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CASE NOTES

TORT LAW – Punitive Damage Determinations: A Jury’s Factual Inquiry or a Court’s Mathematical Leash, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

INTRODUCTION

On May 22, 1981, Curtis Campbell (Campbell) caused a highway accident in Utah, which resulted in the death of Todd Ospital (Ospital) and serious injuries to Robert Slusher (Slusher).¹ Slusher was traveling on a two-lane highway as part of a six-van caravan, which Campbell passed.² Ospital was driving in the opposite direction on the other side of the highway and swerved to miss Campbell’s vehicle, colliding head-on with Slusher.³ At the time of the accident, Campbell had automobile insurance through State Farm Mutual Automobile Insurance (State Farm).⁴ Slusher brought a suit to recover damages against Ospital’s estate and a third-party claim against Campbell.⁵ The investigators - including State Farm’s investigator - and witnesses all agreed Campbell was at fault; yet, State Farm pushed Campbell to trial.⁶ In addition, State Farm and its attorney never told Campbell he would be personally liable for a judgment if the jury found against him.⁷ At the end of the trial, the jury found Campbell completely liable for the accident, and the court entered judgment against him for \$185,849.⁸

After the trial, State Farm refused to pay Campbell’s judgment and told the Campbells to put a for-sale sign on their house.⁹ State Farm also refused to appeal the judgment.¹⁰ The Campbells obtained independent counsel and brought suit against State Farm alleging, *inter alia*: bad faith, fraud, and intentional infliction of emotional distress.¹¹ The district court

1. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 840 P.2d 130, 132 (Utah Ct. App. 1992), *cert. granted*, 535 U.S. 1111 (2002), *rev’d*, 538 U.S. 405 (2003), *remanded to* 98 P.3d 409 (Utah 2004).

2. *Slusher v. Ospital*, 777 P.2d 437, 438-39 (Utah 1989).

3. *Id.*

4. *Campbell*, 840 P.2d at 132.

5. *Slusher*, 777 P.2d at 437.

6. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1141 (Utah 2001).

7. *Campbell*, 840 P.2d at 134.

8. *See Slusher*, 777 P.2d at 439 for the complete record of the facts, reasoning, and resolution of this case.

9. *Campbell*, 65 P.3d at 1142. State Farm refused to pay Campbell’s judgment despite “numerous reassurances to both Mr. and Mrs. Campbell that their assets were safe, that they had no liability for the accident, . . . and that they did not need to procure separate counsel . . .” *Id.*

10. *Id.*

11. *Id.*

granted summary judgment against the Campbells due to State Farm's eventual payment of Campbell's judgments.¹² Furthermore, the court decided State Farm's payment barred the Campbells' bad faith claim.¹³ However, the Utah Court of Appeals later concluded State Farm's eventual payment had not precluded the Campbells from pursuing their bad faith claim.¹⁴

The case against State Farm went to trial on the bad faith claim, where the trial court allowed evidence and testimony regarding State Farm's Performance, Planning and Review Program (PP&R Program) to be presented.¹⁵ The PP&R Program advised and directed State Farm's employees to use a "national scheme to meet corporate fiscal goals by capping payouts on claims company wide."¹⁶ The jury found in the Campbells' favor and awarded them "\$911.25 in out-of-pocket costs, \$2.6 million in compensatory damages, and \$145 million in punitive damages."¹⁷ However, the trial court judge reduced this verdict to \$1 million in compensatory damages and \$25 million in punitive damages.¹⁸ State Farm appealed the punitive damage award, but instead of being lowered as State Farm had hoped, the Supreme Court of Utah reinstated the original jury award of \$145 million in punitive damages.¹⁹

12. *Campbell*, 840 P.2d at 132.

13. *Id.*

14. *Id.* at 143.

15. *Id.* The PP&R Program adhered to the following practices. First, "the PP&R program . . . has functioned . . . as an unlawful scheme . . . to deny benefits owed consumers by paying out less than fair value in order to meet preset, arbitrary payout targets designed to enhance corporate profits." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 431 (2003) (Ginsburg, J., dissenting). Second, a common practice advocated in the PP&R Program, was to "unjustly attack the character, reputation and credibility of a claimant . . . in the event the claim ever came before a jury." *Id.* at 432 (Ginsburg, J., dissenting). Third, employees of State Farm recounted "intolerable and recurrent pressure to reduce payouts below fair value." *Id.* (Ginsburg, J., dissenting) (internal quotations omitted). Fourth, State Farm's Excess Liability Handbook "instructed adjusters to pad files with 'self-serving' documents, and to leave critical items out of files . . ." *Id.* at 433 (Ginsburg, J., dissenting). Fifth, State Farm's PP&R Program was "deliberately crafted to prey on consumers who would be unlikely to defend themselves." *Id.* (Ginsburg, J., dissenting) (internal quotations omitted). Sixth, State Farm made "systematic" efforts to destroy the documentation and pamphlets that recounted the PP&R Program. *Id.* at 434 (Ginsburg, J., dissenting). Seventh, the evidence amply showed State Farm's PP&R Program "and the means used to implement those policies could be found callous, clandestine, fraudulent, and dishonest." *Id.* at 436 (Ginsburg, J., dissenting) (internal quotations omitted).

16. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1143 (Utah 2001).

17. *Id.* at 1141. The compensatory damages award included \$1.4 million to Mr. Campbell and \$1.2 million to Mrs. Campbell, totaling \$2.6 million. *Id.* at 1142 n.4.

18. *Id.* at 1141.

19. *Id.* at 1172. The Utah Supreme Court supported its reinstatement of the jury's punitive damage award by stating:

[The facts in this case] support a higher rather than a lower punitive damage award. State Farm's fraudulent conduct has been a consistent way of

State Farm appealed this decision to the United States Supreme Court who granted certiorari to decide whether “an award of \$145 million in punitive damages, where full compensatory damages are \$1 million, is excessive and in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.”²⁰ In a 6-3 decision, the Court reversed and remanded the Utah Supreme Court decision, holding the award excessive and in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.²¹

This case note will present the history of punitive damage awards, analyze and explain both the majority and dissenting *State Farm* opinions, and evaluate the guidelines governing the three-part test the Court uses to review punitive damage awards. As part of the analysis, this case note will highlight three major problems in the Court’s “formula” for punitive damage awards: (1) the determination and limitation of punitive damage awards should be left to the states; (2) the focus on a mathematical formula instead of a factual inquiry is flawed and constitutes a removal of the jury in determining punitive damage awards; and (3) the Court should have realized the unique nature of punitive damage awards against insurance companies. This case note will then propose an alternative method that would focus punitive damage determinations in the proper direction; investigate how improvements to jury instructions could be used in practice to ensure competent and correct awards; and finally, provide guidance in developing new jury instructions while staying within the Court’s guidelines.

BACKGROUND

Although the history of punitive damages is foreign to most people, these awards date back farther than many imagine. They are “of ancient

doing business for the last twenty years, directed specifically at some of society’s most vulnerable groups. The likelihood of further misconduct by State Farm is great, given the fact that it has not changed its conduct despite a previous \$100 million punitive damage award. Moreover, the effect on the Campbells warrants a large award, given that they had to live in fear of complete financial ruin for over eighteen months because of State Farm’s refusal to settle their claim. Finally, the harm propagated by State Farm is extreme when compared to the statistical probability that State Farm is likely to be required to pay damages only once in 50,000 cases.

Id. at 1154.

20. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 412 (2003) (emphasis omitted).

21. *Id.* at 429.

origin . . . [and] can be found in the Code of Hammurabi, the Bible, the laws of the Babylonians and the Hittites, and the Hindu Code of Manu."²²

American Jurisprudence defines punitive damages "as damages which are given as an enhancement of compensatory damages because of the wanton, reckless, malicious, or oppressive character of the acts forming the basis of the complaint."²³ The primary purposes of punitive damages are "to punish the defendant and deter him and others from similar extreme misconduct in the future."²⁴ Further, in most jurisdictions, "[i]t is within the discretion of the trier of fact to make an award of punitive damages . . ."²⁵ Thus, historically, the jury has been left to determine if there is a need for punishment and deterrence in each case.

Over the last twenty years, distress regarding punitive damages has increased in the courts and state legislatures.²⁶ The United States Supreme Court outlined many of these concerns in *State Farm v. Campbell*.²⁷ First, in civil cases, where punitive damages are awarded, the defendants are less protected than defendants in a criminal case.²⁸ Second, punitive damages are

22. John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391, 395 (2004).

23. 22 AM. JUR. 2D *Damages* § 731 (2003).

24. *Id.* § 733. Although these are the primary purposes, there are other purposes and/or functions for these awards, including "'vent[ing] the indignation of the victimized,' discourage[ing] the injured party from engaging in self-help remedies, compensate[ing] victims for otherwise uncompensable losses, and reimburse[ing] the plaintiff for litigation expenses that are not otherwise recoverable." Gotanda, *supra* note 22, at 396 (quoting Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1320-21 (1993)); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 9 (1982); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 61 (1991).

25. 22 AM. JUR. 2D *Damages* § 739 (2003).

26. *State Farm*, 538 U.S. at 417. In Wyoming's 2004 general election, two Constitutional amendments regarding caps and tort reform were proposed and put to a vote. Specifically, Amendment C "allow[ed] the Wyoming Legislature to consider passing laws requiring alternative dispute resolution or a medical review panel before a person could file a lawsuit against a health-care provider for injury or death." Ilene Olson, *Learn the Pros and Cons of Amendments C and D*, WYOMING TRIBUNE-EAGLE, Oct. 30, 2004, available at <http://www.wyomingnews.com/news/more.asp?StoryID=103693&arch=true>. This amendment passed. Becky Bohrer, *Voters Reject Caps on Malpractice Damage Awards*, CASPER STAR-TRIBUNE, Nov. 4, 2004, available at <http://www.casperstartribune.net/articles/2004/11/04/news/wyoming/3900f99baaa04ce387256f410057f59b.txt>. Amendment D would give the Legislature the power to enact laws limiting the "amount of noneconomic damages plaintiffs could get in medical malpractice lawsuits." The Wyoming Constitution currently prohibits these limits, or "caps." Ilene Olson, *Learn the Pros and Cons of Amendments C and D*, WYOMING TRIBUNE-EAGLE, Oct. 30, 2004, available at <http://www.wyomingnews.com/news/more.asp?StoryID=103693&arch=true>. This amendment did not pass, but is likely to return to a ballot in the future. Becky Bohrer, *Voters Reject Caps on Malpractice Damage Awards*, CASPER STAR-TRIBUNE, Nov. 4, 2004, available at <http://www.casperstartribune.net/articles/2004/11/04/news/wyoming/3900f99baaa04ce387256f410057f59b.txt>.

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

28. *Id.*

administered imprecisely.²⁹ Third, these awards “pose an acute danger of arbitrary deprivation of property.”³⁰ Fourth, jury instructions regarding punitive damages are imprecise and unhelpful, leaving the jury unrestrained.³¹ Finally, presenting the net worth of defendants “creates the potential that juries will use their verdicts to express biases against big businesses,” which in some instances might force them into bankruptcy.³²

The Supreme Court, while ruling that federal common law should not rule in state civil suits, first mentioned the possibility of a Due Process Clause check on punitive damages in *Browning-Ferris Indus. v. Kelco Disposal, Inc.*³³ Although the Court mentioned the Due Process Clause, it did not rule on the issue because the counsel below failed to preserve the matter for appeal.³⁴ The Due Process Clause, found in the Fourteenth Amendment to the United States Constitution, “accords procedural safeguards to protected interests, . . . [and] likewise protects the substantive aspects of liberty against impermissible governmental restrictions.”³⁵

Two years later in *Pacific Mut. Life Ins. Co. v. Haslip*, the Court noted its concern that punitive damage awards could run wild, yet admitted it was unable to “draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.”³⁶ In this case, an insurance company, Pacific Mutual Life Insurance Co. (Pacific Mutual), continued to collect insurance premium payments from Haslip, the insured, even though it had cancelled Haslip’s coverage.³⁷ The trial court found in favor of Haslip, awarded punitive damages, and Pacific Mutual appealed.³⁸ The punitive damage award equaled more than four times the total compensatory damages awarded but was nevertheless affirmed as not violative of due process.³⁹

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). The Court did not rule on the due process issue because the counsel below failed to raise the matter. *Id.* at 277.

34. *Id.* at 277. The *Browning-Ferris* Court did rule that federal common law should not rule in state civil suits. See *supra* note 33 and accompanying text.

35. 16B AM. JUR. 2D *Constitutional Law* § 901 (2004); see U.S. CONST. amend. XIV, § 1.

36. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

37. *Id.* at 4-7.

38. *Id.* at 6-7. Pacific Mutual, by general verdict, was found liable and the jury ordered the company to pay \$1,040,000, of which no less than \$840,000 was the punitive damage award. *Id.* at 6 n.2.

39. *Id.* at 23-24. The Court acknowledged that some may see this award as excessive, but stated the “award here did not lack objective criteria,” meaning Pacific Mutual was procedurally protected. *Id.* at 23. The procedural protections given were: the jury received proper instructions, there was a suitable post-verdict hearing, Pacific Mutual committed intentional fraud, the award was “reasonable in light of the importance of discouraging insurers from

Subsequently, in *TXO Prod. v. Alliance Res.*, the Court affirmed a punitive damage award of more than 526 times the compensatory damages awarded.⁴⁰ The Court reiterated its belief that a due process check might exist if the award is grossly excessive, but refused to hold this award excessive.⁴¹ The Court also ruled punitive damages are "entitled to a strong presumption of validity" when reviewed on appeal, and noted that "[b]ecause no two cases are truly identical, meaningful comparisons of such awards are difficult to make."⁴² Thus, even when presented with a sizeable disparity between punitive and compensatory damages, the Court refused to reverse or reduce punitive damages due to gross excessiveness or unreasonable size.⁴³

The Supreme Court heard the products liability action, *Honda Motor Co. v. Oberg Ltd.*, in 1994.⁴⁴ Oberg brought suit against Honda Motor to recover damages resulting from an all-terrain vehicle accident, and the jury awarded punitive damages against Honda Motor.⁴⁵ The Oregon Supreme Court refused to review the punitive damage award.⁴⁶ On appeal, the United States Supreme Court reversed the decision and ruled that due process requires a meaningful judicial review of punitive damage awards, even though it did not decide whether the punitive damage award in *Honda* was unreasonable.⁴⁷

similar conduct," and finally, there was an appropriate review by the Supreme Court of Alabama review. *Id.*

40. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993). In *TXO Prod.*, the jury awarded \$19,000 in actual damages and \$10 million in punitive damages. *Id.* at 446.

41. *Id.* at 457-62. The Court stated:

In sum, we do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character. . . . The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.

Id. at 462.

42. *Id.* at 457.

43. *Id.*

44. *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994).

45. *Id.* at 418. ("Honda Motor Co., Ltd., manufactured and sold the three-wheeled all-terrain vehicle that overturned while [Oberg] . . . was driving it, causing him severe and permanent injuries."). In *Honda Motor*, the compensatory damage award was \$735,512.31 and the punitive damage award was \$5 million. *Id.*

46. *Id.* at 419.

47. *Id.* at 434-35. On remand, the Oregon Supreme Court held the \$5,000,000 punitive damage award was "appropriate to 'punish a willful, waton, or malicious wrongdoer and to deter that wrongdoer and others similarly situated from like conduct in the future.'" *Oberg v. Honda Motor Co. Ltd.*, 888 P.2d 8, 14 (Or. 1995) (quoting *State ex rel. Young v. Crookham*, 618 P.2d 1268, 1270 (1980)).

In 1996, the Court, for the first time, invalidated a punitive damage award for being unreasonably large.⁴⁸ *Gore*, who bought a new car from BMW, brought an action against BMW, alleging it failed to disclose the car had been repainted after being damaged.⁴⁹ In reaching its decision in *BMW v. Gore*, the Court set three guideposts for trial judges to follow when reviewing the constitutionality of punitive damage awards: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damage award; and, (3) the difference between the punitive damage award and the civil or criminal penalties authorized or imposed in comparable cases.⁵⁰

The Court took this analysis a step further in a 2001 opinion.⁵¹ *Cooper Indus. v. Leatherman Tool Group* involved a manufacturer of hand tools, Leatherman Tool Group, who brought an action against Cooper Industries for using pictures of Leatherman's tools in its advertising.⁵² The jury awarded Leatherman \$4.5 million in punitive damages, and the appeals court affirmed the award.⁵³ Before *Cooper Indus.*, the courts used an abuse of discretion standard of review when reviewing punitive damage awards.⁵⁴ The Supreme Court vacated and remanded the case, ruling appellate courts must apply a *de novo* standard of review, not abuse of discretion.⁵⁵ The Court supported this decision by stating that a punitive damage determination is not a fact on which the jury can rule, but instead a discretionary determination that should be checked by a judge.⁵⁶

Although the Supreme Court's foray into "capping" punitive damages is fairly new, the state legislatures' use of capping is presently a reality; efforts at tort reform and punitive damage capping can now be seen in many states, including Wyoming.⁵⁷ Today, "states . . . have considerable flexibil-

48. *BMW of N. Amer., Inc. v. Gore*, 517 U.S. 559 (1996). Compensatory damages awarded were \$4,000 and punitive damages were \$4 million. *Id.* at 565. It was not until *BMW v. Gore* "that the Court, for the first time, invalidated a state-court punitive damages assessment as unreasonably large." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 430-31 (Ginsburg, J., dissenting).

49. *BMW of N. Amer.*, 517 U.S. at 563.

50. *Id.* at 575. In applying these three guideposts, the court found: (1) BMW's conduct was not reprehensible because the harm was purely economical, (2) the punitive damage award in this case, 500 times the actual harm, was not a reasonable ratio, and (3) the comparable penalties did not justify this award. *Id.* at 575-85.

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

52. *Id.*

53. *Id.*

54. 5 AM. JUR. 2D *Appellate Review* § 695 (2004) ("Rulings committed to the discretion of a trial court are generally subject to review for abuse of discretion only.").

55. *Cooper Indus.*, 532 U.S. at 424.

56. *Id.* at 437 (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 459 (1996)).

57. See RICHARD L. BLATT, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE (2003 ed.) for a book containing state-by-state laws and practices regarding punitive damages. See *supra* note 26 for information on "capping" in Wyoming.

ity in determining the level of punitive damages allowed” and have discretion over the laws and rules governing punitive damages.⁵⁸ As such, states are free to enact statutes limiting the total punitive damages a jury can award; and, on review, these caps have been found to not violate the Constitution.⁵⁹ Yet, as stated, the Supreme Court’s use of “capping” through the judiciary is an unprecedented step.⁶⁰

PRINCIPAL CASE

State Farm v. Campbell brought the issue of punitive damages to the Supreme Court once again.⁶¹ Justice Kennedy wrote the majority opinion, in which five other justices joined, holding the punitive damage award in this case excessive.⁶² The majority opinion began by differentiating between the purposes of compensatory damages and punitive damages, stating, “[punitive damages] are aimed at deterrence and retribution,” whereas compensatory damages “are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct.”⁶³

Justice Kennedy then focused on the constitutional limitations on punitive damages.⁶⁴ The majority explained these awards are subject to limitation through the constitution, both procedurally and substantively.⁶⁵ This conclusion was based on the prohibition of grossly excessive punishments found in the Due Process Clause of the Fourteenth Amendment.⁶⁶ This prohibition “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.”⁶⁷ The Constitution ensures people are given fair notice of what conduct will be punished and the limits of punishment a State

58. 22 AM. JUR. 2D *Damages* § 613 (2004).

59. *Id.* § 615. See *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002); *Phillips v. Mirac, Inc.*, 685 N.W.2d 174 (Mich. 2004); *Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*, 95 P.3d 571 (Colo. 2004); *Parks v. Utah Transit Auth.*, 53 P.3d 473 (Utah 2002).

60. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 430-31 (2003) (Ginsburg, J., dissenting) (“It was not until 1996 . . . that the Court, for the first time, invalidated a state-court punitive damages assessment as unreasonably large. If our activity in this domain is now ‘well-established,’ it takes place on ground not long held.”).

61. *Id.* at 412.

62. *Id.* at 429. Chief Justice Rehnquist and Justices Stevens, O’Connor, Souter, and Breyer joined in the majority opinion. *Id.* at 411.

63. *Id.* at 416.

64. *Id.*

65. *Id.* (“[I]t is well established that there are procedural and substantive constitutional limitations on . . . [punitive damage] awards.”).

66. *Id.* at 416-17 (“The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.”). See *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001); *BMW of N. Amer., Inc. v. Gore*, 517 U.S. 559, 562 (1996).

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

may enforce, and some argue it is impossible to give defendants notice of large punitive damage awards.⁶⁸

Next, the opinion discussed the growing concerns surrounding punitive damages and then delved into the three *BMW* guideposts.⁶⁹ Under the first guidepost, the *State Farm* Court presented five factors that should exist when punitive damages are awarded.⁷⁰ Although the majority admitted “State Farm’s handling of the claims against the Campbells merits no praise,” the Court held a smaller punitive damage award would suffice.⁷¹ The Court found the Campbells did not meet the guidepost requirements because the evidence used to determine State Farm’s reprehensibility was *nationwide* data, not data collected in Utah.⁷² According to the Court, this “extraterritorial” evidence cannot be considered when deciding punitive damage awards; instead, only evidence from the deciding state’s jurisdiction is admissible.⁷³

68. *Id.*

69. *Id.* at 417-18. The Supreme Court mentioned the following concerns: (1) “defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding,” (2) punitive damages are imprecisely administered, (3) these awards “pose an acute danger of arbitrary deprivation of property,” (4) juries can be biased when it comes to big businesses, and (5) inadequate jury instructions. *Id.*

70. *Id.* at 419. The first guidepost is “the degree of reprehensibility of the defendant’s conduct.” *Id.* The five factors used to determine the degree of reprehensibility are:

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

Id.

71. *Id.* at 419-20 (“[A] more modest punishment for this reprehensible conduct could have satisfied the State’s legitimate objectives, and the Utah courts should have gone no further.”).

72. *Id.* at 420-21 (“The Utah Supreme Court’s opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct direct[ed] toward the Campbells.”).

73. *Id.* The Supreme Court explained “extraterritoriality” and how it was wrongly used in this case, stating:

A State cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction. Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction.

Id. at 421-22.

Within the second guidepost, although refusing to set a "bright-line ratio" between punitive damages and actual damages, the Court went on to note "[s]ingle-digit multipliers are more likely to comport with due process."⁷⁴ The Court also instructed: (1) where the harm is egregious, a higher ratio not to exceed a single-digit multiplier may be fitting, and (2) where there are high compensatory damages, a lower ratio (such as one-to-one) is fitting.⁷⁵ The only reasoning the Court presented for this "formula" is tradition, or, in other words, few cases support an award exceeding the single-digit ratio.⁷⁶

Regarding the final *BMW* guidepost, the Court briefly stated the only civil penalty in this case was \$10,000 for an act of fraud.⁷⁷ Therefore, the civil penalty was "dwarfed" by the \$145 million punitive damage award.⁷⁸ The Court also addressed whether or not to compare criminal penalties to punitive damage awards when determining the propriety of punitive damage awards.⁷⁹ While discussing the comparison of these penalties, the Court noted criminal sentences, though useful, have "less utility" than civil penalties when determining punitive damage awards.⁸⁰

The Dissenting Opinions

State Farm v. Campbell contained three dissenting opinions. Justice Scalia and Justice Thomas, in separately written opinions, dissented for essentially the same reason: the Constitution "provides no substantive protections against 'excessive' or 'unreasonable' awards of punitive damages."⁸¹

74. *Id.* at 424-25. The second guidepost is "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." *Id.* at 418.

75. *Id.* at 425.

76. *Id.* ("[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process.")

77. *Id.* at 428. The final guidepost is "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418.

78. *Id.* at 428.

79. *Id.*

80. *Id.* ("The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility.")

81. *Id.* at 429-30 (Scalia, J., dissenting) (Thomas, J., dissenting) (quoting *BMW of N. Amer., Inc. v. Gore*, 517 U.S. 559, 599 (1996)). The dissenting opinions of Justices Scalia and Thomas were very short. For more depth on Justices Thomas and Scalia's arguments, see Justice Scalia's dissenting opinion, joined by Justice Thomas, in *BMW of N. Amer.*, 517 U.S. at 598-99 (Scalia, J., dissenting). In their *BMW of North America* conclusion, the dissenting Justices state:

The relationship between judicial application of the new "guideposts" and jury findings poses a real problem for the Court, since as a matter of logic there is no more justification for ignoring the jury's determination as to how reprehensible petitioner's conduct was (*i.e.*, how much it deserves to

Justice Scalia advocated the following: First, *BMW v. Gore* did not merit “stare decisis effect” because its holding could not be applied in a fair and honorable fashion; second, there are no Due Process protections for punitive damages.⁸² Justice Thomas argued further that the Constitution neither constrains nor limits punitive damage awards.⁸³

Justice Ginsburg’s dissent began with the assumption that affixing punitive damage awards and reviewing them is a state, not a federal job.⁸⁴ In fact, as Justice Ginsburg highlighted, the Supreme Court itself in *Browning-Ferris v. Kelco*, ruled that the federal common law did not rule over punitive damages in state civil cases.⁸⁵ It was not until *BMW v. Gore* in 1996, “that the Court, for the first time, invalidated a state-court punitive damages assessment as unreasonably large.”⁸⁶ Justice Ginsburg denounced “the Court’s foray into punitive damages territory traditionally within the States’ do-

be punished), than there is for ignoring its determination that it was reprehensible *at all* (i.e., that the wrong was willful and punitive damages are therefore recoverable). That the issue has been framed in terms of a constitutional right against unreasonably *excessive* awards should not obscure the fact that the logical and necessary consequence of the Court’s approach is the recognition of a constitutional right against unreasonably *imposed* awards as well. The elevation of “fairness” in punishment to a principle of “substantive due process” means that every punitive award unreasonably imposed is unconstitutional; such an award is by definition excessive, since it attaches a penalty to conduct undeserving of punishment. Indeed, if the Court is correct, it must be that every claim that a state jury’s award of *compensatory* damages is “unreasonable” (because not supported by the evidence) amounts to an assertion of constitutional injury. And the same would be true for determinations of liability. By today’s logic, *every* dispute as to evidentiary sufficiency in a state civil suit poses a question of constitutional moment, subject to review in this Court. That is a stupefying proposition.

Id. at 606-07.

82. *State Farm*, 538 U.S. at 429 (Scalia, J., dissenting) (“I am also of the view that the punitive damages jurisprudence which has sprung forth from *BMW v. Gore* is insusceptible of principled application; accordingly, I do not feel justified in giving the case *stare decisis* effect.”).

83. *Id.* (Thomas, J., dissenting) (quoting *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001) (Thomas, J., concurring)) (“I would affirm the judgment below because ‘I continue to believe that the Constitution does not constrain the size of punitive damages awards.’”).

84. *Id.* at 430 (Ginsburg, J., dissenting) (“Not long ago, this Court was hesitant to impose a federal check on state-court judgments awarding punitive damages.”).

85. *Id.* (Ginsburg, J., dissenting); see *supra* notes 33-34 and accompanying text for a discussion of *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

86. *State Farm*, 538 U.S. at 430-31 (Ginsburg, J., dissenting); see *supra* notes 48-50 and accompanying text regarding *BMW of N. Amer.*, 517 U.S. at 559.

main,” and asserted the Supreme Court should have deferred to the state courts and legislatures.⁸⁷

Next, Justice Ginsburg addressed the reprehensibility, extraterritoriality, and ratio issues.⁸⁸ In reference to State Farm’s reprehensibility, Justice Ginsburg began her analysis by reciting the trial court’s conclusions.⁸⁹ She also highlighted the trial court’s finding that State Farm employed “wrongful profit and evasion schemes” directly related to the facts and situations in the *Campbell* case, and was meant to illustrate State Farm’s widespread fraud.⁹⁰ Ultimately, Justice Ginsburg concluded, “[t]he Utah Supreme Court, relying on the trial court’s record-based recitations, understandably characterized State Farm’s behavior as ‘egregious and malicious.’”⁹¹

Justice Ginsburg thought separating the evidence of State Farm’s PP&R policy and practices in other states from State Farm’s behavior towards the Campbells was out-of-line.⁹² She asserted that the Court, in its majority opinion, acknowledged out-of-state conduct can be probative, and she believed the evidence in this case was admitted for just that reason – to illustrate State Farm’s “deliberateness” and “culpability.”⁹³ Justice Ginsburg strongly believed and advocated “a nexus” between the Campbells’ experience and State Farm’s other dealings with clients outside of Utah.⁹⁴

Justice Ginsburg responded with nothing less than astonishment when the majority set its formula for punitive damage awards.⁹⁵ Justice Ginsburg asserted this decision exhibited no “respect” for precedent and also

87. *State Farm*, 538 U.S. at 431 (Ginsburg, J., dissenting).

88. *Id.* at 431 (Ginsburg, J., dissenting). Justice Ginsburg also stated she would support a legislature’s capping of punitive damages, but not the Court’s. *Id.* (Ginsburg, J., dissenting).

89. *Id.* at 431 (Ginsburg, J., dissenting). Justice Ginsburg agreed with the trial court that State Farm’s actions, in this case, were inexcusable. See *supra* note 15 for Justice Ginsburg’s conclusions.

90. *State Farm*, 538 U.S. at 435 (Ginsburg, J., dissenting).

91. *Id.* at 436 (Ginsburg, J., dissenting).

92. *Id.* at 437 (Ginsburg, J., dissenting).

93. *Id.* (Ginsburg, J., dissenting) (“Other acts’ evidence concerning practices both in and out of State was introduced in this case to show just such ‘deliberateness’ and ‘culpability.’”).

94. *Id.* at 437-38 (Ginsburg, J., dissenting) (“Viewed in this light, there surely was ‘a nexus’ between much of the ‘other acts’ evidence and ‘the specific harm suffered by [the Campbells].’”).

95. *Id.* at 438 (Ginsburg, J., dissenting). Justice Ginsburg stated:

In a legislative scheme or a state high court’s design to cap punitive damages, the handiwork in setting single-digit and 1-to-1 benchmarks could hardly be questioned; in a judicial decree imposed on the States by this Court under the banner of substantive due process, the numerical controls today’s decision installs seem to me boldly out of order.

Id. (Ginsburg, J., dissenting).

showed no judicial “restraint.”⁹⁶ Instead, she maintained that this decision was “boldly out of order,” with the Court improperly overriding a state issue.⁹⁷

Subsequent Decision

The Supreme Court, after determining the reinstated punitive damage award was excessive, remanded the case for a re-determination of the award.⁹⁸ In 2004, the Utah Supreme Court issued its opinion regarding the punitive damage award in *State Farm*.⁹⁹ The Utah court first explicitly clarified it did not agree with the Supreme Court’s interference with state determined issues like punitive damages.¹⁰⁰ The Utah court stated:

As long as the Supreme Court stands by its view that punitive damages serve a legitimate means to satisfy a state’s objectives to punish and deter behavior which it deems unlawful or tortious based on its own values and traditions, it would seemingly be bound to avoid creating and imposing on the states a nationwide code of personal and corporate behavior.¹⁰¹

The Court then discussed how the insurance area is different from other industries because it is an industry created with a goal of not providing their services for payment and an industry that is constantly in court.¹⁰² In addition, due to Campbells’ emotional distress, the Court refused to classify the injury in *State Farm v. Campbell* as purely economic.¹⁰³

The Utah Supreme Court stated its belief that an award for emotional distress and humiliation may deserve more punitive damages than conduct which results in a higher compensatory award for purely economic harm because of the extreme injurious effects from emotional harm.¹⁰⁴

96. *Id.* (Ginsburg, J., dissenting).

97. *Id.* (Ginsburg, J., dissenting).

98. *Id.* at 429.

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

100. *Id.* at 411-12.

101. *Id.* at 413. The court went on to say, “[i]n this instance, we find the blameworthiness of State Farm’s behavior toward the Campbells to be several degrees more offensive than the Supreme Court’s less than condemnatory view that State Farm’s behavior ‘merits no praise.’” *Id.*

102. *Id.* at 415.

103. *Id.* at 415 (“[W]e recognize that the gravity of harm which an insurer may potentially inflict on an insured is unique to the nature of the product and service that insurance provides.”) The Utah Court went on to say, “It remains obvious to us that not only were the Campbells financially vulnerable, but their vulnerability enabled, if not motivated, State Farm’s conduct.” *Id.* at 416.

104. *Id.* at 418 (“We have no difficulty concluding that conduct which causes \$1 million of emotional distress and humiliation is markedly more egregious than conduct which results in \$1 million of economic harm.”).

Therefore, the court determined a nine-to-one ratio between compensatory and punitive damages in *State Farm v. Campbell* was appropriate and set the award for punitive damages at \$9,018,780.75, the maximum award the court could have instated under the Supreme Court's decision in this case.¹⁰⁵

ANALYSIS

Punitive damage awards, "[o]ccupying the uncertain space between civil actions and criminal sanctions," continue to be grounds for controversy and conflict.¹⁰⁶ The *State Farm* Court diverged from traditional rationale in three key areas. First, *State Farm* took punitive damage awards away from state legislatures and judiciaries by dictating the calculation of such awards. Second, it failed to focus on the jury's factual inquiry and instead focused on a formula, which essentially removed the jury from the determination of punitive damages. Third, it refused to recognize the unique nature of punitive damage awards against insurance companies.

Problem 1: Punitive Damages are a State Issue

At this period in our history, many politicians and some members of the bench believe the courts have over-stepped the constitutional checks placed on them by creating law, instead of interpreting law.¹⁰⁷ The *State Farm* Court has given the opponents of "activist judges" additional ammunition for their arguments because this holding "disregard[ed] the Court's own considered reluctance to expand the open-ended reach of substantive due process and hearkens back to the discredited *Lochner* era of judicial activism."¹⁰⁸ It took the power from the states and "merely place[d] . . . [the Su-

105. *Id.*

106. Robert W. Shaw, *Punitive Damages in Medical Malpractice: An Economic Evaluation*, 81 N.C. L. REV. 2371, 2371 (2003).

107. Raffi S. Baroutjian, *The Advent of the Multifactor, Sliding-Scale Standard of Equal Protection Review: Out with the Traditional Three-Tier Method of Analysis*, In with *Romer v. Evans*, 30 LOY. L.A. L. REV. 1277, 1325 (1997). While discussing the Supreme Court's review of *Romer v. Evans*, Baroutjian summarized the judicial activism view:

The Court has often stated that it is neither the Court's position to judge the wisdom of the legislature nor to act as a superlegislature but only to invalidate enactments that violate the Constitution. Former Chief Justice Warren Burger articulated the dangers of failing to exercise self-restraint, stating that "unwarranted judicial action . . . tends to contribute to the weakening of our political processes." Not so long ago, the Court, by overstepping judicial restraint, brought about the evil known as *Lochnerism*. Although the judiciary is the final arbiter of disputes under the Constitution, it should be cautious of disrupting the checks and balances it is entrusted to uphold.

Id. (quoting *Plyler v. Doe*, 457 U.S. 202, 253 (1982)).

108. Brief of Amicus Curiae Association of Trial Lawyers of America at 2, *State Farm v. Campbell*, 538 U.S. 408 (2003) (No. 01-1289) [hereinafter ATLA Brief]. Ms. Cloud, in her

preme] Court in the position of a Court of Additional Appeals from state courts.”¹⁰⁹ The Supreme Court elevated “what has traditionally been a state issue to a constitutional level, thereby implicating federalism concerns and threatening state legislative efforts in this area . . . [and] the Court’s invocation of substantive due process in [*State Farm*] was ill-advised.”¹¹⁰ Moreover, federal court review of punitive damage awards and the applicable formula put the federal courts in the middle of policies that have historically been left to the states.¹¹¹ By taking the power from the state courts, the Court completely disregarded its own prior rulings and precedent.¹¹²

State Farm v. Campbell involved a state civil suit and was brought in a state court, not a federal court.¹¹³ The Supreme Court expanded “federal law to preempt . . . traditional state law concepts such as the rules of evidence . . .”¹¹⁴ Justice Scalia and Justice Thomas agreed with this position in their dissent to *BMW v. Gore*: “Since the Constitution does not make [puni-

article regarding the Lochner era, stated, “in contemporary discourse the Lochner era is infamous. The very name ‘Lochner’ serves as an epithet, and the phrase ‘to Lochnerize’ is used to connote some fundamental judicial error, although the precise nature of the error is not always clear.” Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 556-57 (1996). In sum, the Lochner Era Court:

[I]nvalidated approximately 200 economic regulations, usually under the due process clause of the fourteenth amendment. . . . Although the Court employed substantive due process on many occasions, it sustained as many regulations as it struck down. . . . [T]he Court’s decisions in the Lochner era were often inconsistent. The unifying theme seemed to be the Court’s perception of the “real” reason for the regulation.

GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 724-25 (Richard A. Epstein et al. eds., 4th ed., Aspen Law & Business 2001).

109. ATLA Brief, at 3. The Supreme Court is acting as a Court of Additional Appeals because there are already appeals courts in the state judicial system; to add the federal Supreme Court as another appeals court to decide everyday state issues is nonsensical. *Id.*

110. *Punitive Damages—Grossly Excessive Awards*, 110 HARV. L. REV. 145, 150 (1996) (no author listed).

111. *Packard v. Provident Nat’l Bank*, 994 F.2d 1039, 1046 (3rd Cir. 1993) (“The availability of punitive damages . . . is a quintessential state issue.”). See also ATLA Brief, at 3.

112. See *supra* notes 84-87 and accompanying text for a discussion of the Court’s digression from its own rulings. See also ATLA Brief, at 3. (“Constitutional review of punitive damages cannot provide more detailed or precise rules without abandoning the roots of due process in traditional practice and appearing to impose the personal convictions of the majority of the court.”).

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

114. Brief of Amici Curiae the States of Minnesota, Delaware, Florida, Louisiana, Maryland, Mississippi, Missouri, Montana, Nevada, Oklahoma, Oregon, and Rhode Island at 2, *State Farm v. Campbell*, 538 U.S. 408 (2003) (No. 01-1289) [hereinafter States Brief]. See also *Punitive Damages—Grossly Excessive Awards*, 110 HARV. L. REV. 145, 150 (1996) (no author listed).

tive damages] . . . any of our business, the Court's activities in this area are an unjustified incursion into the province of state governments."¹¹⁵

One view espoused is the Fourteenth Amendment to the Constitution "provides no warrant for federalizing yet another aspect of our Nation's legal culture (no matter how much in need of correction it may be)."¹¹⁶ In fact, when the Fourteenth Amendment was adopted, it was clear punitive damages were to be awarded at the sole discretion of a jury, speaking for their own community, and determining the size of that award on their own.¹¹⁷ The Supreme Court erred when it adopted federal rules to control state matters.¹¹⁸

Problem 2: Punitive Damage Assessment Should Not be Reduced to a Formula

The second departure from tradition the Supreme Court made in *State Farm* was focusing on a mathematical leash instead of a jury's factual inquiry into each case.¹¹⁹ The Court imposed this mathematical formula when it held punitive damage awards more than nine times compensatory damages will violate due process.¹²⁰ This formula, and the entire decision in *State Farm*, does not stand on well-established ground.¹²¹ In fact, *State Farm* is in direct opposition to the Court's previous holdings, where it has stated there is no "simple mathematical formula," "categorical approach," or "constitutional line" for determining punitive damage awards.¹²² This formula creates a system whereby a company can predict its maximum punitive damages liability and allow for it in normal operating costs; in effect, companies can now perform a cost-benefit analysis for egregious acts, which completely undermines the deterrence effect of punitive damages.¹²³

115. *BMW of N. Amer., Inc. v. Gore*, 517 U.S. 559, 598 (1996) (Scalia, J. and Thomas, J., dissenting). See also *supra* notes 84-87 and accompanying text.

116. *BMW of N. Amer.*, 517 U.S. at 599 (Scalia, J. and Thomas, J., dissenting).

117. *Id.* at 600 (Scalia, J. and Thomas, J., dissenting).

118. States Brief, at 5 ("In particular, this Court should not prescribe a federal rule governing the manner in which state courts can consider . . . evidence."). See also *supra* notes 88-91 and 107-15 and accompanying text.

119. Joseph J. Chambers, *In Re Exxon Valdez: Application of Due Process Constraints on Punitive Damages Awards*, 20 ALASKA L. REV. 195, 260 (2003) ("[The questions is what] . . . is the extent of the jury's role in determining punitive damages and whether that role has been needlessly undermined by an excessiveness inquiry conducted under the de novo standard of review.").

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

121. *Id.* at 431 (Ginsburg, J., dissenting) ("If our activity in this domain is now 'well-established,' it takes place on ground not long held.").

122. *BMW of N. Amer.*, 517 U.S. at 582.

123. Brief of Respondents at 16, *State Farm v. Campbell*, 538 U.S. 408 (2003) (No. 01-1289) [hereinafter Respondents Brief]. If defendants are able to budget for punitive damages, then the purpose of these damages is not served because it will never serve to punish or deter. *Id.* See also Meredith Matheson Thoms, *Punitive Damages in Texas: Examining the Need*

One of the principal discrepancies in creating a punitive damage formula is that such an approach disregards the factors a jury should consider when deciding the amount of the award.¹²⁴ One factor extremely important to this case is the wealth of the defendant. Punitive damages are meant to be a punishment and “larger awards are necessary for large corporations, to maximize the likelihood that company executives . . . [are made] aware of imposed punitive sanctions.”¹²⁵ The Campbells brought this suit against State Farm Mutual Automobile Insurance, only one of eight companies in the State Farm Group.¹²⁶ State Farm Mutual Automobile Insurance alone set its net worth in 2003 at \$39.981 billion.¹²⁷ Given its immense wealth and the fact that State Farm’s top management was not even aware of a previous \$100 million punitive damage verdict, a \$145 million award in *State Farm* should not be seen as excessive.¹²⁸ The maximum punitive award in this instance was a little over \$9 million, which, apart from this protracted litigation, would unlikely even catch State Farm’s attention; much less deter future egregious behavior.¹²⁹

The introduction of a formula to calculate punitive damage awards removes the jury from the final determination of the wrongs committed by the defendant and how best to remedy and deter those wrongs. There is broad agreement in the social sciences that “juries perform rationally in punitive damages cases, . . . [that they] award such damages infrequently and in comparatively modest amounts, . . . [and] [s]uch awards typically correspond to the actual or potential harm caused by intentional or grossly negligent tortfeasors.”¹³⁰ In fact, empirical research shows:

[T]he problems with the civil jury are overstated. Civil jury verdicts appear to be sound; civil jury verdicts are generally in line with the weight of the evidence, and there is a high rate of agreement with legal experts such as trial judges.

for a *Split-Recovery Statute*, 35 ST. MARY’S L.J. 207 n.79 (2003) (“This view is based on the suggestion that defendants can calculate the costs of caps and figure them into their budgets. This would allow companies to continue dangerous or tortious behavior and to pass the cost to along to customers.”).

124. Samuel E. Klein, *Punitive Damages*, 338 PLI/PAT 297, 340 (1992).

125. Respondents Brief, at 18 (internal quotations omitted). See also In re H. King & Associates, 295 B.R. 246, 276-77 (Bankr. N.D. Ill. 2003) (“Punitive damages should be large enough to provide retribution and deterrence . . .”).

126. STATE FARM INSURANCE CO., 2003 YEAR IN REVIEW (2004).

127. *Id.* at 40-41.

128. Respondents Brief, at 19 (“Given that State Farm is so wealthy that the earlier \$100 million verdict (less than 0.18 percent of its wealth) was too small for top management even to notice, the jury’s [\$145 million] award (approximately 0.26 percent of its wealth) cannot be viewed as excessive.”).

129. See *supra* notes 98-103 and accompanying text.

130. Brief of Amici Curiae of Certain Leading Social Scientists and Legal Scholars at 1, *State Farm v. Campbell*, 538 U.S. 408 (2003) (No. 01-1289). See also Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497, 1522 (2003).

The claim that juries are uniformly pro-plaintiff cannot be supported.¹³¹

Juries are meant to operate without a mathematical leash, and “properly instructed, juries are clearly capable of carrying out their duty to assess punitive damages fairly and responsibly.”¹³²

Problem 3: The Unique Nature of Punitive Damage Awards Against Insurance Companies

Finally, the Court failed to consider the insurance industry’s uniqueness “in its financial structure and in its involvement in legal matters.”¹³³ Insurance companies are involved in the civil justice system more than any other industry, and every year insurance companies spend in excess of one billion dollars in legal fees.¹³⁴ Unlike other companies, they can insure against punitive damages and “write-off payments of adverse punitive damage awards as ordinary and necessary business expenses on federal income tax returns.”¹³⁵ As experts in the field of litigation, specifically punitive damage litigation, “insurance companies have figured out ways to negate punitive damage awards.”¹³⁶ If the Supreme Court replaces the jury’s factual inquiry with a mathematical formula, the insurance industry will be left unregulated and able to further maximize profits without paying legitimate claims.¹³⁷

131. Albertson, *supra* note 130, at 1522.

132. ATLA Brief, at 3 (emphasis added). See also Albertson, *supra* note 130, at 1523.

133. Brief of Amici Curiae the California Consumer Health Care Council, Inc. at 2, *State Farm v. Campbell*, 538 U.S. 408 (2003) (No. 01-1289) [hereinafter CCHCC Brief]. See also Ralph L. Dewsnup, *The Proposed Contingent Fee Restrictions are Unfair, Unreasonable, Unworkable and Wrong*, 17-FEB Utah B.J. 14, 15-18 (2004).

134. CCHCC Brief, at 3. See also Francis J. Mootz III, *Holding Liability Insurers Accountable for Bad Faith Litigation Tactics with the Tort of Abuse of Process*, 9 CONN. INS. L.J. 467 (2003).

135. CCHCC Brief, at 3; Mootz, *supra* note 134.

136. CCHCC Brief, at 3; Mootz, *supra* note 134.

137. CCHCC Brief, at 3. This is because “[s]tate insurance commissioners do not have the power to effectively police bad faith or unfair insurance practices” *Id.* See also Albertson, *supra* note 130, at 1523. For example:

[Insurance companies] seek to reduce the amount of money that they pay in claims. They are most often corporations who have a duty to maximize their profits by reducing the claims that they pay. They are not supposed to be altruistic. Given their responsibilities to shareholders and policyholders, they can only pay money when to not pay it would subject them to legal or economic sanctions that would harm their profits. Thus, it is folly to suppose that, without the threat of legal or economic sanction that the lawyer provides, an insurance company will “do the right thing” or be “fair and reasonable.” It is simply sound public policy to permit citizens to have every possible means to level the playing field by having legal representation.

The jury in *State Farm* correctly assessed damages, but the Supreme Court disregarded the jury's factual determinations and conclusions. Instead of giving deference to the jury and the state, the Court created a mathematical formula for a determination that should be completely factually based. The answer to punitive damages is not the Supreme Court's formula, or "capping" by the legislatures. The courts, the legislatures, and the people must look at other options and alternatives.

A Long-Term Alternative – Explanatory Verdicts

Although most lawyers and laypersons have heard of the recently popular practice of "capping" punitive damages, this case note advocates a lesser-known alternative: explanatory verdicts.¹³⁸ This tool requires juries to simply "explain their verdicts," and arises from the criticism that punitive damage awards "take the form of unexplained numbers."¹³⁹ When a jury completes a verdict form, it is not asked to explain why it awarded punitive damages, or how it arrived at the dollar amount set.¹⁴⁰ A trial judge or a reviewing court does not know if the jury considered the "correct" evidence or the "right" facts and factors when deliberating on the amount of punitive damages.¹⁴¹ It is clear "a court cannot ensure the propriety of a punitive damage award without knowing something about why a jury selected it" because the court is merely guessing with regards to the basis of the award.¹⁴²

The basis for explanatory verdicts is derived from the "hard look" review used to review administrative agency policy decisions, where courts "require agencies to explain the basis for their policy choices."¹⁴³ Under this type of review, a court knows what evidence an agency took into account

Dewsnup, *supra* note 133, at 16.

138. The practice of damage "capping" sets a maximum dollar limit on awards, which varies from state to state. See *supra* note 57. A statute sets these limits, also known as caps, to control the amount of punitive damages a jury can award. 22 AM. JUR. 2D *Damages* § 615 (2004). See *supra* note 26 for information on "capping" in Wyoming.

139. Richard W. Murphy, *Punitive Damages, Explanatory Verdicts, and the Hard Look*, 76 WASH. L. REV. 995, 996 (2001) (advocating explanatory verdicts); KEVIN F. O'MALLEY ET AL., 1 FED. JURY PRAC. & INSTR. § 8.08 (5th ed. 2004).

140. Murphy, *supra* note 139.

141. *Id.* at 999 ("Absent from these efforts to control punitive damages has been a clear recognition that a court cannot ensure the propriety of a punitive damages award without knowing something about why a jury selected it—one must step beyond the outcome and review the deliberative process as well.").

142. *Id.*

143. *Id.* at 999-1000 ("In the context of administrative law, courts invoke 'hard look' review of agency policy choices to ensure that they are based on consideration of 'relevant factors' and are not tainted by 'clear errors of judgment.'"). See also *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520 (D.C. Cir. 1983) ("In short, we must . . . take a 'hard look' at both the facts and the agency's reasoning.").

and what the agency considered before it made its ruling.¹⁴⁴ Explanatory verdicts would work in essentially the same way, as courts would “require juries to submit ‘explanatory’ verdicts recounting the grounds for their punitive damage awards.”¹⁴⁵ Such explanations would help courts know if the jurors arrived at an award based on the correct factors and allow “jurors to better express what they think of defendants and their conduct.”¹⁴⁶

A large punitive damage award sends a message, but not always a clear message.¹⁴⁷ This message would be clearer if juries were allowed to speak with words, not just money.¹⁴⁸ Ideally, if the trial court determines the jury has come to the award by error, then the trial judge could “vacate” the award and “remand” back to the jury to reconsider the award “in light of clarifying instructions” from the court.¹⁴⁹ This would occur at the trial level, before an appeal and would therefore reduce the number of cases on appeal for erroneous punitive damage determinations.¹⁵⁰

Professor Murphy sees three advantages to the explanatory verdicts approach. First, as discussed above, explanatory verdicts rationalize judicial review.¹⁵¹ Second, explanatory verdicts would allow juries to communicate with more than dollar figures.¹⁵² Professor Murphy believes a jury would

144. Murphy, *supra* note 139, at 999-1000.

145. *Id.* at 996 (“A form of this ‘hard look’ approach could transfer neatly and usefully to judicial review of punitive damages.”). Explanatory verdicts “would articulate a jury’s underlying reasons for assessing a specific punitive damages award and provide an opportunity for the jury to present them at trial.” *Id.* See also Lisa M. White, *A Wrong Turn On the Road to Tort Reform: The Supreme Court’s Adoption of De Novo Review in Cooper Industries v. Leatherman Tool Group, Inc.*, 68 BROOK. L. REV. 885, 922 (2003).

146. Murphy, *supra* note 139, at 996. (“The law has recognized since 1763 that one of the primary functions of punitive damages is to express jury outrage.”).

147. *Id.*

148. *Id.*

149. *Id.* at 1000 (“Such an approach would help ensure that we obtain from juries what we purport to want but do not always get: punitive damages awards that reflect legal, reasonable exercises of jury discretion to determine fair punishment.”).

150. *Id.*

151. *Id.*

152. *Id.* For example:

No doubt there is nothing like a huge punitive damages verdict to concentrate the mind of a tortfeasor; surely the \$5 billion award granted in the Exxon Valdez matter got Exxon’s attention. However, to infer the “message” behind a verdict, one must first infer the jury’s reasons for granting it. Trying to figure out these reasons from an unexplained number creates needless room for distortion—a point demonstrated by cases such as the infamous BMW of North America, Inc. v. Gore, in which an Alabama jury became a poster child for tort reform by inflicting a \$4 million punitive damages award against BMW for failing to disclose that it had touched up the paint on an expensive sports sedan sold as new. Actually, as explored below, the jury likely had a sensible message to communicate that an explanatory verdict could have made clear.

appreciate the ability to communicate with the defendants and illustrates this point through a New York jury panel.¹⁵³ This jury “ordered Dr. Radovan Karadzic (the defendant) to pay \$3.9 billion in punitive damages to victims of rape, torture, and genocide;” yet, it wanted to explain its award to the plaintiffs and defendant.¹⁵⁴ To effectuate this desire, the jury asked the judge if it could make a statement in open court and the judge allowed the jury foreman to briefly explain the basis of the award.¹⁵⁵ On the record, the foreman explained, “the jury knew that money cannot compensate the plaintiffs for their suffering and that awarding damages was a pitiful way to go about this procedure.”¹⁵⁶ The third advantage to explanatory verdicts is they provide useful information for scholarly analysis “assessing whether juries should possess the power to inflict punitive damages in the first place.”¹⁵⁷ Also, it would add to the body of research about juries and their deliberations, which presently is hard to find.¹⁵⁸

In the end, the goal of explanatory verdicts is to “introduc[e] more predictability into the system” by ensuring juries deliberate on the correct facts and evidence.¹⁵⁹ This alternative would provide for a guided jury, ensuring juries use the correct evidence/factors to determine punitive damage awards, and would also make certain the reviewing court knows the basis for the jury’s decision and can determine if it was reasonable.

A “modern-day authorization for a form of . . . [explanatory verdicts] exists in Federal Rule of Civil Procedure 49(b) (and parallel state rules),” which allow written interrogatories to be given to the jury.¹⁶⁰ This federal rule is codified in the Wyoming Rules of Civil Procedure Rule 49; the Wyoming Trial Handbook explains this rule and states, “[i]n appropriate civil cases, the court may submit a general verdict form, accompanied by written interrogatories on any issues of fact necessary to the verdict, with explanatory instructions.”¹⁶¹ The handbook also confirms that if the jury’s interrogatory answers do not agree with its general verdict, then the judge

Id. at 1000-01.

153. *Id.* at 996 (“[Verdicts usually] take the form of unexplained numbers.”). This jury wanted to “clarify their message with words,” and the jury panel’s “attempt to put its verdict into context represented a departure from procedural norms.” *Id.*

154. *Id.*

155. *Id.*

156. *Id.* (internal quotations omitted).

157. *Id.* at 1001 (“In recent years, scholars have injected an increasing amount of empirical research into the debate on this subject. Still largely missing is information concerning how actual juries would justify their awards [if] given the chance. We could obtain this data by asking juries to include it in their verdicts.”).

158. *Id.*

159. David E. Hogg, *Alabama Adopts De Novo Review for Punitive Damage Appeals: Another Landmark Decision or Much Ado About Nothing?*, 54 ALA. L. REV. 223, 238 (2002).

160. Murphy, *supra* note 139, at 1001.

161. Wyo. R. Civ. P. 49; Wyoming Trial Handbook § 41:4.

may enter a different verdict, require the jury to deliberate further, or enter a new trial order.¹⁶² Both Federal Rule 49 and Wyoming Rule 49 presently allow practitioners to use a version of explanatory verdicts, without widespread court adoption of the practice.

Although Professor Murphy substantively and procedurally explains how courts could require juries to submit explanatory verdicts, the concept is not presently practiced in the United States due to the “cardinal principle that the deliberations of the jury shall remain private and secret.”¹⁶³ This principle is followed to ensure jurors can express their views, adjudicate the case, and assess damages without worrying about what people may think or say about them in the future.¹⁶⁴ Yet, the “primary, if not exclusive, purpose of jury privacy and secrecy is to protect the jury’s deliberations from improper influence,” and asking jurors to relay their reasoning to the judge after they have made their decision does not interfere with this purpose.¹⁶⁵ In conclusion, explanatory verdicts would be new to American Jurisprudence, but they would be a less drastic compromise than completely removing factual determinations from punitive damage calculations.

Temporary Improvements – Better Jury Instructions and State Funds

Despite its merits, the pressures against the use of explanatory verdicts, as explained above, have forced today’s practitioners to rely on jury instructions to ensure proper punitive damage determinations.¹⁶⁶ While improving jury instructions may only be a temporary fix, “few can dispute that the [current] instructions used in most jurisdictions do nothing to restrain arbitrary decision making.”¹⁶⁷ Currently, jury instructions for punitive dam-

162. *Id.*

163. Murphy, *supra* note 139, at 1001-02; 2 HANDBOOK OF FED. EVID. § 606.2 n.19 (5th ed., 2005); *United States v. Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964).

164. Nicole B. Casarez, *Examining the Evidence: Post-Verdict Interviews and the Jury System*, 25 HASTINGS COMM. & ENT. L.J. 499, 557 (2003). Secret jury deliberations are used so:

[J]urors can deliberate without fear of later exposure. Otherwise, shy or sensitive jurors may prefer to keep their opinions, prejudices, and feelings about a case to themselves rather than risk that another juror may reveal these confidences to the media. . . . Specifically, it has been argued that holdout jurors may prefer to go along with the majority rather than be publicly criticized as the lone obstacle to justice.

Id. at 557-58.

165. ROBERT E. JONES ET AL., RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL TRIALS AND EVIDENCE ch. 16-A(5) (2005).

166. Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After State Farm*, 6 U. PA. J. CONST. L. 423, 524 (2004).

167. *Id.*

age awards are markedly impractical.¹⁶⁸ These instructions vary from jurisdiction to jurisdiction, with some instructions being no more than a sentence.¹⁶⁹ Even the *American Jurisprudence Pleading and Practice Forms* contains a jury instruction for punitive damages that is confusing to the average American.¹⁷⁰ Proper punitive damage awards are impossible if they are to be awarded by a jury with no decipherable limits or explanations.¹⁷¹

Ineffective jury instructions eventually force courts to rely on appellate review of punitive damage awards when many legal scholars and practitioners agree “[r]elying on post-verdict review as a ‘check’ on arbitrary awards is both strikingly inefficient and undermines the jury’s role in the process.”¹⁷² As mentioned in the American Trial Lawyers of America Amicus Curiae brief, “[p]rotection against arbitrary and excessive punitive awards is best accomplished by requiring that the factors . . . relevant to assessing an appropriate amount of damages be submitted to juries, accompanied by clear and specific instructions.”¹⁷³ Such a simple change could be made now, and it is one that would best protect litigants’ rights.¹⁷⁴

After *BMW* and *State Farm* were decided, some states changed their “model” jury instructions to reflect the three guideposts presented in the

168. Christopher A. Young, *In Search of Consistency: Jury Instructions under Rule 51 of the Federal Rules of Civil Procedure*, 83 IOWA L. REV. 471, 474 (1998).

169. Jeffrey H. Wolf, *Litigating the “Monstrous Heresy”: Punitive Damage in Franchise Disputes*, 21-SUM FRANCHISE L.J. 23, 27 (2001). An example of a one-sentence jury instruction from the *Gore* case: “the damages awarded [should] be reasonably necessary to vindicate the States’ legitimate interest in punishment and deterrence.” *Id.*

170. 8 AM. JUR. PLEADING AND PRACTICE FORMS *Damages* § 373 (1996, Cum. Supp. 2004). The instruction directs the jury to award damages if the defendant “acted either maliciously or with a willful and reckless disregard,” and award damages “as you [the jury] may think proper under the circumstances.” *Id.*

171. Blatt, *supra* note 57, § 3.3. Mr. Blatt gives an example of the Illinois jury instruction for punitive damages. This instruction gives neither limitations nor explanations. Mr. Blatt states, “The standard jury instruction of fifteen states [including Illinois] . . . provide[s] virtually no guidance. . . . Under this jury instruction, a jury can be fairly said to be left to its own devices to determine the amount of punitive damages to award.” Plus, when a jury receives no guidance, the award is “vulnerable to constitutional challenge.” *Id.* § 3.3(B)(1). The Illinois jury instruction Mr. Blatt discusses states:

If you find that the defendant’s conduct was willful and wanton and proximately caused injury to the plaintiff, and if you believe that justice and the public good require it, you may, in addition to any damages to which you find the plaintiff entitled, award an amount which will serve to punish the defendant and to deter others from the commission of like offenses.

Id.

172. *Id.*

173. ATLA Brief, at 3.

174. *Id.*

BMW case.¹⁷⁵ In September 2003, five months after *State Farm v. Campbell* was decided, the Wyoming Civil Pattern Jury Instructions were changed to reflect the *BMW* guideposts and the *State Farm* decision.¹⁷⁶ Although a

175. For a complete listing of the states' pattern jury instructions, see RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE Appendix III (2004 ed.).

176. WYOMING CIVIL PATTERN JURY INSTRUCTIONS, *Exemplary or Punitive Damages – Phase I of Bifurcated Trial*, and *Exemplary or Punitive Damages – Phase II Bifurcated Trial* (2003). The new pattern jury instructions for phase one provides as follows:

The plaintiff seeks from the defendant additional damages known, in the law, as exemplary, or punitive, damages. Punitive damages are allowable, in a proper case, to punish the defendant and to deter the defendant and others similarly situated from engaging in similar conduct in the future. If you find that the plaintiff is entitled to recover compensatory damages as a result of the defendant's conduct, you may in your sole judgment and discretion award additional punitive damages against the defendant if, and only if, you find by a preponderance of the evidence that the defendant was guilty of willful and wanton misconduct. Willful and wanton misconduct is the intentional doing of an act, or an intentional failure to do an act, in reckless disregard of the consequences, and under such circumstances and conditions that a reasonable person would know, or have reason to know, that such conduct would, with a high degree of probability, result in harm to another.

WYOMING CIVIL PATTERN JURY INSTRUCTIONS, *Exemplary or Punitive Damages – Phase I of Bifurcated Trial* (2003). The jury instructions for phase two provides as follows:

Having determined punitive damages should be imposed for the purposes of punishment and deterrence, you must now determine the amount of the punitive damages award. The law provides no fixed standard as to the amount of such punitive damages, but leaves the amount to your sound discretion to be exercised without passion or prejudice. In determining the punitive damage award, you should consider the following factors: 1. Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater; 2. The degree of reprehensibility of a defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard that [he][she] has caused or is likely to cause, and any concealment or "cover up" of that hazard, and the existence and frequency of similar past conduct are all relevant in determining this degree of reprehensibility; 3. If wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss; 4. The financial position of the defendant; 5. All of the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial; 6. If criminal sanctions have been imposed on the defendant for [his][her][its] conduct, this should be taken into account in mitigation of the punitive damage award; 7. If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive award.

change to the previous jury instructions is a step in the right direction, there is still need for improvement.

Due to the overwhelming predilection of lawyers and judges to use so-called "legalese," most jury instructions, even if lengthy, fail to explain the concepts and rules to the average jury member properly.¹⁷⁷ Just a cursory glance through the Wyoming Civil Pattern Jury Instructions for punitive damages reveals many words and phrases that may be ordinary to lawyers and judges, yet do not use language common to lay-people on a jury.¹⁷⁸ Practitioners need to start with a list of factors and rules common in everyday language and capable of being interpreted and understood by the average jury member, even if states and practitioners must begin anew and craft instructions that will ensure the correct outcomes.¹⁷⁹ Although crafting new jury instructions is cumbersome and time-consuming, this task will "provide

WYOMING CIVIL PATTERN JURY INSTRUCTIONS, *Exemplary or Punitive Damages – Phase II Bifurcated Trial* (2003).

177. Wolf, *supra* note 169, at 27 ("Generally, juror research shows that jurors fail to follow complex instructions, and substitute their own predisposition when faced with an instruction they find too difficult to follow.").

178. WYOMING CIVIL PATTERN JURY INSTRUCTIONS, *Exemplary or Punitive Damages – Phase I of Bifurcated Trial* (2003). For example, the pattern jury instructions for phase I of a bifurcated trial, are confusing, complicated, and filled with phrases that are not apparent in meaning. *Id.* The wording "in your sole judgment and discretion" you may award punitive damages "if, and only if, you find by a preponderance of the evidence that the defendant was guilty of willful and wanton misconduct," provides no concrete direction as to what juries are to decide and what evidence they may use to decide it. *Id.* The jury instructions suggested for phase II of a bifurcated trial lists the factors or rules the jury is to take into consideration in assessing punitive damages. *Id.* at *Exemplary or Punitive Damages – Phase II Bifurcated Trial*. Phrases such as, "without passion or prejudice," "reasonable relationship," "degree of reprehensibility," "wrongful conduct," "financial position," "mitigation," and many more, are presented without further definition or explanation. *Id.*

179. Young, *supra* note 168, at 474 ("[W]hen jury instructions are incomprehensible, they do not facilitate the jury's task, and thus prevent juries from properly applying the law."). See also Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 190 (2002). Due to the difficulty jurors have with current jury instructions, practitioners and the courts need to change. *Id.* Some studies suggest that "rewriting the instructions using principles of psycholinguistics such as using shorter sentences, using more logical organization, and minimizing or eliminating uncommon and abstract words, legalese, words with multiple interpretations, passive voice, complex sentence structure, and negatives." *Id.* Other reforms regarding jury instructions include "instructing jurors about the law prior to the presentation of evidence, providing jurors with written instructions, and allowing jurors to take notes . . ." *Id.* at 191-92. Another tool that research has shown may be effective is to "provide explanations and reasons for the legal rules in addition to the rules themselves . . . [which would] improve juror compliance with the substantive law." *Id.* at 192. When the problem arises of jurors "converting their desire[s]" to money, "a specific mechanism for better structuring punitive damage decisions would be to provide jurors with information about representative damage awards from a set of reference cases, . . . [essentially equipping the jury with] legally appropriate benchmarks." *Id.* at 197.

a workable methodology for setting reasonable levels of punitive damage awards” before post-verdict review.¹⁸⁰

State Farm may or may not provide guidance or assistance in crafting jury instructions. Some believe *State Farm* provides no guidance because the Court only mentioned jury instructions twice (in dicta), but urge that without proper jury instructions, the substantive due process requirements in *State Farm* are not met.¹⁸¹ Even Justice Scalia, in a dissent to *BMW v. Gore*, equated the BMW guideposts, as recited by the *State Farm* Court, with “a road to nowhere.”¹⁸² On the other hand, some believe *State Farm* provides definite and clear guidance on jury instructions.¹⁸³ These commentators view two statements from the *State Farm* opinion as possible requirements for jury instructions: (1) “the wealth of the defendant cannot justify an otherwise unconstitutional punitive damages award” and (2) a jury “may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.”¹⁸⁴ Regardless of the view that is taken, new jury instructions should incorporate these statements made by the *State Farm* Court.

Another temporary improvement, a “state fund,” would provide an option for states that do not want to limit punitive damages, but also do not want the entire punitive damage award to be given to the plaintiff.¹⁸⁵ Legislatures can use state funds to allocate part or all of punitive damage awards to a fund administered by the state or a court.¹⁸⁶ This tool “is designed to limit what some commentators view as a windfall to the successful claimant[s],” because they have already been compensated for all of their harm through compensatory damages.¹⁸⁷ Some courts have invalidated these funds, yet others have upheld them, leaving it an option with an unclear future.¹⁸⁸

180. W. Kip Viscusi, *The Blockbuster Punitive Damages Awards*, 53 EMORY L.J. 1405, 1427 (2004).

181. John Gibeaut, *Punitive Precision*, 90-JUN A.B.A. J. 44, 46-49 (2004) (“State Farm requires the glue of procedural due process—jury instructions—to make the substance stick.”).

182. *BMW of N. Amer., Inc. v. Gore*, 517 U.S. 559, 605 (1996) (Scalia, J., dissenting).

183. Franze, *supra* note 166, at 498.

184. *Id.* at 499-500.

185. Sonja Larsen, Annotations, *Validity, Construction, and Application of Statutes Requiring that Percentage of Punitive Damages Awards be Paid Directly to State or Court-Administered Fund*, 16 A.L.R. 5TH 129 (2004).

186. *Id.*

187. *Id.*

188. *Id.* The following are examples where these “state funds” have been held invalid. In Georgia, a statute requiring that seventy-five percent of the punitive damage awards from products liability cases go into a state fund was found to violate the equal protection clause in the Fourteenth Amendment because it did not require other litigants—in non-products liability cases—to put a portion of their punitive damage award into a state fund. *McBride v.*

The Future of Punitive Damage Awards and Tort Reform

For the immediate future, “[t]he most obvious solution, and the one that has attracted the greatest attention, is transforming instructions into more effective vehicles for communication by exchanging overly technical language for plain language.”¹⁸⁹ In the distant future, our local and federal judicial systems need to explore viable alternatives and options other than the holding in *State Farm* and the capping of awards.¹⁹⁰

In September of 2003, the Committee on the Judiciary for the House of Representatives held a hearing regarding the status of punitive damage awards.¹⁹¹ The hearing was entitled, “Potential Congressional Responses to the Supreme Court’s Decision in *State Farm Mutual Automobile Ins. Co. v. Campbell*: Checking and Balancing Punitive Damages.”¹⁹² So far, the hearing has not led to a federal bill being introduced in Congress but one may be introduced in the future, effectively removing the choice of “capping” from the states.¹⁹³

CONCLUSION

After a lengthy history of state-determined punitive damage awards being left to the determination of the jury, the Supreme Court has ruled against all of its own prior history and precedent. The new guidelines set forth in *State Farm* take the determination of punitive damage awards from the jury and put it in the hands of the appellate court in the form of *de novo* review and a mathematical formula. An award meant to punish and deter cannot be effectively formulized because of the extreme differences between

General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990). A Colorado statute required the plaintiff to put one-third of its award into a state fund and the court held this fund violated the takings clauses of the Fifth Amendment. *Kirk v. Denver Pub. Co.*, 818 P.2d 262 (Colo. 1991). The following is an example of a state fund that was held valid. In Missouri, the Supreme Court of Missouri held that their statute requiring fifty percent of the punitive damage award go to the state was not unconstitutional. *Fust v. Attn’y Gen. of Mo.*, 947 S.W.2d 424, 432 (Mo. 1997).

189. Blatt, *supra* note 57, at Appendix III.

190. Murphy, *supra* note 139 (Explanatory Verdicts); Brief of Amicus Curiae Keith N. Hylton, *State Farm v. Campbell*, 538 U.S. 408 (2003) (No. 01-1289) (Deterrence Theory of Review); Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497, 1499-1500 (2003) (Jury Reform). “Virtually all of this [tort reform] legislation had the effect, in one way or another, of reducing plaintiffs’ access to the courts. . . . [because] the tort system was broken and malfunctioning to the detriment of society.” Gary R. Smith, *The Future of Tort Reform: Reforming the Remedy, Re-Balancing the Scales*, 53 EMORY L. J. 1219, 1222 (2004).

191. *Potential Congressional Responses to the Supreme Court’s Decision in State Farm Mutual Automobile Ins. Co. v. Campbell: Checking and Balancing Punitive Damages: Hearing Before the House Subcomm. on the Constitution, Comm. On the Judiciary*, 108th Cong. (2003).

192. *Id.*

193. *Id.*

defendants, their wealth, and the degree of their reprehensible actions. In addition, it is unwise to show large corporations their maximum liability in advance. Companies will begin to factor the risk of committing egregious acts into a budget for punitive damage pay-outs for the year, just as they would for advertising or labor costs, thereby minimizing the deterrent effect of the award. This court-created formula has removed personal and corporate responsibility and replaced a jury's factual inquiry with a court's mathematical leash.

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