Message? Punitive Damages Trends After* State Farm v. Campbell, 56 BAYLOR L. REV. 807, 817–18 (2004) (citing, for example, *United States v. Bailey*, 288 F. Supp. 2d 1261, 1280–81 (M.D. Fla. 2003), which set aside a punitive damage award in its entirety where none of the five factors were present); *see also* Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594, 603 (8th Cir. 2005) (noting the lack of reprehensibility factors, and, as a result, reducing the punitive damages award from $15 million to $5 million with compensatory damages of $4,025,000).

[145] *See* Fey et al., *supra* note 144, at 817 (stating that lower courts are "skeptical of large punitive damage verdicts when the conduct at issue does not satisfy the majority of the factors").

[146] *See* Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 797, 803–04 (Ct. App. 2003) (upholding an award of over $23 million but reemphasizing the need for the court to focus its punitive damages analysis on the "conduct directed toward the plaintiff," which, in this case, was met given the reckless disregard Ford exhibited leading to this wrongful death suit); *see also State Farm*, 538 U.S. at 419 (opining that the absence of all of the reprehensibility factors "renders any award suspect" (citing BMW of N. Am., Inc. V. Gore, 517 U.S. 559, 575 (1996))).

nexus means that the twin aims of punitive damages are more likely fulfilled.

B. State Farm *Does Not Abrogate State Power*

Some commentators have argued that the Court's entrance into punitive damages infringes and impedes the traditional power of the states over the imposition of punitive damages.[147] For instance, in arguing against the Court's due process jurisprudence on punitive damages, an area traditionally maintained by the individual states,[148] the author Ansley Tillman contends that state legislatures were "addressing the problem individually" and were gaining control of the situation, and thus, *State Farm* and its predecessors were unnecessary intrusions on state power.[149]

Tillman ignores, however, that *State Farm* does not stop the states from "enact[ing] or tighten[ing] their . . . tort reform statutes."[150] To some extent, *State Farm* merely reiterated many of the limitations on punitive damages already imposed by the individual states.[151] In essence, the goal of the *State Farm* decision is to "impose systematic rationality on the awarding of punitive damages."[152] Furthermore, since the first step in the due process inquiry is to examine the state interest to be served,[153] states are free to clarify and alter the "substantive objectives of tort liability" if they find the Court relying on some erroneous conceptions.[154] Thus, *State Farm* merely informs the states of the general limitations on

[147] *E.g.*, Tillman, *supra* note 103, at 496–97.

[148] *See* Rustad, *Iron Cage*, *supra* note 25, at 1304 ("The states have historically had the complete freedom to recognize the doctrine of punitive damages and determine the procedural or substantive contours of the remedy.").

[149] Tillman, *supra* note 103, at 494.

[150] *Id.*

[151] *See* American Tort Reform Association, State and Federal Reforms, http://www.atra.org/reforms/ (last visited Oct. 22, 2006) [hereinafter "ATRA"]. For instance, plaintiffs in New Jersey and Montana must show "actual malice," a concept closely linked to *BMW/State Farm*'s reprehensibility guidepost. *Id.* Similarly, plaintiffs in California, Idaho, and Texas must show some form of oppression, fraud, or malice. *Id.* Connecticut plaintiffs are limited to a 2:1 ratio while plaintiffs in New Jersey are limited in most cases to a 5:1 ratio or $350,000, whichever is higher. *Id.* Some states, like New Hampshire, do not allow punitive awards at all. *Id.* Thus, to the extent that *State Farm* is but a mere reiteration on these rules, the *State Farm* requirements will have little to no effect on many of these states.

[152] Cabraser, *supra* note 21, at 1741–42.

[153] *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) (noting that, because states have a legitimate interest in punishing and deterring the repetition of unlawful conduct, "the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve").

[154] Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093, 1115 (2005).

punitive damages as imposed by the Constitution.[155] If the states wish to implement further restrictions, they are free to do so. They are not, however, free to ignore the strictures of the due process clause. In some respects, the *State Farm* Court did what the Supreme Court has always done, informed interested parties as to how the Constitution affects their interests.[156] It did not take the states out of the punitive damages game.

Moreover, some protection against arbitrary state action is necessary and is appropriately addressed by the *State Farm* decision with its extraterritorial evidentiary limitations.[157] As the *BMW* court noted, a corporate defendant's "status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce."[158] Thus, while a state has a legitimate purpose in protecting its own consumers through the deterrence and punishment effects of punitive damages, it cannot use those damages to impose its regulatory will on other states.[159] To do so would violate state sovereignty and federalism and ignore the different conclusions that the many state legislatures have come to regarding the propriety of punitive damages.[160]

But that is not all. In some instances, the state takes a larger role than that of mere arbitrator.[161] In eight states (Alaska, Georgia, Illinois, Indiana, Iowa, Missouri, Oregon, and Utah), the state actually keeps, by statute, a percentage of the punitive damages awarded.[162] These statutes, known as "split-recovery" statutes, further display the need for some control beyond the state's reach lest due process rights become violated by the arbitrary hand of financial interest.[163]

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[155] Rustad, *Iron Cage*, *supra* note 25, at 1301. Even ignoring *State Farm*, it bears noting that the states do not have complete discretion regarding all aspects of punitive damages awards. For example, with one limited exception, I.R.C. § 104(c) (2006), such awards are subject to federal income taxation. *See* I.R.C. § 104(a)(2) (2006).

[156] City of Boerne v. Flores, 521 U.S. 507, 524 (1997) ("The power to interpret the Constitution in a case or controversy remains in the Judiciary."); *see* U.S. CONST. art. III, § 2, cl. 1 (giving the Supreme Court the power to adjudicate cases arising under the Constitution).

[157] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421–24 (2003).

[158] *BMW*, 517 U.S. at 585.

[159] *Id.*

[160] *See, e.g.*, ATRA, *supra* note 151 (noting that while some states use a ratio mechanism similar to that imposed by *State Farm*, other states do not allow punitive damages awards at all).

[161] Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 372–74 (2003).

[162] *Id.* at 373.

[163] *Id.* at 438. Indeed, "[i]f the state is the direct beneficiary of a punitive damages award,

State Farm addressed these fears with its evidentiary limitations.[164] *State Farm* requires that the testimony used to grant punitive damages awards relate to the actual harm suffered by the plaintiff and not other potential plaintiffs.[165] After *State Farm*, "it is not a permissible goal to punish a defendant for everything else it may have done wrong."[166] *State Farm* allows a showing of conduct across state lines, however, where such misconduct bears a nexus to this particular plaintiff.[167] Indeed, "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious."[168] By limiting the evidence available at trial to that with a substantial nexus to the individual harm suffered by the particular plaintiff within the forum state, *State Farm* properly reigns in punitive awards, making them consistent not only with the Constitution's due process requirements,[169] but with the state sovereignty doctrine as well.

C. State Farm *Has Not Eviscerated the Power of Punitive Damages*

Another major condemnation of *State Farm* is that it undermines the power of punitive damages to deter future wrongful conduct.[170]

broader due process concerns might be implicated by the very fact that the government . . . [has] an arguably pecuniary interest in the case." *Id.*

164 State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423–24 (2003).

165 *Id.* at 423.

166 Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 802 (Ct. App. 2003); *see* People v. R.J. Reynolds Tobacco Co., 11 Cal. Rptr. 3d 317, 348 (Ct. App. 2004) (stating that it could not "say that in awarding sanctions based upon Reynold's nationwide numbers, the trial court was vindicating only California's 'interest in protecting its citizens'"); *cf.* Saldi v. Paul Revere Life Ins. Co., 224 F.R.D. 169, 177–78 (E.D. Pa. 2004) (allowing evidence of the national practice of defendant insurance company where a nexus to harm suffered by plaintiff was evident and evidence was used to demonstrate the culpability of the defendant); Cabraser, *supra* note 21, at 1734 (noting that in a negligently marketed pharmaceutical case, "[t]he defendant's out-of-state conduct in developing, testing, and marketing the drug, however, may be admissible on the punitive damages issue because it satisfies the critical requirement of the 'nexus to the specific harm suffered by the plaintiff'").

167 Fey et. al., *supra* note 144, at 826–27.

168 *State Farm*, 538 U.S. at 422.

169 *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) (discussing due process in the personal jurisdiction realm, the Supreme Court stated that critical to the due process analysis is the notion that "'the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there'"). Similarly then, when a defendant is brought into a particular state court, he should be able to rightfully assume that his actions within that state, or those so substantially related to the plaintiff at issue as to warrant out-of-state evidentiary admissions, are being analyzed. Otherwise, the defendant, particularly a corporate defendant, would have no means of knowing what conduct was at issue and thus no means to adequately prepare and respond.

170 Cabraser, *supra* note 21, at 1742; *see* Tilghman, *supra* note 137, at 1036 (concluding

It is argued that "[t]he emergence of the punitive/compensatory ratio as the dispositive factor cannot fully accomplish" the purpose of punitive damages, that is, to deter conduct that could harm a large group, or perhaps all of society.[171] So the argument goes, *State Farm* fundamentally alters the purpose of punitive damages in that "[n]o longer are punitive damages issued to punish and deter future conduct, they are now issued only for the limited purpose of punishing the defendant for what they did to this particular plaintiff."[172] This contention, however, is flawed for a number of reasons.

First,

> [h]istorically . . . punitive damages, even when regarded as punishment, *were* consciously limited to the amount necessary to punish the defendant for the wrong done, and the harm caused, *to the individual plaintiff* only. Although [punitive damages] ultimately served the public good, they were punishment not for the public wrong, but for the private wrong to the plaintiff.[173]

That punitive damages imposed should bear a nexus to the harm committed to the particular plaintiff, then, is not a concept birthed by *State Farm*.[174] Indeed, in this regard, *State Farm* merely restates the power and purpose of punitive damages.

The fear is that, if punished only for particular harm done to a particular plaintiff, then the power of punitives as a means to deter future misconduct, by both this defendant and others like her, is lost because individual defendants are not forced to bear the economic cost of their misconduct.[175] Thus, it is argued, other

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that the "the Supreme Court has lessened the deterrent effect of punitive damages").

[171] Cabraser, *supra* note 21, at 1742.

[172] Michael J. Gallucci, *Punitive Damages: Is There Life After* State Farm *for Plaintiffs' Attorneys?*, 31 OHIO N.U. L. REV. 149, 173 (2005).

[173] Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 628–29 (2003) (emphasis added) (footnote omitted); *see* Sharkey, *supra* note 161, at 359 ("The prevailing justification for punitive damages is *individually oriented*, retributive punishment" (emphasis added)).

[174] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 908(2) (1979) ("In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.").

[175] Orr, *supra* note 19, at 1744–47 (according to Orr's understanding, this problem stems from the argument that, without calibrating for wealth, wealthy defendants do not feel the full force of punitive damages and thus will choose to continue to act wrongfully); *see* Tilghman, *supra* note 137, at 1027–28 (stating that "[e]conomically efficient punitive damages awards give the tortfeasor an incentive to avoid tortious behavior[,] . . . [without which] potential defendants have little incentive to take corrective action to enforce and prevent"

potential defendants will not be deterred by what they feel to be a limited punishment, perhaps one that they can easily bear financially.[176] In this way, it is contended, any effect of specific deterrence on the particular defendant is limited, while general deterrence is abrogated completely.[177]

A closer reading of *State Farm*, however, shows that the power of punitive damages may not have been weakened at all since much of the damages sought by the Campbell's would have gone beyond the proper scope of a punitive damages award. That is, the Court was concerned with the over-imposition of punitive damages to the extent that they "double count" against the defendant.[178] This could happen in two different ways. In the first, the awarded compensatory damages contain within them an element of punitive damages.[179] In this instance, as was found in *State Farm*, an excessive punitive award would, in effect, double tax the defendant for his wrongful conduct as punitive damages were already assessed in the compensatory award.[180] Thus, the defendant would be punished, not for the wrong committed, but for something *more* than the wrong committed. Clearly then, this falls outside the scope of punitive damages, which should "fit" the crime.[181]

The second type of "double counting" relates not to the interaction between the compensatory and punitive awards, but to the possibility of future plaintiffs against this single defendant.[182] Reaching back to *BMW*, the *State Farm* Court stated that "[l]arger

[their abuses]).

[176] *See* Tilghman, *supra* note 139, at 1025–28.

[177] Orr, *supra* note 19, at 1763 (concluding that *State Farm* "not only fail[ed] to deter State Farm's reprehensible conduct, but also sen[t] a message to . . . other wealthy corporations that punitive damages are merely a cost of doing business").

[178] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423–26 (2003).

[179] *Id.* at 426. As the Court noted:

> The compensatory damages for the injury suffered here, moreover, likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element.

Id. (citing RESTATEMENT (SECOND) OF TORTS § 908 cmt c. (1977) ("In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.")).

[180] *Id.*

[181] Day v. Woodworth, 54 (13 How.) 363, 371 (1851) (discussing the well established rule that any punishment should fit the "enormity of [the] offence [sic]").

[182] *State Farm*, 538 U.S. at 423 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 593 (1996)).

damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that *subsequent plaintiffs* would also recover."[183] As Geistfeld notes, *State Farm* merely requires punitive damages to be determined "in a manner that does not expose the defendant to future liability for the same injuries caused by the misconduct."[184] So in this manner too, the defendant would be punished, not commensurate with the harm committed, but for his wrongful act multiplied by the number of future potential plaintiffs.

Thus, upon a closer reading, it appears that the purpose of *State Farm* was not to infringe upon the *rightful* application of punitive damages awards, but rather to control the imposition of such awards where injustice would result, in other words, the *wrongful* application of such awards. Allowing the Campbells the punitive award sought would have over-penalized State Farm—a goal inconsistent with our elementary notions of fairness.[185] Thus, it was not incorrect for the *State Farm* Court to deny such a claim. Likewise, in doing so, *State Farm* did not undermine the traditional role of punitive damages as deterrent and punishment. The imposition of punitive damages can still effectively have its intended purposes,[186] but the imposition of such awards must not abrogate the well-established role of due process, nor reach beyond the proper goals of punitive damages awards.

D. State Farm *Is Not a Single-Digit Ratio Mandate*

Another incorrect assumption made about *State Farm* is that it mandates a single-digit ratio between the compensatory and punitive damages awarded, thereby severely hampering a jury's ability to award large punitive damages.[187] The very language

[183] *Id.* (emphasis added) (quoting *BMW*, 517 U.S. at 593 (Breyer, J., concurring)).

[184] Geistfeld, *supra* note 154, at 1115.

[185] *See State Farm*, 538 U.S. at 416–17; *see also* Semra Mesulam, Note, *Collective Rewards and Limited Punishment: Solving the Punitive Damages Dilemma with Class*, 104 COLUM. L. REV. 1114, 1149 (2004) (concluding that "multiple punitive damages claims threaten to unfairly overdeter defendants and offend due process").

[186] Indeed, in today's interconnected, transparent marketplace, significant awards against corporate defenders, predicated solely on harm committed to the plaintiff's at issue, should still act as a flag to other corporate defenders, warning them of the possible punishments for such action.

[187] *See, e.g.*, Tilghman, *supra* note 137, at 1021–22 (examining how this alleged maximum limit to the punitive to compensatory damage ratio will adversely affect abuse victims in homes for the elderly, stating that *State Farm*'s "single digit ratio as a limit for a permissible punitive damages award" does not account for "the probability that the defendant will not be punished for the wrongful conduct"); Gallucci, *supra* note 172, at 176 (asserting that "if [a

employed by the *State Farm* Court, namely, that the Constitution does not mandate any "bright-line ratio" and that in certain circumstances greater ratios are permissible, expressly refutes any such assertion.[188] Furthermore, the Court itself notes that it is the reprehensibility factor that is the key for punitive damages, thus downplaying any concern that the ratio element should prevail or that a single-digit ratio provides an absolute limitation to punitive awards.[189] Indeed, if single-digit ratios were, in fact, mandated by the Supreme Court, many lower courts have missed or ignored these marching orders as they continue to award higher than single-digit ratios post-*State Farm*.[190]

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defendant] engage[s] in . . . fraud, oppression, malice, deceit and trickery [the defendant] *will only be punished by a single-digit ratio*" (emphasis added)). *But cf.* Peter S. Stamatis & Alexander T. Muhtaris, *Maximizing Punitive Damages After* BMW *and* State Farm*: A Trial Lawyer's Guide*, 93 ILL. B.J. 122, 123 (2005) (declining to accept such an argument claiming that "[t]here is no 'one-size-fits-all' formula by which all punitive damages awards are to be evaluated").

[188] *State Farm*, 538 U.S. at 424–25. In fact, a single-digit ratio would violate the fundamental premise of *State Farm* and all due process analysis: that the circumstances must be weighed in each case. *See, e.g.*, Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961) (discussing due process in the administrative law context, noting that it, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances" (internal quotation marks omitted)). Indeed, any claim that *State Farm* mandates single-digit ratios must come up against the fact that the *State Farm* Court cited *TXO* with approbation even though *TXO* upheld a 526:1 ratio. *State Farm*, 538 U.S. at 424–25 (noting that "[w]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award" (internal quotation marks omitted)). The *State Farm* Court did not say that no awards could exceed single digit ratios, only that "few awards" of that nature would satisfy due process. *Id.* And again, it noted that the ratios in *BMW* and *Haslip* were "not binding." *Id.* Moreover, a single-digit mandate would be logically inconsistent with the conceptual basis of the *State Farm* test. The ratio requirement is merely a judicial creation used to ensure that awards are based on the harm committed and thereby safeguarding the theoretical underpinnings of both due process and punitive damages. It then becomes patently inconsistent with the aims of *State Farm* to allow that the ratio requirement has assumed a life of its own and now mandates single-digit ratios. Again, the ratio requirement is merely a means to an historical judicial end, that is, circumscribing potential punishments within the amount of harm committed. *See, e.g.*, Day v. Woodworth, 13 U.S. (13 How.) 363, 371 (1851) (noting that the notion that the punishment should fit the crime is centuries old).

[189] *State Farm*, 538 U.S. at 419 ("[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." (alteration in original) (internal quotation marks omitted)).

[190] *See, e.g.*, Mathias v. Accor Econ. Lodging, Inc. (*The Bedbugs case*), 347 F.3d 672, 674, 676 (7th Cir. 2003) (awarding punitive damages of $186,000 to compensatory damages of $5,000, a 37:1 ratio, where defendant's conduct was willful and wanton and noting that "[t]he Supreme Court did not, however, lay down a 4-to-1 or single-digit-ratio rule"); Hollock v. Erie Ins. Exch., 842 A.2d 409, 421–22 (Pa. Super. Ct. 2004) (upholding a 10:1 ratio based in part on the small compensatory award and the reprehensibility of the defendant's conduct); Reatta Res., Inc. v. Kraft, No. 05-03-00229-CV, 2004 WL 423144, at *1–*2 (Tex. Ct. App. Mar. 9, 2004) (holding that the fact that a 33:1 ratio was awarded was not enough by itself to

Richard Tilghman presents a related argument against the ratio prong, arguing that it provides "very little help to lower courts trying to find the proper ratio between compensatory and punitive damages."[191] Tilghman's argument ignores the fact that the weighing of specific factors in different situations is the province of the courts and is something the courts, perhaps more than any other body, are better equipped to handle.[192] To argue that courts have no "help" in ascertaining damages is to ignore the jury's role in establishing what is reasonable,[193] as well as to downplay the courts' own expertise. Tilghman seems to say that without a bright-line rule, the courts will flounder, being unable to come to a rational conclusion.[194]

Likewise, Tilghman argues that such a discretionary standard increases societal costs as it requires further appellate review.[195] To the extent that such review is necessary to protect the defendant's great interest in being penalized no more than her actions warrant, such increase in societal cost is a necessary expenditure in the name of the common good. Society is better able to bear the brunt of this increase in costs as compared to the irreparable harm that would result from excessive punitive damages awards levied against single defendants.[196] And although it may be true, to some extent, that "[p]ro-plaintiff appellate courts may affirm higher ratios by characterizing compensatory damages as 'small,'" while at the same time "pro-defendant appellate courts" may characterize compensatory awards as "'substantial'" and thereby cut back on the punitive awards,[197] such discretionary results are more acceptable

invalidate award); Trinity Evangelical Lutheran Church & Sch.-Friestadt v. Tower Ins. Co., 661 N.W.2d 789, 804 (Wis. 2003) (upholding a 200:1 ratio).

[191] Tilghman, *supra* note 137, at 1022.

[192] Imagine a state legislature attempting to enumerate every possible wrongful act in every situation and the subsequent punitive damages award. Even where legislatures wish to set up general rules regarding punitives, such rules often ignore the individual differences of the many parties subject to them. *See infra* Part VIII.

[193] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 600 (1995) (Scalia, J., dissenting) (positing that "punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved").

[194] *See* Tilghman, *supra* note 137, at 1022 (intimating that lower courts might need more than a little help to find the "proper ratio between compensatory and punitive damages").

[195] *Id.* Under *Cooper Industries*, appellate courts have de novo review of lower courts application of the *BMW* guideposts. *See State Farm*, 538 U.S. at 418 ("Exacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." (internal quotation marks omitted) (citing Cooper Indus., Inc. v. Leatherman Tool Group, 532 U.S. 424, 436 (2001)).

[196] Not to mention the myriad of other possible results of over-penalization through punitive damages enumerated above. *See supra* Part V.

[197] Tilghman, *supra* note 137, at 1022 (citing *State Farm*, 538 U.S. at 426).

than a concrete rule of damage liability.[198] As a solution for this level of discretion, Tilghman, like others,[199] proposes a mathematical approach to punitive damages calculation,[200] which will be examined next.

VIII. THE ECONOMIC EFFICIENCY APPROACH: UNRESOLVED ISSUES

In light of the problems Tilghman sees with the *State Farm* approach, he urges the Supreme Court to "move to an economic efficiency test, where total damages equal compensatory damages multiplied by the inverse of the enforcement rate."[201] The enforcement rate is defined as the "probability that a defendant will not be held liable for one's wrongful conduct."[202] Tilghman posits that punitive damages exist, in part, "to deter future similar wrongful conduct, by forcing the defendant to pay for the social costs that arose from the tortious act."[203] In order to make the defendant pay for his conduct, "the defendant must provide full compensation to all victims, which includes payment for tortious acts that were not enforced through a civil lawsuit."[204] Therefore, Tilghman believes that such a bright-line test would make measuring punitive

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[198] *See infra* Part VIII (discussing the rules versus standards debate).

[199] *See generally* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 887 (1998) (contending that where a defendant attempts to escape liability "the proper magnitude of damages is the harm the defendant has caused, multiplied by a factor reflecting the probability of his escaping liability"); Robert Ward Shaw, Comment, *Punitive Damages in Medical Malpractice: An Economic Evaluation*, 81 N.C. L. REV. 2371, 2382–87 (2003) (applying a mathematical approach to punitive damages to medical malpractice cases); *see also* Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 677 (7th Cir. 2003) (observing that "[i]f a tortfeasor is 'caught' only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away").

[200] Tilghman, *supra* note 137, at 1024–26.

[201] *Id.* at 1020.

[202] *Id.* at 1024.

[203] *Id.* (foonote omitted).

[204] *Id.* at 1027 n.171 (citing Polinsky & Shavell, *supra* note 199, at 887 ("[I]f a defendant can sometimes escape liability for the harm for which he is responsible, the proper magnitude of damages is the harm the defendant has caused, multiplied by a factor reflecting the probability of his escaping liability." (alternation in original))). Thus, Tilghman's view, and that of those like him, differs greatly from the Supreme Court's. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003). The Court starts from the premise that the plaintiff has already been made whole via compensation and punitives are used only to punish severely reprehensible behavior. *Id.* Tilghman, on the other, hand, seems to assume that many plaintiffs are not adequately compensated given the low enforcement rates of some defendants. Tilghman, *supra* note 137, at 1027. Under this view, punitives take on a role supplementary to compensatory awards, in essence, making up for un-awarded compensatory claims. *Id.*

damages easy to calculate[205] and result in the defendant's self-regulation, thereby decreasing societal costs.[206] While I do not disagree with such self-regulation, there are numerous problems with this mathematical rule, problems that are circumvented by the Court's use of standards.

First off, a mathematical rule completely ignores the jury's role in determining punitive awards and does not comport with the Supreme Court's understanding of due process.[207] Moreover, statistical data is easily misrepresented and misunderstood and any reliance on the probability of the occurrence of real world events, especially any imposition of liability, requires huge assumptions to be made and accepted about human behavior.[208] Under Tilghman's test, the plaintiff's award would be predicated upon an equation based on this hypothetical "enforcement rate"[209] instead of the harm suffered. Thus, Tilghman's test could avoid a truly efficient punishment and deterrence system because the award does not "punish" the defendant for the acts he actually committed.[210]

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[205] Tilghman, *supra* note 137, at 1028. Total liability will equal compensatory damages multiplied "by the inverse of the enforcement rate. Total liability minus the amount of compensatory damages would then equal the amount of punitive damages." *Id.* (footnote omitted).

[206] *Id.* at 1027 n.173 (citing Polinsky & Shavell, *supra* note 199, at 888 ("If damages merely equal harm, injurers' incentives to take precautions will be inadequate and their incentive to participate in risky activities will be excessive.")).

[207] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 59 (1990) (O'Connor, J., dissenting) ("Due process requires only that a jury be given a measurable degree of guidance, not that it be straitjacketed into performing a particular calculus.").

[208] *See* Tilghman, *supra* note 137, at 1025 (admitting that some assumptions must first be accepted). The main assumptions, unstated by Tilghman but implicit in his argument, are that plaintiffs are likely not to bring suit, that most or many defendants are recidivists, and that these huge awards would not render future compensatory awards to other plaintiffs impossible by bankrupting the defendant.

[209] *Id.* at 1024. Tilghman's "enforcement rate" could run afoul of the Court's bar on the admission of unrelated, extraterritorial evidence because Tilghman does not limit the probability of getting "caught" to getting "caught" in the forum state committing violations that relate directly to the plaintiff at issue. This could result in the imposition of multiple punitive damages, something the Supreme Court was attempting to circumscribe in its evidentiary limitations. Moreover, it ignores the impositions into state sovereignty the Court was particularly concerned with. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003).

[210] For example, let us assume a defendant (D) ritualistically commits wrongful acts (say he has committed 100 counts of fraud) and is punished for those acts every time he commits them. D's enforcement rate, then, would be 1. Using Tilghman's equation, the total liability imposed on D would be the compensatory damages (CD) multiplied by the enforcement rate (1), which would equal CD. Thus, our recidivist wrongdoer, an individual who is clearly more reprehensible than a one-time wrongdoer, would be sanctioned with no punitive damages whatsoever and would merely compensate each of his victims for the harm committed without "learning" his lesson. On the other hand, imagine C, a defendant who has committed two acts of fraud, while only being punished once. C would incur twice as much total liability as D for

Indeed, the defendant could use the test to examine the economic efficiency of his actions, and where his conduct would be more profitable even in light of the resulting punitive damages claim, could choose to harm the plaintiff anyway, thus having the exact opposite effect Tilghman seeks to cause.[211]

Secondly, Tilghman's approach is overly simplistic and, as a result, would effectuate exactly the type of whimsical, discretionary damages awards both the Supreme Court and Tilghman are trying to avoid.[212] Taking the probability that defendant has not been, or will not be, punished for past or future harm runs the extreme risk of imposing liability where no harm exists and, in fact, such a rule would remove the requirement that a plaintiff must prevail in the underlying litigation at all.[213] That is, imposing higher punitive damages awards for past, alleged infractions means that the defendant is being sanctioned for an act that, rather than proven, is

fewer occurrences of the same act.

[211] Not surprisingly, Tilghman comes to the exact same point about the potential abuses by defendants in support of his argument. Tilghman, *supra* note 137, at 1027 ("Under the Supreme Court's analysis, where punitive damages are wholly divorced from enforcement error, potential defendants have little incentive to take corrective action to enforce and prevent elder abuse. Rather, *a defendant's economic incentive is to cover up the tortious act or downplay its significance to reduce liability exposure*. By not taking genuine action to prevent future tortious acts or compensate victims, potential defendants keep the enforcement low and perpetuate their abusive tendencies." (emphasis added)). There is, however, a problem with this thought process. If, as Tilghman assumes, defendants are capable of covering up their wrongful conduct to downplay its significance, and I do not disagree that some unscrupulous defendants are, then how is a court to ascertain how often such conduct is covered up when the defendants are presumably actively hiding their behavior (a necessary examination in light of any use of this enforcement rate concept)? *State Farm* avoids this pitfall by connecting the punitive awards with the level of reprehensibility of the conduct, taking into consideration any aggravating factors, including, recidivist behavior. *See State Farm*, 538 U.S. at 419. It bears noting, however, that designing a test that would be both constitutionally fair and yet, at the same time, would foreclose the possibility that defendants could "work the system" seems a daunting task to say the least, a task not within the scope of this Note.

[212] Honda Motor Co. v. Oberg, 512 U.S. 415, 426 (1994) (discussing the possible expression of biases by juries given wide discretion in deciding punitive damages awards); *Haslip*, 499 U.S. at 59 (O'Connor, J., dissenting) (urging that while the legislature has an interest in allowing juries to "tailor its award to specific facts, the Due Process Clause does not permit a State to classify arbitrariness as a virtue"); Tilghman, *supra* note 137, at 1021–22 (condemning the Court's *State Farm* decision because it fails to take the plaintiff's physical vulnerability into account and fails to provide real guidance to the courts in assessing punitive damages awards).

[213] *See* Colby, *supra* note 173, at 611 ("[T]here would be no need for the requirement that the plaintiff must prevail on an underlying cause of action as a predicate to an award of punitive damages. Indeed, it is the very fact that some plaintiffs or potential plaintiffs will *not* prevail—and therefore will not force the defendant to internalize the cost of the harm done to them—that drives the theory behind this conception." (footnote omitted)).

assumed to have occurred based on statistical probability.[214] Tilghman's test requires an assumption that a defendant is often incorrectly found *not* liable.[215]

Third, this cost-internalization approach discounts the very purpose of punitive awards, that is, to punish for conduct deemed *reprehensible*.[216] This removes from punitive damages its traditional role as one of punishment[217] for morally inappropriate actions,[218] to one of punishment for not being punished earlier—a different focus indeed.[219] Rather than focus on the *actual* harm to *actual* plaintiffs, as the *State Farm* test does, Tilghman's approach would require the jury to examine statistical evidence as to how often the defendant has probably avoided liability for wrongful behavior, thereby ignoring reprehensibility.[220] The very ingenuity of the *BMW/State Farm* test is that it requires courts to examine *individual* cases on the *facts given*, resulting in awards tailored to the circumstances.[221] Tilghman's bright-line test would eviscerate the strength of the *State Farm* test.

In another form of the "failure to consider economic efficiency" argument, Leila Orr contends that *State Farm* bars the analysis of a

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[214] Tilghman, *supra* note 137, at 1024–26 (discussing the use of punitive damages as error correction for the "enforcement error," which is nothing more than a probability that one will not be found liable for his wrongful actions). Indeed, Tilghman notes the difficulty in determining this statistical data within the realm he discusses—elder abuse in nursing homes. *Id.* at 1035 ("Currently, there are very few statistics on enforcement rates in nursing home abuse cases.").

[215] *Id.* at 1024. Otherwise, determining the enforcement error is meaningless.

[216] *See* Colby, *supra* note 173, at 611 n.97 (citing Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 62–63 (1990) (noting that such "deterrence does not depend on reprehensibility")).

[217] Polinsky & Shavell, *supra* note 199, at 906 ("Making punitive damages depend on reprehensibility . . . distort[s] deterrence.").

[218] *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001) (stating that the "imposition of punitive damages is an expression of [a jury's] moral condemnation").

[219] *See* Fey et al., *supra* note 144, at 821 (noting that consideration of potential harm is contrary to the concept of reprehensibility).

[220] *See* Tilghman, *supra* note 137, at 1027–28. Furthermore, Tilghman's test also ignores societal opinion in that as societal opinion of certain actions changes, punitive awards should be subject to change to reflect these changes in value judgments. *See, e.g.*, 16A AM. JUR. 2D *Constitutional Law* § 353 (2005) ("[T]he balance between police powers and due process is more or less in a state of unstable equilibrium, changing with sociological and economic development."). The *State Farm* test necessarily includes such societal influence within the ambit of "reprehensibility" since punitive awards, on the whole, must be "reasonable." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417, 426 (2003) (implying that due process derives from "[e]lementary notions of fairness" (alteration in original) (internal quotation marks omitted)).

[221] Tilghman's test, to the contrary, abrogates the traditional role of the courts in making them statisticians as opposed to arbiters.

defendant's wealth, and thus, courts will be unable to penalize or deter the wealthy defendant from committing future similar harms.[222] As language from the opinion shows, however, *State Farm* did not bar examination of the defendant's wealth.[223] Rather, the *State Farm* Court merely reiterated how wealth should not be used by the courts to "justify an otherwise unconstitutional punitive damages award."[224] An examination of the defendant's assets in *State Farm* "had little to do with the actual harm sustained by the Campbells."[225] As the Court sees it, the *BMW* factors and not the defendant's pecuniary status should be the cause of any imposition of punitive damages.[226] After all, we want to deter defendants from committing future harm, as well as punish them for the harm already committed, not from managing a successful business. Thus, *State Farm* merely holds that a defendant's wealth in a punitive calculation cannot be the sole indicium of liability.[227] Likewise, Judge Posner, speaking for the Seventh Circuit in a well-known punitive damages case, has explicitly noted that a "defendant's wealth is not a sufficient basis for awarding punitive damages. . . . That would be discriminatory and would violate the rule of law . . . by making punishment depend on status rather than conduct."[228]

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[222] Orr, *supra* note 19, at 1760–61 ("Evidence of a defendant's wealth must be considered because an award that could bankrupt a poor defendant may be little more than a pinprick to a wealthy one."). Moreover, Orr contends that without mandatory wealth-calibrated punitive damages awards, the high cost of litigation would prohibit plaintiffs from suing for "highly reprehensible conduct." *Id.* at 1745.

[223] *State Farm*, 538 U.S. at 427.

[224] *Id.* The Court goes on to quote the Court's reasoning in *BMW* that "[t]he fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice." *Id.* (internal quotation marks omitted) (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585 (1996)); *see BMW*, 517 U.S. at 591 (Breyer, J., concurring) ("[Wealth] provides an open-ended basis for inflating awards when the defendant is wealthy . . . . That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors . . . .").

[225] *State Farm*, 538 U.S. at 427.

[226] *Id.* at 427–28.

[227] *See id.* Indeed, this is just another example of how the Court has left the states with ample room to ascertain "fair" punitive awards with fairness as the central concern in the due process analysis. *See id.*

[228] Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 677 (7th Cir. 2003) (citations omitted). There, however, Judge Posner held that wealth should be taken into account when the defendant is deliberately making it very costly to litigate the case so as to deter future suits, factual circumstances very different from those presented to the *State Farm* Court. *Id.* In fact, Judge Posner implied that the defendant's use of its wealth to curb suits could be understood as part of the reprehensible conduct, directly related to the harm at issue, and thus clearly under the ambit of *State Farm* as having a nexus to the harm suffered by the plaintiff in question. *See id.* This is not inconsistent with *State Farm* as there is no evidence in *State Farm* that the insurance company was using its wealth to make impossible future suits against it.

IX. THE RULES V. STANDARDS DEBATE: STRENGTH OF THE SUPREME COURT'S USE OF STANDARDS

It must, of course, be asked whether the standards set forth by *BMW/State Farm* are the best available mechanism to control the potential implications large punitive damages awards could have on a defendants due process rights. This necessarily implicates the long running rules versus standards debate.[229] As will be shown, given the inefficiency of bright-line rules such as Tilghman's, and the primacy of the due process protection requirement within our society, the tightly formed set of standards set forth by the *State Farm* Court is the best available solution. But first, some definitions as well as some of the oft-cited pros and cons of each form of legal determinants must be laid out.

A "rule" exists where its promulgation binds the decisionmaker to respond in a specific, determinate manner when presented with "delimited triggering facts."[230] The purpose of a rule is to limit a decisionmaker's discretion in the face of a specific set of circumstances.[231] Strict categorization, as in the constitutional law test of strict scrutiny, is an example of a rule.[232]

Rules are said to reduce the possibility of arbitrary decision-making and decision-making based on bias because they prevent the imposition of the decisionmakers own attitudes regarding the party's qualities.[233] Similarly, rules provide certainty to actors, enabling them to make informed decisions as to how to act.[234] And rules are said to protect liberty in that they limit the decisionmaker

[229] *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 579–81 (1992) (examining the differences between rules and standards from an economic standpoint, noting that rules are more costly to create, whereas standards are typically more costly for actors to interpret prior to acting); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 23–24 (2000) (conjoining an economic analysis of the rules versus standards debate while taking into consideration various behavioral analyses otherwise ignored by the economic examinations); Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J.L. & PUB. POL'Y 101, 117 (1997) (discussing the relation between the rule of law and the economic approach to the rules versus standards debate, concluding, in part, that "standards, more so than rules, encourage self-reinforcing conformity to the imagined goals of the state rather than actions that reflect one's authentic values and interests"); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 955–56 (1995) (providing a number of suggestions to deal with the oft-cited claims that rules are too obtuse, too conservative, and often too politically charged).

[230] Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992).

[231] *Id.*

[232] *Id.* at 60.

[233] *Id.* at 62.

[234] *Id.*

to a specific conclusion given specific facts.[235]

Standards, rather than confine a decisionmaker merely to deciphering facts, exist where the decisionmaker is left with the power and ability to apply an underlining policy to facts, leaving room for her discretion.[236] Standards allow the court to take into account all pertinent issues within the "totality of the circumstances."[237] Rather than strict categorization, a balancing test is the key here, with the focus of the decisionmaker's job on matters of degree.[238] Given its three guideposts, and the essential element of discretion contained in them, the *BMW/State Farm* test is an example of a standard.

The key benefit to law promulgated through standards is the flexibility and adaptability they allow.[239] That is, where rules become arbitrary at the ends of the spectrum,[240] as bright-line tests must, standards allow courts to treat truly similar cases alike through the use of judicial expertise, expertise that is more likely to be based on rationality.[241] Likewise, where a rule may restrict an actor's conduct that resides just past the hard-line barrier that the rule imposes, a court, under a standards paradigm, could conclude that the conduct is more substantially similar to non-violative conduct than to violative conduct.[242] In this way, standards may actually be less arbitrary than rules.[243]

Similarly, whereas rules create incentives for sharp dealers to exploit the unequal distribution of knowledge of information, there is less room for exploitation under a regime of standards.[244] That is, rules "enable[] the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage" thereby promoting

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[235] *Id.* at 63–64. Other related reasons why rules may be thought to be better than standards, as set forth by Justice Scalia, include: consistency, uniformity among the courts, predictability in court opinions, internal judicial restraint, judicial protection from the popular will, and a need to demarcate the differences between matters of law and those of facts. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177–81 (1989).

[236] Sullivan, *supra* note 230, at 58–59.

[237] *Id.* at 59.

[238] *Id.* at 60–61.

[239] *Id.* at 66–68.

[240] *Id.* at 66 ("Rule-based decisionmaking suppresses relevant similarities and differences; standards allow decisionmakers to treat like cases that are substantively alike.").

[241] *Id.* at 67–68 (opining that standards make judicial decisions "more rationally auditable" (quoting Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821, 825–26 (1962))).

[242] *Id.* at 68–69.

[243] *Id.* at 66.

[244] *Id.*

inequality in their application.[245] Part of this stems from the inefficiency of rules in that every rule has a possibility of exception given that all rules require interpretation and no rules are hermetically sealed against "gaps."[246] Lastly, because rules leave true policy decisions with branches of the government other than the judiciary, rules allow a sort of "judicial abdication of responsibility," namely, the "'sorry, my hands are tied'" argument.[247]

In the due process/punitive damages context, as the *State Farm* Court strongly implied, a bright-line rule would be both unfair and infeasible.[248] Due process has long been understood to require a circumstantial weighing of many factors.[249] After all, the hallmark of due process is *fairness* in both notice and the imposition of sanction[250] and fairness is not a concept easily confined to rule status. Thus, because rules, by definition, can only attend to small pieces of a complex situation,[251] rulemaking in the due process realm as it applies to punitive damages is infeasible,[252] and the

[245] *Id.* at 67 (quoting Morton J. Horowitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977) (book review)).

[246] Sunstein, *supra* note 229, at 984–87 (commenting that "even the most well-specified rules do not offer a full *ex ante* specification of legal rights" and that, as such, "there is a possibility of an exception or an excuse everywhere" as the decisionmaker travels down "a familiar interpretive route").

[247] Sullivan, *supra* note 230, at 67.

[248] State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424–25 (2003); *see also* Kaplow, *supra* note 229, at 599–601 (arguing that the cost of using stringent rules in some circumstances, for instance aesthetic acceptance within zoning ordinances, would be too high, but that certain, more uniform conceptions could be ascertained via rule). In this manner, Kaplow argues, "[t]he choice between rules and standards is one of degree." Kaplow, *supra* note 229, at 600. However, given the import on the circumstances wherever due process concerns arise, rules should generally be precluded from the due process arena as adopting certain presumptions regardless of facts would be implausible. The *State Farm* Court understood this with its use of reprehensibility factors and its avoidance of any bright-line ratio. *State Farm*, 538 U.S. at 424–25; *see also* Korobkin, *supra* note 229, at 25–26 ("Standards . . . require adjudicators . . . to incorporate into the legal pronouncement a range of facts that are too broad, too variable, or too unpredictable to be cobbled into a rule.").

[249] *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands."); Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (discussing due process in the administrative law context and noting that it, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances" (internal quotation marks omitted) (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring))).

[250] *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996) ("Elementary notions of *fairness* enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." (emphasis added)).

[251] Sunstein, *supra* note 229, at 999.

[252] *See, e.g.*, Mo. Pac. Ry. Co. v. Humes, 115 U.S. 512, 521 (1885) ("[T]he damages which

Supreme Court was right in avoiding it.

Moreover, given the numerous instances in which punitive damages can and do arise, some discretion in the Court's limitation of punitive damages awards becomes necessary. Consider, again, the first-time defrauder versus the recidivist defrauder where both caused have the same "amount" of harm. A per se rule predicated on some definable "amount" of harm and intent on deterrence would probably punish both of these actors equally. However, a standard taking into account the recidivists reoccurring actions, under the *State Farm* similar conduct analysis, would increase the level of the recidivist's reprehensibility and as such, the punitive damages award levied against him. Under this standard, both actors have reasonable notice of the extent to which their individual actions will result in sanctions.[253] The actors are then unable to claim due process violations. And although, at first glance, it may appear as if a test like Tilghman's would work here, there is no definitive way to know how many times and to what extent defendants have acted wrongfully before and thus no way to properly impose punitive damages.

Moreover, the number and type of instances in which punitive damages arise often proves too multitudinous for state legislatures to be able to enumerate all the possible instances where punitive damages could be awarded,[254] and more specifically, how high to set the proper award.[255] Indeed, any hard and fast rule set forth by

should be awarded to the injured party are not always readily ascertainable. They are in many cases a matter of conjectural estimate, in relation to which there may be great differences of opinion."). Thus, it seems clear that the idea that punitive awards are inherently predicated upon estimation, having no set definite rule by which such awards are to be made, is not a new concept.

[253] *Cf.* Korobkin, *supra* note 229, at 26 (noting that because standards are necessarily vaguer than rules, actors will not "know with certainty *ex ante* where a legal boundary would be drawn in the event a set of specified facts come to pass"). However, since a little uncertainty will be born by the public at large, the use of standards still seems more beneficial on the whole, as compared to a rule which would leave out parties that do not neatly fit within the parameters of the rule. *See* Sullivan, *supra* note 230, at 66.

[254] *See* Sunstein, *supra* note 229, at 984 (opining that "legal rules . . . leave a variety of gaps and ambiguities" without any "ordinary or literal meaning in many cases" and further that "[n]o law is issued with full knowledge of the factual situations to which it will be applied").

[255] *See* Posner, *supra* note 229, at 101 (providing an illustration of the difference between rules and standards, noting that "[w]hen the legislature enacts a rule, it specifies in advance of some action whether that action will be penalized. When the legislature enacts a standard, it delegates to a court the authority to determine after the action whether that action will be penalized. Rules state that you may not do A, B, and C; a standard typically says that you may not behave 'unreasonably' or 'negligently' . . . ."). Thus, for the legislature to enact useful rules in the punitive damages realm, it would have to specify every type of wrongful action

state legislatures or Congress suffers from the same problems that all rules do in that they are sometimes too inflexible to take into consideration changing circumstances and individualized facts.[256] The standard test set forth by *BMW* and solidified by *State Farm* is more amenable to due process simply because it allows the courts to consider the facts.[257] Whether the court decreases, increases, or leaves in place a particular punitive award is then based on what is fair and reasonable considering the facts, not some statutory mandated demarcations that would otherwise ignore the individuals specifically at issue.

It is exactly the examination of what is fair and reasonable, a method unavailable under the rules regime, that gives the *BMW/State Farm* test its strength. Indeed, the specificity of the *BMW* test makes it more of a strict-standards test in that the Court will only examine three specific and determinate guideposts, thus eliminating much of the fear of the arbitrary decisions and lack of uniformity that seems to ride the coattails of a standards examination.[258] Likewise, many of the benefits supposedly inherent in the use of rules—certainty, predictability, consistency[259]—are maintainable under the *BMW/State Farm* standard because of its limited number and scope of factors. Witness *State Farm's* severe

and how much punitive damages should follow the occurrence of such actions.

[256] Charon, *supra* note 135, at 622. Accessibility is also a problem with rules. For instance, if Tilghman's mathematical formula were adopted, lay actors may not be able to conform their conduct appropriately. Kaplow, *supra* note 229, at 599 (noting that to solve such a problem, legislatures would need to employ a lay panel to design such rules so that the average person could properly understand their implications). Use of a concrete rule, like Tilghman's economic efficiency test, could thus further violate the second precept of due process, namely, that actors must have reasonable notice of possible punishments for their actions.

[257] *See* Sullivan, *supra* note 230, at 59.

[258] *See* Joseph J. Chambers, In Re Exxon Valdez*: Application of Due Process Constraints on Punitive Damages Awards*, 20 ALASKA L. REV. 195, 199 (2003) (discussing the fear that *State Farm*'s guideposts will result in a lack of uniformity in lower court decisions in assessing punitive damages). Although Chambers' point is well taken, it must be limited in scope. After all, his article came out the very same year that *State Farm* was set forth, and it would seem practical to assume that some courts would take time to fully grasp and properly apply the guideposts. Moreover, the de novo review of punitive awards mandated by *Cooper Industries* should fix some of the fears of inconsistency. Cooper Indus. Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001). Judges possess a level of expertise that the jury does not and should be able to apply this expertise consistently when assessing punitive damages through the *BMW/State Farm* guideposts. As Justice O'Connor in her *Haslip* dissent pointed out, there is a fear of arbitrary and capricious decisions by the jury. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting). Since the fear of violation of due process is very real, it makes sense then to remove the decision of "excessiveness" from the jury on appeal. *Id.*

[259] *See* Scalia, *supra* note 235, at 1179, 1184–85.

limitation on extraterritorial evidence.[260] With this evidentiary limitation in place, defendants have a better idea as to what conduct is at issue in a particular case and are better able to plan their affairs.[261] They know that the conduct at issue probably occurred within State X and affected Plaintiff Z (or those similarly situated within State X), and any out-of-state conduct that may be brought in must have such a relationship to the conduct affecting Z within State X that the defendant is on notice that this may be presented to the fact-finder as well. And although the circumstances are many in which the imposition of punitive damages could arise, whether the defendant's conduct was reprehensible is a more exacting question than that which is thought to be asked by many juries: Is this defendant a good or likeable person?[262] The traditional discretion left to juries leaves more opportunity for arbitrary decisions than that imposed by judges who are experts in adjudication and the concomitant weighing of circumstances. Although the extent to which a defendant's reprehensibility warrants a certain amount of damages awards is not such an easy question, it is, nonetheless, a question that must be analyzed under a balancing scheme. In the end, rules regarding the level of damages allowable would be more arbitrary than the alternative and would promote less predictability and certainty than their discretionary counterparts.

X. CONCLUSION

Although the *BMW/State Farm* test is admittedly a variation of the traditional role of the federal courts as pertains to punitive damages award, it effects a necessary change. Due process concerns come alive when courts have the ability to arbitrarily impose

[260] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421–24 (2003).

[261] Rachel M. Janutis, *Reforming Reprehensibility: The Continued Viability of Multiple Punitive Damages After* State Farm v. Campbell, 41 SAN DIEGO L. REV. 1465, 1483 (2004) (explaining the *State Farm* Court's concern as "not just that State Farm was punished for misconduct unrelated to the misconduct directed at the Campbells, but more generally that State Farm was punished for any conduct other than the conduct directed at the Campbells"). Taking this reading to its logical conclusion, the defendant who finds herself in State Farm's position will know that if she is to be punished, she will be punished for the conduct to the particular plaintiff.

[262] *See, e.g.*, Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994) (noting the wide discretion left to the jury in choosing amounts to be awarded coupled with the presentation of a defendants worth often results in the expression of bias against big business). Where, as in here, the state removes the safeguard of judicial review over awards, the fear of excessive and capricious awards becomes even stronger.

punitive awards against defendants. Only through the use of specifically delineated standards can a defendant's constitutionally protected right to be free of the arbitrary deprivation of property be realized, while at the same time adequately compensating plaintiffs for the harm they suffer. Although no test is perfect, the *BMW/State Farm* test is the most realistic means yet available to protect these two interests. In our world of increasing litigiousness, a line must be drawn over which courts cannot pass in pursuit of otherwise legitimate ends. Without such a line, punitive damages could truly spiral out of control with no party the winner and everyone suffering the injustices of an entropic legal system.