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SUBSTANTIVE DUE PROCESS LIMITS ON PUNITIVE DAMAGES AWARDS: "MORALS WITHOUT TECHNIQUE"?

*F. Patrick Hubbard**

In a series of cases decided over the last two decades, the Supreme Court has used the Due Process Clause to establish a procedural and substantive framework for awarding punitive damages. Initially, the substantive aspects of this framework were sufficiently clear and flexible that they required little change in the system and probably generated a helpful level of debate and uniformity as to some basic requirements for awards. However, in *BMW of North America, Inc. v. Gore*, the Court adopted an approach characterized by a lack of clarity and consistency, an inadequate basis in theory and policy, and ad hoc decisions. The harmful results of this approach are evident in the Court's recent decision, *Philip Morris USA v. Williams*, which requires states to instruct juries in terms of a distinction that the four dissenting judges refer to as elusive, unclear, and confusing. Even if one accepts the view that there should be, at some point, substantive due process limits on the amount of punitive damages, decisions like *Williams* are likely to make the process less fair and reliable. Therefore, the Court should abandon its current approach, which is both unnecessary and likely to do more harm than good, and should, instead, be more deferential to the state courts and legislatures, and be more concerned with developing a coherent framework.

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I. INTRODUCTION

In a series of cases over the last two decades, the Supreme Court has used the Due Process Clause to establish a procedural and substantive framework for awarding punitive damages. Initially, the substantive aspects of this framework were sufficiently flexible and clear that they required little change in the system and probably generated a helpful level of debate and uniformity as to some basic requirements for awards.

However, starting with *BMW of North America, Inc. v. Gore*,[1] the Court began an effort to micromanage the process of awarding punitive damages by imposing on the state courts its own substantive framework for determining the amount of punitive damages. This framework has made the process less fair and reliable because the Court's decisions have shown a lack of clarity and consistency, an inadequate basis in terms of theory and policy, and an ad hoc approach to the application and construction of the framework.

The Court's recent decision, *Philip Morris USA v. Williams*,[2] illustrates these problems. The case requires states to instruct juries in terms of the following distinction: Juries may consider harm to third parties in determining the amount of punitive damages (because such harm is relevant to the degree of reprehensibility of a defendant's conduct), but juries may not increase punitive damages awards to punish "directly" the defendant for this harm.[3] The four dissenting Justices refer to this distinction as elusive and unclear.[4] Their concern can be summarized by the following question, which the majority never addresses: If an additional amount of punishment is imposed because harm to a third party from similar conduct makes the conduct that harmed the plaintiff more reprehensible, then what is the nature and purpose of this additional amount if it is not punishment for the third-party harm?[5] The *Williams* case requires states either to do something that is virtually impossible—i.e., craft an instruction that enables lay persons to follow a distinction that is unclear to four Supreme Court Justices—or to give jury instructions that are, at best, empty formalistic incantations about a meaningless and potentially confusing distinction. Thus *Williams* most clearly indicates that the Court's ad hoc attempts to develop a "moral" framework to prevent "grossly excessive" awards of punitive damages may fall within Karl Llewellyn's statement that "morals without technique is a mess."[6]

To place *Williams* in context, Part II of this Article summarizes the procedural and substantive aspects of the Supreme Court's constitutional scheme. Part III critiques the substantive standard of "grossly excessive"

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1. 517 U.S. 559 (1996).

2. 127 S. Ct. 1057 (2007).

3. *Id.* at 1065. For further discussion of *Williams*, see *infra* notes 36–43, 53, 58, 61 and accompanying text.

4. *Williams*, 127 S. Ct. at 1067 (Stevens, J., dissenting) ("This nuance eludes me."); *id.* at 1069 (Ginsburg, J., joined by Scalia, J., and Thomas, J., dissenting) (indicating that the charge sought by the defendants at trial that allegedly makes the distinction was useless and more likely to confuse than enlighten the jury).

5. *See id.* at 1068 (Ginsburg, J., joined by Scalia, J., and Thomas, J., dissenting).

6. CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE xi (1990) (quoting Karl Llewellyn as saying: "Technique without morals is a menace; but morals without technique is a mess.").

punitive awards in terms of four concerns: precedent, clarity and consistency, novelty and utility, and theoretical basis. This discussion does not offer a "solution" to the problems raised by these concerns. Instead, it analyzes each concern in terms of its importance and, in some cases, intractability. Because of possible arguments that constitutional standards, even if vague, are needed, Part IV discusses the Court's reason for imposing a necessarily vague standard in this area. This Article concludes in Part V by arguing that, because continuing the current approach to identifying grossly excessive awards is both unnecessary and likely to do more harm than good, the Court should be more deferential to state courts and legislatures, and more concerned with developing a coherent framework.

II. THE SUPREME COURT'S FRAMEWORK FOR PUNITIVE DAMAGES AWARDS

A. *Development of Framework*

The Court began developing its punitive damages framework in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,[7] which held that the Eighth Amendment prohibition of excessive fines did not apply to punitive awards "when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."[8] *Browning-Ferris* did not address excessiveness under the Due Process Clause because petitioners failed to raise the issue in the lower courts or to mention it in their petition for certiorari.[9] The Court addressed the due process issue two years later in *Pacific Mutual Life Insurance Co. v. Haslip*,[10] which held that the Due Process Clause applied to punitive damages awards.[11] The Court also held that Alabama's scheme for imposing punitive damages in this insurance fraud case was constitutional and that the punitive award involved did "not cross the line into the area

7. 492 U.S. 257 (1989).

8. *Id.* at 263–64. A later case applied the Excessive Fines Clause to a civil forfeiture. United States v. Bajakajian, 524 U.S. 321, 324 (1998). The result in *Browning-Ferris* may be different in many states today because of the adoption of statutory schemes granting the state a share in punitive awards. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 616–18 (1996) (Ginsberg, J., dissenting) (listing states with a scheme that allocates a share of punitive damages to the state); F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 505, 509 (2006) (discussing statutes that allow the state to share in the award). The Ohio Supreme Court, acting on its inherent common-law powers, adopted a sharing arrangement without a statute. Hubbard, *supra*, at 509.

9. *Browning-Ferris*, 492 U.S. at 276–77.

10. 499 U.S. 1 (1991).

11. *Id.* at 17–18.

of constitutional impropriety."[12] The Alabama scheme involved (1) instructions and evidentiary rules to structure and limit jury discretion in determining punitive damages and (2) a detailed list of relevant factors for judges to use when reviewing a jury's determination.[13] Similarly, *TXO Production Corp. v. Alliance Resources Corp.*,[14] decided two years after *Haslip*, held that the Due Process Clause barred "grossly excessive" punitive awards and that a $10 million punitive award in a slander-of-title case involving $19,000 in compensatory damages was not grossly excessive.[15] The next year, *Honda Motor Co. v. Oberg*[16] relied on the Due Process Clause to impose the procedural requirement of judicial review of the jury's punitive damages award.[17] Based on this holding, the Court reversed and remanded a case where the amount of the award had not been subjected to judicial review.[18]

Gore, which was decided in 1996, is the first case to use substantive due process to strike down the amount of an award.[19] In *Gore*, an Alabama jury awarded $4,000 in compensatory damages and $4 million in punitive damages against BMW for fraudulently selling a car with minor repairs as "new."[20] The Alabama Supreme Court remitted this verdict to $2 million.[21] As an initial point, *Gore* noted that a state may not punish a defendant for out-of-state conduct that was lawful where committed and that had no impact on the state.[22] However, this restriction was not at issue in *Gore* because the Alabama Supreme Court "eschewed reliance on BMW's out-of-state conduct" in granting the remitted $2 million award.[23] Therefore, the U.S. Supreme Court addressed whether the punitive award was grossly excessive.[24] The Court set forth three factors for determining this issue: (1) the degree of reprehensibility, which is "[p]erhaps the most important

12. *Id.* at 23–24. The jury returned a general verdict in favor of Haslip of $1,040,000, which combined compensatory and punitive damages. *Id.* at 7 n.2. The Supreme Court "accepted" a description of the verdict as containing "a punitive damages amount of not less than $840,000." *Id.*

13. *See id.* at 19–23. For further discussion of the Alabama scheme, see *infra* notes 155–59 and accompanying text.

14. 509 U.S. 443 (1993).

15. *Id.* at 462.

16. 512 U.S. 415 (1994).

17. *Id.* at 418.

18. *Id.* at 419, 435.

19. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585–86 (1996). As noted in *TXO Production Corp.*, several early twentieth-century cases recognized that the Due Process Clause imposed limits on the amount of punitive civil awards but held that the amounts involved were permissible. 509 U.S. at 454–55.

20. *Gore*, 517 U.S. at 563–65.

21. *Id.* at 567.

22. *Id.* at 572–73.

23. *Id.* at 573–74.

24. *Id.* at 574.

indicium of the reasonableness of a punitive damages award," (2) the ratio of the punitive award to the actual and potential harm from the defendant's wrongdoing, and (3) the criminal and regulatory sanctions for comparable misconduct.[25] Based on this three-part test, the Court held the award grossly excessive, reversed the judgment, and remanded the case.[26]

Five years after *Gore*, the Court returned to procedural due process in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[27] In *Cooper Industries* the Court concluded that appellate courts must apply de novo review when determining whether a punitive damages award is "grossly excessive."[28] The Court stressed that the Seventh Amendment prevents an appellate court from applying the de novo standard to findings of fact by the jury.[29] The Court also noted that a state appellate court could use a different standard of review in conducting a common-law review of punitive damages.[30] Although the Court remanded the case to the Ninth Circuit for de novo review, the Court's opinion analyzed, based on *Gore*'s three-factor test, the $4.5 million punitive damages award (with a $50,000 compensatory damages award) for false advertising and unfair competition.[31] This analysis was designed to "illustrate why . . . the Court of Appeals' answer to . . . [the constitutional] question may depend upon the standard of review."[32]

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25. *Id.* at 574–75.

26. *Id.* at 585–86. On remand, the Alabama Supreme Court held that a new trial was required unless the plaintiff accepted a remitted award of $50,000. BMW of N. Am., Inc. v. Gore, 701 So. 2d 507, 515 (Ala. 1997).

27. 532 U.S. 424 (2001). Because this case reviewed an award imposed in a federal district court and was discussed within the context of the Seventh Amendment, the case could arguably be viewed as based on the Supreme Court's supervisory powers over federal courts rather than on the Due Process Clause. *See* Cynthia L. Blackwell, Note, *Did* Cooper v. Leatherman *Require State Appellate Courts to Apply a De Novo Standard of Review for Determining the Constitutional Excessiveness of Punitive Damages Claims?* Aken v. Plains Electric Generation & Transmission Cooperative, Inc., 34 N.M. L. REV. 405, 416 (2004). However, language in *Cooper* suggests that state courts are bound, *see Cooper Indus.*, 532 U.S. at 440 n.13, and state supreme courts have generally treated de novo review as a constitutional requirement, *see, e.g.*, Simon v. San Paolo U.S. Holding Co., 113 P.3d 63, 70 (Cal. 2005) (using de novo review to decide if an award was excessive); Mosing v. Domas, 830 So. 2d 967, 973 (La. 2002) (listing cases and applying de novo review to due process review but not common-law review); Aken v. Plains Elec. Generation & Transmission Coop., Inc., 49 P.3d 662, 668 (N.M. 2002) ("*Cooper Industries* imposed de novo review as a matter of federal constitutional imperative.").

28. *Cooper Indus.*, 532 U.S. at 436.

29. *Id.* at 433, 440 n.13.

30. *Id.* at 440 n.14.

31. *Id.* at 441–43.

32. *Id.* at 443. On remand, the Ninth Circuit applied the three *Gore* factors in a de novo review and reduced the punitive award to $500,000. Leatherman Tool Group, Inc. v. Cooper Indus., Inc., 285 F.3d 1146, 1147 (9th Cir. 2002).

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Two years later, *State Farm Mutual Automobile Insurance Co. v. Campbell*[33] used the *Gore* framework to reverse a $145 million punitive damages award in an insurer's bad-faith "failure to settle" case involving a compensatory award of $1 million.[34] In terms of reprehensibility, the Court reiterated that an award could not be based on lawful out-of-state conduct with no "nexus to the specific harm suffered by the plaintiff" and stated that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."[35]

Williams, the most recent case, addresses the question of how to charge the jury regarding wrongdoing and harms similar to those involving the plaintiff that affect third parties residing in the same state as the plaintiff.[36] The jury found that Philip Morris had fraudulently misrepresented the risks of smoking its cigarettes and awarded compensatory damages of approximately $821,000 (of which $800,000 was noneconomic) and $79.5 million in punitive damages.[37] The Oregon Supreme Court upheld the award.[38] The U.S. Supreme Court reversed the punitive damages award because the jury instructions failed to clarify that similar wrongdoing and harm to third parties in Oregon must be addressed in terms of the following distinction: A jury may properly consider similar harm to third parties in determining the amount of a punitive award insofar as that harm is relevant to the degree of reprehensibility of defendant's conduct, but "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties."[39] The Court remanded the case to the Oregon Supreme Court.[40] Because this remand might result in a new trial or in a reduction in the amount of punitive damages, the Supreme Court did not consider whether the award amount was grossly excessive.[41] Though the Court indicated that it would "only consider the Constitution's procedural

33. 538 U.S. 408 (2003).

34. *Id.* at 412, 429.

35. *Id.* at 422–23.

36. Philip Morris USA v. Williams, 127 S. Ct. 1057, 1061–65 (2007).

37. *Id.* at 1060–61.

38. Williams v. Phillip Morris Inc., 127 P.3d 1165, 1182 (Or. 2006), *vacated*, 127 S. Ct. 1057 (2007). The trial judge held that the punitive damages award of $79.5 million was excessive and reduced it to $32 million. *Id.* at 1171. On appeal, the Oregon Court of Appeals reinstated the $79.5 million award. The Oregon Supreme Court denied review. On appeal, the Supreme Court remanded the matter for reconsideration in light of *Campbell*. On remand, the Oregon Court of Appeals did not change its view, and the Oregon Supreme Court upheld the $79.5 million punitive damages award. *Id.* at 1171, 1182. This decision was reversed by the U.S. Supreme Court. *See Williams*, 127 S. Ct. at 1062.

39. *Williams*, 127 S. Ct. at 1064.

40. *Id.* at 1065.

41. *Id.*

limitations,"[42] the holding in *Williams* clearly addresses the substantive content of the jury instructions.[43]

B. *Summary of Framework*

The procedural dimension of the Supreme Court's due process framework for imposing punitive damages has three components. First, though it is desirable to use a standard of proof like "clear and convincing evidence," the Constitution permits a state to use a lower standard like "preponderance of the evidence."[44] Second, a state must provide de novo appellate review of the constitutionality of the amount of a punitive damages award.[45] Third, a state must give fair notice of both the conduct subject to punitive damages and the severity of the penalty to be imposed.[46]

In practice, the content of the required notice intertwines with the substantive issues of the conduct that would justify punitive damages and of the standard for determining the amount of the award. The *TXO Production Corp.* Court rejected the defendant's claim that the standard for conduct was unconstitutionally vague by reasoning as follows: "[T]he notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct. Prior law, in West Virginia and elsewhere, unquestionably did so."[47] The substantive dimension of the adequacy of notice of the amount of a possible award is measured by the three factors set forth in *Gore*—i.e., defendants have notice that they are subject to a punitive damages award in accordance with these factors.

Gore's three-part test has been supplemented by specific, substantive guidance on the facts that courts should consider in applying the test and by requirements concerning the instructions to the jury, like the distinction imposed by *Williams*, concerning the jury's consideration of the factors.[48] The following list from *Campbell* provides examples of factors relevant to reprehensibility:

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42. *Id.* at 1063.

43. *See, e.g., id.* at 1067 (Thomas, J., dissenting) ("It matters not that the Court styles today's holding as 'procedural' because the 'procedural' rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages.").

44. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 n.11 (1991). Courts commonly use the "clear and convincing standard." *See* Hubbard, *supra* note 8, at 501.

45. *See supra* notes 16–18 and accompanying text.

46. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996) (severity of penalty); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 465–66 (1993) (conduct).

47. *TXO Prod. Corp.*, 509 U.S. at 465–66 (citation omitted).

48. *See supra* notes 2–6, 39 and accompanying text; *infra* notes 52, 57 and accompanying text. For other examples of a required charge to the jury, see *infra* notes 155, 162 and accompanying text.

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.[49]

It is tempting to conclude that the Court has also provided substantive guidance on factors that may *not* be considered in applying *Gore*'s factors. In particular, one such impermissible factor might be out-of-state conduct that is lawful in the state where it is committed. This concern was present in both *Gore* and *Campbell*, and is perhaps based as least as much, if not more, on federalism and interstate commerce than on due process.[50] However, as indicated below in Part III, the treatment of out-of-state conduct is complicated because there may be instances where even lawful out-of-state conduct would be relevant to reprehensibility.[51]

C. *The Dissenting Opinions*

Several Justices do not support the substantive framework. Justices Scalia and Thomas have consistently dissented from the opinions establishing the substantive framework, arguing that the Constitution provides no substantive limit on the size of punitive damages awards and that the framework cannot be applied in a principled fashion.[52] In addition, in *Williams* they joined Justice Ginsberg's dissent, which argued that the Oregon Supreme Court correctly applied *Gore*, that the defendants failed to preserve error, and that the distinction relied upon by the majority would confuse a jury if included in the jury charge.[53]

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49. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003). For further discussion of factors relevant to reprehensibility, see *infra* notes 81–111 and accompanying text.

50. *See, e.g.*, *Campbell*, 538 U.S. at 422 ("A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."); *Gore*, 517 U.S. at 572, 585 (referring to "principles of state sovereignty and comity" and to the "federal interest in preventing individual states from imposing undue burdens on interstate commerce"); *infra* notes 224–26.

51. *See infra* notes 88–90 and accompanying text.

52. Philip Morris USA v. Williams, 127 S. Ct. 1057, 1067–68 (2007) (Thomas, J., dissenting); *Campbell*, 538 U.S. at 429 (Scalia, J., dissenting); *id.* at 429 (Thomas, J., dissenting); *Gore*, 517 U.S. at 598 (Scalia, J., joined by Thomas, J., dissenting). Justices Scalia and Thomas have not dissented from the procedural parts of the Court's framework. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 443 (2001) (Thomas, J., concurring); *id.* at 443 (Scalia, J., concurring); Honda Motor Co. v. Oberg, 512 U.S. 415, 416 (1994) (majority opinion, joined by Thomas, J.); *id.* at 435 (Scalia, J., concurring).

53. *See Williams*, 127 S. Ct. at 1068–69 (Ginsburg, J., dissenting); *supra* notes 2–6 and accompanying text.

Justice Ginsburg has disagreed with both the substantive and the procedural parts of the framework.[54] In *Oberg*, she dissented from imposing judicial review primarily because she thought that Oregon provided adequate procedural limitations on the jury's discretion. Specifically, she found that Oregon's trial process was adequate because it (1) limited the recovery of punitive damages to the amount requested in the complaint, (2) prohibited evidence of a defendant's wealth until the plaintiff showed a prima facie case of a right to recover punitive damages, (3) required that "wanton disregard for the health, safety, and welfare of others" be shown by "clear and convincing evidence," and (4) required a jury charge including a statutory list of factors relevant to the amount of the award.[55]

Justice Ginsburg dissented in *Cooper Industries* for two reasons. First, the Seventh Amendment barred de novo review of the amount of the award, which she viewed as basically a factual finding.[56] Second, it was impractical to expect lower courts to apply two very subtle distinctions: (1) between the amount of the award, which is subject to de novo review, and the "specific findings of fact" relevant to the amount of damages, and (2) "between ordinary common-law excessiveness [reviewed on the basis of an abuse of discretion standard] and constitutional excessiveness [reviewed de novo]."[57]

Though Justice Ginsburg's dissents from the substantive framework have been based partly on her view of the records below and on the flaws in requirements like the distinction concerning third-party harms in *Williams*,[58] they have focused on two interrelated concerns: (1) the lack of an objective test for gross excessiveness, and (2) the institutional limits on the ability of the Supreme Court, unaided by lower federal courts, to superintend the level of state court punitive damages awards without an objective test.[59]

Justice Stevens, who authored the Court's opinions in four of the seven due process cases,[60] dissented in *Williams*. He disagreed with the

54. *See Williams*, 127 S. Ct. at 1068 (Ginsburg, J., dissenting); *Campbell*, 538 U.S. at 430 (Ginsburg, J., dissenting); *Cooper Indus.*, 532 U.S. at 444 (Ginsburg, J., dissenting); *Gore*, 517 U.S. at 607 (Ginsburg, J., dissenting); *Oberg*, 512 U.S. at 436 (Ginsburg, J., dissenting).

55. *Oberg*, 512 U.S. at 438–43 (Ginsburg, J., dissenting).

56. *Cooper Indus.*, 532 U.S. at 444–49 (Ginsburg, J., dissenting).

57. *Id.* at 450. The majority in *Cooper Industries* explicitly noted that an abuse-of-discretion standard would continue to apply to underlying facts and to reasonableness based on state law standards. *Id.* at 433, 439 n.12 (majority opinion).

58. *See Williams*, 127 S. Ct. at 1068–69 (Ginsburg, J., dissenting); *Campbell*, 538 U.S. at 431–39 (Ginsburg, J., dissenting); *Gore*, 517 U.S. at 607–11 (Ginsburg, J., dissenting). For further discussion of the distinction in *Williams*, see *supra* notes 2–6 and accompanying text.

59. *See Campbell*, 538 U.S. at 431 (Ginsburg, J., dissenting); *Gore*, 517 U.S. at 611–14 (Ginsburg, J., dissenting).

60. These cases are *Cooper Industries*, *Gore*, *Oberg*, and *TXO Production Corp.* (plurality opinion). Justice Stevens also joined Justice O'Connor's dissent in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part

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majority's reliance on the "distinction between taking third-party harm into account in order to assess the reprehensibility of the defendant's conduct—which is permitted—from doing so in order to punish the defendant 'directly'—which is forbidden" because he had concluded, "This nuance eludes me."[61]

III. CRITIQUE OF SUBSTANTIVE FRAMEWORK

A. *Precedent*

The Court has argued that its imposition of the substantive framework is supported by a series of early twentieth-century ("*Lochner*-era") cases recognizing that, at some point, there must be a substantive limit on the size of punitive damages awards.[62] However, these cases appear to treat the money awards involved as penal in the sense of a state regulatory scheme, not in terms of a civil punitive damages award.[63] Moreover, the Court concedes that none of the *Lochner*-era cases held that the limit had been exceeded.[64] Thus, at best, these cases provide authority only for the principle that some limit must be imposed. The development of the substantive framework for identifying that limit has been solely a matter of creative decision-making by the Court in *Gore*, *Campbell*, and *Williams*.

The Court also claims support from more modern cases. Some of these[65] clearly do not apply.[66] The Court has also referred to cases applying the Eighth Amendment's prohibition of cruel and unusual punishment in the criminal-law system.[67] Though not based on the Due Process Clause, these cases provide partial support for some specific aspects of the substantive framework. However, the Court can use this support in determining details only after making the decision to use the Due Process Clause to impose that framework. Moreover, the Court has used an ad hoc approach to decide when and how to follow the criminal-punishment cases in developing its substantive framework.[68]

This lack of precedent is, to a considerable extent, beside the point. Constitutional jurisprudence has always been characterized by the

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and dissenting in part).

61. *Williams*, 127 S. Ct. at 1066–67 (Stevens, J., dissenting).

62. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453–54 (1993); *see Browning-Ferris*, 492 U.S. at 276; *id.* at 280–81 (Brennan, J., concurring).

63. *See, e.g.*, A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085, 1116–18 (2006) (noting that the Court has determined "that punitive damages are not sufficiently penal or fine-like to fall within the protection of the Eighth Amendment").

64. *TXO Prod. Corp.*, 509 U.S. at 453–54.

65. *See, e.g.*, Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 12 (1991).

66. *See* Spencer, *supra* note 63, at 1111–16.

67. *See, e.g.*, BMW of N. Am., Inc., v. Gore, 517 U.S. 559, 576 n.24 (1996) (noting that punishments should not be excessive).

68. *See infra* notes 140–42, 171–201 and accompanying text.

occasional adoption of new, and thus unprecedented, principles. Moreover, there is merit in the principle that, at some point, a limit on the amount of punitive damages must be imposed. For example, a punitive damages award of $2 billion in *Gore* would seem so outrageously excessive by almost any measure that it should, somehow, be declared unconstitutional. In any event, as a practical matter, the Court is not likely to abandon the principle in the near future because the Court explicitly recognized the principle of a substantive due process limit nearly twenty years ago and a solid six-justice majority currently supports the substantive due process scheme.[69] For these reasons, this Article does not address whether there should be a substantive limit on the amount of punitive damages. Instead, the Article focuses on the Court's design and application of the framework for imposing the limit.

B. *Clarity and Consistency*

1. The Need for a Clear Framework

The Supreme Court candidly admitted that its substantive framework cannot avoid some degree of vagueness:

> We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.[70]

No "bright line" test is possible because punitive damages "awards are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. . . . [N]o two cases are truly identical . . . ."[71] The Court has adopted the view that the necessary vagueness in its framework will be reduced over time because the *Gore* factors will acquire "more meaningful content through case-by-case application at the appellate level."[72]

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69. Justice Breyer's majority opinion in *Williams* was joined by Chief Justice Roberts and by Justices Kennedy, Souter, and Alito. Justice Stevens dissented in *Williams*, but only on the matter of the details of the framework. Philip Morris USA v. Williams, 127 S. Ct. 1057, 1065–66 (Stevens, J., dissenting). Justice Stevens has consistently supported imposing a substantive due process framework and authored the majority or plurality opinions in *Cooper Industries*, *Gore*, *Oberg*, and *TXO Production Corp.*

70. *Haslip*, 499 U.S. at 18.

71. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 457 (1993).

72. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001).

However, for this appellate development to be effective, the Court's framework must provide lower appellate courts with clear guidance for addressing the size of punitive damages awards. Lower courts need such guidance because, as Justice Ginsburg has noted in dissent, the Supreme Court cannot be the final appellate forum for even a small portion of the punitive damages cases decided in the United States.[73] The limits on the Court are reflected in the small percentage of cases where certiorari is granted[74] and by the fact that, starting with *Browning-Ferris* in 1989 and concluding with *Williams* in 2007, the Court has decided only eight punitive damages cases in eighteen years.[75] This necessarily limited rate of review is important because the number of punitive damages awards to be reviewed in any year is so high. Punitive damages awards are uncommon, but the sheer number of tort cases decided each year means there will be a substantial number of punitive damages awards.[76] For example, a study of the seventy-five largest counties in the United States indicated that there were about 7,948 tort trials in 2001, that plaintiffs won about 52% of the trials, and that less than 5% of winning plaintiffs received punitive damages.[77] In 217 cases involving punitive damages, 45 awarded damages of over $250,000 and 23 over $1 million.[78]

The majority opinion in *Gore* responded in a footnote to Justice Ginsburg's concern about the limits on the Court's ability to superintend the amount of state court punitive damages awards as follows:

> The small number of punitive damages questions that we have reviewed in recent years, together with the fact that this is the first case in decades in which we have found that a

73. *See supra* note 59 and accompanying text.

74. *See, e.g.*, Yee v. City of Escondido, 503 U.S. 519, 536 (1992) ("Last Term alone we received over 5,000 petitions for certiorari, but we have the capacity to decide only a small fraction of these cases on the merits."). The Court's case load has declined in recent years. *See, e.g.*, David Von Drehle, *Inside the Incredibly Shrinking Role of the Supreme Court. And Why John Roberts Is O.K. with That*, TIME, Oct. 22, 2007, at 40, 44 ("[T]he court is tackling fewer cases than at any other time in the past half-century. Last term's output of just 68 decisions was the lowest since 1953.").

75. *See* Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); *Cooper Indus.*, 532 U.S. 424; BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); Honda Motor Co. v. Oberg, 512 U.S. 415 (1994); *TXO Prod. Corp.*, 509 U.S. 443; *Haslip*, 499 U.S. 1; Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 494 U.S. 257 (1989).

76. *See, e.g.*, Hubbard, *supra* note 8, at 443–44, 503–04 (discussing studies indicating that 750,000 tort suits were filed in 2000, that about 3% of filed cases are tried, and that punitive damages awards are uncommon).

77. THOMAS J. COHEN, U.S. DEP'T OF JUSTICE, CIVIL JUSTICE SURVEY OF STATE COURTS, 2001: TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 2001, at 1, 5, 7 (2004), *available at* http://www.ojp.usdoj.gov/bjs/abstract/ttvlc01.htm.

78. *Id.* at 5.

> punitive damages award exceeds the constitutional limit, indicates that this concern is at best premature. In any event, this consideration surely does not justify an abdication of our responsibility to enforce constitutional protections in an extraordinary case such as this one.[79]

This response has several flaws. First, the "small number" of cases reviewed and the fact that the award in *Gore* may be the Court's "first case" finding an award excessive are more likely due to the vagaries of getting a case to the Court than to the number of cases that require review. Second, the view that such cases are unusual contradicts the Court's argument that the substantive due process framework is necessary to address the "concern about punitive damages that 'run wild.'"[80] Finally, "enforc[ing] constitutional protections" in a single case does not address the Court's inability to control the *system* of imposing punitive damages. Relatively rare fact-specific determinations that a particular award has (or has not) complied with substantive due process provide little systematic guidance. Only a clear, consistent framework can provide systematic protection of any constitutional right involved.

2. Vague and Contradictory Nature of Framework

a. Reprehensibility

Gore contains some extraordinarily contradictory positions.[81] For example, on the one hand, the case establishes a three-factor test and stresses that degree of reprehensibility is the most important factor,[82] while on the other hand, three of the five Justices in the majority join in a concurring opinion asserting that the degree of reprehensibility "provides little guidance on how to relate culpability to the size of an award."[83] Perhaps recognizing this lack of guidance, the Court has attempted to reduce vagueness by identifying the following factors as relevant to reprehensibility: (1) whether the harm was physical, economic, or

79. *Gore*, 517 U.S. at 586 n.41.

80. *Haslip*, 499 U.S. at 18; *see, e.g.*, *id.* at 61 (O'Connor, J., dissenting) ("Recent years . . . have witnessed an explosion in the frequency and size of punitive damages awards."); *Browning-Ferris*, 492 U.S. at 282 (O'Connor, J., concurring in part and dissenting in part) (noting a "trend to award multimillion dollar awards of punitive damages"). For further discussion of the Court's view that there is a need to address problems with the system used by lower courts in awarding punitive damages, see *infra* Part IV.

81. For other examples, see *infra* notes 112–21, 249–50 and accompanying text.

82. *Gore*, 517 U.S. at 575.

83. *Id.* at 590 (Breyer, J., joined by O'Connor, J., and Souter, J., concurring).

emotional in nature and whether it is permanent or temporary,[84] (2) whether the defendant's "mental state" evinces intentional, knowing, reckless, or accidental conduct,[85] (3) whether the victim was vulnerable,[86] and (4) whether the defendant attempted to conceal the wrongdoing.[87] Evidence with a sufficient "nexus" to one of these factors is relevant even if it involves misconduct involving a third party or lawful out-of-state conduct.[88] In this regard, out-of-state conduct is treated like the in-state conduct involved in *Williams* because a state cannot *punish* out-of-state conduct, but some out-of-state conduct may be *considered* in applying the *Gore* factors. For example, *Campbell* stated:

> Lawful 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, but that conduct must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.[89]

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84. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003); *Gore*, 517 U.S. at 575 n.24, 576. The Court has not treated mental distress consistently. *Gore* noted that conduct is more reprehensible if the victim suffers "'mental fear, torture, and agony of mind.'" *Gore*, 517 U.S. at 575 n.24 (quoting Blanchard v. Morris, 15 Ill. 35, 36 (Ill. 1853)). In contrast, *Campbell* devalued mental distress in terms of the ratio factor, arguing as follows:

> 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.

538 U.S. at 426. For further discussion of the treatment of mental distress in *Gore* and *Campbell*, see *infra* notes 126–33 and accompanying text.

85. *Campbell*, 538 U.S. at 419; *Gore*, 517 U.S. at 575–76, 576 n.26.

86. *Campbell*, 538 U.S. at 419.

87. *Gore* noted that the defendant had not concealed " evidence of improper motive," such as the defendants had in *Haslip* and *TXO*. *Gore*, 517 U.S. at 579; *see* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21 (1991) (approving the existence of concealment as a factor in determining awards in Alabama).

88. *See Campbell*, 538 U.S. at 422; *Gore*, 517 U.S. at 572–73, 574 n.21; Steven R. Hamlin, *Punitive Damages After* Campbell, 28 CAMPBELL L. REV. 63, 101 (2005).

89. *Campbell*, 538 U.S. at 422. *Gore* noted:

> Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.

Thus, where the requisite nexus exists, both in-state and out-of-state third-party conduct raise the problems with applying the distinction between considering such conduct in assessing reprehensibility but not using it to punish the defendant directly.[90]

The utility of the Court's list of factors relevant to reprehensibility is limited because the factors are vague, they can conflict with one another, and the presence or absence of one or all the factors is not determinative.[91] Moreover, there may be other factors that the Court has not yet explicitly identified as relevant. For example, *Haslip* approved the Alabama scheme, which involved factors—such as the duration of the conduct—that have not been explicitly accepted as relevant to *Gore*'s three-factor analysis.[92] Are these other factors relevant? Unfortunately, the Court's discussion and application of specific factors has not adequately addressed these problems. Addressing the vagueness of reprehensibility by focusing on factors relevant to reprehensibility has been made more difficult by the Court's ad hoc treatment of other factors that are usually relevant to punishment. More specifically, the Court has adopted an ad hoc approach in addressing recidivism and the risk of potential harm from the defendant's misconduct.

(1) Recidivism

Gore recognized that recidivism is relevant to reprehensibility because "repeated misconduct is more reprehensible than an individual instance of malfeasance."[93] *Gore* also noted:

> Habitual offender statutes permit the sentencing court to enhance a defendant's punishment for a crime in light of prior convictions, including convictions in foreign jurisdictions. A sentencing judge may even consider past criminal behavior which did not result in a conviction and lawful conduct that bears on the *defendant's character* and prospects for rehabilitation.[94]

> . . . [This] does not mean that evidence describing out-of-state transactions is irrelevant in a case of this kind. . . . [S]uch evidence may be relevant to the determination of the degree of reprehensibility of the defendant's conduct.

Gore, 517 U.S. at 572–73, 574 n.21 (footnote omitted).

90. *See supra* notes 2–6, 39, 53, 58 and accompanying text.

91. *Campbell*, 538 U.S. at 419 ("The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.").

92. *See infra* note 155.

93. *Gore*, 517 U.S. at 577.

94. *Id.* at 573 n.19 (emphasis added) (citations omitted).

Williams also recognizes this point.[95] However, *Campbell* limits this principle in the punitive damages context:

> A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.
>
> . . . Although "[o]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance," in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions.[96]

The Court adopts this special rule of replicating prior transgressions, applicable only for civil actions, simply by fiat; no reasons are given. The closest thing to a reason is a reference to *TXO Production Corp.*, which indicated that "courts should look to 'the existence and frequency of similar past conduct.'"[97] However, *TXO Production Corp.* held only that such conduct is relevant; it did not hold that *only* such conduct is relevant.[98]

(2) Actual and Potential Harm from the Misconduct

One might expect that the amount of actual or potential harm would be a factor in determining reprehensibility under *Gore*'s test. In the criminal law, both actual and potential harm are relevant to culpability and thus to

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95. *See* Philip Morris USA v. Williams, 127 S. Ct. 1057, 1065 (2007). In support of the view that risk of harm to many is more reprehensible than risk to only a few, the Court offers the following citation to authority:

> *Cf., e.g., Witte v. United States*, 515 U.S. 389, 400 (1995) (recidivism statutes taking into account a criminal defendant's other misconduct do not impose an "'additional penalty for the earlier crimes,' but instead . . . 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one'" (quoting *Gryger v. Burke*, 334 U.S. 728, 732 (1948))).

Id. (alteration in original).

96. *Campbell*, 538 U.S. at 422–23 (alteration in original) (citation omitted) (quoting *Gore*, 517 U.S. at 577).

97. *Id.* at 423 (quoting TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462 n.28 (1993)).

98. *See id.*

amount of punishment,[99] though the pattern of imposing lessened punishments for attempts, as opposed to completed crimes, indicates that actual harm has more weight than potential harm.[100] Though having recognized that the amount of harm is relevant to the amount of punitive damages, the Court's treatment of actual and potential harm in this context has been inconsistent in two respects.

First, the Court has been inconsistent in deciding whether to measure the amount of harm in terms of reprehensibility or in terms of ratio. *Gore* separates actual and potential harm from the analysis of reprehensibility and treats it separately as the second factor in its three-factor analysis—i.e., as the ratio of the amount of punitive damages to the harm involved.[101] In applying this second factor, the Court considered actual harm to Gore and to other in-state victims of the fraud and noted that none of the victims were threatened by any other potential harm.[102] However, *Williams* and *Campbell* adopt a different approach because these cases treat harm to third parties as a factor relevant to reprehensibility.[103]

Second, *Williams* adopts a contradictory (or at least confusing) approach in addressing potential harm to third parties. Prior to *Williams*, the Court treated actual and potential harm to third parties the same way. For example, *TXO Production Corp.* stated:

> It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred. In this case the State Supreme Court of Appeals concluded that TXO's pattern of behavior "could potentially cause millions of dollars in damages to other victims."[104]

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99. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 164–65 n.9, 166 (1976) (approving capital punishment under Georgia's scheme, which included the following in a list of ten aggravating circumstances required for imposition of death penalty: "The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person"); WAYNE R. LAFAVE, CRIMINAL LAW § 11.1–12.4 (4th ed. 2003) (discussing crimes of solicitation, attempt, and conspiracy).

100. *See, e.g.*, LAFAVE, *supra* note 99, § 11.5, at 611 (noting that the most common approach in modern reconfigurations of criminal statutes treats attempts as "a crime one degree below the object crime").

101. *Gore*, 517 U.S. at 580–83.

102. *Id.* at 582.

103. *See* Philip Morris USA v. Williams, 127 S. Ct. 1057, 1065 (2007); *Campbell*, 538 U.S. at 422–24.

104. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460–61 (1993) (quoting TXO Prod. Corp. v. Alliance Res. Corp., 419 S.E.2d 870, 889 (W. Va. 1992), *aff'd*, 509 U.S. 443 (1993)).

Williams appears to be consistent with *TXO Production Corp.* because *Williams* contains language such as the following: "[W]e recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility."[105] However, *Williams* also contains language indicating that actual harm to third parties is relevant to reprehensibility and that potential harm to others is not relevant. More specifically, the Court stated:

> We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused *the plaintiff.*
>
> . . . Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse.[106]

If this language imposes a limit on potential harm to third parties,[107] the Court offers no justification for this limit. Instead, as with its ad hoc treatment of recidivism, the Court adopts the limit simply by fiat.[108] In addition, by suggesting that "counsel may argue" that the defendant's actions "posed a grave risk to the public," even though no harm to others resulted, the Court contradicts its own position that only potential harm to the plaintiff is relevant. If potential harm to third parties is not relevant, why is it permissible for counsel to argue about third-party risk where no harm to others resulted?

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105. *Williams*, 127 S. Ct. at 1065.

106. *Id.* at 1063–64.

107. The language is hard to interpret for two reasons. First, *Williams* involved only actual third-party harm, and *Williams* emphasized the distinction between punishing third-party harm and using third-party harm to assess reprehensibility. Second, the passages from which the language is taken provide only limited assistance in interpretation.

108. The Court claimed support from language referring to potential harm to the plaintiff in *Campbell* and in *TXO Production Corp. See Williams*, 127 S. Ct. at 1063. However, neither *Campbell* nor *TXO Production Corp.* explicitly addresses the issue of potential harm to third parties. Moreover, to the extent that *TXO Production Corp.* addresses potential harm to third parties, it appears to view such harm as relevant. *See, e.g., TXO Prod. Corp.*, 509 U.S. at 459–60 (noting that a man who recklessly fired a gun into a crowd could reasonably be subjected to substantial punitive damages, even if only ten dollars in property damage resulted, because of the need to deter such acts in the future). For further discussion of this point, see *infra* notes 186–90 and accompanying text.

Perhaps *Campbell* and *Williams*—which are the two most recent cases and which together not only appear to bar evidence of potential third-party harm but also apply a narrow technical approach to actual third-party harm—indicate that the Court is moving toward excluding any consideration of actual or potential harm to others. This exclusion would be consistent with the Court's concerns about the treatment of alleged harm to persons who are not parties to the litigation. For example, *Campbell* notes:

> Due 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 . . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains. ("Larger 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").[109]

Similarly, in arguing that punitive damages awards cannot be used to punish a defendant for wrongful harm to a third party (though they could be used to determine the amount of reprehensibility and thus the amount of the punitive award), *Williams* notes:

> [A] defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary.
>
> . . . [T]o permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate.[110]

Barring any consideration of harm to third parties would provide, at least, a bright-line standard. It would also eliminate the contradictory and confusing notion in *Williams* that the jury can consider such harm in assessing reprehensibility, which affects the amount of punitive damages,

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109. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003) (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 593 (1996) (Breyer J., concurring)).

110. *Williams*, 127 S. Ct. at 1063.

but cannot "directly" punish the defendant for such harmful conduct. However, such a position about third parties would considerably expand substantive due process limits on imposing punitive damages, particularly in terms of traditional concepts of reprehensibility, retribution, and deterrence. Given the lack of any theoretical basis for such an expansion, this fundamental change in the common law would be very questionable.[111] In the meantime, because the Court has, at most, only hinted at such a bar, the lower courts have even less clarity for applying the *Gore* factors and clarifying those factors through appellate adjudication.

b. Ratio of Punitive Damages to Actual (and Potential) Damages

As with reprehensibility, the Court treats its ratio factor in a contradictory manner. With both reprehensibility and ratio, the Court claims that the framework is not only flexible but also rigid enough to structure and limit discretion. This dual approach has caused the Court to take conflicting positions concerning the ratio of a punitive damages award to actual and potential harm. One position stresses flexibility and the inability to "'draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable [ratio] that would fit every case.'"[112] "[T]here are no rigid benchmarks that a punitive damages award may not surpass . . . [because t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff."[113] Thus,

> low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.[114]

Under this approach, in *TXO Production Corp.*, the Court approved a punitive award that was 526 times larger than the actual damages award because of the potential for substantial harm to others (and for substantial

111. *See infra* notes 161–223 and accompanying text.

112. *Gore*, 517 U.S. at 582–83 (quoting *TXO Prod. Corp.*, 509 U.S. at 458); *see, e.g., id.* at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula."); *Campbell*, 538 U.S. at 425 ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed.").

113. *Campbell*, 538 U.S. at 425.

114. *Gore*, 517 U.S. at 582.

gain to the defendant) if the defendant's conduct continued.[115] This flexible approach to ratio also permitted the Court to disapprove in *Gore* a 35-to-1 ratio of punitive damages to the amount of actual harm suffered by Gore and the other Alabama victims.[116]

The Court's use of various specific ratios to suggest a more precise formula reflects the opposing position. For example, the Court has stated:

- "When the ratio is a breathtaking 500-1, . . . the award must surely 'raise a suspicious judicial eyebrow.'"[117]
- "[A different approach to review might apply] if the State's scheme . . . defined punitive damages as a multiple of compensatory damages (e.g., treble damages)."[118]
- "[A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety."[119]
- "[T]here is a presumption against an award that has a 145-to-1 ratio."[120]
- "[F]ew awards exceeding single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . Single-digit multipliers are more likely to comport with due process . . . than awards with ratios in range of 500-1."[121]

Given the Court's repeated assertions that there is no test and given the wide variation in the Court's proposed "formulas," lower courts are left with considerable discretion but are given very little guidance on how to exercise that discretion.

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115. *TXO Prod. Corp.*, 509 U.S. at 459–60. The Court also noted that, if potential harm to the plaintiff were also considered, the ratio would be 10-to-1 or less. *See id.* at 451, 462 (ratio of $10 million punitive damages award to conservative estimate of $1 million in potential harm). In terms of deterrence, the Court also recognized the relevance of "possible harm[s] to other victims that might have resulted if similar future behavior were not deterred." *Id.* at 460.

116. *Gore*, 517 U.S. at 582 n.35. The ratio was 500-to-1 if only the harm to Gore were considered. *Id.* at 582.

117. *Id.* at 582 (quoting *TXO Prod. Corp.*, 509 U.S. at 481 (O'Connor, J., dissenting)).

118. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 440 n.13 (2001).

119. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003). The "questionable" nature of such an award was initially raised in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 23–24 (1991), and was reiterated in *Gore*, 517 U.S. at 581.

120. *Campbell*, 538 U.S. at 426.

121. *Id.* at 425.

The Court's contrasting approaches concerning the harm to be compared with the amount of the punitive damages award has also complicated the task of determining an appropriate ratio. As indicated above,[122] *Gore* indicates that the actual and potential harm to the plaintiff and to in-state third parties should be addressed in terms of their ratio to punitive damages. In contrast, *Campbell* and *Williams* address third-party harm in terms of reprehensibility.[123] *Williams* adds additional contrast to *Gore* and earlier cases because *Williams* appears to regard potential harm as completely irrelevant.[124] Finally, the consideration of third-party harm has been complicated by the tension between language in some opinions stressing that determining actual harm to third parties involves considerable uncertainty and the Court's continued recognition of the relevance of third-party harm.[125]

The treatment of ratio is also complicated by the Court's considerable ambivalence about the importance of mental trauma in calculating ratio. *Gore* notes that conduct is more reprehensible if the victim suffers "mental fear, torture, and agony of mind"[126] and that a higher ratio may "be justified in cases in which . . . the monetary value of noneconomic harm might have been difficult to determine."[127] However, *Campbell* contains conflicting statements about noneconomic harm. On the one hand, the case repeats *Gore*'s statement that a higher ratio may be necessary where "'the monetary value of noneconomic harm might have been difficult to determine.'"[128] On the other hand, the following statement in *Campbell* suggests that the presence of noneconomic harm indicates that a lower ratio is appropriate:

> 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.[129]

The treatment of mental distress is important to the final result in *Campbell* in two respects. First, on remand, the Utah Supreme Court

122. *See supra* notes 101–02 and accompanying text.

123. *See supra* note 103 and accompanying text.

124. *See supra* notes 101–02, 104–08 and accompanying text.

125. *See supra* notes 101–11 and accompanying text.

126. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 n.24 (1996).

127. *Id.* at 582.

128. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (quoting *Gore*, 517 U.S. at 582).

129. *Id.* at 426.

disagreed with the U.S. Supreme Court's equivocal treatment of mental distress.[130] Instead, the Utah Supreme Court emphasized that the psychic harm to the plaintiffs was "more closely akin to physical assault or trauma than to mere economic loss."[131] Second, the Utah Supreme Court noted that the trial court's findings in support of a reduction in actual damages from $2.6 million to $1 million showed that the award had been "purged of elements which may have been more properly placed in the category of punitive damages."[132] Based on these and other reasons, the Utah Supreme Court imposed a punitive damages award of $9,018,780.75, a 9-to-1 ratio.[133]

Partly because it has rejected any substantial role for deterrence as a purpose of punitive damages,[134] the Court has not been receptive to a number of factors that would indicate the need for a higher ratio to improve deterrence. More specifically, the Court has been reluctant to recognize the revelance of the difficulty of detection and likelihood of being sanctioned,[135] the costs of litigation,[136] the possibility of financial gain,[137] the potential harm to third parties,[138] or the defendant's wealth.[139]

c. Criminal and Regulatory Sanctions

Though comparing a punitive damages award to civil and criminal penalties for the same conduct arguably provides an "objective" measure of the proper amount of punitive damages, there are several fundamental problems with this measure. First, because there is no objective measure of "comparable," identifying comparable misconduct may be difficult. For example, why did the Court compare the fraud involved in *Gore* to Alabama's Deceptive Trade Practices Act[140] but not to any possible criminal theft offenses based on fraud?[141] The Court has recognized this problem in discussing the amount of punishment for criminal conduct. In this context, the Court has noted that "[o]ne cannot compare the sentences

130. *See* Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409, 415 (Utah 2004).

131. *Id.*

132. *Id.* at 418.

133. *Id.* The Utah Supreme Court noted that insurance policies are purchased partly for peace of mind and that State Farm deliberately chose to "callously betray[] [plaintiffs'] expectation of peace of mind," including the trauma caused by the "risks and rigors of a trial" and from being told by State Farm that they should sell their house to deal with this liability. *See id.* at 414–17.

134. *See infra* Part IV.D.1.

135. *See infra* notes 177–83 and accompanying text.

136. *See infra* note 183 and accompanying text.

137. *See infra* notes 184–85 and accompanying text.

138. *See supra* text accompanying note 106; *infra* notes 186–90 and accompanying text.

139. *See infra* notes 191–96 and accompanying text.

140. BMW of N. Am., Inc., v. Gore, 517 U.S. 559, 583–84 (1996) (citing ALA. CODE § 8-19-11(b) (1993)).

141. *See, e.g.*, MODEL PENAL CODE § 223.3 (Proposed Official Draft 1962) ("Theft by Deception"); LAFAVE, *supra* note 99, § 19.7 (false pretenses).

imposed by the jurisdiction for 'similarly grave' offenses if there is no objective standard of gravity. Judges will be comparing what *they* consider comparable."[142] Second, where conduct might also result in imprisonment, comparing a prison term with a monetary punitive sanction will be difficult, if not impossible. Third, comparing punishments would involve similar difficulties if the regulatory sanctions include loss of a license or some other prohibition on the conduct of business.[143] Fourth, the criminal and regulatory fines may be too low to attain the proper amount of retribution or deterrence.[144] For example, the amount of a criminal fine might be low because the legislature viewed imprisonment, which is inapplicable to corporations, as the primary means of achieving the purposes of the punitive scheme. Because of these problems, many state courts have treated this factor as inapplicable in some situations.[145] For example, in dealing with *Gore* on remand from the Supreme Court, the Alabama Supreme Court concluded:

> Because the legislature has set the statutory penalty for deceitful conduct at such a low level, there is little basis for comparing it with any meaningful punitive damages award, particularly where the defendant is wealthy and the profit gained from the fraudulent act is substantial. In this case, the maximum statutory penalty does not even remove the profit BMW realized from the sale of the damaged automobile to Gore. Accordingly, a consideration of the statutory penalty does little to aid in a meaningful review of the excessiveness of the punitive damages award.[146]

142. Harmelin v. Michigan, 501 U.S. 957, 988 (1991).

143. *See, e.g.*, Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 678 (7th Cir. 2003) ("[D]efendant would prefer to pay the punitive damages assessed in this case than to lose its license."); Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409, 418 n.8 (Utah 2004) (noting, on remand from the U.S. Supreme Court, that State Farm's conduct might justify "termination of its license, a penalty that surely would cost it more than" the $10,000 fine for a first-degree felony).

144. *See, e.g.*, Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1426–27 (1993) (noting that railroad companies ignored minimal fines for failing to take required steps to prevent fires but addressed these preventive steps after a large punitive damages award).

145. *See, e.g.*, Simon v. San Paolo U.S. Holding Co., 113 P.3d 63, 78 (Cal. 2005) ("The third guidepost is less useful in a case . . . where plaintiff prevailed only on a cause of action involving 'common law tort duties that do not lend themselves to a comparison with statutory penalties.'" (quoting Cont'l Trend Res. v. OXY USA, Inc., 101 F.3d 634, 641 (10th Cir. 1996))); Aken v. Plains Elec. Generation & Transmission Coop., Inc., 49 P.3d 662, 672 (N.M. 2002) (noting "dissatisfaction with the comparison urged by the third guidepost"); James v. Horace Mann Ins. Co., 638 S.E.2d 667, 671–72 (S.C. 2006) (finding that the third guidepost was not useful in reviewing the punitive damages award); *Campbell*, 98 P.3d at 419 (noting, on remand from the U.S. Supreme Court, that the comparison can be "quixotic" and that the maximum fine for a first-degree felony in Utah was $10,000).

146. BMW of N. Am., Inc. v. Gore, 701 So. 2d 507, 514 (Ala. 1997).

Since adopting the *Gore* test, the Supreme Court has not recognized these problems with the third factor.[147] In *Campbell*, for example, the Court noted that it was not necessary to "dwell long on this guidepost" because "[t]he most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud, an amount dwarfed by the $145 million punitive damages award."[148] But, on remand, the Utah Supreme Court went beyond mechanical comparisons to "dwell long on this guidepost." In particular, the Utah Supreme Court noted the following: (1) the actual damages were $1 million, an amount that would support a punitive award of $1 million (a 1:1 ratio), and this award would also dwarf the $10,000 fine, (2) revocation of State Farm's license to underwrite insurance in Utah was a possible penalty, and (3) "a legislature can be quixotic," as shown by the fact that $10,000 was also the maximum fine for a first-degree felony, "the classification assigned our most serious crimes."[149]

The U.S. Supreme Court's treatment of regulatory and criminal sanctions, as shown by its feeling that there was no need "to dwell long on this guidepost" in *Campbell*, indicates that it is oblivious to (or at least unconcerned about) a number of aspects of the American political and legal systems. The most obvious overlooked point is that because imprisonment, which does not apply to corporations, is the primary method of punishment for criminal misconduct, the amount of a fine, if any, may be a legislative afterthought. The Court's failure to recognize this point fits with its general lack of any concern for the unique problems involved with punishing corporate actors.[150] The Court has also failed to consider that Americans are, at best, ambivalent about regulation of business. This ambivalence results in a tendency to limit both the power and the funding of regulatory agencies. In addition, regulation of business is resisted by and shaped by business itself through political contributions, lobbying, and efforts to "capture" agencies.[151]

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147. *Haslip* approved a punitive damages award that was "much in excess of the fine that could be imposed." Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991). However, *Haslip* was decided before the *Gore* test was adopted.

148. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 428 (2003) (citation omitted). Rather than address the problems described in the text above, the Court minimized the relevance of criminal sanctions. For example, while noting that "a criminal penalty does have bearing on the seriousness with which a State views the wrongful action," the Court noted that "[w]hen used to determine the dollar amount of the award, . . . the criminal penalty has less utility." *Id.*

149. *Campbell*, 98 P.3d at 418–19. The Utah Supreme Court imposed a punitive award of $9,018,780.75, a 9-to-1 ratio. *See supra* note 133 and accompanying text.

150. *See infra* notes 212–23 and accompanying text.

151. *See, e.g.*, THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 14–15 (2002); SUNSTEIN, *supra* note 6, at 84–86, 101–02; Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 535–46 (1999); Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1130–33 (1954); Thomas W. Merrill, *Capture Theory and*

Because of these aspects of American business regulation, judicial enforcement of private rights through compensatory damages awards in the tort system has become an important part of deterring wrongful conduct, such as the negligent design of automobiles.[152] Where compensatory damages alone are inadequate for deterrence or for satisfying the need for retribution, the tort system also needs the option of using punitive damages awards to provide additional liability, particularly because legislators and regulators may consider the tort system's role when setting legislative and regulatory sanctions.[153] Given that business entities often succeed in limiting both the likelihood and the amount of regulatory and criminal sanctions, state courts should be free to use their common-law power to proceed independently in assessing punitive damages awards. In addition, these courts need to be free to provide a punitive damages award of sufficient size to encourage private attorneys

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the Courts: 1967–1983, 72 CHI.-KENT L. REV. 1039, 1050–52 (1997); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 928 (1998) (arguing that one reason for skepticism about the utility of other sanctions is that "[s]uch penalties are influenced in part by political factors—interest group pressures, logrolling, and the like. . . . [And these factors] may themselves be influenced by the possibility of punitive damages awards in private suits: public penalties might be low precisely because legislators believed that punitive damages awards would create effective deterrence"); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1296 (1986) (noting a pattern where agencies "exhibited a consistent bias in favor of the interests of politically influential constituents").

152. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 68–94 (1970); Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 99, 104–08 (David G. Owen ed., 1995). Even when no wrongdoing is involved, imposing compensatory liability for accident costs provides an incentive to reduce injuries not currently preventable by due care by lowering the level of activity or by seeking innovations that result in new, more cost-effective safety measures. *See* Ind. Harbor Belt R.R. v. Am. Cyanamid Co., 916 F.2d 1174, 1177 (7th Cir. 1990); CALABRESI, *supra*, at 73, 155; Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1082 (1972); Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611, 652–63 (1998).

153. *See, e.g.*, David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1277–95 (1976) (discussing how punitive damages help to punish the defendant, deter future crimes, encourage private people to bring claims, and compensate plaintiffs); Polinsky & Shavell, *supra* note 151, at 928 (arguing that legislative sanctions may be low "because legislators believed that punitive damages awards would create effective deterrence"); *infra* notes 177–78 and accompanying text (discussing the role of likelihood of detection in efficient deterrence). Prevention is achieved not only by the negative impact of compensatory and punitive liability on a wrongdoer but also by several related effects of liability. These other effects are (1) assuring careful members of society that it is not foolish to conform their behavior to legal norms of safety, (2) conveying a strong message about social disapproval of certain types of conduct and thus strengthening moral frameworks, and (3) inculcating the habit of obeying the law. *See* F. Patrick Hubbard et al., *A "Meaningful" Basis for the Death Penalty: The Practice, Constitutionality, and Justice of Capital Punishment in South Carolina*, 34 S.C. L. REV. 391, 546–49 (1982); Dorothy Thornton et al., *General Deterrence and Corporate Environmental Behavior*, 27 LAW & POL'Y 262, 263–67 (2005).

general to seek punitive damages.[154] This encouragement is necessary because prosecutors and regulators often lack the resources needed for effective investigation and enforcement. In addition, their salary-based compensation scheme eliminates any entrepreneurial incentive like that of plaintiffs' attorneys to sanction improper conduct by business enterprises. The Court's mechanical, uncritical reliance on regulatory and criminal sanctions as a measure of punitive damages ignores all these considerations about regulatory schemes and the role of tort law.

C. *Novelty and Utility*

According to *Haslip*, under Alabama's scheme of judicial review of punitive damages awards,

> the following could be taken into consideration in determining whether the award was excessive or inadequate: (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.[155]

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154. *See infra* notes 207–08 and accompanying text.

155. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21–22 (1991). *Haslip* also indicates that the instruction to the jury "expressly described for the jury the purpose of punitive damages, namely, 'not to compensate the plaintiff for any injury' but 'to punish the defendant' and 'for the added purpose of protecting the public by [deterring] the defendant and others from doing such wrong in the future.'" *Id.* at 19 (alteration in original) (quoting Joint Appendix, *Haslip*, 499 U.S. 1 (No. 89-1279), 1990 WL 10023011, at *105–06). The Court concluded as follows:

> [T]he instructions gave the jury significant discretion in its determination of punitive damages. But that discretion was not unlimited. It was confined to deterrence and retribution, the state policy concerns sought to be advanced. And if punitive damages were to be awarded, the jury "must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." The instructions thus enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.

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Haslip also indicates that a court must undertake this review "to ensure that the award does 'not exceed an amount that will accomplish society's goals of punishment and deterrence.'"[156] By endorsing the Alabama scheme used in *Haslip*, the Court showed lower courts that there were substantive limits on the imposition of punitive damages awards and that a state could satisfy these limits by following the Alabama scheme. Not surprisingly, state courts took the hint and, if necessary, conformed their scheme to the one approved in *Haslip*.[157]

The Court never indicated why its framework is better than the framework approved in *Haslip*. Instead, the Court simply adopted its three-part test in *Gore* because it thought that the Alabama scheme approved in *Haslip* failed to prevent the Alabama courts from denying BMW its substantive rights under the Due Process Clause.[158] However, there is no reason to believe that the *Gore* factors will prevent any such abuse more effectively than the *Haslip* factors. The lists of factors are very similar. Items (a) and (b) listed in *Haslip* are the same as the *Gore* factors of degree of reprehensibility and of ratio of punitive damages to compensatory damages. *Gore* adds the comparison to other sanctions, but as indicated above, this factor is very questionable, and some state supreme courts have not applied it under some circumstances, including the Alabama Supreme Court when it addressed *Gore* on remand.[159] In addition, the *Gore* framework omits the more detailed guidance provided by items (c) through (g) in the Alabama scheme. In short, *Gore* adds one new but highly debatable and frequently useless consideration, and omits details about other relevant considerations. These details can help lower courts attempting to satisfy due process requirements. On the whole, therefore, *Gore* adds little that is novel and useful, and omits much that is helpful.

D. *Theoretical Basis*

The Court's development of its substantive due process framework has been characterized by a preference for ad hoc decisions instead of the

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Id. (citation omitted) (quoting Joint Appendix, *supra*, at *106).

156. *Id.* at 21 (quoting Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (1989)).

157. *See, e.g.*, Gamble v. Stevenson, 406 S.E.2d 350 (S.C. 1991) (adopting post-trial review standards for punitive damages awards in South Carolina to conform with *Haslip*); Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 908–09 (W. Va. 1991) (specifying that the review of punitive damages awards in West Virginia would follow the dictates of *Haslip*).

158. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575–85 (1996) (applying the three-factor test); *id.* at 586–97 (Breyer, J., concurring) (arguing that Alabama's framework had been abused).

159. *See supra* notes 144–46 and accompanying text.

construction of an underlying theoretical framework. As a result, the Court has not justified its emphasis on retribution to such a degree that the deterrent purpose of punitive damages has been virtually eliminated from consideration. Similarly, the Court has applied to punitive damages ad hoc distinctions that do not generally apply to other punitive sanctions and has failed to develop a coherent theoretical perspective on the role of punitive damages in controlling corporate misconduct. Finally, the Court has relied on a concern for federalism as the basis for imposing limitations on a state's interference with other states, but it has given little weight to the federalism concern of limiting federal interference with a state's sovereignty.

1. Purposes of Punishment

As a part of its limited theoretical scheme to support its substantive framework, the Court has stated that compensatory damages address the need to redress the harm a plaintiff suffers,[160] while punitive damages serve the purposes of deterrence and retribution.[161] Consequently, a court must instruct the jury that punitive damages are imposed for these purposes, not for compensation.[162] In addition, a punitive award that grossly exceeds the amount necessary to serve these two purposes violates due process.[163] Retribution appears to have a greater role than deterrence in the framework because the Court has stressed that the amount of punitive damages "should fit the crime" and that "punitive damages should be 'commensurate to the nature of the offence.'"[164] As a result, a court may impose a substantial punitive damages award—even if a lesser punishment would be sufficient to achieve "efficient" or "economically optimal" deterrence—if the punishment imposed constitutes just desert for particularly reprehensible conduct.[165]

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160. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001).

161. *Gore*, 517 U.S. at 568. The Court sometimes states that the purposes are to punish and deter. *See, e.g.*, *Cooper Indus.*, 532 U.S. at 432 (listing the purposes of punitive damages as punishment and deterrence); *Gore*, 517 U.S. at 568 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."). However, because of the tautological nature of "punishing to punish," it is better to refer to retribution as one of the goals.

162. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19–20 (1991) (approving Alabama's jury instructions in which the juries were told that punitive damages were not for compensating the plaintiff). *Haslip* also approved the following as a way to explain the purposes of punishment: "[T]he jury 'must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.'" *Id.* (quoting Joint Appendix, *supra* note 155, at *106).

163. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.").

164. *Gore*, 517 U.S. at 575 n.24 (quoting Burkett v. Lanata, 15 La. Ann. 337, 339 (1860)).

165. *See Cooper Indus.*, 532 U.S. at 438–40. For example, the Court noted:

> [I]t is not at all obvious that even the *deterrent* function of punitive damages can

In developing its substantive framework, the Court has modified the traditional retributive approach in one respect. Retributive schemes generally share two common tenets.[166] First, the person being punished "deserves" the punishment imposed because he has committed an offense and the amount of punishment is proportional to the reprehensibility of both the offense and the offender.[167] Second, punishment in accordance with the defendant's "just desert" is legitimate, regardless of whether it will prevent any future offenses, because, for example, the punishment "restores a balance to the 'moral order.'"[168] Consistent with this approach, recidivists are punished more severely than first-time offenders because of the recidivists' increased reprehensibility.[169] However, as indicated above, the Court has limited this recidivism principle in the context of punitive damages to conduct that "replicates" the conduct that harmed the plaintiff.[170]

In death penalty cases, the Court has similarly emphasized retribution and proportionality when applying the Eighth Amendment prohibition of cruel and unusual punishment. Because capital punishment constitutes just desert for egregious murders, the Constitution permits capital punishment in this situation even if no additional deterrence results from execution rather than life imprisonment.[171] In contrast, capital punishment for the rape of an adult is unconstitutional—regardless of any possible additional deterrent impact resulting from imposing the only penalty greater than life imprisonment—because capital punishment is not proportionate to the crime.[172]

> be served *only* by economically "optimal deterrence." "[C]itizens and legislators may rightly insist that they are willing to tolerate some loss in economic efficiency in order to deter what they consider morally offensive conduct, albeit cost-beneficial morally offensive conduct; efficiency is just one consideration among many."

Id. at 439–40 (second alteration in original) (quoting Galanter & Luban, *supra* note 144, at 1450).

166. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 231 (1968); MARY MARGARET MACKENZIE, PLATO ON PUNISHMENT 21–33 (1981); EDMUND L. PINCOFFS, THE RATIONALE OF LEGAL PUNISHMENT 2–16 (1966); Hugo Adam Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601, 602–03 (1978).

167. *See* HART, *supra* note 166, at 231.

168. *See* Hubbard et al., *supra* note 153, at 534–37.

169. *See supra* notes 93–94 and accompanying text.

170. *See supra* note 96 and accompanying text.

171. *See, e.g.*, Harris v. Alabama, 513 U.S. 504, 517–18 (1995) (Stevens, J., dissenting) ("[T]he assumption that death provides a greater deterrent than other penalties is unsupported by persuasive evidence. Instead, the interest that we have identified as the principal justification for the death penalty is retribution . . . ." (footnote omitted)).

172. Coker v. Georgia, 433 U.S. 584, 600 (1977); *see, e.g.*, Godfrey v. Georgia, 446 U.S. 420, 432–33 (1980) (finding the death penalty unconstitutional where defendant's crime was not "more 'depraved' than that of any person guilty of murder"); Steven F. Shatz, *The Eighth Amendment, the*

However, in its cases addressing state schemes for punishing recidivists, the Court has given far less weight to the retributive concern for proportionality and has upheld draconian prison sentences for repeat offenders, partly because deterrence and incapacitation justified imposing such severe punishments.[173] These two justifications were also involved in *Harmelin v. Michigan*,[174] which held that the Eighth Amendment did not bar imposing a statutory mandatory sentence of life imprisonment without parole for a first-time drug offender.[175] *Harmelin* noted that the amount of punishment imposed for a crime

> depends, of course, upon the *weight* the society accords to deterrence and rehabilitation, rather than retribution, as the objective of criminal punishment (which is an *eminently legislative judgment*). In fact, it becomes difficult even to speak intelligently of "proportionality," once deterrence and rehabilitation are given significant weight. Proportionality is inherently a retributive concept . . . .[176]

In the context of punitive damages, the Court has rejected *Harmelin*'s approach. Instead, the Court itself has made the "eminently legislative judgment" that retribution has more weight than deterrence. Based on this judgment, the Court has been unsympathetic to increasing the amount of punitive damages above the amount of a defendant's "just desert" to achieve additional deterrence. For example, although the Court has stressed the role of retribution as a reason to limit the amount of punitive damages or to exceed economically optimal punishment, it has given little weight to the view that, to achieve "efficient" deterrence, the amount of punishment must vary not only in terms of reprehensibility and amount of harm but also in terms of probability of detection. As noted in *Harmelin*: "[S]ince deterrent effect depends not only upon the amount of the penalty but upon its certainty, crimes that are less grave but significantly more difficult to detect may warrant substantially higher penalties."[177] *Gore*

Death Penalty, and Ordinary Robbery–Burglary Murderers: A California Case Study, 59 FLA. L. REV. 719, 721–23 (2007) (describing the "national standard" set by the Supreme Court, "requiring the states to exclude from death eligibility those defendants who commit murders not deemed sufficiently aggravated by the nation as a whole").

173. *See* Ewing v. California, 538 U.S. 11, 29–30 (2003); Hutto v. Davis, 454 U.S. 370, 374–75 (1982); Rummel v. Estelle, 445 U.S. 263, 284–85 (1980). *But see* Solem v. Helm, 463 U.S. 277, 279, 303 (1983) (holding that a sentence of life imprisonment without parole for a seventh nonviolent offense was unconstitutional).

174. 501 U.S. 957 (1991).

175. *Id.* at 994–95.

176. *Id.* at 989 (emphasis added).

177. *Id.*; *see* Ciraolo v. City of New York, 216 F.3d 236, 243–46 (2d Cir. 2000) (Calabresi, J., concurring); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 221, 226–27 (7th ed. 2007); Hubbard et al., *supra* note 153, at 544–45; *see also* Polinsky & Shavell, *supra* note 151, at 888–91

noted that a "higher ratio may . . . be justified in cases in which the injury is hard to detect."[178]

Some opinions, however, appear to eliminate or minimize this detection concern. For example, though Justice Breyer's concurring opinion in *Gore* indicated that, in terms of deterrence, the amount of a punitive award for conduct causing a particular amount of total harm should become larger as the "number of successful lawsuits that would likely be brought" gets smaller, he also noted "that the Constitution 'does not incorporate the [efficient deterrence] views of the Law and Economics School'"[179] and that there was nothing in the record "suggesting that the Alabama Supreme Court . . . applied *any* 'economic' theory that might explain the $2 million recovery" in *Gore*.[180] Justice Kennedy, writing for the Court in *Campbell*, showed similar ambivalence. Addressing the ratio of punitive damages to compensatory damages, he noted that "a higher ratio *might* be necessary where 'the injury is hard to detect.'"[181] However, his opinion appears to ignore this concern and to focus solely on retribution because it simply concluded that "the argument that State Farm will be punished in only the rare case . . . had little to do with the actual harm sustained" by the plaintiffs.[182]

Detection of wrongdoing is of limited deterrent value if that wrongdoing is not sanctioned. Therefore, plaintiffs must bring suit if punitive damages are to provide the deterrent sanction. For this reason, the Alabama scheme involved in *Haslip* included this concern as a factor.[183] Since *Haslip*, however, the Court has not considered the possible need for a higher punitive award to encourage plaintiffs to litigate against a deep-pocketed corporation. Similarly, though *TXO Production Corp.* noted that the possibility for "tremendous financial gains" was relevant to the amount of punitive damages,[184] the Court has not included that factor in its analysis

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(arguing that when a wrongdoer causes $100,000 in harm to each victim but has only a 25% chance of detection, he should be liable for $400,000, not just $100,000, so that he will be concerned about the 75% of cases where his wrong is not detected and he will thus be optimally deterred).

178. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996).

179. *Id.* at 593 (Breyer, J., concurring) (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 300 (1989) (O'Connor, J., concurring in part and dissenting in part)).

180. *Id. But see* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 440 n.13 (2001) (indicating that de novo appellate review might not be appropriate where a jury was constrained to impose only an amount of punitive damages "necessary to obtain economically optimal deterrence").

181. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (quoting *Gore*, 517 U.S. at 582).

182. *Id.* at 427.

183. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991). For an example of a lower federal court using this factor, see *infra* note 193 and accompanying text.

184. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 461 (1993). The Alabama scheme in *Haslip* also included profitability and the need to deter by imposing a loss as a factor to consider. *See Haslip*, 499 U.S. at 22.

of ratio in terms of the *Gore* factors even where it would seem appropriate.[185]

The Court's rejection of deterrence as a goal, as well as its ad hoc approach to reprehensibility, are also shown by the Court's position that potential harm to third parties is not relevant to the amount of punitive damages.[186] This exclusion conflicts with the focus of deterrence on preventing harmful acts in the future. "[I]t is the known tendency of acts which makes it desirable to prevent them, regardless of the particular results of any one commission."[187] As the Court noted in *TXO Production Corp.*, the state court's imposition of a large punitive award was based in part on the conclusion that "TXO's pattern of behavior 'could potentially cause millions of dollars in damages to other victims.'"[188] *TXO Production Corp.* also noted that a man who wildly fires into a crowd but damages only a pair of glasses worth ten dollars could reasonably be subjected to substantial punitive damages to deter such dangerous acts in the future.[189] The reference to shooting at the crowd, rather than to shooting at the owner of the glasses, indicates that potential harm to third parties is important in terms of deterrence. From a retributive perspective, this conduct seems more reprehensible as well.[190] Nevertheless, *Williams* appears to bar consideration of the risk of potential harm to third parties.

The Court has also deemphasized the relevance of the wealth of a defendant to the amount of the punitive damages award necessary to deter that defendant (and defendants with similar wealth) from future misconduct. From an economic perspective, wealth is relevant to deterrence by monetary sanctions.

> [F]ines should be proportional to the criminal's wealth, quite apart from any notions of a just distribution of wealth. The principle of diminishing marginal utility of income implies that a heavier fine is necessary to impose the same disutility on a rich as on a poor person. . . . The point is not that equalizing disutilities is an aim in itself, but that optimal deterrence may require price discrimination against the wealthy.[191]

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185. For example, in dealing with *Gore* on remand, the Alabama Supreme Court noted that the maximum statutory penalty would not remove the profit that BMW received from the sale to Gore. *See supra* note 146 and accompanying text.

186. *See supra* notes 106–07 and accompanying text.

187. Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1181 (1931).

188. *TXO Prod. Corp.*, 509 U.S. at 460–61 (quoting TXO Prod. Corp. v. Alliance Res. Corp., 419 S.E.2d 870, 889 (W. Va. 1992), *aff'd*, 509 U.S. 443 (1993)).

189. *Id.* at 459–60. The Court presented this scenario by quoting a selection from *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 902 (W. Va. 1991), which took the example from Morris, *supra* note 187, at 1181.

190. *See supra* note 108 and accompanying text.

191. POSNER, *supra* note 177, at 228. *But see, e.g.*, Polinsky & Shavell, *supra* note 151, at 910–14 ("[F]rom the perspective of achieving proper deterrence, a defendant's wealth generally should not be considered when the defendant is a corporation . . . [and] the wealth criterion frequently should not be considered when the defendant is an individual . . . .").

In addition, the wealth of a defendant is relevant to the use of plaintiffs as private attorneys general.[192] Wealth enables

> the defendant to mount an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case, involving as it does only modest stakes, for the usual 33–40 percent contingent fee.[193]

By minimizing the relevance of these points in determining the amount of punitive damages, the Court has allowed its preference for retribution to trump considerations of wealth and deterrence. For example, in *Campbell* the Court implicitly acknowledged the role of wealth in deterrence by stating that it is not "unlawful or inappropriate" to consider wealth in assessing punitive damages.[194] However, the Court then gave retribution far greater weight than deterrence, asserting that the wealth of the defendant "'cannot make up for the failure of other factors, such as "reprehensibility," to constrain significantly an award that purports to punish a defendant's conduct.'"[195] In other words, wealth is relevant to deterrence and therefore may be considered, but wealth has no impact on the retributive concern for proportionality and thus no impact on the amount of punishment.

The quote from *Campbell* concerning the "failure of other factors" in the preceding paragraph comes out of Justice Breyer's concurring opinion in *Gore*. In this opinion, Justice Breyer went even further and rejected any relevance for substantial wealth in terms of deterrence. He argued as follows:

> Since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of this factor to the State's interest in retribution (though not necessarily to its interest in deterrence, given the more distant relation between a defendant's wealth and its responses to economic incentives).[196]

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192. *See infra* notes 207–08 and accompanying text.

193. Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 677 (7th Cir. 2003) (upholding an award of $5,000 in compensatory damages and $186,000 in punitive damages based on a deliberate choice by a motel chain, with an aggregate net worth of $1.6 billion, to expose guests to bed bug bites rather than exterminate the motel properly).

194. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 428 (2003) (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 591 (1996) (Breyer, J., concurring)).

195. *Id.* (quoting *Gore*, 517 U.S. at 591 (Breyer, J., concurring)); *see, e.g.*, *Gore*, 517 U.S. at 591 (Breyer, J., concurring) (expressing concern that wealth "provides an open-ended basis for inflating awards when the defendant is wealthy").

196. *Gore*, 517 U.S. at 591 (Breyer, J., concurring).

This contradictory combination of accepting the concept of diminishing marginal utility in terms of poverty and retribution but not in terms of wealth and deterrence suggests a dislike for (or rejection of) economic theories of deterrence. These theories might have flaws, but such flaws do not support using the Due Process Clause to deny a state the right to apply these widely accepted theories in adopting an approach to deterrence.

The Court has likely granted so little weight to deterrence concerns such as probability of detection and wealth of the defendant for two interconnected reasons. First, deterrence provides a basis for punishments that are excessive in the sense that they are not proportional to wrongdoing. As noted in *Harmelin*, once deterrence is given significant weight, "it becomes difficult even to speak intelligently of 'proportionality.'"[197] Consequently, a jury might impose a punitive damages award that is "disproportionately" high in terms of retribution to deter wrongdoing that is hard to detect or committed by wealthy defendants. *Campbell* illustrates the Court's concern for preventing this result, noting that using wealth in a deterrence framework "'provides an open-ended basis for inflating awards when the defendant is wealthy.'"[198]

The Court treats such "open-ended" inflation of punishment as permissible in legislative schemes for imprisoning humans, like that in *Harmelin*. However, the Court's second concern—fear of jury abuse in determining the amount of a punitive damages award to be imposed on a corporate defendant—results in different treatment for punitive damages awards. Because of this concern and the Court's distrust of the ability or willingness of lower appellate courts to control jury abuse, the Court views the impact of wealth on deterrence as suspect in the context of punitive damages. Two examples convey the sense of the numerous expressions of this concern for jury abuse.[199] *Oberg* requires de novo review partly because "evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences."[200] *TXO Production Corp.* noted that a jury instruction to consider a defendant's wealth—"in recognition of the fact that effective deterrence" may require a larger fine on a wealthy defendant—"increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident."[201]

197. *See supra* note 176 and accompanying text.

198. *Campbell*, 538 U.S. at 427–28 (quoting *Gore*, 517 U.S. at 591 (Breyer, J., concurring)).

199. For expressions of this concern for abuse by judges and juries in addition to those in the main text, see *infra* notes 239–48 and accompanying text.

200. Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994).

201. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 463–64 (1993). The Court did not address the constitutionality of such an instruction in *TXO Production Corp.* because this issue had not been preserved. *Id.* at 464.

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2. Failure to Address Relevant Perspectives on Punishment

One reason the Court's substantive framework has such an ad hoc quality is that the opinions contain very little theoretical discussion of two important perspectives on punishment. First, although the Court distinguishes between punishment in the civil tort system and punishment in the regulatory and criminal systems, the Court fails to develop any basis for the distinctions it emphasizes.[202] Second, although all eight of its cases have involved the imposition of punitive awards on corporate entities, the Court has not meaningfully addressed the unique issues concerning the purpose and effectiveness of punishing corporate entities.

a. Private Civil Punishment

Punitive damages awards differ from both regulatory and criminal sanctions in numerous ways. First, the amount of punitive damages is initially set by the jury, rather by an agency or a court using a statute, a regulation, or a set of sentencing guidelines. In part, this approach is used for punitive damages because, as the Court has noted, each case is unique and requires flexibility.[203] The jury plays an important role in fitting the amount of the award to the circumstances involved by providing useful input about community views and attitudes about reprehensibility and the relative importance of retribution and deterrence. In addition, a jury provides a human dimension to the process of addressing misconduct by the public, charitable, and profit-motivated corporate bureaucracies that dominate our lives. From the human point of view, the criminal and regulatory systems are, to a considerable extent, no different from other bureaucratic organizations granted the status of artificial persons. In contrast, the jury provides a necessary direct input, unaffected by bureaucratic roles and agendas, from ordinary natural persons in addressing any misconduct by artificial persons.[204] Moreover, judges and juries are less susceptible to political influences and capture by corporate interests than legislators, prosecutors, or administrators.[205] Thus, courts play an important role in preventing corporate misconduct by imposing both compensatory and punitive damages. Given the widespread adoption of legislative schemes to limit the amount of punitive damages awards,[206] any state without such a scheme has, in effect, an implicit legislative endorsement of that state's common-law scheme for determining the amount of punitive damages.

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202. *See supra* notes 93–111 and accompanying text.

203. *See supra* notes 70–71 and accompanying text.

204. *See generally* Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 BUFF. L. REV. 1369 (2006) (discussing the development and nature of artificial persons (APs) and the role of law in the interrelation of APs and natural persons).

205. *See supra* note 151 and accompanying text.

206. *See supra* note 8.

Another major difference between regulatory and criminal fines and punitive damages is that the punitive damages are awarded to private litigants rather than the government. Though this arguably results in a windfall to the plaintiff, any windfall is justified, in part, by the need to encourage plaintiffs to serve as private attorneys general.[207] Legislative schemes in some states grant the state a share of a punitive damages award, and these schemes reflect this concern because they provide plaintiffs with a sufficient amount of the award to encourage plaintiffs to seek punitive damages.[208]

A third difference is that defendants in tort suits may face multiple suits, each seeking a punitive award, where multiple parties are injured by the same conduct. However, similar problems exist in the criminal and regulatory system because the prosecuting entity has discretion whether and how to combine charges of specific unlawful acts. In civil claims, the problem of multiplicity is not limited to common-law awards of punitive damages. The problem also arises in statutory schemes authorizing private plaintiffs to seek both compensatory damages and some form of "punitive" damages. Because these schemes may involve automatic multipliers like treble damages, the problem is potentially worse with statutory schemes. For example, the Alabama system approved of in *Haslip* addresses the potential multiplicity of claims for common-law punitive damages by including "the existence of other civil awards against the defendant for the same conduct" as a mitigating factor.[209]

Punitive damages also differ from criminal sanctions in other important ways, particularly in procedural protections like the "beyond a reasonable doubt" standard of proof[210] and the limited role of discovery to obtain information from the defendant. The criminal justice system requires such procedural protections because criminal sanctions can be far more severe, particularly for human defendants, and can have serious secondary consequences—such as severe social censure, loss of a license, or diminished civil rights—that do not accompany punitive damages awards.

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207. *See* Galanter & Luban, *supra* note 144, at 1441–42, 1445–46; David G. Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 VILL. L. REV. 363, 380–81 (1994); *supra* note 154 and accompanying text. This desire to secure private enforcement of both private rights and public interests underlies the widespread use of legislative schemes authorizing punitive damages, treble damages, and attorney fees. *See, e.g.*, S.C. CODE ANN. § 39-5-140 (2006) (damages for unfair trade practices); Thomas Koenig & Michael Rustad, *"Crimtorts" as Corporate Just Deserts*, 31 U. MICH. J.L. REFORM 289, 305–07, 325–27, 342–43 (1998).

208. *See* Hubbard, *supra* note 8, at 505, 509.

209. *See supra* note 155 and accompanying text.

210. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 428 (2003) (noting "heightened protections of a criminal trial"). Some states have adopted the reasonable-doubt standard for proving the egregious conduct necessary for imposing punitive damages. *See, e.g.*, COLO. REV. STAT. § 13-25-127 (2007) (Civil actions—degree of proof required).

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Despite the importance of these differences, the Court has not addressed them or placed them within any theoretical framework. Instead, the Court has used an ad hoc approach to exclude, for example, recidivism and potential harm to third parties from the determination of the amount of punitive damages, even though such factors are relevant to the amount of punishment in the criminal-punishment system.[211] In time, courts may develop such ad hoc distinctions in more detail, and these details may reduce some of the uncertainty caused by the lack of a broader, more systematic theory. However, uncertainty is only part of the problem. Distinctions imposed by fiat, no matter how clear the distinctions may be, raise serious questions about the legitimacy of the Court's substantive framework.

b. Punishment of Corporations

To a considerable degree, the Court's substantive framework is designed for large corporate defendants. All the cases, including the early twentieth-century cases relied upon as precedent in *TXO Production Corp.*,[212] involved relatively large corporations. In addition, the Court has stressed that the Due Process Clause protects corporations.[213] Further, the Court has defended its substantive due process framework in terms of a perceived need to protect corporations, particularly out-of-state corporations, from "the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences."[214] Finally, large corporations are more likely than individual humans to have the funds to pay the substantial punitive damages awards that seem to attract the Court's attention.[215]

Despite this close relationship between the due process framework and corporate defendants, the Court's punitive damages decisions have not addressed the problems affecting both deterrence and retribution that arise

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211. *See supra* notes 93–111 and accompanying text.

212. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453–54 (1993); *supra* notes 62–64 and accompanying text.

213. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585 (1996) ("The fact that BMW is a large corporation . . . does not diminish its entitlement to fair notice . . . .").

214. Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994); *see infra* note 245 and accompanying text.

215. *See, e.g.*, Philip Morris USA v. Williams, 127 S. Ct. 1057, 1061 (2007) (noting that the company was ordered to pay $79.5 million in punitive damages); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 412 (2003) (noting that the company was ordered to pay $145 million in punitive damages); *Gore*, 517 U.S. at 562–63 (noting that the company was ordered to pay $2 million in punitive damages); *TXO Prod. Corp.*, 509 U.S. at 446 (noting that the company was ordered to pay $10 million in punitive damages); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 7 n.2 (1991) (noting that the company was ordered to pay approximately $840,000 in punitive damages).

when punishing corporations.[216] A corporation "has no soul to be damned, and no body to be kicked."[217] Given the corporation's lack of a "soul," punishing a corporation based on retribution raises conceptual problems. For example, punishing in accord with just desert supposedly restores a balance to the "moral order."[218] Such moral concerns are largely inapplicable to a corporate entity, which cannot feel emotions like shame, guilt, or empathy. In contrast, given the profit motive of corporate businesses and of the humans filling roles within them, and given the possible harms that can result from corporate misconduct, deterring misconduct by fines and punitive damages has considerable appeal.[219] The Court recognized this point in *Haslip*, which held that imposing punitive damages on the basis of the doctrine of *respondeat superior* did not violate due process because imposing liability on this basis "rationally advances the State's goal" of deterrence.[220]

However, the Court has emphasized retribution rather than deterrence in addressing the amount of punitive damages awards. This retributive emphasis has reduced the effectiveness of punitive damages to deter corporate misconduct because this emphasis precludes punishing a defendant in excess of just desert regardless of whether the excess would achieve a preferable level of deterrence.[221] Under the Court's framework, the concept of just desert limits punishment for the purpose of deterrence in the case of corporations but not for humans. As a result, humans can be treated more harshly because retributive concerns do not bar a disproportionate statutory term of imprisonment where that term is necessary for deterrence.[222] Emphasizing retribution in punishing corporations has also caused the Court to be, at best, suspicious of increasing deterrence by increasing the amount of punitive damages where

216. Courts and scholars alike have discussed the range of these problems. *See, e.g.*, Ciraolo v. City of New York, 216 F.3d 236, 248–49 (2d Cir. 2000) (Calabresi, J., concurring); POSNER, *supra* note 177, at 456–58. *See generally* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981) (discussing the problems arising in the context of corporate punishment and suggesting ways they can be fixed); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996) (critiquing corporate criminal punishment in terms of economically efficient deterrence); Lawrence Friedman, *In Defense of Corporate Liability*, 23 HARV. J.L. & PUB. POL'Y 833 (2000) (arguing for a more retributive justification for corporate punishment); Andrew Weissman & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411 (2007) (arguing for a different model for achieving deterrence through corporate punishment for criminal conduct).

217. Coffee, *supra* note 216, at 386 (quoting the Lord Chancellor of England, Edward, First Baron Thurlow, 1731–1806, *quoted in* MERVYN KING, PUBLIC POLICY AND THE CORPORATION 1 (1977)).

218. *See supra* note 168 and accompanying text.

219. *See supra* notes 173–96 and accompanying text.

220. *Haslip*, 499 U.S. at 14–15. This is the same standard that the Court has adopted for criminal punishment of corporations since its initial approval of such punishment in 1909. *See* N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 495–96 (1909).

221. *See supra* notes 173–201 and accompanying text.

222. *See supra* notes 175–76 and accompanying text.

the likelihood of detection is low, litigation costs are high, the gain to the defendant is substantial, or the defendant is wealthy.[223]

3. Federalism and Interstate Commerce

Campbell and *Gore* both prohibit imposing punitive damages to punish out-of-state conduct. As indicated above,[224] the Court based this prohibition more on concerns for federalism and interstate commerce than on substantive due process. This Article does not address the Court's reliance on these concerns to limit punishing out-of-state conduct.[225] However, these federalism concerns cannot justify a national framework addressing nonfederalism issues like the relative roles of retribution and deterrence. Consequently, the Court has relied on the Due Process Clause to impose its ad hoc national framework, based largely on the retributive concept of just desert and on its views about measuring reprehensibility. This scheme limits a state's right to assess punishment in accordance with its views of retribution and just desert by denying a state's right to emphasize the deterrent role of punitive damages. This severe hampering of a state's ability to use the common-law tort system to deter corporate misconduct within its borders is both a highly suspect use of the Due Process Clause and contrary to another basic concern of federalism: preventing the federal government from interfering with a state's sovereignty.[226]

IV. REASON FOR IMPOSING A NECESSARILY VAGUE FRAMEWORK

A. *"Wild" Verdicts*

The Court's substantive due process framework raises three interrelated questions. The first addresses the institutional issue of whether the Court, which is composed of unelected federal judges, should use the Due Process Clause to impose a necessarily vague substantive framework on states. Given the Court's recognition of its reliance on *Lochner*-era precedents,[227] and given the general suspicion of *Lochner*-era judicial activism[228] and of substantive due process in general,[229] one might expect

223. *See supra* notes 173–201 and accompanying text.

224. *See supra* note 50 and accompanying text.

225. For a criticism of the Court's use of federalism as a basis for its substantive framework, see Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1, 3 (2004).

226. *See* Spencer, *supra* note 63, at 1097–98.

227. *See supra* notes 62–64 and accompanying text.

228. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) ("As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint."); David. E. Bernstein, Lochner's Legacy*'s Legacy*, 82

the decisions imposing the substantive due process framework for punitive damages to address this issue in some detail. However, to the extent that the Court has addressed this question, the decisions speak only to a need to address cases of extreme abuse. For example, *TXO Production Corp.* purported to deal with the concern for legitimacy by listing and discussing precedents supporting a constitutional limit on the amount of a monetary penalty a state may impose.[230] However, the cited precedents, by themselves, simply recognize the very broad principle that there is, at some point, a limit.[231] As the Court notes, only one of these "'*Lochner*-era precedents'" reversed a penalty.[232] Moreover, because that one barred a state from imposing any punishment "for conduct . . . undertaken in complete good faith,"[233] the amount of the punitive sanction was not a concern. This broad principle underlies *Haslip*'s defense of the initial adoption of due process limits: "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."[234] However, *Haslip* noted that Alabama's system limited jury discretion, and partly for this reason, the Court's "constitutional sensibilities" were not jarred.

A second issue concerns timing: Why, in the 1990s—many decades after establishing the broad principle that there must be some substantive limit to address extreme abuse—did the Court feel it necessary not only to reassert the principle in *Haslip* and *TXO Production Corp.* but also to give it detailed form and reverse awards in *Gore*, *Campbell*, and *Williams*? Apparently, the Court felt that the existing common-law system for imposing punitive damages awards was not "working" and that, as a result, extreme abuse was occurring. Though *Haslip* approved the Alabama scheme, a model set up to limit discretion and prevent abuse might, in practice, fail to prevent abuse. Therefore, the Court "'cannot simply assume the model works as intended; [the Court] must critique [the

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TEX. L. REV. 1, 2–11 (2003) ("Avoiding '*Lochner's* error' remains a primary focus of constitutional law and constitutional scholarship.").

229. *See, e.g.*, Albright v. Oliver, 510 U.S. 266, 271–72 (1994) ("'As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.'" (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992))).

230. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453–55 (1993).

231. *See supra* notes 62–64 and accompanying text.

232. *TXO Prod. Corp.*, 509 U.S. at 454 & n.17, 455 (quoting Brief of Respondents, *TXO Prod. Corp.*, 509 U.S. 443 (No. 92-479), 1993 WL 469320, at *17).

233. *Id.* at 454 n.17. In the case, a patron of the company successfully sued to recover a statutory penalty of $6,300 ($100 per day for 63 days) for unreasonable discrimination. Sw. Tel. & Tel. Co. v. Danaher, 238 U.S. 482, 485 (1915). This penalty was unconstitutional because there was "no departure from any prescribed or known standard of action . . . [and] no mode of judicially testing the regulation's reasonableness in advance of acting under it." *Id.* at 490–91.

234. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

model's] performance in terms of its results.'"[235] This concern with results became explicit in *Gore*, which involved the same Alabama scheme that the Court approved in *Haslip*. Despite Alabama's use of this scheme in *Gore*, the Court found that the award involved was grossly excessive. As noted in Breyer's concurring opinion, "[T]he rules that purport to channel discretion in this kind of case, here did not do so in fact."[236]

Assessing a model's legitimacy by reviewing its results presents a third issue: Are any failures typical of the system or simply rare aberrations in an otherwise well-functioning scheme? Initially, the Court thought that the system was functioning reasonably well. For example, *Haslip* adopted a respectful view of the lower courts' imposition of punitive damages awards and adopted the following presumption: "Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable . . . ."[237] Thus, the Court appears to view any problems as rare mistakes. However, both before and after *Gore*, some opinions explicitly assert that a substantive due process model, no matter how vague or ad hoc, must be imposed because the common-law system malfunctions on far too broad a scale. In particular, despite *Haslip*'s views about the strong presumption in favor of the process of jury trials and judicial control of the jury process and about the need for discretion in awarding punitive damages on a case-by-case basis,[238] many of the dissenting opinions in earlier cases indicate a distrust of juries[239] and state courts,[240] and a concern that punitive damages have "run wild."[241]

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235. McClesky v. Kemp, 481 U.S. 279, 338 (1987) (Brennan, J., dissenting) (quoting F. Patrick Hubbard, *"Reasonable Levels of Arbitrariness" in Death Sentencing Patterns: A Tragic Perspective on Capital Punishment*, 18 U.C. DAVIS L. REV. 1113, 1162 (1985) (criticizing a death penalty scheme on the basis of patterns of results indicating racial discrimination)).

236. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 595 (1996) (Breyer, J., concurring).

237. *TXO Prod. Corp.*, 509 U.S. at 457.

238. *See supra* notes 70–71 and accompanying text.

239. *See, e.g.*, *TXO Prod. Corp.*, 509 U.S. at 500–01 (O'Connor, J., dissenting) ("[M]any courts continue to provide jurors with skeletal guidance that permits the traditional guarantor of fairness—the jury itself—to be converted into a source of caprice and bias."); *Haslip*, 499 U.S. at 43 (O'Connor, J., dissenting) ("Multimillion dollar losses are inflicted on a whim.").

240. *See, e.g.*, *Haslip*, 499 U.S. at 55 (O'Connor, J., dissenting) ("Alabama's grant of standardless discretion to juries is not remedied by *post hoc* judicial review.").

241. *Id.* at 18 (majority opinion); *see, e.g.*, *Gore*, 517 U.S. at 598 (Scalia, J., dissenting) ("Today we see the latest manifestation of this Court's recent and increasingly insistent 'concern about punitive damages that "run wild."'" (quoting *Haslip*, 499 U.S. at 18)); *TXO Prod. Corp.*, 509 U.S. at 475 (O'Connor, J., dissenting) ("[T]his Court and its Members have expressed concern about punitive damages awards 'run wild,' inexplicable on any basis but caprice or passion.").

This distrust stems from a view that the size and frequency of punitive awards have increased sharply in recent years,[242] a concern for the wide discretion granted to juries,[243] substantial disagreement with the exercise of discretion by state courts in particular cases,[244] and a desire to foster a national marketplace where commerce occurs without undue risk that a state will wrongfully extract money from "wealthy" corporations, particularly out-of-state corporations.[245] Justice O'Connor has been the most outspoken about these concerns.[246] For example, her dissenting opinion in *Browning-Ferris* asserted:

> Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. Since then, awards more than 30 times as high have been sustained on appeal. The threat of such enormous awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages.

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242. *See infra* note 247 and accompanying text.

243. *See, e.g.*, *Haslip*, 499 U.S. at 42–43, 46, 50 (O'Connor, J., dissenting) ("States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so. . . . Multimillion dollar losses are inflicted on a whim. . . . Alabama . . . gives civil juries complete, unfettered, and unchanneled discretion . . . . Alabama's 'standards' in fact provide no guidance . . . .").

244. *See, e.g.*, *Gore*, 517 U.S. at 586–97 (Breyer, J., concurring) (discussing reasons why the presumption of validity of state court discretion was overcome under the circumstances).

245. *See, e.g.*, *TXO Prod. Corp.*, 509 U.S. at 464 (indicating concern that evidence of the defendant's wealth "increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident"); *id.* at 489–91 (O'Connor, J., dissenting) (arguing that "it seems quite likely that the jury in fact was unduly influenced by the fact that TXO is a very large, out-of-state corporation," and asserting that the instructions "encouraged the jury to transfer some of TXO's impressive wealth to the" plaintiffs, that "jurors may view large corporations with great disfavor," that "jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth," and that "juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from 'wealthy' corporations to comparatively needier plaintiffs"); *supra* notes 200–01 and accompanying text.

246. *See TXO Prod. Corp.*, 509 U.S. at 475, 500 (O'Connor, J., dissenting); *Haslip*, 499 U.S. at 43, 46–47, 61–62 (O'Connor, J., dissenting); Browning-Ferris Indus. of Vt., Inc. v. Kelsco Disposal, Inc., 492 U.S. 257, 282 (O'Connor, J., concurring in part and dissenting in part); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 87–88 (1988) (O'Connor, J., concurring).

> The trend toward multimillion dollar awards of punitive damages is exemplified by this case.[247]

In *Gore*, the majority accepted Justice O'Connor's characterization of the system.[248] Though the Court has not regarded the problem as common enough to prohibit all jury assessments of punitive damages awards, it has allowed its distrust of the state courts to overcome any presumption in favor of their decisions and has imposed both the procedural framework and the substantive framework discussed herein.

B. *Critique*

There are two fundamental problems with the Court's reliance on its concern for "wild" verdicts to impose its due process scheme. First, the substantive framework can reduce "mistakes" only if it is sufficiently clear to guide lower courts or if the Court can exercise meaningful review of the flow of state and federal decisions imposing punitive damages awards. As indicated above, neither of these alternatives are realistic.[249] Rather than address this difficulty, the Court adopted the *Gore* three-factor test, which is based on the following contradictory position: Because Alabama's vague set of common-law guidelines for awarding punitive damages failed to prevent a denial of substantive due process in awarding punitive damages, the Court must impose its own set of guidelines, even though the Court's guidelines are basically the same as Alabama's guidelines in terms of content and vagueness, and even though the Court can review only a small fraction of cases applying its guidelines.

Second, the Court adopted the position that punitive damages awards have "run wild" with virtually no critical analysis. Justice O'Connor's opinions, which contain the most detail concerning the assertion that punitive damages awards are "skyrocketing,"[250] typify this lack of analysis. She supported her assertions by referring to myriad sources: a RAND Institute study of punitive awards in California and Chicago published in 1987,[251] a *Wall Street Journal* article,[252] an opinion by the Ninth Circuit,[253]

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247. *Browning-Ferris*, 492 U.S. at 282 (O'Connor, J., concurring in part and dissenting in part) (citations omitted).

248. *See Gore*, 517 U.S. at 583–84.

249. *See supra* notes 73–80 and accompanying text.

250. *See supra* note 247 and accompanying text.

251. *Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting). Justice O'Connor cited this study in support of two assertions: (1) "[r]ecent years . . . have witnessed an explosion in the frequency and size of punitive damages awards," and (2) "punitive damages were assessed against 1 of every 10 defendants who were found liable for compensatory damages in California." *Id.* (citing MARK PETERSON, SYAM SARMA, & MICHAEL SHANLEY, RAND INST. FOR CIVIL JUSTICE, PUNITIVE DAMAGES: EMPIRICAL FINDINGS iii, viii (1987), *available at* http://www.rand.org/pubs/reports/2006/R3311.pdf.). Her use of this study is both superficial and selective. For example, she never

several state court appellate opinions sustaining large punitive damages awards,[254] an amicus curiae brief filed by the Pharmaceutical

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indicates that the study noted the following: (1) "awards are frequently reduced by post-trial actions," PETERSON, SARMA & SHANLEY, *supra*, at viii, 26–30, (2) its "findings . . . are limited," *id.* at ix, (3) "most punitive damage awards are modest," *id.* at 17, (4) the increase in number and amount of punitive awards involved many intentional torts, *id.* at 12, 38, 46 tbl.4.2, and (5) the ratio of punitive damages to compensatory damages tended to be low in California, with medians ranging from 0.6 to 1.4 and averages ranging from 1.5 to 4.4, *id.* at 40–41 & tbl.3.7.

252. *Haslip*, 499 U.S. at 61–62 (O'Connor, J., dissenting) (citing L. Gordon Crovitz, *Rule of Absurd Punitive Damages Also "Mock" Due Process*, WALL ST. J., Mar. 14, 1990, at A19). This very short piece contains anecdotal reports, unsupported conclusory assertions ("[P]unitive damages are routine"), and rhetorical references, such as "fear of unpredictable liability," "absurd tort," and the need to defuse "the litigation bomb." Crovitz, *supra*.

253. *Haslip*, 499 U.S. at 62 (O'Connor, J., dissenting) ("The amounts 'seem to be limited only by the ability of lawyers to string zeroes together in drafting a complaint.'" (quoting Oki Am., Inc. v. Microtech Int'l, Inc., 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring))). The court in *Oki America* affirmed the trial court's grant of summary judgment to the plaintiff on the defendant's counterclaim for the tort of bad-faith denial of the existence of the contract. 872 F.2d at 314. The concurring opinion disagreed with the policy choices involved in California's recognition of the tort and viewed this recognition as an example of the general decline of tort law. *Id.* at 315–16 (Kozinski, J., concurring). To support his disagreement with punitive damages, the concurring judge cited and stated the awards in two cases. *Id.* at 315. One of these cases was apparently a miscitation because the case involved only the reversal of the grant of a motion to dismiss. *See* April Enters., Inc. v. KTTV, 195 Cal. Rptr. 421, 423 (Cal. Ct. App. 1983). The other case involved a deliberate trespass and knowing destruction of the plaintiff's hedge row that had little economic value (which was the basis of a $10 compensatory award), but had great aesthetic value to its owners, and the harm caused by the loss of this personal aesthetic value played a role in the appellate court's decision to assess a punitive damages award of $14,500. *See* Klimek v. Hitch, 124 Ill. App. 3d 997, 998–99 (1994).

254. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) (citing Ford Motor Co. v. Durrill, 714 S.W.2d 329 (Tex. Ct. App. 1986), *vacated per agreement of parties*, 754 S.W.2d 646 (Tex. 1988), Ford Motor Co. v. Stubblefield, 319 S.E.2d 470 (Ga. Ct. App. 1984), and Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984)). In *Durrill*, which was later vacated by agreement of the parties, a young woman sustained fatal burn injuries from a fuel tank explosion caused by a collision, and on appeal the plaintiffs were awarded $2.3 million in compensatory damages and $10 million in punitive damages, a ratio of slightly more than 4-to-1 for grossly negligent conduct involving serious injury and death. *Durrill*, 714 S.W.2d at 333, 346–47. *Stubblefield* also involved a young woman who suffered burns and death when a collision caused the car she was in to be engulfed by fire. *Stubblefield*, 319 S.E.2d at 473. The appellate court upheld an $8 million punitive damages award, in part because the evidence showed that Ford had made a "conscious decision to deter implementation of safety devices in order to protect its profits . . . [and possibly] realize a design cost savings of $20.9 million." *Id.* at 481. The plaintiff in *Palmer* suffered the loss of a fetus from a spontaneous abortion as well as the loss of her uterus, fallopian tubes, and ovaries, as a result of the defendant's deliberate choice "to profit by making exaggerated statements regarding the safety and efficacy of its product." *Palmer*, 684 P.2d at 196–97, 204. The defendant's sales revenues from the product exceeded $11 million. *Id.* at 197–98. Based on this evidence, the appellate court upheld compensatory damages of $600,000 and punitive damages of $6.2 million. *Id.* at 221.

Manufacturers Association,[255] a book by Peter Huber,[256] and four law review articles.[257] Justice O'Connor's use of these authorities is flawed in three basic respects. First, she did not attempt to place the verdict information in context, whether in terms of statistics about the tort system generally or in terms of the facts of the cases imposing the verdicts referred to in the appellate opinions or in the articles.[258] Nor did she attempt to address more recent studies of punitive damages that indicate punitive damages awards are not "wild."[259] Second, she did not attempt to

255. *Browning-Ferris*, 492 U.S. at 282 (O'Connor, J., concurring in part and dissenting in part) (citing Brief of the Pharmaceutical Manufacturers Ass'n & the American Medical Ass'n, as Amici Curiae in Support of Petitioners, *Browning-Ferris*, 494 U.S. 257 (No. 88-556), 1989 WL 1127717).

256. *Id.* (citing PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 152–71 (1988)).

257. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting); *Browning-Ferris*, 492 U.S. at 282 (O'Connor, J., concurring in part and dissenting in part). O'Connor's dissent in *TXO Prod. Corp.* noted:

> As little as 30 years ago, punitive damages awards were "rarely assessed" and usually "small in amount." [Dorsey D.] Ellis, [*Fairness and Efficiency in the Law of Punitive Damages*,] 56 S. CAL. L. REV. [1,] 2 [(1982)]. Recently, however, the frequency and size of such awards have been skyrocketing. One commentator has observed that "hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case." [Malcolm E.] Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. [919,] 919 (1989). And it appears that the upward trajectory continues unabated. *See* [William H.] Volz & [Michael C.] Fayz, *Punitive Damages and the Due Process Clause: The Search for Constitutional Standards*, 69 U. DET. MERCY L. REV. 459, 462[] n.17 (1992).

TXO Prod. Corp., 509 U.S. at 500 (O'Connor, J., dissenting) (formatting added); *see also Browning-Ferris*, 492 U.S. at 282 (O'Connor, J., concurring in part and dissenting in part) ("As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000." (citing Owen, *supra* note 153, at 1329–32)).

258. *See supra* notes 251, 253–54.

259. For more recent studies, see, for example, Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 31, 41–43 (1990) (noting that punitive damages are awarded infrequently and not large); Theodore Eisenberg, Jeffrey J. Rachlinski & Martin T. Wells, *Reconciling Experimental Incoherence with Real-World Coherence in Punitive Damages*, 54 STAN. L. REV. 1239, 1241–43 (2002) ("[R]esearchers have not identified either a crazy pattern of awards or a substantial series of actual punitive damage awards that constitute a shocking pattern of incoherence or unfairness."); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 745 (2002) (finding punitive awards rare, especially in products liability cases); Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions, the Impact of* BMW v. Gore *on Punitive Damages Awards, and Forecasting Which Punitive Awards Will Be Reduced*, 7 SUP. CT. ECON. REV. 59, 61 (1999) (finding no significant difference in patterns before and after *Gore* and finding predictability in outcome of appellate review); Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 624 (1997) (presenting evidence to show that juries are reliable

develop a conceptual framework for determining whether any increase in the size of punitive damages awards is occurring "too fast" or whether any increase results from prior awards that were "too low" to prevent corporate misconduct or from more recent awards that were "too high." Third, she seems to simply accept, without qualification, not only Huber's book, which has been described as a strident polemic against the tort system as a whole[260] but also self-serving factual assertions in the brief filed on behalf of drug manufacturers.

The net result is that Justice O'Connor and the other members of the majority simply accepted, without any critical analysis, the rhetoric used by the "tort reform" movement in its push for a wide range of changes in tort law to favor defendants in tort litigation.[261] This uncritical acceptance has played a crucial role in the Court's punitive damages decisions, particularly the Court's treatment of the state courts. More specifically, the Court has gone from the strong presumption in favor of decisions by state courts adopted in *Haslip* to a scheme of de novo review by the Court based on, and accompanied by, a pattern of "bashing" common-law judges. In effect, the Court has used the Due Process Clause to impose itself as the highest common-law court in the land in order to "reform" tort law punitive damages in a manner that reduces the states' ability to sanction corporate misconduct.

V. CONCLUSION

This Article does not challenge the Supreme Court's position that, at some point, the Due Process Clause limits the amount of punitive damages that can be assessed. Instead, this Article focuses on the problems resulting from the Court's approach to developing a framework for imposing that limit. The Court's initial decisions in developing this framework were helpful because its concern for imposing substantive limits generated

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and predictable); Hubbard, *supra* note 8, at 503–04 (discussing studies); David Luban, *A Flawed Case Against Punitive Damages*, 87 GEO. L.J. 359, 360–62 (1998) (summarizing studies of punitive damages awards); Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida: In Terrorem and in Reality*, 38 HARV. J. ON LEGIS. 487, 512–13 (2001) (finding that, except for asbestos cases, punitive damages were not awarded in products liability cases and that awards were not extremely large).

260. *See, e.g.*, Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637, 1641–42 (1993) (stating that Huber's work does not appear to be "a serious work of legal research or thought").

261. For discussion of "tort reform" rhetoric used by this "movement" of repeat players on the defense side, see Hubbard, *supra* note 8, at 474–79 (noting, for example, rhetorical expressions of concern about a "litigation explosion," "judicial hellholes," "lawsuit abuse," "looney lawsuits," and "dishonorable courts"). For an argument that cases like *Williams* indicate a pattern in the Court's recent decisions of helping business by reducing liability and litigation costs for business defendants, see, for example, Richard Brust, John Gibaut & Jason Krause, *The Company Line*, A.B.A. J., Oct. 2007, at 50, 54–55.

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useful dialogue about those limits and its endorsement of the Alabama scheme in *Haslip* provided a workable framework for state courts to use in imposing punitive damages. In *Gore*, however, the Court began imposing its own framework, which added only the questionable factor of comparison with other sanctions and omitted helpful relevant factors included in the *Haslip* scheme. Disagreeing with some of the lower courts' applications of the necessarily vague *Gore/Haslip* framework, the Court abandoned any presumption in favor of decisions by state common-law courts and undertook fact-based reviews of specific applications of the framework by lower courts. It has also adopted ad hoc details like the distinction involved in *Williams*. The Court has done these things without developing a coherent theory about the purpose of punitive damages, the role of private civil punishment, or the punishment of corporations. The Court's ad hoc approach increases uncertainty about both the content and application of the framework, and its uncritical adoption of a scheme based on distrust and disvaluing of common-law judges and juries weakens the tort system's ability to prevent corporate misconduct.

If the Court continues this approach, there will be considerable uncertainty as courts struggle to determine the answers to questions like the following: What is an instruction that will satisfy *Williams*?[262] Will evidence of similar injury to third parties continue to be relevant and admissible?[263] If so, how will "similar" be defined and will *potential* injury to third parties be relevant?[264] Every two years or so, the Court may issue a new decision that may resolve some of this uncertainty but will also require retrials or other reconsideration of cases where the lower courts guessed wrong. Periodically, the Court may also simply reverse an application of the framework like it did in *Gore*. Given the Court's failure to develop a coherent theoretical foundation for its substantive framework, continuing to impose its views in an ad hoc manner will raise questions of legitimacy. This ad hoc imposition will also increase the likelihood that cases imposing substantive limits on the amount of punitive damages will provide examples that support Llewellyn's assertion that "morals without technique is a mess."[265]

Solving this "mess" will require the Court to exercise two judicial

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262. The instruction requested by the defendant in *Williams* is not a good model because the requested charge did not indicate that the jury should consider harm to others in determining reprehensibility. Instead, the requested charge would instruct the jury as follows: "'The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams . . . . [Y]ou may consider the extent of harm suffered by others in determining what that reasonable relationship is . . . .'" Philip Morris USA v. Williams, 127 S. Ct. 1057, 1068 (2007) (Ginsburg, J., dissenting) (quoting Joint Appendix, *Williams*, 127 S. Ct. 1057 (No. 05-1256), 2006 WL 2147483, at *280).

263. *See supra* notes 109–11 and accompanying text.

264. *See supra* notes 101–11 and accompanying text.

265. *See supra* note 6 and accompanying text.

virtues: technique and restraint. For punitive damages doctrine, technique would involve a greater concern for craft, including a shift from reliance on ad hoc decision-making to a greater emphasis on coherent decisions, particularly concerning theoretical issues such as the role of punitive damages in deterring corporate misconduct. Judicial restraint would require replacing the current "bashing" of state courts with the respect they deserve. This shift would be similar to the shift in takings law from "bashing" regulators to showing them respect.[266]

This emphasis on technique and restraint would involve a change, not an abandonment, of the Court's role. Instead of the ad hoc micromanaging involved in cases like *Gore*, *Campbell*, and *Williams*, the Court would focus on the theoretical foundation underlying its limits on the imposition of punitive damages awards. If, for example, the Court wants to eliminate or severely limit some particular factor—deterrence, for example—when determining the amount of punitive damages, it must present a very strong theoretical justification for denying the states' right to choose deterrence as a goal and must articulate a clear statement of the new requirement. On the other hand, if the Court cannot articulate a coherent reason for eliminating or limiting the role of deterrence, it should restrain from prohibiting the use of or ignoring the role of deterrence in determining the amount of punitive damages. At the same time, however, it could insist that, as a matter of procedural due process, any state court using deterrence to determine that an award is not excessive must be clear about the role deterrence plays in its decision. But what if a state court gives clear

266. Regulators were initially granted respect and deference in *Penn Central Transportation Co. v. City of New York*, which adopted a balancing test for identifying an unconstitutional taking. 438 U.S. 104, 105 (1978). However, in the 1990s a different approach emerged. For example, *Lucas v. South Carolina Coastal Council*, which adopted a per se rule that a regulation effecting a total loss of all value in real property is a taking, adopts a style that can be viewed as "bashing" state court and state legislatures. 505 U.S. 1003, 1017–19 (1992). For example, Justice Scalia's majority opinion asserted that government has a natural tendency to use the police power to eliminate private property and engage in "plundering" and that the harm principle would not be an effective limit unless the legislature had a "stupid staff." *Id.* at 1025 n.12. His opinion in *Nollan v. California Coastal Commission* referred to regulatory conditions imposed on coastal development as "'an out-and-out plan of extortion.'" 483 U.S. 825, 837 (1987) (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14–15 (N.H. 1981)). In contrast, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, which upheld a moratorium on development to provide an opportunity to plan, is far more respectful. 535 U.S. 302, 306 (2002). For example, the *Tahoe-Sierra* opinion stressed the environmental importance of the water quality of Lake Tahoe, the need for a comprehensive regional plan to protect the lake, and that delays in adopting a plan resulted "[d]espite the fact that TRPA performed [its] obligations in 'good faith and to the best of its ability.'" *Id.* at 307–11 (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1233 (D. Nev. 1999), *aff'd in part, rev'd in part*, 216 F.3d 764 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002)). The opinion further noted that moratoria are "an essential tool of successful development" because they enable a planning agency to "make well-reasoned decisions." *Id.* at 337–40.

reasons, presented coherently in terms of permissible factors, for an award that is so large the Court feels the need to reverse it? In such a case, the virtue of restraint would require the Court to accept the lower court's decision. If the amount is nevertheless so outrageous that reversal is required, then morals would justify a reversal, while the virtue of technique would require a clear articulation of the basis for the decision. In this way, the Court can achieve both morals and technique.

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