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MAKING A CASE FOR WEALTH-CALIBRATED PUNITIVE DAMAGES

I. INTRODUCTION

Courts in the United States have struggled for many years to find rational and workable ways in which to limit punitive damage awards. A key issue considered by courts and lawmakers has been the extent to which juries should be permitted to use the defendant's wealth in deciding what punitive damages award would best achieve the twin goals of punitive damages, punishment and deterrence. In 2003, the Supreme Court decided *State Farm Mutual Automobile Insurance Co. v. Campbell*¹, ending the debate about what role the defendant's net worth would play in the punitive damages calculus.

Prior to the decision in *State Farm*, the doctrine of punitive damages had been described as the "struggle of individuals to preserve their rights against the mighty."² Most courts allowed jurors to consider the defendant's net worth in deciding what punitive damages award would best achieve punishment and deterrence.³ By holding that plaintiffs may not use the wealth of the defendant, whether a corporation or individual, in arguing for a higher punitive damages award, the Supreme Court, in *State Farm*, undermined the ability of the civil system to punish and deter misconduct and protect those unable to protect themselves.

1. 123 S. Ct. 1513 (2003).

2. Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1285 (1993).

3. Annotation, *Punitive Damages: Relationship to Defendant's Wealth as Factor in Determining Propriety of Award*, 87 A.L.R.4th 141, 151 (1991) ("The vast majority of courts which have considered the issue of whether the trier of fact may also consider the wealth of the defendant in fashioning a punitive award have determined that the defendant's wealth is an appropriate consideration because the degree of punishment or deterrence is to some extent proportionate to the means of the wrongdoer."); see also RESTATEMENT (SECOND) OF TORTS § 908(2) (1979) ("In assessing punitive damages, the trier of fact can properly consider the . . . wealth of the defendant").

In *State Farm*, the Court foreclosed individuals' ability to preserve their rights against wealthy defendants.⁴ The *State Farm* Court severely limited the use of a defendant's wealth in the calculation of punitive damages when it stated, "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."⁵

In a recent Seventh Circuit opinion, *Mathias v. Accor Economy Lodging, Inc.*, Judge Posner interpreted the Supreme Court's decision in *State Farm* as creating a narrow circumstance where the wealth of the defendant would be relevant to the punitive damages calculus.⁶ According to *Mathias*, a wealth-calibrated punitive award is appropriate when the defendant's conduct is highly reprehensible, but the plaintiff's compensable harm is small or hard to quantify.⁷ In this narrow circumstance, a substantial punitive award prevents a wealthy defendant from profiting from its misconduct and discouraging other litigants by outspending them.⁸ While Judge Posner's opinion is well supported by the history and development of punitive damages, it is entirely inconsistent with the Supreme Court's holding in *State Farm*.

Judge Posner's position, however, carries the weight of history and hundreds of years of precedent. The *State Farm* Court was wrong to preclude consideration of defendant's wealth in inflating a punitive award. This Article will argue that contrary to *State Farm*, the wealth of the defendant, as Judge Posner suggests, is relevant to achieving the goals behind punitive damages: punishment and deterrence.⁹ Ignoring a defendant's wealth in the punitive damages calculus allows many wealthy defendants to engage in misconduct without the fear of punishment or the possibility of deterrence.

Part II of this Article reviews the history of punitive damages to reveal that the wealth of the defendant has consistently been a factor in the punitive damages determination. Part III examines the two theories underlying punitive damages, punishment and deterrence.

4. See *State Farm*, 123 S. Ct. at 1525.

5. *Id.* (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996)).

6. See *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003).

7. *Id.* at 677.

8. *Id.*

9. *State Farm*, 123 S. Ct. at 1519.

Next, Part IV considers the Supreme Court's decisions shaping the punitive damages analysis, culminating with *State Farm*. The analysis in Part V establishes that the Supreme Court's decision in *State Farm* is inconsistent both with the history and underlying theories of punitive damages. In Part VI, this Article examines Judge Posner's reasoning in *Mathias* to reveal that it is inconsistent with *State Farm*. Part VII's discussion demonstrates that, while inconsistent with *State Farm*, *Mathias* is consistent with the history and theories of punitive damages. Finally, the Article concludes in Part VIII that *Mathias* correctly identifies the need to consider the wealth of the defendant if punishment and deterrence are to be achieved and our civil system is to protect those unable to protect themselves.

II. HISTORY OF PUNITIVE DAMAGES

A. *The Beginnings of Punitive Damages*

The doctrine of punitive damages has ancient lineage.¹⁰ The use of evidence of the defendant's wealth in the punitive damages calculus is equally ancient.¹¹ In Roman times, the statutory remedy of multiple damages functioned in much the same way as punitive damages; both provide for an award in excess of actual harm.¹² These multiple damages blended compensation with punishment and provided a necessary means to constrain the wealthy elite.¹³

Common law punitive damages originated in England in the thirteenth century.¹⁴ Just as Roman Senators might have paid multiple damages when they oppressed private citizens, the wealthy English elite paid punitive damages when they used their wealth and power to oppress.¹⁵ The eighteenth century companion cases of

10. Rustad & Koenig, *supra* note 2, at 1285.

11. *See id.*

12. LINDA L. SCHLUETER & KENNETH R. REDDEN, *PUNITIVE DAMAGES* § 1.1 (4th ed. 2000); *see also* KENNETH R. REDDEN, *PUNITIVE DAMAGES* § 2.2 (1980) (discussing the use of the statutory remedy of multiple damages in the Code of Hammurabi in 2000 B.C., in the Hittite Law in 1400 B.C., in the Hindu Code of Manu in 200 B.C., and in the Bible).

13. Rustad & Koenig, *supra* note 2, at 1286.

14. *See* SCHLUETER & REDDEN, *supra* note 12, § 1.3(A).

15. *Id.*

*Wilkes v. Wood*¹⁶ and *Huckle v. Money*¹⁷ exemplified the English courts' employment of punitive damages to punish and deter the misuse of wealth and power that threatened English social order.¹⁸ The courts stated that exemplary damages not only served as a satisfaction to the injured person, but also punished and deterred the wealthy defendant.¹⁹ As the eighteenth century came to a close, the use of evidence of wealth in the punitive damages analysis was firmly entrenched in the English tradition.

B. *The Beginnings of Punitive Damages in the United States*

The doctrine of punitive damages was exported to America "where it received widespread and substantial acceptance."²⁰ By the 1850s, the doctrine of punitive damages was well-settled and American courts began to hold that punitive damages served a separate function from compensation; they were necessary to punish the offender and deter the offender and others from engaging in similar conduct.²¹ American courts also followed the English tradition of considering evidence of wealth as essential to determining the amount of punitive damages necessary to punish and deter each defendant.²²

16. 98 Eng. Rep. 489 (K.B. 1763).

17. 95 Eng. Rep. 768 (K.B. 1763).

18. *Wilkes*, 98 Eng. Rep. at 498-99. In the case of *Wilkes v. Wood*, the King had Wilkes' house searched and seized property because Wilkes published a pamphlet allegedly libelous to the King. The court held that small compensatory damages would do nothing to stop the King from invading Wilkes' civil rights and that punitive damages were necessary to punish the defendant and deter future misconduct. *Id.* *Huckle v. Money* involved similar though less outrageous conduct by the King's Secretary of State. *Huckle*, 95 Eng. Rep. at 768-69.

19. *Wilkes*, 98 Eng. Rep. at 498-99.

20. See Jill McKee Pohlman, *Punitive Damages in the American Civil Justice System: Jackpot or Justice?*, 1996 UTAH L. REV. 613, 619 (quoting THOMAS F. LAMBERT, JR., THE CASE FOR PUNITIVE DAMAGES: A NEW AUDIT 1 (1988)).

21. SCHUELTER & REDDEN, *supra* note 12, § 1.4(A).

22. See *Schafer v. Ostmann*, 155 S.W. 1102, 1104 (Mo. 1913) ("It was proper to take into consideration [defendant's] financial condition in assessing punitive damages against him."); *Harman v. Cundiff*, 82 Va. 239, 246 (1886) ("[I]n ascertaining the damages they shall consider . . . the wealth of the defendant . . . so far as it tends to show the defendant's rank and influence in society."); *Birchard v. Booth*, 4 Wis. 85, 88 (1855) ("Upon this subject of

In the late nineteenth century and early twentieth century, the use of punitive damages expanded beyond just punishing wealthy defendants for malicious acts to punishing wealthy corporations for equally malicious acts. In 1870, the New Hampshire Supreme Court observed, “when exemplary or punitive damages are to be given, the [defendant’s circumstances are] . . . material. [S]ufficient damages . . . for a day laborer without means, would be nothing . . . to a wealthy corporation.”²³ By the twentieth century, most courts considered it “obviously proper that the wealth of the defendant should be considered” on the question of punitive damages.²⁴

C. Present Status in the United States

Indeed, until *State Farm*, the vast majority of courts had determined that the defendant’s wealth was an appropriate consideration. In 1991, courts in forty-five states recognized that evidence of the defendant’s financial circumstances, although not mandatory, was a relevant factor when assessing the correct amount of punitive damages.²⁵ Thirteen of those courts held that the trier of fact *must* consider the wealth of the defendant in determining the appropriate amount of punitive damages.²⁶ Very few state courts held that the wealth of the defendant could not be considered in awarding punitive damages.²⁷

Thus, courts consistently treated the defendant’s wealth as a relevant factor in the punitive damages analysis until the *State Farm* decision. The main reason courts throughout history have allowed, or at times required, consideration of a defendant’s wealth was the

vindictive or exemplary damages . . . you may consider that the defendant is a man of large property.”).

23. *Belknap v. Boston & Maine R.R.*, 49 N.H. 358, 358 (1870).

24. *Flaacke v. Stratford*, 64 A. 146, 147 (N.J. 1906).

25. See Annotation, *supra* note 3, § 4 (1991) (showing that Kentucky, Michigan, Washington, and Nebraska are the only states that do not consider the defendant’s wealth relevant.).

26. *Id.* § 3 (showing that Alaska, California, Illinois, Louisiana, Maine, Mississippi, Montana, New Jersey, New York, South Dakota, Tennessee, Utah, and West Virginia all require that a defendant’s wealth be considered.).

27. *Id.* § 6 (showing that Kentucky and Michigan courts do not allow the wealth of the defendant to be considered by the finder of fact in arriving at its award of punitive damages.).

recognition that wealth-calibrated punitive damages are better able to achieve punishment and deterrence.²⁸

D. *When and Why Punitive Damages Are Awarded*

Punitive damages are awarded in very few cases.²⁹ In order for a plaintiff to recover punitive damages, the plaintiff must first establish an underlying cause of action for which damages are recoverable.³⁰ Courts only allow juries to award punitive damages in cases involving highly reprehensible conduct.³¹ A defendant's mental state is the basis for an award of punitive damages;³² if the defendant acted maliciously, recklessly or oppressively, a court will give jurors the discretion to determine "whether to make the award at all, and . . . the amount of the award."³³ Generally plaintiffs must prove by a preponderance of the evidence that punitive damages are appropriate, but some courts demand a higher standard of clear and convincing evidence.³⁴

III. PUNISHMENT AND DETERRENCE: THE TWIN GOALS OF PUNITIVE DAMAGES

A. *Deterrence*

It is well acknowledged that the most important goal of punitive damages is deterrence—the prevention of similar misconduct in the future.³⁵ There are two types of deterrence: specific and general.³⁶ Specific deterrence's goal is to teach the defendant not to engage in misconduct again.³⁷ General deterrence serves to prevent others

28. See *supra* note 22 and accompanying text.

29. See Lori Woodward O'Connell, *The Case for Continuing to Award Punitive Damages*, 36 TORT & INS. L.J. 873, 884–86 (2001) (indicating that studies done in the 1980's and 1990's revealed that punitive damages were rarely awarded in all types of cases).

30. DAN B. DOBBS, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 811 (2d ed. 1993); see SCHLUETER & REDDEN *supra* note 12, § 2.1(A).

31. See DOBBS, *supra* note 30, at 810.

32. REDDEN, *supra* note 12, § 3.1(A).

33. DOBBS, *supra* note 30, at 811.

34. *Id.*

35. O'Connell, *supra* note 29, at 894–95.

36. *Id.* at 877.

37. *Id.*

from following the defendant's example.³⁸ Regardless of whether the goal is specific or general deterrence or both, consideration of the financial condition of the defendant is necessary. Neither the jury nor the reviewing court will be able to properly determine the amount of punitive damages that will effectively prevent the wrongdoer's conduct and deter others from acting similarly if the defendant's financial status is not available. "Different defendants deserve different damages."³⁹

Furthermore, if punitive damages are not calibrated for wealth, then a plaintiff's ability to bring suit to deter a wealthy defendant from engaging in misconduct will be very limited. First of all, wealth-calibrated punitive damages enable certain plaintiffs to pursue claims they might otherwise be unable to afford to pursue.⁴⁰ Faced with expensive litigation and a relatively small compensatory award, plaintiffs may in fact be deterred from suing for highly reprehensible conduct, especially when the defendant is wealthy.⁴¹ Moreover, even if a plaintiff can expect to recover a large amount of compensatory damages, the cost of bringing suit may be prohibitive.⁴²

In addition, a defendant's wealth enables the defendant to make bringing suit prohibitive. A wealthy defendant can mount an "extremely aggressive defense," making litigation very costly for the plaintiff involved while simultaneously establishing a reputation aimed at deterring other plaintiffs from bringing suit.⁴³ Without wealth-calibrated punitive damages, plaintiffs faced with suing an aggressive and wealthy defendant likely will choose not to pursue their claim, since even if they win, they will not be made whole by whatever award they receive.⁴⁴ As a result, wealthy defendant's malfeasance will go undeterred. Thus, wealth-calibrated punitive

38. *Id.*

39. *Id.* at 895; *see also id.* at 876-77.

40. *See* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 *VILL. L. REV.* 363, 378-79 (1994).

41. *See id.*

42. *See id.*

43. *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003).

44. Owen, *supra* note 40, at 378-79; *see also* O'Connell, *supra* note 29, at 878 (discussing how punitive damages provide the plaintiff with extra compensation).

damages perform the important function of encouraging plaintiffs to pursue their claims, resulting in more deterrence.⁴⁵

Moreover, in the context of suits brought against corporations, the financial status of the defendant is a key factor in the punitive damages analysis because the enormous wealth of America's giant corporations make punitive damages an ineffective deterrent unless wealth can be considered.⁴⁶ Deterrence through punitive damages cannot be accomplished if a wealthy defendant can "absorb [an] award with little or no discomfort."⁴⁷ "Deterrence theory is based on the . . . assumption that actors weigh the expected costs and benefits of their future actions."⁴⁸ In the context of wealthy corporations, the cost-benefit calculations, while rational from an economic standpoint, may have devastating social costs for society.⁴⁹ Thus, if financial status cannot be used to increase a punitive damages award, then there exists no meaningful way to teach corporations that "tort does not pay."⁵⁰

Finally, wealth-calibrated punitive damages are necessary to deter corporate malfeasance where there are "gaps" in the criminal law.⁵¹ Many serious misdeeds cannot be deterred because they are

45. See O'Connell, *supra* note 29, at 878; Owen, *supra* note 40, at 378–81; Rustad & Koenig, *supra* note 2, at 1321–26.

46. See Thomas Koenig & Michael Rustad, "Crimtorts" as Corporate Just Deserts, 31 U. MICH. J.L. REFORM 289, 289 (1998).

47. Kirk A. Pasich, *Bad Faith: The New Generation Weapon*, in ABI-ABA COURSE OF STUDY; ENVIRONMENTAL INSURANCE: PAST PRESENT, AND FUTURE 201, 213 (2002) (quoting *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381, 391, 202 Cal. Rptr. 204, 210 (1984)), WL SG102 ALI-ABA 201, at *213 (2002).

48. Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1023 (1999) (quoting Kenneth S. Abraham & John Calvin Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415, 417 (1989)).

49. Koenig & Rustad, *supra* note 46, at 312. For example, in *Anderson v. General Motors Corp.*, 537 U.S. 1053 (2002), General Motors designed the Chevy Malibu's fuel system based upon its own cost-benefit analysis, which though economically sound, resulted in severe physical and emotional injuries to Patricia Anderson and her four children. O'Connell, *supra* note 29, at 874–75.

50. Koenig & Rustad, *supra* note 46, at 314.

51. Rustad & Koenig, *supra* note 2, at 1326–28.

beyond the reach of the criminal law or public prosecutor.⁵² Further, many misdeeds that can be criminally prosecuted are either done so unsuccessfully or are not pursued at all.⁵³ Without wealth-calibrated punitive damages, corporations have an incentive to engage in profitable, yet harmful behavior because they know that neither the criminal nor the civil justice system will prevent it. Thus, punitive damage awards that are adjusted to reflect the financial status of the defendant fill the gaps left by the criminal law, deterring behavior that would otherwise go undeterred.⁵⁴

B. *Punishment*

A fundamental basis for punitive damages is to provide retribution to the victim of an aggravated wrong.⁵⁵ Punishment is justified “in the sense that every wrong deserves to be punished.”⁵⁶ “The idea of imposing a judicial fine is viewed to be appropriate insofar as it encourages the two most fundamental values of our legal system—freedom and equality.”⁵⁷ Consideration of a defendant’s wealth in determining the appropriate punitive damages award furthers this goal of punishment.⁵⁸

Generally, evidence of a defendant’s wealth is thought to be an important consideration because of the conventional reasoning that it

52. Owen, *supra* note 40, at 380–81. This is because the practical difficulties of prosecuting misconduct on the criminal side of the law, like issues of cause-in-fact, the stringent procedural and evidentiary standard of beyond a reasonable doubt and the more demanding evidentiary rules required under the criminal law mean that few corporations will be criminally prosecuted. Koenig & Rustad, *supra* note 46. Another reason the criminal law is so ineffectual in prosecuting corporate misconduct is that corporate defendants hire teams of former white collar prosecutors to defend against these actions. *Id.* at 313 n.105.

53. See Koenig & Rustad, *supra* note 46, at 326–28. The Ford Pinto case is “the only case in American history in which a corporation was criminally prosecuted for knowingly marketing a dangerously defective product.” *Id.* at 312–13. Ford was acquitted of the criminal charges. *Id.* The acquittal discouraged other prosecutors from using the criminal law to punish corporations. *Id.* Thus, punitive damages punished Ford; the criminal law did not. *Id.*

54. Rustad & Koenig, *supra* note 2, at 1326–28.

55. Owen, *supra* note 40, at 375.

56. O’Connell, *supra* note 29, at 877.

57. *Id.*; Owen, *supra* note 40, at 375.

58. See Rustad & Koenig, *supra* note 2, at 1318–20.

takes more to punish a rich person than a poor one.⁵⁹ This intuitively correct assumption reflects the diminishing marginal utility of money; that is, a dollar is generally thought to have more marginal value to a poor person than a rich one.⁶⁰ Thus, for an award of punitive damages to “inflict the same amount of [punishment] upon a rich person as a poor one, the law needs to deprive the rich person of more dollars than the poor one.”⁶¹ “[T]aking the defendant’s wealth into account is theoretically consistent with principles of fairness in that it seeks to equilibrate the amount of disutility imposed.”⁶² From this perspective, the defendant’s wealth is extremely relevant in determining the appropriate amount of a punitive damage award, especially in the context of retributive justice.⁶³

Furthermore, punitive damages assessed with reference to the wealth of the defendant are also useful in punishing corporate wrongdoing, which too often goes unpunished because of the great power of large companies.⁶⁴ This punishment calibrated to reflect the wealth of the defendant is necessary for two reasons: (1) the rich are rarely criminally prosecuted; and, (2) in this context, punitive damages can effectively punish impermissible cost-benefit calculations, which trade consumer safety for profits.⁶⁵

For example, in *Grimshaw v. Ford Motor Co.*,⁶⁶ “punitive damages punished Ford[;] [t]he criminal law did not.”⁶⁷ After “three teenage girls died from burns when their 1973 Pinto was struck from

59. Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 61 (1982); Owen, *supra* note 40, at 386.

60. Owen, *supra* note 40, at 386. This means that the harm suffered by a poor person in losing one dollar is greater than the harm suffered by a rich person in losing one dollar, even though the value of that dollar remains the same. See Ellis, *supra* note 59, at 61.

61. Owen, *supra* note 40, at 386.

62. Ellis, *supra* note 59, at 61.

63. Owen, *supra* note 40, at 386.

64. See Koenig & Rustad, *supra* note 46, at 304–05. “As Justice Louis Brandeis warned: ‘Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the State.’” *Id.* at 304–05 (quoting *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 565 (1933) (Brandeis, J., dissenting)).

65. *Id.* at 312–15.

66. 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

67. Koenig & Rustad, *supra* note 46, at 312.

behind . . . [a]n Indiana prosecutor charged Ford with three counts of reckless homicide.”⁶⁸ Ford was acquitted of the criminal charges.⁶⁹ The Ford Pinto litigation resulted in one of the few cases thus far in which a corporation was criminally prosecuted based upon a defective product.⁷⁰

While the *Grimshaw* court awarded \$3.5 million in punitive damages,⁷¹ the court’s punishment would have been more effective if it had been calibrated for wealth.⁷² According to an economic analysis, ideal punishment should vary with the wealth of the defendant.⁷³ Thus, in *Grimshaw*, where Ford’s net worth was \$7.7 billion and the company earned more than two times the unadjusted punitive damages award (\$125 million) during the last quarter of the year of appeal, the punitive damage award would have achieved optimal punishment if it had been calibrated for Ford’s wealth.⁷⁴

Punitive damages are imposed, in part, to punish defendants for egregious misconduct. Punitive damages fail to perform this important function “if the wealth of the defendant allows him to absorb the award with little or no discomfort.”⁷⁵ To ensure that a wealthy defendant experiences more than just a pinprick, the calculation of a punitive damages award must include consideration of a defendant’s financial condition.

68. *Id.* at 313.

69. *Id.*

70. *Id.*

71. *Grimshaw*, 119 Cal. App. 3d at 771.

72. Peter Diamond, *Integrating Punishment and Efficiency Concerns in Punitive Damages for Reckless Disregard of Risks to Others*, 18 J.L. ECON. & ORG. 117, 128 (2002). Holding other variables constant, Peter Diamond explores how punitive damages should vary with wealth. Assuming ideal punishment is proportional to wealth, Peter Diamond concludes that “no additional conditions are needed for the conclusion that punitive damages should increase with the wealth of the defendant.” *Id.*

73. *Id.*

74. Rustad and Koenig, *supra* note 2, at 1314.

75. Pasich, *supra* note 47, at 213 (quoting *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381, 391 (1984)).

IV. SUPREME COURT PRECEDENT LEADING UP TO AND CULMINATING
IN *STATE FARM V. CAMPBELL*

A. *Supreme Court Precedent Prior to State Farm v. Campbell*

In the late 1980's and early 1990's, the Supreme Court began to identify constitutional constraints on punitive damages awards. In these early cases, the Court expressed concerns that punitive damage awards were "run[ning] wild,"⁷⁶ but fell short of imposing constraints that would reduce punitive damages awards.

In two early cases, the Supreme Court for the first time noted that the constitutionality of punitive damages raised "important issues which, in an appropriate setting, must be resolved."⁷⁷ In *Aetna Life Insurance Co. v. Lavoie*, the Court recognized that punitive damages awards raise important constitutional questions.⁷⁸ Similarly, in *Bankers Life & Casualty Co. v. Crenshaw*,⁷⁹ Justice O'Connor, in a concurring opinion, "expressed the view that unrestricted jury discretion over punitive damages awards presented 'serious' procedural due process problems."⁸⁰

In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,⁸¹ the Supreme Court held that a punitive damages award could not be challenged under the Excessive Fines Clause of the Eighth Amendment because the Eighth Amendment "does not constrain an award of [punitive] damages in a civil suit."⁸² However, the Court stated, "[t]here is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a

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

77. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986).

78. *Id.* The Supreme Court ultimately set aside the punitive damages award on other grounds. *Id.*

79. 486 U.S. 71 (1988).

80. Joseph J. Chambers, *In re Exxon Valdez: Application of Due Process Constraints on Punitive Damages Awards*, 20 ALASKA L. REV. 195, 202 (2003) (discussing O'Connor's concurring opinion in *Bankers Life*). The Supreme Court did not reach the constitutional issue in *Bankers Life* because the issue had not been properly raised in the state court. *Bankers Life*, 486 U.S. at 76.

81. 492 U.S. 257 (1989).

82. *Id.* The Court did not reach the question of whether the Due Process Clause is a constraint on jury discretion over punitive damages even in the absence of statutory limits also because this question was not properly raised in the court below. *Id.* at 276-77.

civil damages award made pursuant to a statutory scheme.”⁸³ In a concurrence, Justice Brennan emphasized that “the Due Process Clause forbids damages awards that are ‘grossly excessive’ or ‘so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.’”⁸⁴ The Court, in *Browning-Ferris*, intimated that it would be willing to address the role the Due Process Clause plays in limiting the size of punitive damage awards in the future.⁸⁵

In *Pacific Mutual Life Insurance Co. v. Haslip*,⁸⁶ Pacific Mutual Life Insurance brought a challenge to a punitive damage award based on the Due Process Clause.⁸⁷ The Supreme Court responded by stating firmly that the Due Process Clause imposes a limit on punitive damages awards.⁸⁸ The Court endeavored to resolve “whether the Due Process Clause render[ed] the punitive damages award in [Pacific Mutual] constitutionally unacceptable.”⁸⁹ Here, the Court refused to draw a constitutional bright line between the acceptable and unacceptable, but emphasized that “general concerns of reasonableness and adequate guidance from the court” are part of the “constitutional calculus.”⁹⁰

The Court also approved of seven factors used by the state to determine “whether a punitive award is reasonably related to the goals of deterrence and retribution.”⁹¹ Two of those factors were the “profitability” and “financial position” of the defendant.⁹² The *Pacific Mutual* Court “viewed wealth of the defendant as a key factor in determining the reasonableness of a punitive award.”⁹³

“The Court ultimately upheld the punitive damages award, finding that the award had an ‘understandable relationship to [the] compensatory damages.’”⁹⁴ Thus, in *Pacific Mutual*, the punitive

83. *Id.* at 276.

84. *Id.* at 280–81 (Brennan, J., concurring) (citations omitted).

85. *See id.* at 276–77.

86. 499 U.S. 1 (1991).

87. *See id.* at 12.

88. *See id.* at 18–19; *see also* Chambers, *supra* note 80, at 202.

89. *Id.* at 18.

90. *Id.*

91. *Id.* at 21.

92. *Id.* at 22.

93. Rustad & Koenig, *supra* note 2, at 1313.

94. Chambers, *supra* note 80, at 203 (discussing *Pac. Mut.*, 499 U.S. at 22.)

The punitive damages award assessed against Pacific Mutual did not violate

damages award, which was four times the amount of the compensatory damages, may have been close to the line, but did “not cross the line into the area of constitutional impropriety.”⁹⁵

Two years later in *TXO Production Corp. v. Alliance Resources Corp.*,⁹⁶ the Supreme Court “upheld the punitive damage award while reiterating that ‘reasonableness’ is an important factor in determining whether a punitive damages award is so ‘grossly excessive’ that it violates the Due Process Clause.”⁹⁷ The *TXO* Court adopted the *Pacific Mutual* factors, including the defendant’s wealth.⁹⁸ The Court recognized that “as ‘a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages,’” but still upheld an award with a ratio of punitive to compensatory damages of 526 to one.⁹⁹ Because *TXO*’s conduct was malicious and fraudulent, the Court concluded the disparity between the actual damages and the punitive award was not controlling.¹⁰⁰ Together, these cases established the foundation for the Court’s decisions in *Gore*¹⁰¹ and *State Farm*.¹⁰²

the Due Process Clause because the jury’s discretion was confined by the state policy concerns of deterrence and punishment and the trial court and Alabama Supreme Court conducted a post-verdict hearing to ensure that the award was not grossly out of proportion to the severity of the offense. *Pac. Mut.*, 499 U.S. at 22–23.

95. *Pac. Mut.*, 499 U.S. at 23–24.

96. 509 U.S. 443 (1993).

97. Chambers, *supra* note 80, at 203 (discussing *TXO*, 509 U.S. at 453, 458).

98. *TXO*, 509 U.S. at 462. (“The punitive damages award in this case is certainly large, but in light of the . . . petitioner’s wealth, we are not persuaded that the award was so ‘grossly excessive’ as to be beyond the power of the State to allow.”).

99. *Id.* at 459 (citing *Games v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 909 (1991)).

100. *Id.* at 462.

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

102. The Supreme Court also considered, in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), whether a state’s decision to prevent review by courts of punitive damages awards violated Due Process. The Court held that an Oregon law denying its courts the authority to reduce or vacate excessive punitive damages awards violated the Due Process Clause. *Id.* at 435–35. The Court stated that “[j]udicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded.” *Id.* at 421.

B. *BMW of North America v. Gore*

In *BMW of North America, Inc. v. Gore*,¹⁰³ the Supreme Court held that the amount of the punitive damages award in that case violated the Due Process Clause of the Fourteenth Amendment.¹⁰⁴ The *Gore* Court stated, “[o]nly when an award can fairly be categorized as ‘grossly excessive’ in relation to [a state’s] interests does it enter the zone of arbitrariness that violates the Due Process Clause.”¹⁰⁵ “The majority opinion articulated the following three guideposts to be considered when a court determines whether a punitive damages award is constitutionally excessive: (1) the reprehensibility of the defendant’s conduct; (2) the ratio of the award to the harm inflicted on the plaintiff; and (3) the difference between the award and the civil or criminal penalties that could be imposed for comparable conduct.”¹⁰⁶ After it applied the guideposts to the facts, the Court found the punitive award grossly excessive in relation to the state’s legitimate interests and remanded the case to the Alabama Supreme Court.¹⁰⁷ *Gore* was the first time the Supreme Court applied its analysis to invalidate an “excessive” award on due process grounds.¹⁰⁸ Furthermore, in *Gore*, the Court emphasized the three guideposts, while de-emphasizing other previously considered factors like the profitability and financial status of the defendant.¹⁰⁹

C. *State Farm Mutual Automobile Insurance Co. v. Campbell*

State Farm was the first case to apply the *Gore* guideposts and presented the Supreme Court with an opportunity to further limit the role the wealth of the defendant would be allowed to play in the punitive damages award calculus.

In *State Farm*, the Supreme Court reversed the Utah Supreme Court’s punitive damages award of \$145 million on the ground that it violated the Due Process Clause of the Fourteenth Amendment.¹¹⁰

103. 517 U.S. 559 (1996).

104. *Id.*; see also Chambers, *supra* note 80, at 204 (discussing *Gore*, 517 U.S. at 574–75).

105. *Gore*, 517 U.S. at 568.

106. Chambers, *supra* note 80, at 204 (discussing *Gore*, 517 U.S. at 574–75).

107. *Id.* (discussing *Gore*, 517 U.S. at 585–86).

108. See Pohlman, *supra* note 20, at 644–48.

109. See *Gore*, 517 U.S. at 574–86.

110. *State Farm Mut. Auto. Ins. v. Campbell*, 123 S. Ct. 1513, 1526 (2003).

The Supreme Court, in its analysis, made clear the relative importance of each of the three guideposts in evaluating a punitive damages award for excessiveness.¹¹¹

While the Supreme Court did not specifically proscribe consideration by lower courts of some other factors, the Court did severely limit the use of one factor in particular: the financial status of the defendant.¹¹² The Court stated that the wealth of the defendant still could be a relevant factor, but, so restricted its relevance that it only could be used in situations where an award must be lowered because it threatens to bankrupt a defendant.¹¹³ This section of the Article reviews the facts behind *State Farm*, the Court's application and analysis of the three *Gore* guideposts, and finally, discusses the State Farm Court's ban on the use of defendant's wealth to increase an award of punitive damages.

1. Facts of the Case

In 1981, Mr. Campbell was driving with his wife as passenger down a two-lane highway in Utah when he began passing six vans traveling in front of him.¹¹⁴ Todd Ospital was the driver of a car approaching from the opposite direction.¹¹⁵ To avoid a head-on collision with Campbell, Ospital swerved, lost control of his vehicle and collided with another vehicle driven by Robert Slusher.¹¹⁶ Ospital was killed, Slusher was permanently disabled, and the Campbells escaped unharmed.¹¹⁷

Although investigators reached an early consensus that Mr. Campbell's unsafe pass had caused the crash, Campbell's insurer, State Farm Automobile Insurance ("State Farm"), decided to contest liability and rejected offers to settle for the policy limit of \$50,000.¹¹⁸ State Farm took the case to trial, assuring the Campbells that, "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to

111. *See id.* at 1520–26.

112. *See id.* at 1525.

113. *See id.*

114. *Id.* at 1517.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 1517–18.

procure separate counsel.”¹¹⁹ A jury determined that Campbell was 100 percent at fault and returned a judgment for \$186,849.¹²⁰ State Farm refused to cover the \$135,849 in excess liability, telling the Campbells, “[y]ou may want to put [a] for sale sign . . . on your property to get things moving.”¹²¹

Campbell obtained his own counsel and appealed the judgment.¹²² The Utah Supreme Court affirmed the judgment and State Farm finally paid the entire \$186,849.¹²³ Nonetheless, the Campbells “filed a complaint against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress.”¹²⁴ The trial was bifurcated at State Farm’s request and “[i]n the first phase [of trial,] the jury determined that State Farm’s decision not to settle was unreasonable.”¹²⁵

In the second phase, the Campbells introduced evidence of State Farm’s business practices in numerous states showing a pattern of dishonest and fraudulent nation-wide claims adjustment, which was orchestrated from the highest levels of corporate management.¹²⁶ The jury awarded the Campbells \$2.6 million in compensatory damages and \$145 million in punitive damages.¹²⁷ The trial court reduced the award to \$1 million and \$25 million respectively.¹²⁸ Both parties appealed and the Utah Supreme Court reinstated the \$145 million punitive damages award.¹²⁹ The U.S. Supreme Court granted certiorari.¹³⁰

119. *Id.* at 1518 (quoting *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1142 (Utah 2001), *rev’d*, 123 S. Ct. 1513 (2003)).

120. *Id.*

121. *Id.* (quoting *Campbell*, 65 P.3d at 1142).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 1518–19. “State Farm’s decision to take the [Campbells’] case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide.” *Id.* at 1519 (quoting *Campbell*, 65 P.3d at 1143). The trial court allowed the Campbells to introduce expert evidence proving the existence of the scheme because it was necessary to determine whether State Farm’s conduct was “intentional and sufficiently egregious to warrant punitive damages.” *Id.* at 1519 (quoting *Campbell*, 65 P.3d at 1143).

127. *Id.*

128. *Id.*

129. *Id.* The Utah Supreme Court relied upon State Farm’s “massive wealth,” and the low probability of State Farm being punished in other cases

2. The Supreme Court's Reasoning in *State Farm*

The Supreme Court, applying the principles outlined in *BMW v. Gore*, concluded it was error to reinstate the jury's \$145 million punitive damages award.¹³¹ *Gore* established three guideposts for determining the reasonableness and proportionality of an award of punitive damages: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."¹³²

Citing *Gore*, the Court noted, "[t]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."¹³³ The *Gore* Court instructed courts to determine the reprehensibility of a defendant's conduct by considering the following factors: (1) whether the harm caused was physical as opposed to economic; (2) whether the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (3) whether the target of conduct had financial vulnerability; (4) whether the conduct involved repeated actions or was an isolated incident; and (5) whether the harm was the result of intentional malice, trickery, or deceit, or mere accident.¹³⁴ Punitive damages should only be awarded if a defendant's actions are so reprehensible that compensatory damages alone cannot achieve punishment or deterrence.¹³⁵

While the Supreme Court acknowledged that *State Farm's* actions "merit . . . no praise,"¹³⁶ the Court nonetheless concluded, "a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives."¹³⁷ The Court dismissed

and concluded the \$145 million punitive damages award was not excessive. *Id.* (quoting *Campbell*, 65 P.3d at 1153).

130. *Id.*

131. *Id.* at 1521.

132. *Id.* at 1520 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

133. *Id.* at 1521 (quoting *Gore*, 517 U.S. at 575).

134. *Id.* (citing *Gore*, 517 U.S. at 576, 577).

135. *Id.*

136. *Id.*

137. *Id.*

evidence of State Farm's out-of-state conduct as "tangential," stressing that the Utah Supreme Court overstepped the bounds of due process in considering this conduct.¹³⁸ Thus, "the only conduct relevant to the reprehensibility analysis" was the conduct that harmed the Campbells.¹³⁹ This conduct, according to the Court, did not warrant a punitive damages award of \$145 million.¹⁴⁰

Turning to the second *Gore* guidepost, the Court declined to impose a bright line ratio.¹⁴¹ However, the Court stressed that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff."¹⁴² Usually, this means that few awards exceeding a single-digit ratio will satisfy due process.¹⁴³ The Court concluded there is a presumption against an award that has a 145:1 ratio, since the compensatory award was substantial.¹⁴⁴

"The Utah Supreme Court sought to justify the . . . award by pointing to State Farm's . . . failure to report a prior \$100 million punitive damages award . . . to its corporate headquarters . . . and State Farm's enormous wealth."¹⁴⁵ According to the Court, the prior punitive damages award was only marginally relevant and "should have been accorded little or no weight."¹⁴⁶ As for the wealth of the defendant, the Supreme Court indicated it "cannot justify an otherwise unconstitutional punitive damages award."¹⁴⁷ Reference to State Farm's assets, according to the Court, "had little to do with the actual harm sustained by the Campbells."¹⁴⁸

The Court did not dwell on the third guidepost, pointing out the most relevant civil sanction in Utah was a \$10,000 fine, a much smaller amount than the \$145 million punitive damages award.¹⁴⁹

138. *Id.* at 1523.

139. *Id.* at 1524.

140. *See id.* at 1521.

141. *Id.* at 1524.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 1525.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1526.

3. Impact of *State Farm*

After *State Farm*, the wealth of the defendant is no longer relevant to increase the amount of a punitive damages award. The Court says wealth cannot compensate for the failure of the other factors to constrain significantly an award of punitive damages.¹⁵⁰ While on its face, *State Farm* seems to recognize wealth as a factor, it really only considers it viable as a means of lowering an award threatening to bankrupt a defendant.

The *State Farm* Court exposes its opposition to using a defendant's wealth to increase an award of punitive damages when it acknowledges that "the presentation of evidence of a defendant's net worth" may result in juries using their verdicts to "express biases" against wealthy defendants.¹⁵¹ The Court seems to assume that juries, when confronted with evidence of a defendant's wealth, "will be unable to avoid punishment based solely upon bias or whim."¹⁵² According to the *State Farm* Court, it was in light of this assumption that the *Gore* Court announced the three guideposts.¹⁵³

The *State Farm* Court not only expressed concern about the due process implications of the hypothetical use of defendant's wealth to inflate a punitive award, but also disapproved of the actual use of *State Farm's* net worth by the Utah Supreme Court.¹⁵⁴ The Utah Supreme Court reinstated the \$145 million punitive award, in part because *State Farm* had already disregarded a smaller award, was rarely punished, and was enormously wealthy.¹⁵⁵ The *State Farm* Court labeled the Utah Supreme Court's analysis "a departure from well-established constraints on punitive damages."¹⁵⁶ Thus, according to the *State Farm* Court, using the financial status of the defendant to inflate a punitive damages award both conflicts with and departs from the appropriate due process analysis.

The *State Farm* Court implied that wealth can still be a relevant factor, but this relevance seems illusive. In cases where the defendant is very wealthy, an award of punitive damages only could

150. *Id.* at 1525.

151. *Id.* at 1520.

152. *Id.* (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991)).

153. *Id.*

154. *See id.* at 1520-21.

155. *Id.*

156. *Id.* at 1525.

be large if the defendant's conduct was especially reprehensible, there was a reasonable ratio between punitive and compensatory damages and a reasonable relationship between punitive damages and civil penalties.¹⁵⁷ But, this would be the same without regard for the defendant's wealth. In fact, under these circumstances, it seems that the only time wealth would be relevant would be to reduce an award that threatens to bankrupt a poor defendant.

Conversely, according to the Court in *State Farm*, in cases where the conduct is not highly reprehensible and/or the compensatory damages are low, the defendant's wealth could not be used to increase the award of punitive damages because a large award in this context would be unconstitutional.¹⁵⁸ Thus, a defendant's financial status remains a relevant factor, if at all, in cases where though the defendant's conduct may be reprehensible, the defendant's poverty makes imposition of a large punitive damages award unnecessary to achieve punishment and deterrence. Thus, while the *State Farm* Court gives lip service to two of the goals of punitive damages, punishment and deterrence, it forecloses the use of evidence of the defendant's wealth to achieve either objective.

V. *STATE FARM* IS INCONSISTENT WITH THE HISTORY AND GOALS OF PUNITIVE DAMAGES

A. *History of Punitive Damages*

Over the centuries, juries or judges have considered a defendant's wealth in determining the appropriate punitive damages award.¹⁵⁹ Moreover, nearly every American jurisdiction that has recognized punitive damages has permitted evidence of financial standing to be considered in order to ensure that the award is large enough.¹⁶⁰ The Supreme Court, in *Haslip*, viewed wealth as a key factor in determining the reasonableness of a punitive award. Yet, the *State Farm* Court has broken with this long tradition. By holding that plaintiffs may not use the defendant's wealth in arguing for a

157. *Id.* at 1520.

158. *Id.* at 1524.

159. *See supra* Part II.

160. Annotation, *supra* note 3, § 1.

higher punitive damages award, the *State Farm* Court has moved away not only from its own precedent, but also from a long history and tradition of considering defendant's wealth. In doing so, the *State Farm* Court has taken a step in the wrong direction.

B. Punishment and Deterrence

1. Punishment

A key goal of punitive damages is to provide retribution to the victim of an aggravated wrong.¹⁶¹ Evidence of a defendant's wealth must be considered because an award that could bankrupt a poor defendant may be little more than a pinprick to a wealthy one.¹⁶² The *State Farm* Court's determination that a defendant's wealth cannot be used to inflate a punitive damages award results not only in minimal punishment in *State Farm*, but minimal punishment in all future punitive damages cases.

In *State Farm*, the Supreme Court discredited the Utah Supreme Court's reliance upon evidence of State Farm's enormous wealth and the fact that State Farm's actions rarely will be punished.¹⁶³ In doing so, the Supreme Court failed to punish State Farm. Because of the diminishing marginal utility of money, an award of punitive damages will punish defendants differently, based upon their wealth. Like Ford,¹⁶⁴ State Farm likely was not punished by the reduced punitive damages award because of its enormous wealth.¹⁶⁵ Thus, the *State Farm* Court's exclusion of defendant's wealth as a means of increasing a punitive damages award is inconsistent with achieving punishment.

161. See *supra* Part III.B.

162. *Id.*

163. *State Farm*, 123 S. Ct. at 1525–26.

164. See discussion *supra* Part III.B.

165. James E. Wilson, Jr., *Punitive Damages: The U.S. Supreme Court's State Farm v. Campbell Decision: What About Deterrence?*, NEV. LAW. Sept. 2003, at 8, 11. State Farm disregarded a previous punitive damages award of one million dollars. *Id.* To break even on such an award, State Farm need only make \$20 per bad act. *Id.* State Farm could hardly feel the sting of punishment from a punitive damages award of this size. *Id.*

2. Deterrence

If the defendant's financial status is not a factor, then judges and juries will be unable to effectively deter the wrongdoer and others from engaging in reprehensible conduct.¹⁶⁶ The *State Farm* Court limits the punitive damages award assessment to the three *Gore* guideposts.¹⁶⁷ While this Article does not address the specific failures of the *Gore* guideposts, it should be noted that by excluding consideration of a defendant's wealth and relying on the *Gore* guideposts, the Supreme Court has minimized punitive damages' deterrent effect.¹⁶⁸

The Supreme Court described the first *Gore* guidepost, the degree of reprehensibility, as the most important factor in evaluating a punitive damages award.¹⁶⁹ Careful analysis of the degree of reprehensibility of a defendant's conduct is an important starting point for achieving deterrence; however, this guidepost alone is insufficient.¹⁷⁰ For example, a uniform penalty levied for equally reprehensible acts committed both by a poor defendant and a wealthy one "will trigger different levels of deterrence."¹⁷¹ "A one thousand dollar [punitive] award might greatly deter a poor defendant, but barely concern a wealthy one."¹⁷²

Moreover, the second *Gore* factor, the ratio between punitive and compensatory damages, may in some circumstances actually undermine the deterrent effect of punitive damages.¹⁷³ This is because the ratio factor "stress[es] the *actual resultant harm* rather than the *social undesirability* of the defendant's conduct."¹⁷⁴ The problem with this approach "is that the actual injury sustained may

166. See *supra* Part III.B.

167. See *State Farm*, 123 S. Ct. at 1520; Lisa M. Broman, Comment, *Punitive Damages: An Appeal for Deterrence*, 61 NEB. L. REV. 651 (1982).

168. See Diamond, *supra* note 72; Pasich, *supra* note 47; Wilson, *supra* note 165;

169. *State Farm*, 123 S. Ct. at 1521; Casenote, Bridget E. Leonard, *State Farm Mutual Automobile Insurance Co. v. Campbell: Refining BMW of North America, Inc. v. Gore and Further Restricting Punitive Damages*, 38 U. RICH. L. REV. 545, 549 (2004).

170. See Broman, *supra* note 167, at 661.

171. *Id.*

172. *Id.*

173. *Id.* at 676.

174. *Id.*

bear little relationship, if any, to the amount of an award which would be an effective deterrent.”¹⁷⁵

In addition, if, as the Supreme Court suggests in *State Farm*, the ratio is limited to single-digit multipliers, then the deterrent effect of an award of punitive damages is further minimized.¹⁷⁶ For example, if a jury awarded \$1,000 in compensatory damages against a wealthy defendant, a \$9,000 award of punitive damages (the maximum punitive award allowable if the ratio is limited to a single-digit ratio) “probably would not have any meaningful impact.”¹⁷⁷ Because the amount of punitive damages, which will serve as an example to the defendant and others will necessarily vary widely, a rigid ratio formula would fail in many instances to achieve deterrence.¹⁷⁸

Furthermore, the third *Gore* factor requires a comparison of the punitive damages award to civil and criminal sanctions for comparable misconduct.¹⁷⁹ This guidepost provides jurors and reviewing courts with little guidance, especially since for some misconduct, a civil or criminal sanction may have no relation to the appropriate punitive damages award.¹⁸⁰

In addition, in *State Farm*, the punitive damages award failed not only to deter State Farm’s reprehensible conduct, but also to deter other corporate defendants from engaging in similarly reprehensible conduct. The majority opinion in *State Farm*, in overturning a punitive damages award of \$145 million, discredited the Utah Supreme Court’s reliance on evidence that State Farm’s corporate headquarters was not informed of a prior punitive damages award of \$100 million.¹⁸¹ The Court also ignored evidence that State Farm’s actions “will be punished at most in one out of every 50,000 cases as a matter of statistical probability.”¹⁸²

If a \$100 million punitive damages award was not even reported to State Farm’s home office, then it is fair to infer that it will take

175. *Id.*

176. Pasich, *supra* note 47, at 213.

177. *Id.* at 212.

178. *Id.*

179. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583 (1996).

180. *See* Pasich, *supra* note 47, at 212–13.

181. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1525 (2003); Wilson, *supra* note 165, at 11.

182. *State Farm*, 123 S. Ct. at 1519.

something more than \$100 million to get State Farm's attention.¹⁸³ Yet, by placing the financial status of the defendant off limits as a factor for consideration in increasing a punitive damages award, the *State Farm* Court is in actuality not only failing to deter State Farm's reprehensible conduct, but also sending a message to State Farm and other wealthy corporations that punitive damages are merely a cost of doing business.¹⁸⁴ As long as the profit exceeds the cost, wealthy defendants have an economic incentive to commit reprehensible fraudulent conduct.¹⁸⁵ Thus, the *State Farm* Court's decision to prevent fact-finders from using wealth to increase a punitive damages award prevents deterrence.

C. Juries Do Not Use Evidence of a Defendant's Wealth Improperly as Suggested by the Supreme Court in State Farm

The *State Farm* Court suggests, and many critics of punitive damages argue, that evidence of a defendant's wealth "provides an open-ended basis for inflating [punitive damages] awards."¹⁸⁶ Some critics complain juries are consistently biased against wealthy defendants and that presenting evidence of a defendant's financial condition creates a "Robin Hood like state of mind in the jury room."¹⁸⁷ While the possibility that juries might use a defendant's wealth improperly is a valid concern, in practice, social psychological research finds no evidence that juries are unfavorably disposed towards wealthy defendants.

183. *Id.* at 1525.

184. Pasich, *supra* note 47, at 213.

185. Wilson, Jr., *supra* note 165, at 11.

186. *State Farm*, 123 S. Ct. at 1525.

187. Koenig & Rustad, *supra* note 46, at 337. One study conducted by David Kahneman, David Schkade, and Cass Sunstein (Sunstein study), found that conduct deemed to be equally reprehensible resulted in a larger punitive damages award when the defendant was wealthy than when the defendant was poor. David Kahneman, David A. Schkade, & Cass R. Sunstein, *Shared Outrage, Erratic Awards*, in CASS R. SUNSTEIN ET AL., *PUNITIVE DAMAGES: HOW JURIES DECIDE*, 31, 40-42 (2002). However, the Sunstein study concluded that jury awards were so erratic, not because jurors were given evidence of the defendant's wealth, but because "jurors lack an understanding of how to choose one or another point along [a] literally infinite scale." *Id.* Thus, according to the Sunstein study, jurors are in need of "guidance about the meaning or consequences of different choices on the unbounded dollar scale." *Id.* With that guidance, jurors would be able to use a defendant's wealth appropriately.

For example, one study concluded that jurors actually harbored suspicions about the validity of plaintiffs' claims and worried about the social cost of large jury awards.¹⁸⁸ Moreover, RAND investigated the widely held view that jurors are biased against wealthy "deep pocket" defendants with jury simulations. Its study is consistent with other empirical research¹⁸⁹ in casting doubt on the deep-pocket hypothesis.¹⁹⁰

Furthermore, a secondary analysis of million dollar punitive damage awards upheld in federal courts between 1984 and 1994 conducted by Thomas Koenig and Michael Rustad revealed that most wealthy defendants "were punished only slightly in view of their size and the gravity of their offense."¹⁹¹ The study concluded that "improper references to the wealth of the defendant were not an issue in these cases. In fact, in the full decade examined, no federal appeals court cited has reduced an award because of a plaintiff's improper references to the defendant's wealth."¹⁹² Thus, the Supreme Court and critics' concerns over juror's use of defendant's wealth is unfounded; "wealth-calibrated punitive damages are not out of control."¹⁹³

VI. *MATHIAS V. ACCOR ECONOMY LODGING, INC.*

The Seventh Circuit in *Mathias v. Accor Economy Lodging, Inc.*¹⁹⁴ interpreted *State Farm* to mean that the wealth of the defendant could be used to inflate a punitive damages award in limited circumstances.¹⁹⁵ In *Mathias*, the Seventh Circuit upheld the decision to award an amount of punitive damages in a case brought by hotel guests who were bitten by bedbugs while staying in a Motel 6 in downtown Chicago.¹⁹⁶ The majority opinion, authored by Judge

188. Koenig & Rustad, *supra* note 46, at 337–38.

189. See Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the Deep Pockets Hypothesis*, 30 LAW & SOC'Y REV. 121, 140–44 (1996) (concluding that there is little evidence that a defendant's wealth affects juror judgments).

190. Koenig & Rustad, *supra* note 46, at 338–39.

191. *Id.* at 340–41.

192. *Id.* at 342.

193. *Id.*

194. 347 F.3d 672 (7th Cir. 2003)

195. *Id.* at 676.

196. *Id.* at 673, 678.

Posner, concluded that the wealth of the defendant is relevant in cases where the defendant's resources enable the defendant to mount an aggressive defense, and the plaintiff's actual damages are low.¹⁹⁷ Under these circumstances, a wealthy defendant can make litigation very costly for the plaintiff making it hard for the plaintiff to find a lawyer willing to take the case on a contingency fee basis.¹⁹⁸ Judge Posner argues that consideration of the wealth of the defendant, in this context, may warrant a punitive damages award exceeding the single-digit punitive to compensatory ratio suggested in *State Farm*.¹⁹⁹

A. *Facts*

The plaintiffs brought suit against Accor Economy Lodging, the affiliated entities that own and operate the "Motel 6" chain of hotels and motels.²⁰⁰ They were guests in a motel owned by defendants and were bitten by bedbugs while in their hotel room.²⁰¹ The plaintiffs claimed that allowing guests to be attacked by bedbugs while charging more than it could have charged had it informed the guests of the risks of being bitten by bedbugs constituted willful and wanton conduct, making Accor liable for both compensatory and punitive damages.²⁰² The jury agreed and awarded each plaintiff \$5,000 in compensatory damages and \$186,000 in punitive damages.²⁰³ Accor appealed, arguing the plaintiffs were not entitled to any award of punitive damages and the amount of punitive damages awarded plaintiffs was excessive, depriving Accor of property without due process of the law.²⁰⁴

B. *Judge Posner's Reasoning in Mathias*

The Seventh Circuit reviewed the evidence offered at trial and concluded there was sufficient evidence of willful and wanton conduct to warrant an award of punitive damages in the case.²⁰⁵

197. *Id.* at 677.

198. *Id.*

199. *Id.*

200. *Id.* at 673.

201. *Id.*

202. *Id.* at 674.

203. *Id.*

204. *Id.*

205. *Id.*

Next, the Court had to determine whether the amount of punitive damages awarded below violated the due process rights of Accor. Accor argued for an award of \$20,000 in punitive damages, a ratio of four to one, based on the Supreme Court's suggestion in *State Farm v. Campbell* that a ratio of four to one between punitive and compensatory damages "might be close to the line of constitutional impropriety."²⁰⁶ However, Judge Posner disagreed with Accor; the Supreme Court did not establish a mandatory four to one ratio.²⁰⁷

Judge Posner emphasized the need to consider two questions in deciding whether the amount of the punitive damage award should be upheld: "why punitive damages are awarded and why the Court has decided that due process requires that such awards be limited."²⁰⁸ Judge Posner answered the first question in terms of the present case; where the compensable harm done was slight and at the same time difficult to quantify because largely emotional, without punitive damages, the defendant may continue his outrageous behavior with impunity.²⁰⁹ Thus, the punitive damages award serves to punish the defendant, to deter future conduct and to limit the defendant's ability to profit from its outrageous behavior.

In answer to the second question of why the Court had decided Due Process requires limited awards, Judge Posner emphasized the penal nature of punitive damages—"the punishment should fit the crime."²¹⁰ He also pointed out that "a defendant should have reasonable notice of the sanction for unlawful acts [and]... sanctions should be based on the wrong done, not the status of the defendant."²¹¹

However, Judge Posner indicates that the wealth or status of the defendant can, in certain circumstances, be relevant to a determination of the amount of punitive damages. If a wealthy defendant is "investing in developing a reputation intended to deter plaintiffs" from pursuing legitimate claims, then a larger award of punitive damages may be justified to allow plaintiffs to finance the

206. *Id.* at 676.

207. *Id.*

208. *Id.*

209. *Id.* at 677.

210. *Id.* at 676.

211. *Id.*

suit.²¹² Accor demonstrated “great stubbornness [in its defense of this case], making a host of frivolous evidentiary arguments despite the very modest stakes.”²¹³ As a result, Judge Posner considered Accor’s net worth of \$1.6 billion relevant in his determination that the award of punitive damages in this case was not excessive.²¹⁴

C. *Mathias is Inconsistent with State Farm*

Judge Posner’s suggestion that evidence of wealth may be relevant in certain narrow circumstances is inconsistent with *State Farm*. In *State Farm*, the Court specifically forecloses the use of evidence of wealth in a case where compensatory damages are low, the type of case where Judge Posner thinks evidence of wealth may be relevant.

According to *State Farm*, where an act has resulted in only a small amount of economic damages, a larger award could be justified by the extreme reprehensibility of the defendant’s conduct, but not by evidence of the defendant’s wealth.²¹⁵ Although the amount of the punitive award in *Mathias* takes into account the reprehensibility of Accor’s conduct, the size of the award is in large part justified by Accor’s \$1.6 billion net worth, which enables Accor to make it very costly for any plaintiff to bring suit.²¹⁶ The *State Farm* Court made it clear that the defendant’s wealth “cannot justify an otherwise unconstitutional punitive damages award.”²¹⁷ In direct contrast, Judge Posner uses the defendant’s wealth to justify an award that would otherwise be unconstitutional.²¹⁸

212. *Id.* at 677.

213. *Id.*

214. *Id.*

215. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1524 (2003).

216. *Mathias*, 347 F.3d at 677.

217. *State Farm*, 123 S. Ct. at 1525.

218. The punitive to compensatory ratio of the award upheld in *Mathias* is 37.2 to 1. *Mathias*, 347 F.3d at 676. The *State Farm* Court, though declining to set a mathematical bright-line ratio, authoritatively established that “few awards exceeding a single-digit ratio . . . will satisfy due process.” *State Farm*, 123 S. Ct. at 1524. Thus, the 37.2 to 1 ratio of the award in *Mathias* would likely be unconstitutional by the Supreme Court’s standards.

VII. *MATHIAS* IS CONSISTENT WITH THE HISTORY AND GOALS OF PUNITIVE DAMAGES

A. *Mathias* is Consistent with the History of Punitive Damages

Judge Posner's recognition that the defendant's wealth can, in certain circumstances, play an important role in the punitive damages assessment is consistent with the long history of punitive damages.²¹⁹ The vast majority of American courts that have considered the issue have concluded that the defendant's wealth is an appropriate consideration.²²⁰ Judge Posner came to the same conclusion in *Mathias* when he determined that the punitive damages award assessed against the defendant is appropriate because the plaintiff's compensatory damages are small and a larger punitive award is necessary to punish and deter the wealthy defendant.²²¹ Thus, the result reached by Judge Posner, unlike that reached by the Supreme Court in *State Farm*, appropriately recognizes the important role the defendant's wealth has played throughout the history of punitive damages.

B. *Mathias* is Consistent with Punishment and Deterrence

1. Punishment

Punishment is one of the main goals of punitive damages; allowing for consideration of a defendant's wealth in increasing a punitive damages award enables courts to achieve this goal.²²² Judge Posner's opinion in *Mathias* recognizes that punishment cannot be achieved without consideration of a defendant's wealth. In *Mathias*, a small punitive damages award would enable the hotel chain to commit wrongdoing with impunity. After all, a small punitive award could hardly cause the defendant, whose net worth was \$1.6 billion,²²³ to suffer any discomfort. Judge Posner acknowledged this fact in upholding the punitive damages award in *Mathias*.

219. See *supra* Part II.

220. Annotation, *supra* note 3.

221. *Mathias*, 347 F.3d at 676-78.

222. See *supra* Part III.B.

223. *Mathias*, 347 F.3d at 677.

In addition, Judge Posner's opinion is consistent with the goal of punishing impermissible cost-benefit calculations through a wealth-calibrated punitive damages award. In *Mathias*, Accor weighed the cost of closing the hotel for a thorough fumigation against the cost of refunds to unhappy customers and decided it would be less expensive to rent rooms in an unsanitary condition than to rectify the problem.²²⁴ Judge Posner determined that a smaller punitive award (such as \$20,000 or four times the amount of compensatory damages) would not have effectively punished Accor's cost-benefit calculation.²²⁵ Thus, unlike the *State Farm* Court, Judge Posner was able to achieve the appropriate level of punishment through consideration of Accor's wealth.

2. Deterrence

Judge Posner's decision in *Mathias* is consistent with deterrence even more so than it is with retribution. Inherent in Judge Posner's reasoning is the recognition that a wealthier defendant will not be deterred at all by a punitive damages award that is not calibrated for wealth. In fact a small punitive damages award may even have the opposite effect. In *Mathias*, for example, a small punitive damages award would not only have allowed Accor to profit from its misconduct, but also sent a message to other plaintiffs that bringing suit against this defendant would be very costly.²²⁶

Mathias, in using Accor's wealth to justify the punitive damages award, succeeds at deterring Accor and other defendants. The wealth-calibrated punitive damages award in *Mathias* effectively deterred Accor from similar conduct in the future by taking the profit out of Accor's misconduct and making Accor aware that it could face a large punitive award despite only a small compensatory award. Moreover, *Mathias* deterred other wealthy defendants by making it clear that misconduct that trades profits for safety will not be tolerated. Thus, by creating a place for the defendant's wealth in the punitive damages calculus, Judge Posner has furthered punitive damages' goal of deterrence.

224. *Id.* at 674, 677.

225. *See id.* at 676-78.

226. *See id.* at 677.

VIII. CONCLUSION

The future role of punitive damages is unsure. After *State Farm*, punitive damages awards cannot effectively achieve either of the twin goals of punitive damages: punishment and deterrence. Judge Posner's recognition of one circumstance where wealth-calibrated punitive damages are needed to prevent abuses by wealthy defendants is an indication of the direction that punitive damages should be taking.

Wealth-based punitive damages should be allowed to play the crucial role they were intended to play, punishing and deterring social deviance. The Supreme Court overlooked the long history and substantial precedent supporting the use of wealth-calibrated punitive damages. Judge Posner's decision in *Mathias* recognizes that the history and precedent behind punitive damages not only supports wealth-calibrated punitive damages, but requires them. If punitive damages are going to continue to function, as they have for centuries, to effectively punish and deter reprehensible misconduct, then the defendant's wealth must be a factor in the punitive damages calculus.

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