Constitutional Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma

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Almost twenty years ago, the Supreme Court in BMW v. Gore *invoked the Due Process Clause for the first time to invalidate a punitive damages award as excessive. Since then, the Court has issued a handful of decisions that further refine Gore's tripartite guidepost framework. In this Article, we draw on a ten-year span of reported state and federal punitive damages decisions in an attempt to evaluate how lower courts have understood and implemented this constitutionalization of punitive damages law. Ours is not a normative analysis about whether the Court should or should not have federalized punitive damages. Rather, we examined a sample of cases to assess three of the Court's punitive damages due process objectives.*

First, the guideposts were intended to provide clear and predictable ex ante standards regarding the potential monetary consequences of misconduct. Second, the uniform guidepost standards sought to prevent arbitrary or disparate treatment of punitive damages among the states. Third, the guideposts were designed to curb what the Court perceived as erratically high punitive damages awards. We evaluated and coded each punitive damages case in our collection to test the efficacy of the guidepost analysis in accomplishing each of these goals. Our 507 case sample suggests a high degree of uniformity nationwide in the process by which courts conduct the review of punitive damages awards. Less clear, however, is whether that heightened level of judicial review significantly reduced the inconsistency or unpredictability of punitive damages awards overall.

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INTRODUCTION

Since 1996, the Supreme Court has imposed a constitutionally mandated obligation upon state and federal courts to review each award of punitive damages for "excessiveness."[1] The due process standards for identifying excessive punitive damages require an examination of the

1. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996).

reprehensibility of the defendant's conduct, the proportionality of the punitive damages awarded to the compensatory damages awarded, and a comparison of the punitive damages awarded to statutory or other applicable sanctions. These three "guideposts," established in *BMW of North America, Inc. v. Gore*,[2] and later refined in *State Farm Mutual Automobile Insurance Company v. Campbell*,[3] have been subjected to a host of judicial and academic critiques.[4] This Article eschews any such normative analysis of the Court's constitutionalization of punitive damages. Rather, we set out to examine the extent and nature of lower court implementation of the Court's guidepost framework.

To that end, we have compiled a dataset of 507 state and federal opinions issued in the decade after *Campbell*, and applied various criteria in order to analyze how lower courts have utilized (or failed to utilize) the three guideposts in their review of punitive damages awards.[5] Without engaging in the fraught exercise of judging what a "fair" amount of punitive damages might be in any particular case, we nonetheless designed our study to evaluate lower court implementation of the guideposts by the metric of the Court's articulated goals: clear and predictable punitive damages limits; consistent standards of judicial review; and constraint of punitive damages awards deemed to be outliers, either due to sheer enormity or the disproportionality of the award to the harm caused.

In Part I, this Article provides a brief account of the Court's evolving punitive damages jurisprudence, including the three-guidepost framework. Part II describes our methodology for selecting opinions for our sample of cases. The data from our survey of punitive damages opinions is presented in Part III, which examines how lower courts implement each guidepost. While certain aspects of the guideposts appear to be operating smoothly, we observed a marked lack of clarity and consistency among lower courts in their application of other aspects of the Court's guidepost recommendations. A surprisingly large number of lower courts failed to explicitly apply any of the Court's reprehensibility criteria,[6] and over half of the opinions in our study either omitted analysis of the comparability guidepost altogether or found no relevant sanction with which to compare the punitive damages award at issue.[7] We also identify several guidepost

2. *Id.* at 574.

3. 538 U.S. 408, 418 (2003).

4. *See, e.g.*, F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: "Morals Without Technique?"*, 60 FLA. L. REV. 349 (2008); Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239 (2009); Catherine M. Sharkey, *Federal Incursions and State Defiance: Punitive Damages in the Wake of* Philip Morris v. Williams, 46 WILLAMETTE L. REV. 449 (2010).

5. *See infra* Part II.

6. *See infra* Table 2.

7. *See infra* Table 11.

criteria that reflect lower court variation or innovation, such as resistance to the Court's preference for 1:1 ratios in cases involving substantial compensatory awards, consideration of defendant's wealth, and widespread reliance on comparable punitive damages awards. Finally, we identify a number of guidepost criteria in need of reform or greater elucidation in light of our analysis of how lower courts understand and apply the guideposts.

I. THE CONSITUTIONALIZATION OF PUNITIVE DAMAGES

A. DUE PROCESS SCRUTINY OF PUNITIVE DAMAGES AWARDS FOR "EXCESSIVENESS"

The Court's 1996 decision to recognize substantive due process limits on the amount of punitive damages was many years in the making and encountered fierce resistance within the Court.[8] The need for reform was seen as addressing two somewhat distinct problems that combined to produce the impression of great unpredictability in the size of punitive damages awards: (1) the lack of consistency among courts with respect to the rigor of judicial review applied to punitive damages awards and (2) the absence or inadequacy of objective external standards to assess the reasonableness of a specific award.[9] Another chief driver of the federalization of punitive damages law seems to have been the widely held perception that lower courts were failing to adequately police against spiraling punitive damages awards. The Court later acknowledged the significant body of empirical research largely debunking the notion that punitive damages were out of control.[10] But enforcing due process safeguards against the imposition of unreasonably excessive or punitive damages remains a primary concern, especially with regard to what the

8. The Justices split five to four in *Gore*, six to three in *Campbell*, and five to three in *Exxon Shipping*. BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008); *Campbell*, 538 U.S. 408.

9. At this time, state and federal lower courts generally reviewed the grounds for awarding punitive damages and the size of the awards utilizing very broad and open-ended tests, such as whether the award appeared fair and reasonable, taking all the facts of the case into account, or, to the contrary, whether the award reflected passion or prejudice on the part of the jury. Another common test was whether the size of the award "shocked the conscience of the court." *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 14–15 (5th ed. 1984); 1 DAN B. DOBBS, LAW OF REMEDIES 314–15 (2d ed. 1993).

10. *Exxon Shipping*, 554 U.S. at 494; *see, e.g.*, Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263–95 (2006) (concluding that once the relevant punitive damages data was controlled for the occasional outlier case, and adjusting for inflation, the average size of punitive damages awards had actually remained fairly constant during the decade before *Gore*); Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997) (challenging claim that punitive damages were increasing dramatically in either frequency and size); Robert J. Rhee, *A Financial Economic Theory of Punitive Damages*, 111 MICH. L. REV. 33, 47–49 (2012).

Court has described as "outlier" awards.[11] A brief history of the Court's punitive damages jurisprudence reveals both the nature of that persistent interest and the intended goals of the Court's due process standards.

1. Evolution of the Supreme Court's Punitive Damages Jurisprudence

The view that punitive damages awards pose a serious constitutional threat can readily be found in judicial opinions and legal scholarship from the 1980s and early 1990s.[12] Indeed, in her concurring and dissenting opinions in that era, Justice O'Connor launched a virtual one-Justice campaign to persuade the Court to develop some constitutional mechanism to rein in out-of-control punitive damages awards. Justice O'Connor's opinions were peppered with alarmist descriptions of the punitive damages landscape such as "skyrocketing,"[13] "run wild," "inexplicable on any basis but caprice or passion,"[14] and unpredictable windfalls.[15] She also contended that the imposition of punitive damages required federal intervention because they permitted juries "to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth."[16]

The first hint that arbitrary or extremely large punitive damages might raise constitutional concerns under the Due Process Clause[17] arose in the

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11. *But see* Jim Gash, *The End of an Era: The Supreme Court (Finally) Butts Out of Punitive Damages for Good*, 63 FLA. L. REV. 525, 585 (2011) ("[I]t seems fair to say that the Court, given its current makeup, will no longer take punitive damages cases even if they do not comply with the *Gore* guideposts.").

12. *See, e.g.*, Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982).

13. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989).

14. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 476 (1993).

15. Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (citing Elec. Workers v. Foust, 442 U.S. 42, 50 (1979)).

16. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 43 (1991). Justice O'Connor also asserted that punitive damages were a "powerful weapon," which if imposed indiscriminately could have a "devastating potential for harm." *Id.* at 42. She also cited amicus briefs from manufacturing trade associations to suggest that the design and production of innovative products was stifled by manufacturers' fear of possibly huge punitive damages awards. *Id*. at 46. *But see* Daniel W. Morton-Bentley, *Law, Economics, and Politics: The Untold History of the Due Process Limitation on Punitive Damages*, 17 ROGER WILLIAMS U. L. REV. 791 (2012) (asserting that the Court's invocation of due process is just window dressing for an effort to prevent financial harm to large corporations and contrary to the historic function of punitive damages to hold society's powerful accountable).

17. For the first 150 years in which the Court dealt with only the occasional punitive damages case, it showed little or no interest in claims that punitive damages awards could be unconstitutionally arbitrary or excessive. Beginning with *Day v. Woodworth*, the Court repeatedly approved as constitutional the common law practice of relying on jury determinations to award punitive damages. 54 U.S. 363 (1851). In the 1960s, two prominent U.S. Court of Appeals judges in different circuits expressed grave concerns about the exploding size and undisciplined nature of punitive damages awards. *See, e.g.*, Curtis Pub. Co. v. Butts, 351 F.2d 702 (5th Cir. 1965) (Rives, J., dissenting); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (1967) (Friendly, J., concurring). As late as 1984, however, the Court still manifested a general disinterest in giving close scrutiny to the size of state punitive damages awards generally, saying in one high-profile case:

Court's 1986 decision in *Aetna Life Insurance Company v. Lavoie*.[18] Writing for the Court, Chief Justice Burger declined to address the defendant's claim that awarding very large punitive damages violated either the Eighth Amendment or the Fourteenth Amendment, but noted that both claims raised "important issues which, in an appropriate setting, must be resolved."[19]

Five years later, in *Pacific Mutual Life Insurance Company v. Haslip*, a slim majority accepted in principle the contention that the Due Process Clause of the Fourteenth Amendment furnished a constitutional basis for overturning arbitrary or excessive punitive damages awards.[20] But the Court's due process commitment remained theoretical because it found that the punitive damages award at issue satisfied both procedural and substantive constitutional requirements. Writing for the majority, however, Justice Blackmun noted that the 4:1 ratio of punitive damages to compensatory damages in the case was "close to the line" of unconstitutional excessiveness for an ordinary tort case.[21] Justice Scalia's lengthy concurring opinion argued that excessive punitive damages could not logically violate due process because the imposition of punitive damages by U.S. courts antedated the adoption of the Fourteenth Amendment by many years.[22]

In its next punitive damages case, the Court in *TXO Production Corporation v. Alliance Resources Corporation* similarly declined to find the punitive damages award at issue to be unconstitutionally excessive.[23] Interestingly, the Court reached this decision by converting the 526:1 ratio of punitive to compensatory damages at issue into a 10:1 ratio by substituting an amount reflecting the "potential harm" that might have occurred if the defendant's fraudulent scheme had succeeded instead of the actual harm represented by the compensatory damages award.[24]

"Punitive damages have long been a part of traditional state tort law." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984).

18. 475 U.S. 813, 828 (1986).

19. *Id.* at 828–29.

20. 499 U.S. 1, 26 (1991).

21. *Id.* at 23. In her dissent in *Haslip*, Justice O'Connor continued to urge the Court to adopt some form of substantive constitutional constraint on the size of punitive damages awards, arguing that the tradition of complete deference to juries' discretion to set such awards was so unprincipled as to raise constitutional "void for vagueness" concerns. *Id.* at 43 (O'Connor, J., dissenting).

22. *Id.* at 28–32 (Scalia, J., concurring) (tracing the history of the concept of due process back to the phrase "law of the land" in the Magna Carta).

23. 509 U.S. 443, 462 (1993).

24. *Id.* at 462. Writing separately, Justice Scalia again disputed the plurality's assumption that substantive due process could be invoked as a constraint against unreasonably high punitive damages. *Id.* at 472 (Scalia, J., concurring) ("The plurality's continued assertion that federal judges have *some*, almost-never-usable, power to impose a standard of 'reasonable punitive damages' through the clumsy medium of the Due Process Clause serves only to spawn wasteful litigation, and to reduce the incentives for the proper institutions of our society to undertake that task.").

Finally, in 1996, the Court struck down a punitive damages award as a violation of the defendant's substantive due process rights for the first time in *BMW of North America, Inc. v. Gore*.[25] Writing for the majority, Justice Stevens reasoned that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[26] Justice Stevens then articulated a tripartite set of constitutional standards of the type Justice O'Connor had long championed, which he labeled "guideposts": degree of reprehensibility, ratio, and sanctions for comparable misconduct.[27] Justice Stevens briefly explained the reasoning behind each guidepost and then applied to the facts of the case in finding that the challenged punitive damages award fell short on each of the three indicia of excessiveness.[28]

In dissent, Justice Ginsburg cited federalism concerns for her opposition to the Court's unwarranted intrusion into an area of law traditionally committed to state decisionmaking.[29] Justices Scalia and Thomas, on the other hand, reiterated their deeply held view that the Due Process Clause could not form the basis of a substantive challenge to excessive punitive damages awards.[30] Moreover, Justice Scalia offered a harsh critique of the guideposts themselves, memorably describing them as representing a "road to nowhere."[31] He predicted that the "crisscrossing platitudes" would prove incomprehensible and unworkable for lower court implementation:

> The Court has constructed a framework that does not genuinely constrain, that does not inform state legislatures and lower courts—that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not "fair."[32]

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25. 517 U.S. 559 (1996).

26. *See id.* at 574; *see also* Theodore J. Boutrous, Jr. & Blaine H. Evanson, Essay, *The Enduring and Universal Principle of "Fair Notice"*, 86 S. CAL. L. REV. 193 (2013). *But see* Martha T. McCluskey, *Constitutionalizing Class Inequality: Due Process in* State Farm, 56 BUFF. L. REV. 1035, 1046–47 (2008) (critiquing this "fair notice" rationale as deeply flawed and stunting the development of neutral legal principles).

27. *Gore*, 517 U.S. at 574–85.

28. *Id.* In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, Justice Ginsburg's dissent traced the origins of the three guideposts. She observed that the first and second guideposts codified deeply rooted state common law standards, but the Court created the comparability guidepost out of whole cloth. *See* 532 U.S. 424, 448–50 (2001) (Ginsburg, J., dissenting).

29. *Gore*, 517 U.S. at 610–14 (Ginsburg, J., dissenting).

30. *Id.* at 598–605 (Scalia & Thomas, JJ., dissenting).

31. *Id.* at 605.

32. *Id.* at 606.

The Court reaffirmed and further refined the *Gore* guideposts in *State Farm Mutual Automobile Insurance Company v. Campbell*.[33] Writing for the majority, Justice Kennedy embraced the *Gore* guideposts analysis with relish, proposing an even more detailed ratio framework. Justice Ginsburg's dissent took particular umbrage at this set of ratio instructions, which she described as resembling "marching orders" for lower courts.[34] The opinion in *Campbell* shed far less light on the first and third guideposts.

With respect to the third guidepost, Justice Kennedy explained, "we need not dwell long on this guidepost" given the $10,000 applicable civil sanction.[35] As in *Gore*, the punitive damages award so far exceeded the relevant statutory penalty the Court simply ticked off the guidepost as supporting a finding of excessiveness. *Campbell*'s reprehensibility analysis focused almost exclusively on the relevance of harm to others, cautioning that punitive awards could not actually *punish* a defendant for harm to others, but the Court did permit evidence of sufficiently "similar" misconduct to be factored into the reprehensibility assessment.[36] In her dissenting opinion, however, Justice Ginsburg pointed out that the majority had failed to adequately evaluate several important indicia of State Farm's culpability: its repeated acts of intentional trickery and deceit,[37] its profit motivation,[38] and its targeting of plaintiffs who were financially, physically, and emotionally vulnerable.[39]

In its two most recent punitive damages cases, *Philip Morris USA, Inc. v. Williams*[40] and *Exxon Shipping Company v. Baker*,[41] the Court declined opportunities to rule on the excessiveness of challenged punitive damages awards under the *Gore*/*Campbell* due process guideposts.[42] In

33. 538 U.S. at 439. Five years after *Gore*, the Court reaffirmed its commitment to the substantive due process analysis in *Cooper Industries, Inc. v. Leatherman Tool Group*, but did not apply the guideposts to the 90:1 ratio of punitive damages to compensatory damages presented. 532 U.S. 424, 441–43 (2001). The Court instead remanded the case, holding that procedural due process required a *de novo* review of punitive damages awards to determine compliance with the emerging constitutional guidepost requirements. *Id.* at 443; *see also* Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 918 (2004) (suggesting that the Court in *Cooper* "clearly assumed that de novo review would provide two opportunities to bring excessive punitive damages awards into line").

34. *Campbell*, 538 U.S. at 439 (Ginsburg, J., dissenting) ("Even if I were prepared to accept the flexible guideposts prescribed in *Gore*, I would not join the Court's swift conversion of those guides into instructions that begin to resemble marching orders.").

35. *See id.* at 428 (majority opinion).

36. *See id.* at 422–24.

37. *See id.* at 431–37 (Ginsburg, J., dissenting).

38. *See id.* at 435 (referring to State Farm's "wrongful profit" scheme).

39. *See id.* at 433–34 (characterizing the Campbells as "economically vulnerable and emotionally fragile").

40. 549 U.S. 346 (2007).

41. 554 U.S. 471 (2008).

42. The grant of certiorari in *Philip Morris* (involving a 97:1 punitive damages ratio) was limited to the constitutional correctness of a jury instruction regarding the relevance of possible injury to others

Williams, the Court based its decision on procedural due process, imposing on states the obligation to implement jury instructions that adequately safeguard against punitive damages based improperly on harm done to others.[43] *Williams* involved a $79 million punitive damages award for the wrongful death of a smoker,[44] a context far removed from the economic wrongdoing and injuries addressed in its previous punitive cases.

In *Exxon Shipping*, the Court reversed a $2 billion punitive award under newly promulgated substantive maritime law limits on punitive damages, while deliberately sidestepping the question of whether the award might also have been constitutionally excessive.[45] As in *Campbell*, the majority in *Exxon* wasted little time on either comparable sanctions or reprehensibility factors, although it identified for the first time that a defendant's profit motive warranted a finding of aggravated culpability.[46] The Court instead emphasized the difference between the "reckless" conduct exhibited by Exxon and intentional or malicious conduct signifying a higher degree of culpability.[47]

Notably, Justice Souter's opinion acknowledged the lack of any empirical support for the perception of out-of-control punitive damages awards that led the Court to establish the *Gore*/*Campbell* constitutional analysis in the first place.[48] Despite the overall modesty of punitive damage awards, Justice Souter opined, heightened scrutiny of punitive damages is warranted due to the "stark unpredictability" of punitive damages, coupled with the problem of "outlier cases [that] subject defendants to punitive damages that dwarf the corresponding compensatories."[49] After considering various state-tested approaches to excessiveness, the Court relied almost

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than the plaintiff. The case made it back to the Court in 2009 after the Oregon Supreme Court affirmed the award on remand, but was dismissed after oral arguments as an improvidently granted. *See* Philip Morris USA, Inc. v. Williams, 556 U.S. 178 (2009). The *Williams* saga inspired a good bit of law review commentary. *See, e.g.*, Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392 (2008); N. William Hines, *Marching to a Different Drummer: Are Lower Courts Faithfully Implementing the Evolving Due Process Guideposts to Catch and Correct Excessive Punitive Damages Awards?*, 62 CATH. U. L. REV. 371 (2013); Catherine M. Sharkey, *Federal Incursions and State Defiance: Punitive Damages in the Wake of* Philip Morris v. Williams, 46 WILLAMETTE L. REV. 449 (2010); Benjamin C. Zipursky, Palsgraf, *Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1774 (2012) (describing the Oregon Supreme Court's refusal to reduce the punitive award on remand as "a striking display of recalcitrance" to which the Supreme Court simply "threw up their hands in exasperation").

43. *Williams*, 549 U.S. at 355.

44. *Id.* at 350.

45. *Exxon*, 554 U.S. 471.

46. *Id.* at 494.

47. *Id.* at 510–11.

48. *Id.* at 500. *But see* Joni Hersch & W. Kip Viscusi, *Punitive Damages by the Numbers:* Exxon Shipping Co. v. Baker, 18 SUP. CT. ECON. REV. 259 (2010) (presenting a complex statistical analysis to dispute the Court's rationale for a 1:1 ratio in *Exxon*).

49. *Exxon*, 554 U.S. at 500.

exclusively on the ratio test as the best mechanism to curb these "outlier cases." It reached this conclusion due to its lack of confidence in the efficacy of state judicial review standards that closely resemble the *Gore*/*Campbell* guideposts themselves:

> [We are] skeptical that verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers. Instructions can go just so far in promoting systemic consistency when awards are not tied to specifically proven items of damage . . . and although judges in the States that take this approach may well produce just results by dint of valiant effort, our experience in the analogous business of criminal sentencing leaves us doubtful that anything but a quantified approach will work.[50]

Absent the usual allowances for cases involving "modest economic harm or odds of detection," Justice Souter adopted *Campbell*'s suggested 1:1 ratio as the proper benchmark in maritime cases for cases involving substantial compensatory damages and "without intentional or malicious conduct" or "behavior driven primarily by desire for gain."[51] He based that particular benchmark, in part, on several empirical studies that had found median punitive to compensatory ratios to hover somewhere below 1:1. Those findings suggested to Justice Souter that a ratio of 1:1 (or less) reflected broad consensus of what constitutes proportional punitive damages.[52]

2. *The* Gore/Campbell *Guideposts*

a. Degree of Reprehensibility

The Court in *Gore* (and again in *Campbell*) proclaimed the degree of reprehensibility to be "the most important indicium of the reasonableness of a punitive damages award."[53] That assertion is not self-evident, given the outsized role played by the ratio analysis both in traditional punitive damages law and in the new constitutional jurisprudence. As we discovered while reviewing our collection of lower court cases, however, reprehensibility may be indeed the most important guidepost because the concept plays two pivotal roles in the Court's due process jurisprudence. First, a punitive damages award may not be sustained at all unless some significant degree of reprehensibility is identified with regard to the

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50. *Id.* at 504.

51. *Id.* at 513.

52. *Id.* at 512–13 (pointing to empirical studies "showing the median ratio of punitive to compensatory verdicts, reflecting what juries and judges have considered reasonable across many hundreds of cases"). The Court thought "it [was] fair to assume that the greater share of the verdicts studied in these comprehensive collections reflect reasonable judgments about the economic penalties appropriate in their particular cases." *Id.*

53. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003).

defendant's misconduct.[54] Second, assuming that some amount of punitive damages is justified, the degree of reprehensibility can play a key role in sustaining, lowering, or raising the constitutionally permissible ratio of punitive damages to compensatory damages.

In adopting the somewhat unconventional term "degree of reprehensibility" for the first guidepost, the Court presumably sought to avoid the possible confusion created by the many grounds for imposing punitive damages prescribed in state statutes and endorsed in prior judicial decisions.[55] Use of the term "degree of reprehensibility" was thus intended to capture the idea of egregiously bad or morally outrageous misbehavior by a defendant, without bringing along the baggage of all the synonyms used for this purpose across the legal landscape.[56]

Perhaps realizing he was introducing a relatively unconventional term to the punitive damages review process, Justice Stevens briefly sketched out five factors in *Gore* to assist lower courts in identifying highly reprehensible conduct, and then applied them to Gore's claim against BMW.[57] The five reprehensibility factors are: (1) the imposition of physical harm versus purely economic harm; (2) indifference to or reckless disregard for the health or safety of others; (3) targeting a financially vulnerable plaintiff; (4) repeated instances of similar misconduct (as opposed to an isolated incident); and (5) harm resulting from intentional malice, trickery, or deceit rather than by carelessness.[58] Neither *Gore* nor *Campbell*, however,

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54. *See* Laura J. Hines, *Due Process Limitations on Punitive Damages: Why* State Farm *Won't Be the Last Word*, 37 AKRON L. REV. 779 (2004) (comparing *Campbell*'s ratio analysis to criminal sentencing guidelines, with aggravating and mitigating factors militating either increases or reductions in acceptable ratios).

55. Justice Stevens apparently borrowed the term "degree of reprehensibility" from Alabama's so-called "Green Oil" standard for reviewing punitive damages awards, applied in the lower court's decision in *Gore*. *See* William E. Shreve, Jr., *Exploring Wantonness*, 74 ALA. L. REV. 48 (2013) (discussing the meaning of "wantonness" in Alabama's punitive damages jurisprudence). Reprehensibility may have been seen as a generic proxy for the multiple negative formulations courts have employed over the years to describe the type of grossly unacceptable or morally offensive misconduct the state may rightfully claim a legitimate interest in punishing and deterring: malicious, wanton, outrageous, egregious, morally offensive, wicked, despicable, detestable, deplorable, heinous, willful injury, deceitful, underhanded, done with an evil motive or mind, reckless indifference to other's rights, aggravated injury, capricious harm, conscious disregard of property rights, coercive or oppressive misbehavior, trickery, intentional fraud, intentional breach of a fiduciary duty, and gross wrong characterized by its enormity.

56. Justice Stevens' introduction of relatively novel terminology to implement a newly created constitutional requirement for the review of punitive damages awards is similar to what other Justices have done in modern times, presumably to stimulate a new analysis of a long-standing issue thought to be confusing to lower courts. *See, e.g.*, Nollan v. Cal. Coastal Comm., 483 U.S. 825, 837 (1987) ("essential nexus"); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) ("rough proportionality"); Lucas v. S.C. Coastal Comm., 505 U.S. 1003, 1030 (1992) ("total taking").

57. *Gore*, 517 U.S. at 589–92.

58. *Id.* Justice Stevens did not manufacture these factors out of thin air; they were among the types of misconduct cited in earlier punitive damages cases like *Haslip*, 499 U.S. 1 (1991), and *TXO*, 509 U.S. 443 (1993), and in *Gore* itself.

provided much insight into how courts should weigh each reprehensibility factor.

As our dataset makes abundantly clear, the number of reprehensibility factors present in a particular case and their relative significance can vary greatly, depending on the nature of the claim made by the plaintiff and the egregiousness of the defendant's misconduct.[59] Assuming the presence of either physical harm or economic loss, the presence of one of the other four reprehensibility factors is likely sufficient to sustain a punitive damages award; on the other hand, the Court has intimated the absence of all five of the factors renders any punitive damages award "suspect," if not unsustainable.[60] The inherent vagueness of the five factors, however, arguably offers an inherent flexibility that allows lower courts to exercise judicial ingenuity to sort out the degree of reprehensibility in the stunning variety of punitive damages claims currently litigated in our nation's courts.[61]

b. Ratio of Punitive Damages to Plaintiff's Harm (or Potential Harm)

With respect to the ratio guidepost, the disparity or ratio between the punitive damages awarded and the actual (or potential harm) suffered by the plaintiff, the Court has noted that a reasonable relationship between punitive damages and compensatory damages has "a long pedigree" in U.S. law, and therefore represents perhaps the "most commonly cited indicium" of excessiveness.[62] Despite the Court's steadfast refusal to adopt anything approaching a rigid mathematical formula for ruling that any particular ratio between punitive damages and compensatory damages is categorically excessive, its opinion in *Campbell* set out an escalating ratio framework that Justice Ginsburg scathingly characterized as "marching orders."[63] *Campbell*'s ratio guidance ranges from 1:1 (for cases involving "substantial" compensatory damages), to 2:1–4:1 (representing longstanding common law and statutory benchmarks of proportionality), to ratios in excess of double digits (justified by particularly egregious conduct coupled with either low economic damages, difficulty of detection, or difficulty of valuing harm).[64]

In *Exxon Shipping*, Justice Souter echoed *Campbell*'s suggestion that a "substantial" compensatory award warranted a 1:1 punitive damages

59. *See infra* Table 4.

60. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003).

61. *See generally* Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007).

62. *Gore*, 517 U.S. at 580.

63. *See Campbell*, 538 U.S. at 439 (Ginsburg, J., dissenting).

64. *See, e.g.*, *Gore*, 517 U.S. at 580; Hines, *supra* note 54.

ratio not only under maritime law, but also possibly under a due process analysis.[65] Indeed, Justice Ginsburg's dissent in *Exxon Shipping* specifically protested this apparent adoption of *Campbell*'s dicta on 1:1 ratio limits, asking, "On next opportunity, will the Court rule, definitively, that 1:1 is the ceiling due process requires in all of the States, and for all federal claims?"[66]

The Court has clearly expressed a strong preference for "single digit" ratios.[67] As the Court mused in *Haslip*, 4:1 ratios may be close to the line, and certainly ratios larger than 4:1 raise a suspicion of excessiveness.[68] Low single-digit damage multipliers have long been a part of U.S. law to raise the stakes for certain types of civil violations,[69] including the traditional double or treble damages for committing waste,[70] and the treble damages available for certain federal antitrust violations.[71] The Court's explanation for a practice that favors low punitive damages ratios comports well with the "fair notice" rationale underlying this constitutional initiative.[72] However, the Court's approval of a 526:1 ratio in *TXO* suggests one justification for high-end ratios: where the defendant's egregious action resulted in little actual harm but a high level of potential harm. In such circumstances, the numerator represents the potential harm the defendant's wrongful conduct could have caused, rather than the actual harm.[73]

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65. Exxon Shipping Co. v. Baker, 554 U.S. 471, 501 (2008).

66. *See id.* at 524 (Ginsburg, J., dissenting); *see also* Jill Wieber Lens, *Procedural Due Process and Predictable Punitive Damage Awards*, 2012 B.Y.U. L. REV. 1, 44 (suggesting that the Court's justifications for adopting a 1:1 ratio may apply with equal force to its due process excessiveness jurisprudence). *But see* Grosch v. Tunica Cnty., No. 2:06CV204-P-A, 2009 WL 161856, at *16 (N.D. Miss. Jan. 22, 2009) ("[T]he holding in *Exxon* was confined to cases arising under federal admiralty law and has no application to the case at hand."); Am. Family Mut. Ins. Co. v. Miell, 569 F. Supp. 2d 841, 859 (N.D. Iowa 2008) ("[T]he Court did *not* conclude that the Constitution prohibits a punitive damage award greater than the amount awarded for compensatory damages . . . ."); Robert L. Rabin, *The Pervasive Role of Uncertainty in Tort Law: Rights and Remedies*, 60 DEPAUL L. REV. 431, 451 (2011) (questioning the potential impact of *Exxon*'s 1:1 ratio given the unpersuasive weakness of its rationale).

67. *See, e.g.*, *Campbell*, 538 U.S. at 425.

68. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23–24 (1991).

69. *See Gore*, 517 U.S. at 581; *Campbell*, 538 U.S. at 420.

70. *See, e.g.*, IOWA CODE § 658.1A (2015) (treble damages for injury to real property); *id.* § 658.4 (2015) (treble damages for injury to trees).

71. *See* 15 U.S.C. § 15 (2015) (mandating treble damages for plaintiff establishing specific parts of the antitrust law).

72. For an argument that the Court's pursuit of objective proportionality between punitive damages and compensatory damages is an exercise in wrongheaded judicial activism and not of judicial restraint, see Tracy A. Thomas, *Proportionality and the Supreme Court's Jurisprudence of Remedies*, 59 HASTINGS L.J. 73 (2007).

73. *See* TXO Prod. Co. v. Alliance Res. Corp., 509 U.S. 442 (1993); *see also infra* notes 159–77. and accompanying text.

c. Comparability to Civil Sanctions

The comparability guidepost, which directs courts to examine relevant civil or criminal penalties for similar misconduct, has been the most difficult to apply, and therefore has proved to be the least useful of the guideposts. The idea behind it, however, makes perfect sense when understood against the due process background of an abiding concern over "fair notice," not only of what misconduct will subject one to punishment, but also of the severity of the punishment the state may potentially impose. As Justice Souter reasoned in *Exxon Shipping*, "a penalty should be reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another."[74] The Court has repeatedly invoked this fundamental constitutional principle to explain the basis for its intervention into this historically state-law field.[75] One way a would-be tortfeasor is put on notice that her wrongful act may potentially have serious financial consequences is to look to the civil or criminal sanctions that could be invoked to punish this type of misconduct.

Thus, the comparability guidepost directs reviewing courts to examine the fines and other civil penalties, or criminal sanctions that could be assessed against the defendant for the same or similar misconduct, and then use them as a benchmark to judge the reasonableness of a particular punitive damages award.[76] Problems in applying this guidepost mostly arise from the total absence of civil or criminal sanctions for the specific conduct at issue, lack of a close fit between the particular wrong done to the plaintiff and specific misconduct punished by possible civil or criminal sanctions, along with difficulty in deciding whether conduct outlawed and punished by a particular statute or regulation is truly "similar" to the defendant's misconduct. Indeed, our empirical study confirms that the comparability guidepost is by far the least utilized by lower courts.[77] Questions have also arisen over whether it is appropriate in a comparability analysis to consider nonmonetary penalties, such as loss of a business or professional license, forfeiture of property, or disgorgement of profits.[78] In *Campbell*, Justice Kennedy pointedly questioned the utility of comparisons to relevant criminal penalties.[79]

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74. 554 U.S. 471, 502 (2008).

75. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 577–78 (1996). In *Campbell*, Justice Kennedy asserted that the principle of "fair notice" finds its origins in the Magna Carta and "arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003).

76. *Gore*, 517 U.S. at 576–77.

77. *See infra* Table 11.

78. Colleen P. Murphy, *Comparison to Criminal Sanctions in the Constitutional Review of Punitive Damages*, 41 SAN DIEGO L. REV. 1443 (2004).

79. *Campbell*, 538 U.S. at 421; *see also* Murphy, *supra* note 78.

B. Anticipated Benefits of Excessiveness Analysis

Gore and *Campbell* represent the primary repositories of information about why the Court created a new constitutional regime for reviewing punitive damages awards and what it expected lower courts to achieve by employing the guideposts.[80] Justice Breyer, in his concurring opinion in *Gore*, explained the constitutional importance of establishing legal standards that would provide reasonable guidance for the exercise of judicial discretion by a reviewing court whenever a jury awarded punitive damages. Such standards serve to "permit [a level of] 'appellate review [that] makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.'"[81] Indeed, all three of the *Gore* guideposts readily find their roots in suggested standards advanced by Justice O'Connor in pre-*Gore* cases as a convenient "multipart test" that could be imposed on the states to achieve some meaningful rationality and consistency in the review of punitive damages awards.[82] The Court clearly intended the *Gore*/*Campbell* guideposts to embody this pursuit of greater objectivity and consistency in lower court review of punitive damages awards.

The *Gore*, *Campbell*, and *Cooper Industries, Inc. v. Leatherman Tool Group* opinions (and, indirectly, *Exxon Shipping*) all fleshed out the expectations to be fulfilled by the three guideposts to some degree, but in none of the cases did the Court provide lower courts with definitive tests or even very precise standards for identifying arbitrary or excessive punitive damages awards. It is difficult to determine the Court's precise expectations because the Court has conceptualized the three guideposts as broad and flexible standards. Indeed, the Court has repeatedly declined to create per se tests, embrace mathematical formulae, or otherwise cabin the controlling standards for identifying unconstitutionally excessive punitive damages awards.[83] Dissenting Justices regularly take the majority to task for its unwillingness to be more specific about how lower courts are expected to determine when a punitive damages award is arbitrary or excessive.[84] Thus, lower courts are largely left to infer the Supreme Court's expectations regarding the implementation of the three guideposts based on comments made in earlier cases about what was constitutionally

80. Pac. Mut. Life Ins. v. Haslip, 499 U.S. 1, 28 (1991).

81. *Gore*, 517 U.S. at 587 (Breyer, J., concurring) (quoting *Haslip*, 499 U.S. at 21).

82. *Id.*

83. *See Campbell*, 538 U.S. at 424–25.

84. For example, in her dissent in *Gore*, Justice Ginsburg asked, "What is the Court's measure of too big? Not a cap of the kind a legislature could order, or a mathematical test this Court can divine and impose. Too big is, in the end, the amount at which five Members of the Court bridle." *Gore*, 517 U.S. at 613 n.5 (Ginsburg, J., dissenting).

questionable about the heretofore open-ended review of punitive damages awards for arbitrariness and/or excessiveness. Although the Court has repeatedly declined to promulgate anything approaching a bright line numerical test with respect to the ratio guidepost—the only one for which some degree of mathematical precision might be possible—the *Campbell* ratio framework (bolstered by the apparent adoption of a 1:1 presumptive ratio in *Exxon Shipping*)[85] at least shines some light on the Court's understanding of acceptable ratio ranges.

The Court has, however, articulated three distinct concerns that it expects the constitutionalization of punitive damages to help redress: (1) the absence or inadequacy of applicable external norms for judging the reasonableness of such awards, (2) the lack of consistency among lower courts in the rigor of judicial review applied to punitive damages awards, and (3) the perception of outlier or disproportionate punitive damages. To the extent that lower courts are compelled to apply a uniform constitutional framework in reviewing punitive damages, the guideposts certainly serve a channeling function by requiring all reviewing courts to apply more or less the same analytical process.

As the study below suggests, lower courts have largely understood the standards reflected in the guideposts, although some areas cry out for additional clarification. With respect to consistency, the guideposts themselves attempt to provide semi-objective standards for assessing the reasonableness of specific punitive damages awards, although many academics regard these standards as wholly subjective and incapable of predictable application.[86] As empirical data has suggested, the overall picture of punitive damages has changed little over time, with average ratios hovering well within a range the Court has suggested is constitutionally acceptable.[87] But to the extent, as *Exxon Shipping* indicates, the Court has narrowed its focus on the extreme outlier awards that may be masked by aggregate data, lower courts may have proved less successful at reining in multi-million dollar awards. The Court has yet to apply its guidepost standards to a case with significant personal injuries and intentional misconduct, so many of these high value punitive awards may well pass

85. *See supra* note 52 and accompanying text.

86. *See, e.g.*, Steve P. Calandrillo, *Penalizing Punitive Damages: Why the Supreme Court Needs a Lesson in Law and Economics*, 78 GEO. WASH. L. REV. 774, 819 (2010) (criticizing the Court for applying "undefined, unprincipled, and largely subjective terms that do little or nothing to correct the arbitrary nature of the punitive damages that it seems to fear so greatly"); A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085, 1096 (2006) *(*asserting that "the first two guideposts consist of subjective factors that are not susceptible to principled application").

87. *See* Theodore Eisenberg & Michael Heise, *Judge-Jury Difference in Punitive Damages Awards: Who Listens to the Supreme Court?*, 8 J. EMPIRICAL LEGAL STUD. 325, 325 (2011) (discussing a body of empirical research that leads to general understanding "that the bulk of punitive damages awards have been reasonably sober, modest in size, and relatively stable over time").

constitutional muster. And one of the most puzzling aspects of the guidepost framework is the expected interaction among the three guideposts, with lower courts often approving multi-million dollar punitive damage awards in cases involving substantial compensatory damages.

II. The Empirical Study: Collection and Coding Methodology

We collected and analyzed 507 punitive damages decisions implementing the three guideposts from 2003 through 2013, the decade after *Campbell* was decided.[88] The post-*Campbell* limitation was based in part on the theory that until *Campbell* reaffirmed and reinforced the constitutional standards introduced by *Gore*, lower courts might have been somewhat unsure about the durability of the closely-divided *Gore* holding, and therefore may have been somewhat less dedicated in their efforts to implement the guideposts. Studying the most recent cases also allowed us to focus on the most recent trends in judicial implementation of the guideposts by lower courts.

The objective of our empirical research was to draw on the detailed information gathered in this collection of cases to reach some tentative conclusions on the clarity and consistency with which the nation's lower courts were interpreting the three guideposts, and the efficacy of the Court's stated objective of constraining arbitrary and excessively high punitive damages awards. In so doing, we intended to probe the soundness of assertions by Justice Scalia and other critics that the guideposts were so fundamentally flawed that, in practice, they would prove wholly unworkable for lower courts. We were particularly curious to learn how frequently the serious difficulties identified and speculated upon by critics actually arose when courts applied the three guideposts to real cases, and whether there were perhaps other unforeseen problems with the utility of the guideposts experienced by the lower courts charged with implementing them.

Our selection criteria involved identifying punitive damages decisions issued from 2003 through 2013 by state and federal courts, including 298 opinions chosen for publication by the courts themselves and 209 unpublished opinions reported by Westlaw or Lexis. We acknowledge the limit of our dataset as it fails to account for a vast universe of unpublished punitive damages decisions.[89] The selection bias of the courts choosing to publish the cases in our collection, and the

88. A smaller-scale study involving 200 post-*Campbell* cases was published in 2006, focusing primarily on judicial implementation of the ratio guidepost. *See* Lauren R. Goldman & Nickolai G. Levin, State Farm *at Three: Lower Courts' Application of the Ratio Guidepost*, 2 N.Y.U. J.L. & Bus. 509 (2006).

89. The Department of Justice Bureau of Justice Statistics examined a national sample of state court civil litigation, which found 700 tort, contract, and property cases awarding punitive damages in 2005 alone. *See* Thomas H. Cohen & Kyle Harbacek, U.S. Dep't of Justice, Punitive Damage Awards in State Courts, 2005 at 5 (2011), www.bjs.gov/content/pub/pdf/pdasc05.pdf.

underrepresentation of state or federal courts less likely to publish cases generally, may skew or obscure important data regarding lower courts' understanding and application of the *Gore*/*Campbell* guideposts. Given the constitutional inquiry required, and the often high stakes involved in punitive damages cases, we are nonetheless hopeful that we have captured a body of judicial opinions sufficiently varied and voluminous to permit some cautious reflections on the implementation of the constitutionally mandated guidepost analysis.

The 507 opinions collected are divided fairly evenly between state and federal courts; 260 cases were decided by state courts and 247 cases were decided by federal courts. Given the much higher relative volume of cases in state courts, the state-federal parity in our study obviously reflects a significant underrepresentation of state court cases. The federal cases were almost evenly split between state-based claims tried in federal court pursuant to federal diversity jurisdiction and claims based on various federal statutes that permit the imposition of punitive damages. Our sample includes about two-thirds appellate opinions and one-third trial court opinions. One explanation for the imbalance is that appellate court opinions are more likely to be published than trial court opinions, especially in state cases. But the overrepresentation of appellate opinions in our study is also due to our elimination of published trial court opinions from the dataset if the case resulted in a published appellate opinion, so as to avoid counting the same litigation twice.

We also classified each case by the type of substantive law claim the plaintiffs presented for which they sought punitive damages. Applying the criterion that there had to be at least fifteen cases involving a specific type of claim to justify a separate category, we identified fourteen major categories of claims for punitive damages in the ten-year period studied. This process produced a large fifteenth category we labeled "Other Cases." Although we found a few cases applying punitive damages to a claim singular among our collection, several cases involved the same substantive claims but in numbers insufficient to meet the fifteen-case minimum. Table 1 lists the claim categories and the applicable number of cases found within.

TABLE 1: PUNITIVE DAMAGES OPINIONS BY CLAIM CATEGORY

Claim Category	Number of Opinions
Fraud	66
Civil Rights	64
Employment	56
Business Tort	45
Title VII	44
Insurance	44
Gross Negligence	24
Property	23
Wrongful Death	22
Product Liability	18
Assault and Battery	18
Breach of Fiduciary Duty	15
Creditor Abuse	15
Defamation	15
Other	38
Total	**507**

We also gathered data for each case regarding the amount of compensatory and punitive damages awarded by the jury and then either approved or remitted by the trial court and (in most of our cases) the applicable appellate court.[90] As will be presented in greater detail below, our study found significantly higher punitive damage awards and higher median ratios of punitive to compensatory damages than those examined in larger scale empirical studies.[91] Our study did not include an assessment of the effect of applicable state or federal statutory punitive damages caps on the lower courts' implementation of the excessiveness guideposts.[92]

To facilitate our analysis, we coded each case by identifying the court's explicit utilization of each guidepost. We particularly studied the use and weighting of each guidepost separately, and we watched closely for occasions when one guidepost interacted with or reinforced ("crisscrossed," to use Justice Scalia's term[93]) another guidepost in the court's application of the constitutional standard they represented. We noted the degree to which these interactions between different guideposts complicated or undermined the courts' analyses, and the extent to which the guideposts appeared to reinforce it. We also sought evidence of factors beyond the three guideposts that may have affected judicial determinations about

90. *See infra* notes 137–41 and accompanying text.

91. An earlier version of this dataset covering the first nine years of the study was published as an appendix to Hines, *supra* note 42, at 407.

92. *See generally* Colleen P. Murphy, *Statutory Caps and Judicial Review of Damages*, 39 AKRON L. REV. 1001 (2006) (discussing various statutory caps on damages); *see also* MORTON F. DALLER, TORT LAW DESK REFERENCE: A FIFTY-STATE COMPENDIUM (2014) (surveying state punitive damages caps).

93. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 606 (1996).

the arbitrariness or excessiveness of a punitive damages award, such as the defendant's relative wealth or the presence of multiple defendants. Interestingly, the cases in our sample revealed no material differences between state and federal court utilization of the guideposts or trial and appellate court utilization. What follows, then, is a guidepost-by-guidepost assessment of how lower courts in our sample have understood and implemented the Court's punitive damages excessiveness review.

III. Assessing the Effectiveness of the Excessiveness Guideposts

Ever since the *Gore* case was decided in 1996, lower federal courts have consistently recognized an obligation to apply the new constitutional law jurisprudence, of which the three guideposts are an essential component, in reviewing punitive damages awards challenged as arbitrary or excessive. It took some state courts a little longer than federal courts, however, to add the guideposts to their existing judicial review standards, blend the guideposts into their local law requirements, or to simply substitute the guideposts for their former conventional analysis of punitive damages reasonableness.[94] Nineteen years after the addition of *Gore*'s new constitutional dimension to the judicial review of punitive damages awards, it is rare to see a trial or appellate decision that does not expressly recite the three guideposts and then proceed to apply them in some fashion to the facts of the case before the court.

While this national uniformity in recognizing and attempting to apply the same substantive standards for correcting arbitrary or excessive punitive damages is exactly what the Supreme Court majority clearly intended to achieve, it is by no means obvious that consistent results are being reached in seemingly similar cases, nationally or across time. This general observation, based on our close examination of over 500 cases, is most likely a function of the open-ended and under-clarified character of the guideposts as review standards rather than a sign of outright judicial resistance to the Supreme Court's excessiveness review.[95] Our clear impression is that the statement in a recent Kentucky Court of Appeals decision represents the overwhelming attitude of the nation's lower courts with respect to their duty to implement the three guideposts for reviewing punitive damages awards: "Kentucky has faithfully and consistently traveled the path paved by the Supreme Court."[96] As detailed below, however, that path is sufficiently riddled with imprecision and lack of guidance, with

94. *See, e.g.*, Philip Moring & Tom Dukes, *A Pound of Flesh: A Primer on Punitive Damages Claims and Defenses Thereto*, Trial Advoc. Q., Winter 2013, at 4, 4 (describing how Florida law has incorporated the three guideposts into judicial review of punitive damages awards).

95. For a fuller discussion supporting the conclusion that lower courts are neither rejecting nor resisting the duty to apply the emerging constitutional limits on punitive damages, see generally Hines, *supra* note 42.

96. R.O. v. A.C., 384 S.W.3d 185, 191 (Ky. Ct. App. 2012).

respect to both inter-guidepost and intra-guidepost analyses, such that lower court opinions vary notably in the way they conduct what was expected to be a uniform excessiveness review.

A. The Reprehensibility Guidepost

1. Utilization of Reprehensibility Factors

As noted earlier, reprehensibility actually plays two quite different roles in the constitutional analysis under the three guideposts.[97] A court first considers whether the defendant has engaged in sufficiently reprehensible misconduct to justify any award of punitive damages. In the rare case where none of the five factors is even arguably present, courts have little trouble concluding that no punitive damages award is warranted.[98] Next, a court reviews the punitive damages actually awarded to determine the relative degree of reprehensibility represented by the defendant's misconduct. Application of this first guidepost entails consideration of the five Court-approved indicia of reprehensibility: (1) the nature of the plaintiff's harm, (2) whether the defendant demonstrated a reckless disregard for plaintiff's health or safety, (3) whether the plaintiff was targeted due to financial vulnerability, (4) whether the defendant engaged in the misconduct repeatedly, and (5) whether the defendant engaged in intentional malice, trickery, or deceit.[99]

Some lower courts do not appear to regard an analysis of the cumulative *degree* of reprehensibility to be required, as opposed to only a threshold punitive determination. As Table 2 reveals, the cases in our study varied quite markedly in the number of these factors expressly analyzed. Only thirty-one percent of the cases fully applied each of the five factors, although forty-six percent analyzed at least four factors. A surprising eleven percent of the cases applied none of the factors directly, and twenty-four percent applied one or fewer.[100]

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97. *See, e.g.*, Michael L. Rustad, *The Uncert-Worthiness of the Court's Unmaking of Punitive Damages*, 2 Charleston L. Rev. 459, 495 (2008) (describing reprehensibility as "both the measure of whether punitive damages should be awarded and in what amount").

98. *See, e.g.*, Lewis v. Travis, Nos. 2006-CA-000531-MR, 2006-CA-000574-MR, 2006-CA-000807-MR, 2007 WL 1893646, at *4 (Ky. Ct. App. June 29, 2007) (finding that defendant's trespass on plaintiff's land was neither intentional nor malicious); *cf.* Berkley v. Dowds, 61 Cal. Rptr. 3d 304, 314–17 (Ct. App. 2007) (finding that where plaintiff's claim did not allege a wrong for which compensatory damages were recoverable, no punitive damages could be awarded).

99. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003).

100. *See, e.g.*, Acevedo Luis v. Zayas, 419 F. Supp. 2d 115, 126 (D.P.R. 2006), *aff'd sub nom.* Acevedo-Luis v. Pagan, 478 F.3d 35 (1st Cir. 2007) ("The amount of the award of punitive damages does not welcome extensive comment."); Carey v. Johnson, No. M2002-00911-COA-R3-CV, 2003 WL 21439039, at *3 (Tenn. Ct. App. June 23, 2003) (describing the conduct as "intentional and outrageous" but applying no other factors).

TABLE 2: UTILIZATION OF FIVE REPREHENSIBILITY FACTORS BY CLAIM CATEGORY

Claim Category	Zero Factors	One Factor	Two Factors	Three Factors	Four Factors	All Five Factors
Fraud	6	8	8	5	12	27
Civil Rights	10	8	12	17	6	11
Employment	7	12	5	6	10	16
Business Tort	7	4	1	3	4	22
Title VII	2	9	10	5	7	11
Insurance	0	8	5	3	7	22
Gross Negligence	3	1	6	5	6	3
Property	3	3	6	3	3	5
Wrongful Death	2	1	5	4	4	6
Product Liability	2	1	2	2	5	6
Assault & Battery	1	1	6	4	2	4
Br. Fiduc. Duty	1	2	2	4	3	3
Creditor Abuse	1	3	1	2	2	6
Defamation	1	1	5	3	3	4
Other	8	4	6	4	5	12
Total	**54 (11%)**	**66 (13%)**	**80 (16%)**	**70 (14%)**	**79 (15%)**	**158 (31%)**

Some claim categories, such as business torts and insurance, show close to two-thirds of cases assessing every factor and a lower than average number of cases applying none. Other claim categories come in well below the average of cases applying all five factors, such as civil rights at seventeen percent, or above the average in applying only one or fewer factors, such as employment at thirty-four percent. These discrepancies among claim categories may be due to the illustrative clarity of each factor in the context of commercial claims like those in *Gore* and *Campbell*, and the converse lack of Supreme Court guidance regarding a multitude of claims involving physical,[101] constitutional, dignitary, or employment-related harms.

Some of the factors are more highly utilized than others, as indicated in Table 3. The factor courts most often considered was whether the defendant's conduct reflected malicious or deceitful intent. The intent factor was analyzed in eighty-two percent of the cases in our study and affirmatively found in sixty-eight percent of the cases. Courts in our sample examined the repeated nature of the defendant's conduct in fifty-seven percent of the cases and found that heightened signs of reprehensibility in forty-three percent of the cases.

101. The Court passed up two opportunities to consider the significance of physical harm in assessing the excessiveness of a punitive damages award when it focused first on procedural due process rather than excessiveness in *Williams*, and then dismissed its second grant of certiorari in the case after the Oregon Supreme Court declined to reduce the $79 million award on remand.

Characterization of plaintiff's harm as either physical or economic comes in at a surprisingly low fifty-nine percent, given that it appears to be one of the easiest of the factors to apply. This likely reflects courts' implicit consideration of the harm at issue rather than rejection of the notion that some harms reflect relatively more reprehensibility than others. Courts have also balked at the Supreme Court's apparently binary mode of analysis of this factor, physical or economic. Instead, courts often chose to rank certain harms, for example those of a constitutional or emotional nature, higher than mere economic harm, if perhaps less culpable than physical harm.[102] The Court in *Campbell* not only declined to find the plaintiff's emotional harm to be physical,[103] it concluded that the portion of plaintiff's compensatory award representing emotional distress included duplicative punitive elements that militated toward remittitur of the punitive damages award.[104]

TABLE 3: UTILIZATION AND APPLICATION OF REPREHENSIBILITY FACTORS IN SAMPLE

Reprehensibility Factor	**Number of Cases**
Physical v. Economic Harm to Plaintiff	*300 (59%)*
Physical Harm	117 (23%)
Economic Harm	183 (36%)
Reckless Disregard of Health/Safety	*311 (61%)*
Reckless Disregard Found	163 (32%)
No Reckless Disregard Found	148 (29%)
Target of Misconduct Financially Vulnerable	*193 (38%)*
Plaintiff Financially Vulnerable	116 (23%)
Plaintiff Not Financially Vulnerable	77 (15%)
Repeated v. Isolated Misconduct	*291 (57%)*
Repeated Conduct	216 (43%)
Isolated Conduct	75 (15%)
Intentional Malice, Trickery, or Deceit	*415 (82%)*
Malice, Trickery, or Deceit Found	343 (68%)
No Malice, Trickery, or Deceit Found	72 (14%)

102. *See, e.g.*, Action Marine, Inc. v. Cont'l Carbon, Inc., 481 F.3d 1302, 1319 (11th Cir. 2007) (explaining that the loss of use and enjoyment of municipal property "cannot adequately be characterized as solely economic"); O'Lee v. Compuware Corp., No. A111774, 2007 WL 963450, at *17 (Cal. Ct. App. Apr. 2, 2007) (describing the harm caused by attack on plaintiffs' reputation as "well beyond mere economic harm"); Hirsh v. Lecuona, No. 8:06CV13, 2008 WL 2795859, at *9 (D. Neb. July 18, 2008) ("With respect to the reprehensibility of the defendant's conduct, the court finds that, although the harm inflicted on the plaintiff was largely economic as opposed to physical, the plaintiff suffered a significant loss as well as the intangible and abstract injury of infringement of a constitutional right.").

103. *See Campbell*, 538 U.S. at 426 (finding that emotional distress was not a "physical injury" because "[t]he harm arose from a transaction in the economic realm, not from some physical assault or trauma").

104. *See id.* (finding that compensatory damages for emotional distress "likely were based on a component which was duplicated in the punitive award").

Finding the requisite reprehensibility can sometimes involve a degree of creative interpretation of the five factors in cases where, on the surface, it appears some of them do not readily apply. Some courts, for example, have broadly interpreted the second factor, reckless disregard for health and safety, to include plaintiff's "peace of mind" or "mental well-being," again seeking to hold more culpable misconduct that results in emotional, dignitary, or constitutional injuries rather than physical ones.[105] A number of courts have expanded upon the financial vulnerability factor. Some have interpreted the factor to require only that the defendant be aware of the plaintiff's financial vulnerability rather than having deliberately targeted the plaintiff due to that condition.[106] Others have suggested that most employees are inherently financially vulnerable to the misconduct of an employer.[107] Still other courts have expanded on the concept of financial vulnerability itself to include other types of vulnerable plaintiffs, such as immigrants,[108] children,[109] the elderly,[110] victims of police abuse,[111] and people suffering from poor health[112] or mental disability.[113] Consequently, beyond the 116 cases in

105. *See, e.g.*, Ojeda-Rodriguez v. Zayas, 666 F. Supp. 2d 240, 265 (D.P.R. 2009) (explaining that if the concept of risk to health and safety "were adapted to the 'constitutional tort' context from the traditional tort context in which it evolved, then the court could ask whether [the defendant's] conduct evinced an indifference or reckless disregard of [plaintiff's] right to due process"); Omari v. Kindred Healthcare Operating, Inc., No. B185113, 2007 WL 1640958, at *18 (Cal. Ct. App. June 7, 2007) (asserting that "the second factor does not involve physical health alone, and may consist of an assault on the peace of mind of the plaintiff, without regard to the effect on his or her mental health"); O'Lee v. Compuware Corp., 2007 WL 963450, at *17 (Cal. Ct. App. Apr. 2, 2007) (emotional distress caused by defendant's attack on plaintiffs' reputations "did not impact plaintiffs' safety, but in a real sense it could be said to have impacted plaintiffs' health and well being"); Century Sur. Co. v. Polisso, 43 Cal. Rptr. 3d 468, 499 (Ct. App. 2006) (finding that bad faith denial of insurance benefits showed indifference to plaintiffs' health and "peace of mind").

106. *See, e.g.*, Hrobuchak v. Nationwide Prop. & Cas. Ins. Co., No. 3:03 CV 0591, 2004 WL 3333124, at *6 (M.D. Pa. Sept. 4, 2004) (citing as "especially reprehensible" defendant's conduct given its awareness of plaintiffs' financial difficulties).

107. *See, e.g.*, Styers v. Pa., No. 1:CV-05-2127, 2008 WL 598285, at *3 (M.D. Pa. Feb. 29, 2008) ("[W]hile not financially vulnerable, [the plaintiff] was a vulnerable target because [the defendant] had control over [his] ability to qualify as a Pilot-in-Command of the PSP helicopter."); Parexel Int'l Corp. v. Feliciano, No. 04-cv-3798, 2008 WL 5101642 (E.D. Pa. Dec. 3, 2008); Roby v. McKesson HBOC, 53 Cal. Rptr. 3d 558, 563 (Ct. App. 2006).

108. *See, e.g.*, Lopez v. Aramark Unif. & Career Apparel, Inc., 426 F. Supp. 2d 914, 971 (N.D. Iowa 2006).

109. *See, e.g.*, Ondrisek v. Hoffman, 698 F.3d 1020, 1029 (8th Cir. 2012); Henley v. Philip Morris Inc., 9 Cal. Rptr. 3d 29, 71 (Ct. App. 2004).

110. *See, e.g.*, Hull v. Ability Ins. Co., No. CV–10–116–BLG–RFC, 2012 WL 6083614, at *3 (D. Mont. Dec. 6, 2012) (emphasizing "the undisputable fact that the elderly are particularly vulnerable").

111. *See, e.g.*, Mendez v. Cnty. of San Bernardino, 540 F.3d 1109, 1121 (9th Cir. 2008) (describing vulnerability in the context of abuse of police power).

112. *See, e.g.*, Chopra v. Gen. Elec. Co., 527 F. Supp. 2d 230, 244 (D. Conn. 2007) ("Defendant's acts are rendered more reprehensible by the fact that [he] was aware that plaintiff required dialysis [and had a] fragile health condition . . . .").

113. *See, e.g.*, Payne v. Jones, 696 F.3d 189, 201 (2d Cir. 2012) (describing awareness of plaintiff's mental illness to be "an aggravating factor").

our study expressly finding the plaintiff financially vulnerable, courts characterized the plaintiff as nonetheless "vulnerable" (and the misconduct at issue more reprehensible) in an additional thirty cases, increasing the total number of cases finding plaintiff vulnerability from twenty-three percent to twenty-nine percent.

The Supreme Court has flagged for concern awards of punitive damages based only on one or few indicia of reprehensibility, but has shed little light on the relative importance of each factor or various combinations thereof.[114] In a few rare cases in our sample, the defendant's wrongdoing was so egregious and pervasive that the court determined that each of the five factors pointed to a high degree of reprehensibility.[115] Cases in which the court found three or four of the reprehensibility factors present still almost always yielded approval of the punitive damages award.[116] Interestingly, some courts concluded that even though none of the five factors were clearly present, the defendant's misconduct was nonetheless sufficiently reprehensible to justify the awarding of punitive damages anyway.[117]

Although the Court has offered little clarity on the interaction among factors, lower courts nonetheless must regularly assess reprehensibility in cases where some factors point one way and others point in the opposite direction.[118] In *American Family Mutual Insurance Company v. Mieli*, for example, the district court considered a case where some reprehensibility factors pointed in different directions.[119] The *Mieli* case involved fraudulent insurance claims for hail damage to roofs on 145 buildings owned by the defendant. A jury found for the insurance company, awarding $887,000 in compensatory damages for breach of contract and fraudulent

114. *See* Zipursky, *supra* note 42, at 1001 ("[T]he Court has never provided clear guidance on how courts should tailor the amount of punitive damages to the reprehensibility of a defendant's conduct. This lack of guidance is an important failure because juries generally agree on the reprehensibility of a given act but cannot effectively translate that agreement into a dollar amount."); Hubbard, *supra* note 4, at 364 (complaining that the reprehensibility factors are "vague, they can conflict with one another, and the presence or absence of one or all the factors is not determinative").

115. *See, e.g.*, Eden Elect. Ltd. v. Amana Co., 370 F. 3d 824, 828 (8th Cir. 2004) (affirming $10 million punitive award, with the court stating that it could "hardly think of a more reprehensible case of business fraud").

116. *See, e.g.*, McLemore *ex rel.* McLemore v. Elizabethton Med. Inv., Ltd. P'ship, 389 S.W.3d 764, 786 (Tenn. Ct. App. 2012) (concluding that the defendant was highly reprehensible as "three of the five considerations for reprehensibility listed in *Campbell* were present"); Innovative Tech. Corp. v. Advance Mgmt. Tech., No. 23819, 2011 WL 5137204, at *19 (Ohio Ct. App. Oct. 28, 2011) (finding four of the five factors justified a "substantial award of punitive damages" for the economic harm caused); Romania v. Volk, No. 08-6229-AA, 2009 WL 4823390, at *1 (D. Or. Dec. 11, 2009) (finding that "two, perhaps three reprehensible factors [were] met, making defendant's conduct 'moderately reprehensible'").

117. *See, e.g.*, Saunders v. Branch Banking and Trust Co. of Va., 526 F.3d 142, 152–53 (4th Cir. 2008).

118. *See, e.g.*, Roby v. McKesson HBOC, 53 Cal. Rptr. 3d 558 (Ct. App. 2006) (noting that the relevant factors "offset" each other leaving a "neutral result," but nevertheless finding sufficient reprehensibility to affirm a $2 million punitive damage award for wrongful discharge plaintiff).

119. 569 F. Supp. 2d 841, 858 (N.D. Iowa 2008).

misrepresentation, and $1,017,332 in punitive damages.[120] In applying the three guideposts to review the punitive damages award for unconstitutional excessiveness, the court started with the five reprehensibility factors. It noted that three factors favored the defendant's position—the harm was solely economic, no reckless disregard was shown for the health or safety of others, and there was no financial vulnerability present—but the other two factors strongly favored the plaintiff's position—defendant's deliberate acts of fraud were repeated many times, and defendant's actions clearly involved "trickery" in the form of numerous phony repair bills from nonexistent contractors. Citing an earlier Eighth Circuit case with a similar distribution of reprehensibility factors,[121] the court upheld the jury's finding of reprehensibility—and the 1.85:1 ratio of punitive damages to compensatory damages.

2. *Additional Reprehensibility Considerations*

Two other aspects of the reprehensibility guidepost bear brief consideration: the nuanced role of conduct that harms others and the impact of defendant's profit motive on the assessment of reprehensibility. As discussed earlier, *Williams* occupied a good bit of the Court's time during the prior decade.[122] The main issue addressed by the Court in that case concerned whether jurors could consider harms to individuals other than the plaintiff in establishing a punitive damages award that properly punished the defendant's reprehensible misconduct and deterred it in the future. Although it did not explain exactly how the trial judge is supposed to "unring" this bell, Justice Breyer's majority opinion in *Williams* clearly drew a sharp line between allowing inquiry into harms to others in the state in determining the degree of reprehensibility, and taking such harms into account in setting the punitive damages award.

This is a sufficiently complicated bifurcation of the degree of harm information a jury is allowed to consider that we expected this problem to appear in a number of the lower court cases we reviewed, but we found only ten cases (less than two percent) post-*Williams* that addressed harm to others,[123] including the remand to the Oregon Supreme Court in *Williams* itself.[124] In one case focusing directly on the *Williams* issue, an Idaho court found no due process violation, even though the jury was instructed that its reprehensibility analysis could consider similar harms to others both in

120. *Id.* at 853 n.12.

121. Diesel Mach., Inc. v. B.R. Lee Indus., Inc., 418 F.3d 829, 839–40 (8th Cir. 2005).

122. Philip Morris USA, Inc. v. Williams, 556 U.S. 178 (2009).

123. One case where the issue was raised resulted in a determination that was much like *Williams*, where the appellate court refused to consider the claim because the defendant had not preserved the proper objection in the court below. *See* Flax v. DaimlerChrysler Corp., 272 S.W.3d 521, 538 (Tenn. Ct. App. 2008).

124. Williams v. Philip Morris USA, Inc., 176 P.3d 1255, 1255 (Or. 2008).

Idaho and nationally.[125] In another case, the defendant argued the "harms to others" issue to the appellate court, but the court refused to consider it because, as in *Williams*, the issue had not been properly preserved at the trial stage.[126] The significance of harm to others may yet reemerge as a thorny reprehensibility issue, but for now courts may simply be letting the dust settle from the saga of *Williams*.

Another aspect of defendant conduct identified as having a negative impact on the degree of reprehensibility is whether the misconduct was motivated by profit. The Court in *Exxon* characterized the profitability of misconduct as warranting a higher level of reprehensibility,[127] although it did not find that the company engaged in profit seeking misconduct. Consideration of the profit motivation behind defendant's bad actions may be best understood as simply a variation on the intentional malice and deceit factor rather than a stand-alone reprehensibility factor itself. Lower courts in our sample cited the profitability of defendant's misconduct in forty-six or nine percent of cases.[128] This factor is sometimes discussed alongside consideration of defendant's wealth, a topic that will be further addressed below.

B. The Ratio Guidepost

As described earlier, in reviewing punitive damages awards, most courts focus a great deal of attention on the stark numerical relationship between punitive and compensatory damages. Lower courts appear particularly comfortable with this stage of the review process. Perhaps working with numbers and ratios gives the judges conducting the review process a sense of mathematical firmness that the narrative criteria of the other two guideposts lack. Generally, the numerator in the ratio fraction called for by the ratio guidepost is the amount of money the plaintiff is receiving to compensate for the losses suffered. In some cases, the Supreme Court has allowed lower courts calculating the ratio to substitute for the compensatory damages awarded a figure representing their best estimate of the potential harm that might have been caused by the defendant's conduct.[129]

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125. *See* Weinstein v. Prudential Prop. & Cas. Co., 233 P.3d 1221, 1259–62 (Idaho 2010).

126. *See Flax*, 272 S.W.3d 521.

127. Exxon Shipping Co. v. Baker, 554 U.S. 471, 494 (2008) ("Action taken or omitted in order to augment profit represents an enhanced degree of punishable culpability . . . .").

128. *See, e.g.*, Merrick v. Paul Revere Life Ins. Co., 594 F. Supp. 2d 1168, 1185 (D. Nev. 2008) (finding highly reprehensible that "[d]efendants have reaped hundreds of millions of dollars if not more in benefit from engaging in the conduct"); Tanner v. Ebbole, 88 So. 3d 856, 870, 876–77 (Ala. Civ. App. 2011).

129. This is arguably the message of the *TXO* decision, where a ratio of 526:1 with respect to compensatory damages was approved because the evidence showed a huge potential harm would have been inflicted on the plaintiff if the defendant's wrongful scheme had not been thwarted. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993).

On whatever basis the operative ratio is constructed, the reviewing court is then tasked with producing a ratio and determining whether that ratio is constitutionally sustainable, considering all the relevant factors in the case. In some jurisdictions, as addressed below, calculating the ratio numerator can raise issues about what will be included beyond the compensatory amounts actually awarded.[130] Once the figure serving as the numerator in the ratio fraction is established, factors commonly considered in determining the reasonableness of the ratio include the general guidance provided by the Supreme Court opinions regarding appropriate ratios, the absolute size of the compensatory damages award (either very large or very small), whether the compensatory award already includes some punitive element, the degree of reprehensibility of the defendant's conduct, the relative wealth of the defendant, and other more speculative factors.

Lower courts regularly advert to discussions found in the leading Supreme Court opinions about how they should determine constitutionally permissible ratios, and frequently emphasize that the Court has consistently declined invitations to turn the ratio guidepost into a purely mathematical exercise.[131] The Court's clearly stated preference for "single digit" ratios is often cited as providing constitutional cover for ratios below 10:1. In *McClain v. Metabolife International Inc.*, for example, a federal district court in Alabama explained its understanding of *Campbell* thusly:

> If the ratio of punitive to compensatory damages exceeds 9 (the highest possible single digit), a red flag goes up. . . . Assuming *arguendo* that a multiplier of 9 or less means that the punitive damages presumptively passes muster under the Due Process Clause, Metabolife's challenges to most of the punitive damage awards in this case are eliminated.[132]

Other courts hone in on the Court's suggestion in *Haslip* that ratios exceeding 4:1 may raise constitutional excessiveness concerns.[133] The Court's admonition in *Campbell* that very high compensatory damages awards may call for ratios no greater than 1:1, as discussed below, has been quite inconsistently applied.[134]

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130. *See infra* notes 178–82 and accompanying text. In some jurisdictions, such "add-ons" as prejudgment interest and attorney fees are included in compensatory damages to which the punitive damages award is compared.

131. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (No "bright line ratio," which a punitive damages award cannot exceed); *but see* Rustad, *supra* note 97, at 491 ("The *State Farm* Court comes perilously close to developing a per se mathematically-based test as a surrogate for the reasonable punitive damages award . . . .").

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

133. *See, e.g.*, Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 308–10 (Tex. 2007) (citing *Haslip* in finding punitive ratio of 4.33:1 to exceed constitutional limits).

134. For an interesting discussion (with a well-argued dissent) about whether small versus large compensatory awards necessitate different analyses of the ratio issue, see Hamlin v. Hampton Lumber Mills, 246 P.3d 1121, 1124–28 (Or. 2011).

Most judges emphasize that the Supreme Court has not set forth firm rules, but rather has provided only guiding principles that provide a "rough framework" for determining the appropriate ratio of punitive damages to compensatory recovery.[135] As one federal judge described this flexible interpretation, "the Supreme Court's guideposts are just that: guideposts."[136]

1. Aggregate Ratio Data

Our collection of cases produced significantly higher awards than those reported in large empirical studies on punitive damages, which have found overall median punitive damages awards less than $64,000.[137] As indicated in Table 4, even with post-remittitur and post-appeal adjustments, our cases show an aggregate median punitive damages award of $460,500. While in some claim categories the median punitive amount is less than that overall median, none of the claims show medians approaching the aggregate data found in wide-scale empirical studies of punitive damages cases.

TABLE 4: MEDIAN PUNITIVE DAMAGES AWARDS IN CASE SAMPLE

Claim Category	**Median Original Punitive Damages**	**Median Post-Review Punitive Damages**
Fraud	$500,000	$353,895
Civil Rights	$250,000	$100,000
Employment	$975,000	$480,000
Business Tort	$2,250,000	$500,000
Title VII	$500,000	$290,000
Insurance	$3,000,000	$1,325,000
Gross Negligence	$749,362	$500,000
Property	$350,000	$150,000
Wrongful Death	$5,250,000	$4,183,000
Product Liability	$15,607,000	$10,000,000
Assault and Battery	$275,000	$200,000
Br. Fiduc. Duty	$2,000,000	$1,647,000
Creditor Abuse	$250,000	$260,000
Defamation	$250,000	$250,000
Other	$500,000	$365,952
Total	$829,197	$460,500

Similarly, as shown in Table 5, the total punitive damages awarded in our sample reflect significantly higher amounts than in the mine run of cases included in empirical studies. The Department of Justice's 2011 report on tort, contract, and property cases awarding punitive damages in state courts,

135. *See* Merrick v. Paul Revere Life Ins. Co., 594 F. Supp. 2d 1168, 1189 (D. Nev. 2008).

136. Noble Biomaterials v. Argentum Med., LLC, No. 3:08-CV-1305, 2011 WL 4458796, at *8 (M.D. Pa. Sept. 23, 2011).

137. *See* COHEN & HARBACEK, *supra* note 89, at 50.

for example, found only thirteen percent of punitive damage awards at or over $1,000,000, but thirty-six percent of our cases involved punitive damages of $1,000,000 or more.[138] Indeed, fourteen percent of the punitive damage awards in our sample exceeded $5,000,000, and two percent were over $50,000,000. According to one scholar, a punitive award does not achieve "blockbuster" status until it reaches $100,000,000;[139] our sample included fourteen such initial blockbuster awards, or 2.8 percent. Eight of those awards were reduced on appeal to an amount less than $100,000,000, but in six cases (one percent of our total) the awards remained over that amount even after district or appellate court remittitur.

TABLE 5: AMOUNT OF PUNITIVE DAMAGES AWARDS IN SAMPLE

Punitive Damages Award	**Original Award**	**Post-Review Award**
$1,000–$99,999	83 (16%)	124 (24%)
$100,000–$499,999	124 (24%)	147 (29%)
$500,000–$999,999	52 (10%)	54 (11%)
$1,000,000–$4,999,999	131 (26%)	112 (22%)
$5,000,000–$9,999,999	41 (8%)	28 (6%)
$10,000,000–$49,999,999	51 (10%)	30 (6%)
Over $50,000,000	25 (5%)	12 (2%)

Because scholars have reported a significant empirical correlation between the size of compensatory damage awards and punitive damages,[140] Table 6 sets forth the distribution and amount of compensatory damages awarded in our cases. Twenty-one percent of these cases involved compensatory amounts of $1,000,000 or more, a sum that the Court in *Campbell* characterized as "substantial" enough to warrant consideration of a 1:1 ratio.[141]

138. *Id.*

139. W. Kip Viscusi, *The Blockbuster Punitive Damages Awards*, 53 EMORY L.J. 1405, 1408 (2004) (stating $100,000,000 "blockbuster" threshold is necessary because although "$1 million awards used to generate media coverage for a substantial award, we now live in an era in which there may be award levels of a billion dollars or even more").

140. *See, e.g.*, Theodore Eisenberg et al., *The Decision to Award Punitive Damages: An Empirical Study*, 2 J. LEGAL ANALYSIS 577, 600 (2010) (showing a "general pattern of increasing rates of punitive awards as the compensatory award increases").

141. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426–27 (2003).

TABLE 6: AMOUNT OF COMPENSATORY DAMAGES AWARDS IN SAMPLE

Compensatory Damages Award	Original Award	Post-Review Award
$1–$999	45 (9%)	45 (9%)
$1,000–$9,999	54 (11%)	55 (11%)
$10,000–$99,999	109 (22%)	120 (24%)
$100,000–$499,999	136 (27%)	131 (26%)
$500,000–$999,999	52 (10%)	50 (10%)
$1,000,000–$9,999,999	90 (18%)	85 (17%)
Over $10,000,000	21 (4%)	21 (4%)

The significantly higher median punitive damages awards found in our sample can likely be explained by the selection bias of courts or legal databases choosing to publish cases featuring a large absolute amount of punitive damages or particularly high ratios of punitive to compensatory damages. Our sample does not capture a huge universe of unpublished cases that clearly involve comparatively much lower punitive damages amounts or ratios. That selection bias may nonetheless be useful in gauging how lower courts approach the excessiveness review in the very high dollar category of cases about which the Supreme Court appears most concerned.

With respect to the ratios of punitive to compensatory damages found in our sample, our data again reveals a significantly higher median ratio than in larger scale reported empirical studies that have found median ratios below 1.0.[142] As set forth in Table 7, the original ratio median across all claims is 5.87, but the post-trial or post-appeal median ratio is still 3.95. While some claim categories show remitted median ratios slightly lower or higher than 3.95, none approaches the median .62 ratio discussed by Justice Souter in *Exxon*[143] or the .88–.98 ratio found by a prominent punitive damages scholar.[144]

142. *See, e.g.*, Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 754 (2002).

143. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 497–98, n.14 (2008) (surveying empirical research finding the median ratio to be as low as .62:1 and concluding that "by most accounts the median ratio of punitive to compensatory awards has remained less than 1:1").

144. *See* Eisenberg et al., *supra* note 142, at 754 (finding median ratios of .88–.98).

TABLE 7: MEDIAN PUNITIVE DAMAGES RATIOS IN SAMPLE

Claim Category	Median Original Ratio	Median Remitted Ratio
Fraud	5.51	4.17
Civil Rights	9.64	3.00
Employment	5.33	4.00
Business Tort	4.89	3.00
Title VII	5.54	2.00
Insurance	10.04	4.00
Gross Negligence	5.49	3.00
Property	5.09	5.00
Wrongful Death	8.50	4.00
Product Liability	4.18	2.40
Assault and Battery	8.66	4.10
Br. Fiduc. Duty	4.23	2.23
Creditor Abuse	5.00	3.25
Defamation	7.58	3.33
Other	5.00	3.86
Total	5.87	3.95

Tables 8 and 9 display the pattern of ratios between punitive damages and compensatory damages pre- and post-review in each claim category across ten years of published lower court opinions. The highest ratio reported in our sample was 5,000,000:1;[145] the lowest was 0.02:1.[146] The Tables classify ratios by five ranges: less than 1:1, 1:1 to 4:0, 4:1 to 9.9:1, 10:1 to 99.9, and 100:1 or higher.

145. *See* Lawnwood Med. Ctr. v. Sadow, 43 So. 3d 710, 734 (Fla. Dist. Ct. App. 2010) (affirming punitive award of $5 million where compensatory damages award was $1 in defamation case).

146. *See* USA Commercial Mortg. Co. v. Compass USA SPE LLC, 802 F. Supp. 2d 1147, 1154 (D. Nev. 2011) (awarding $50,000 in punitive damages compared to $2.5 million in compensatory damages and attorney's fees).

TABLE 8: ORIGINAL RATIOS BY CLAIM CATEGORY

Claim Category	Less Than 1:1	1:1–4:0	4.1:1–9.9:1	10:1–99.9:1	Over 100:1
Fraud	4	25	14	18	5
Civil Rights	9	13	10	13	19
Employment	4	19	10	17	6
Business Tort	4	14	9	8	6
Title VII	3	14	11	10	6
Insurance	1	15	6	19	4
Gross Negligence	5	6	6	7	0
Property	3	8	3	5	4
Wrongful Death	2	7	2	10	1
Product Liability	1	8	3	5	1
Assault & Battery	1	5	3	8	1
Br. Fiduc. Duty	0	7	7	1	0
Creditor Abuse	1	4	6	4	0
Defamation	3	3	3	3	5
Other	5	11	11	6	6
Total	46 (9%)	159 (31%)	104 (21%)	134 (26%)	64 (13%)

TABLE 9: POST-REVIEW RATIOS BY CLAIM CATEGORY

Claim Category	Less Than 1:1	1:1–4:0	4.1:1–9.9:1	10:1–99.9:1	Over 100:1
Fraud	4	33	20	7	2
Civil Rights	11	20	11	6	16
Employment	4	27	12	9	4
Business Tort	4	23	7	5	2
Title VII	9	19	5	7	4
Insurance	1	25	13	5	1
Gross Negligence	5	11	5	3	0
Property	3	9	5	2	4
Wrongful Death	2	9	4	6	1
Product Liability	1	11	4	2	0
Assault & Battery	0	8	4	5	1
Br. Fiduc. Duty	0	10	5	0	0
Creditor Abuse	1	7	5	2	0
Defamation	3	6	2	1	5
Other	7	18	7	3	4
Total	55 (11%)	236 (47%)	109 (22%)	63 (11%)	44 (9%)

Again, while the Department of Justice's report on state court punitive damages in tort, contract, and property cases found that seventy-six percent involved punitive damages ratios below 3:1, the ratio distribution in our sample is different. Only eleven percent of our cases fell under 1:1, and only fifty-eight percent of our cases reflected ratios at or below the 4:1 "benchmark" suggested by some of the Court's dicta. In 152, or thirty

percent of our cases, courts expressly noted the constitutional acceptability of such a 1:1–4:1 ratio.[147] Twenty-two percent of the cases in our study yielded ratios greater than 4:1 and less than 10:1, the magic "single digit" level suggested by the Court as the presumptive upper limit of cases without mitigating circumstances. Indeed, courts in seventy-nine (sixteen percent) of the cases in our study explicitly invoked the Court's alleged blessing of ratios below double digits.

Thirty-nine percent of the original jury ratios in our cases exceeded 10:1, although the marked effect of judicial review at both the trial and appellate level can be seen by the reduction of such double or triple digit ratios to twenty percent of cases post-review. Even after judicial review, a notable nine percent of our cases reflected ratios in excess of 100:1. The lion's share of those awards resulted from civil rights cases, however, where high degrees of reprehensibility coupled with low or even nominal compensatory damages awards can readily achieve triple digit ratios.

To get a little more of the flavor of how the ratio guidepost operates, consider four recent illustrative cases. In *Hancock v. Variyam*,[148] the plaintiff was a physician who claimed he had been defamed by the defendant, another physician who publically disparaged plaintiff's professional skill. The jury ruled for the plaintiff and awarded $90,000 in compensatory damages and $85,000 in punitive damages (.94:1 ratio). The Texas Court of Appeals upheld the punitive damages award as reasonable under the circumstances and clearly consistent with the ratio guidepost.

Illustrating a classic less than 4:1 ratio, in *Allstate Insurance Company v. Dodson*,[149] the plaintiff sued the insurance company defendant for defamation and tortious interference with business expectancy. The jury sided with plaintiff, awarding $6 million in compensatory damages and $15 million in punitive damages (a 2.5:1 ratio).[150] The trial judge ordered a remitter of the punitive damages award down to $6 million (a 1:1 ratio).[151] On appeal, the Arkansas Supreme Court addressed the ratio guidepost and restored the punitive damages award to $15 million, noting that the ratio was still less than 4:1.[152]

In *Brim v. Midland Credit Management, Inc.*,[153] the plaintiff sued the defendant, a credit agency, for violations of the Fair Credit Reporting Act.

147. *See, e.g.*, Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998, 1014–15 (9th Cir. 2004) (rejecting argument that *Campbell* dictated a 1:1 ratio in comparable bad faith insurance case, court pointed out that "[t]he ratio in this case is approximately 2.6:1, well within the Supreme Court's suggested range for constitutional punitive damages").

148. 345 S.W.3d 157, 161–62 (Tex. App. 2011).

149. 2011 Ark. 19, at 1, 376 S.W.3d 414, 418.

150. *Id.* at 4, 376 S.W. 3d at 419.

151. *Id.*

152. *Id.* at 28, 376 S.W. 3d at 432.

153. 795 F. Supp. 2d 1255, 1255 (N.D. Ala. 2011).

The jury awarded the plaintiff $100,000 in compensatory damages and $623,180 in punitive damages (a 6.23:1 ratio).[154] The federal district court for the Northern District of Alabama applied the ratio guidepost and upheld the punitive damages award. In support of its decision, the court specifically cited the U.S. Supreme Court's "jurisprudential preference" for single-digit punitive awards.[155]

Finally, in *Sepulveda v. Burnside*,[156] the plaintiff sued state prison officials for repeated violations of Eighth Amendment rights. The jury awarded plaintiff $1 in compensatory damages and $99,999 in punitive damages (a 99,999:1 ratio).[157] The Eleventh Circuit affirmed the punitive damages award, noting that the violations of plaintiff's rights were very serious and reprehensible; therefore the jury's punitive damages award was reasonable, even though the ratio was much higher than any ratio ever upheld before in the Eleventh Circuit. The opinion emphasized that no precise mathematical formula exists for evaluating an award's justification.[158]

2. *Determining the Proper Numerator and Denominator*

Given the crucial role of proportionality in the excessiveness analysis, it is not surprising to find lower courts grappling with exactly which values to include in both sides of the ratio calculus. The greatest uncertainty surrounds the determination of the numerator (actual harm) side of the punitive damages-to-compensatory-award calculus. In *TXO*,[159] the Court established the proposition that where proper factual grounds are found to exist, a lower court may utilize as the ratio numerator a dollar value reflecting the *potential* harm that might have been suffered by the plaintiff rather than the compensatory damages award representing the actual harm to plaintiff.[160] Typically, this consideration of potential harm arises in cases of alleged economic harm where, had the defendant's unlawful scheme succeeded, the plaintiff would have suffered a much greater economic loss than what actually occurred.[161] Although the constitutional standard in the ratio guidepost is always stated in terms of "actual or potential harm,"[162] the overwhelming majority of cases in our dataset only

154. *Id.* at 1263.
155. *Id.* at 1264.
156. 432 F. App'x 860 (11th Cir. 2011).
157. *Id.* at 861.
158. *Id.* at 866.
159. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453 (1993).
160. *See generally* Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 Minn. L. Rev. 83 (2007).
161. *See TXO*, 509 U.S. at 460 (finding TXO's fraudulent scheme could have caused millions of dollars in damages if the wrongful plan had succeeded).
162. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 420 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 571 (1996); *TXO*, 509 U.S. at 460; Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21 (1991).

utilized the actual compensatory damages awarded as the appropriate basis for reviewing proportionality in the ratio guidepost. Courts expressly included calculation of potential harms in only twenty-nine (six percent) of the cases in our study.

Bennett v. Reynolds[163] provides a good illustration of how much difference it can make when the reviewing court applies a "potential harm" analysis. In *Bennett*, the jury awarded $5327 in actual damages against Bennett and the Bonham Corporation jointly and severally, $250,000 in punitive damages against Bennett, and $1 million in punitive damages against Bonham.[164] The Texas Court of Appeals upheld the 47:1 ratio against Bennett and the 187:1 ratio against Bonham Corporation, expressly applying the potential harm analysis.[165] During the trial, Bennett testified that to settle the matter he would willingly pay the plaintiff $500,000 for mental anguish as a result of the defendant falsely accusing the plaintiff of theft of cattle. This amount, however, was not included in the actual damages awarded to the plaintiff by the jury.[166] *TXO* and *Campbell* both suggested that in the proper case, the ratio numerator could be based on the potential harm likely to have resulted from the defendants' conduct.[167] Therefore, the court calculated the potential harm at $500,000, which reduced the ratios to 0.5:1 for Bennett and to 2:1 for Bonham.[168]

Additionally, the court noted that the defendant's testimony was significant because it bore on the "fair notice" concerns that are the ultimate rationale for the due process analysis.[169] On appeal, the Texas Supreme Court disagreed, invoking the U.S. Supreme Court's metaphor of constructing a "constitutional fence around exemplary damages" to rule that the award in this case was neither reasonable nor proportionate to the wrong committed.[170] The case was remanded back to the court of appeals for a fresh assessment of the appropriate size of the punitive damages award.[171] The Texas Supreme Court ignored the lower court's ruling that the large potential harm from the defendant's wrongful action found to be $500,000, to which the defendant acquiesced, was the correct ratio numerator.

Another example of how potential harm may come into play to support setting a ratio numerator higher than actual harm is provided by the

163. 242 S.W.3d 866, 905 (Tex. App. 2007).
164. *Id.* at 876.
165. *Id.* at 906–07.
166. *Id.* at 877–78.
167. *Id.* at 905 (citing *Campbell*, 538 U.S. at 424).
168. *Id.* at 905–06.
169. *Id.* at 906.
170. Bennett v. Reynolds, 315 S.W.3d 867, 885 (Tex. 2010).
171. *Id.*

2008 case of *Parexel International Corp. v. Feliciano*.[172] There, an employee plaintiff claimed that the defendant had ordered him to engage in illegal conduct by acquiring certain marketing secrets from a competitor.[173] When the plaintiff refused, defendant fired him.[174] Giving effect to the potential harm concept, the federal district court considered how acceding to defendant's unlawful demand would have ruined plaintiff's reputation and made him unemployable in the industry. The court held that the potential harm to plaintiff went well beyond the compensatory damages awarded to him for the actual harm he suffered, and affirmed the $1.7 million punitive damages award using the potential harm figure as the ratio numerator.[175]

The potential harm analysis was also approved and applied in a recent Iowa case involving a successful bad faith claim against a casualty insurer.[176] In *Deters v. USF Insurance Co.*, the Iowa Court of Appeals relied on what it determined to be the $1 million potential harm to plaintiff to uphold the $1 million punitive damages awarded when defendant insurance company, in bad faith, refused to defend a claim against plaintiff. The compensatory damages awarded in the case were only $69,000.[177]

Employment cases can also pose challenges in the determination of the correct numerator, because monetary awards sometimes include back or front pay amounts not considered "compensatory" in nature. In *Chopra v. General Electric Co.*, for example, the court agreed that the employee's back pay should be included in determining the actual harm numerator, but then calculated the ratio both with and without the award of front pay in considering the excessiveness of the award.[178] Similarly, the court in *EEOC v. AutoZone, Inc.* calculated the punitive damages ratio by first using only compensatory damages and then by including the award of back pay, concluding that the relevant ratio in either event passed constitutional muster.[179] As one scholar has argued, courts reviewing punitive damages awards in employment cases regularly under account for awards of back pay, reinstatement, and attorney fees awarded to prevailing plaintiffs, as well as the monetary value of injunctive relief.[180] This uncertainty and lack of consistency among courts assessing the proper numerator in such

172. Parexel Int'l Corp. v. Feliciano, No. 04-CV-3798, 2008 WL 5101642 (E.D. Pa. Dec. 3, 2008).
173. *Id.* at *2.
174. *Id.* at *6.
175. *Id.* at *6 n.8.
176. *See* Deters v. USF Ins. Co., 797 N.W.2d 621 (Iowa Ct. App. 2011) (unpublished table decision).
177. *Id.*
178. 527 F. Supp. 2d 230, 245 (D. Conn. 2007).
179. 707 F.3d 824, 839–40 (7th Cir. 2013).
180. *See* Sandra Sperino, *The New Calculus of Punitive Damages for Employment Discrimination Cases*, 62 OK. L. REV. 701, 709–13 (2010).

cases would be greatly benefitted by the Supreme Court's review of punitive damages in the employment law context.

Another problem in computing the proper ratio is that setting the precise number to use as the numerator of the ratio fraction is not handled uniformly from one jurisdiction to the next. For example, while many courts focus exclusively on the compensatory damages award, tort law in a number of states allows the inclusion of prejudgment interest as part of the ratio numerator,[181] and others also include court costs and the attorneys' fees awarded to the plaintiff.[182] Five percent of the cases in our study counted attorneys' fees, prejudgment interest, and other types of extra-compensatory values in calculating the proper numerator. Courts must also assess the role of statutory caps on compensatory awards, such as limits on the recovery of noneconomic damages. In conducting the ratio analysis for reviewing constitutional excessiveness, courts must decide whether to compare the punitive damages awarded to the "harm" represented by the jury's original determination of damages or only to the amount of compensatory damage allowed under the relevant statutory cap.

Moreover, in jurisdictions where fault is assigned on a comparative basis, courts must decide how to construct the ratio if the compensatory damages award must be reduced by the percentage of fault assigned to the plaintiff. The consensus solution appears to be to use the entire compensatory damages award as the numerator of the ratio fraction, even though the plaintiff did not collect the full compensatory award.[183]

Finally, correctly constructing the punitive ratio for excessiveness review may be complicated in cases involving multiple defendants against whom punitive damages awards were made separately. Courts must determine whether to compare the total amount of compensatory damages awarded to the plaintiff with the total amount of punitive damages, or separately analyze the compensatory to punitive damages ratio with respect to each defendant. In *Cooley v. Lincoln Electric Co.*, for example, the plaintiff was a welder who brought a products liability claim against a defendant manufacturer and two individual defendants.[184] To complicate matters, the compensatory award was reduced by the amount determined

181. *See* USA Commercial Mortg. Co. v. Compass USA SPE LLC, 802 F. Supp. 2d 1147 (D. Nev. 2008).

182. *Compare Deters*, 797 N.W.2d 621 (combining estimate of potential harm, an out-of-court settlement, and an award of attorney fees to produce the $1 million denominator in the ratio fraction), *with* Clear Channel Outdoor, Inc. v. Advertising Display Sys., Nos. A102492, A102716, 2004 WL 2181793, at *14 (Cal. Ct. App. Sept. 29, 2004) (reversing a series of punitive damages awards because the jury's compensatory damages awards improperly included plaintiffs' attorney fee expenses).

183. *See, e.g.*, R.J. Reynolds Tobacco Co. v. Townsend, 90 So. 3d 307 (Fla. Dist. Ct. App. 2012) (using the full $10.8 million compensatory damages amount in the ratio to support a $40.8 million punitive damages award, even though plaintiff only received fifty-one percent of the award); *see also* Merrick v. Paul Revere Life Ins. Co., 594 F. Supp. 2d 1168, 1191 (D. Nev. 2008).

184. Cooley v. Lincoln Elec. Co., 776 F. Supp. 2d 511 (N.D. Ohio 2011).

to constitute the plaintiff's comparative fault. To implement the ratio guidepost, the court combined the two compensatory damages awards against each individual defendant and compared them with the total punitive damages awarded to produce an overall ratio of 7:1. If the court had treated the two punitive awards separately, the ratios would have been 9:1 and 4:1, both still within the single digit norm, but with the larger ratio perhaps raising more serious excessiveness questions. While the court's approach is not irrational, it would appear to make more sense for a reviewing court to evaluate the punitive damages award in relation to the compensatory damages awarded against each individual defendant separately. For example, imagine that the ratios of the separate awards in the *Cooley* case had been 15:1 and 3:1. The first award would have been much more suspect than a combined award coming in at the 7:1 ratio.

A 2012 Minnesota case involving multiple defendants, one of which was a corporation, raised similar issues to the *Cooley* case. In *McGrath v. MICO, Inc.*,[185] the plaintiff prevailed on two distinct claims (breach of fiduciary duty and tortious interference with contract) against the corporation and two individual defendants. Although the jury awarded separate compensatory damages on each of the two claims, in ruling on excessiveness challenges from all three defendants, the court compared the punitive damages award against each defendant to the total compensatory damages awarded for both claims, and concluded that the ratios for the corporation and each of the two individual defendants were 1:1 or less, and therefore not close to excessive.[186] If the compensatory awards had been disaggregated, the ratios would have been in the middle to high single digits. In passing, the court noted that as to the tortious interference with contract claim against the two individual defendants, the disaggregated ratios would have been 4:1 and 8:1, both still well within the single digit norm.

Noble Biomaterials v. Argentum Medical, LLC,[187] raised the issue of what to do when no compensatory damages were awarded against two individual defendants who nevertheless had substantial punitive damages awards assessed against them. In this patent infringement case, the Ohio court awarded substantial compensatory damages only against the corporate defendant, but no punitive damages. Punitive damages of $1 million and $1.2 million respectively, but no compensatory damages, were awarded against the two individual defendants.[188] Brushing aside the defendant's objection that these punitive damages awards were

185. Nos. A11–1087, A11–1109, A12–0093, 2012 WL 6097116 (Minn. Ct. App. Dec. 10, 2012).
186. *Id.* at *14.
187. No. 3:08-CV-1305, 2011 WL 4458796 (M.D. Pa. Sept. 23, 2011).
188. *Id.* at *3.

unconstitutionally excessive because no compensatory damages had been assessed against the individual defendants, the court observed that each of the two individual defendants had actually done roughly $1 million in harm to the plaintiff, so the punitive awards were not excessive.[189]

This aggregation of compensatory and punitive damages appears to be the majority approach. We found very few multiple defendant cases where the punitive to compensatory ratios were disaggregated for each defendant.[190] We question whether the aggregation approach is consistent with the fairness rationale regularly advanced to support constitutional review of punitive damages. Fairness would seem to require that punitive damages be assessed with respect to each defendant relative to the amount of harm or the potential harm inflicted.

3. Factors Justifying Ratios Above Single Digits

The Court has offered three justifications for tolerating a high punitive damages ratio: (1) a finding of high reprehensibility coupled with low economic harm, (2) misconduct that is particularly hard to detect, and (3) harm to plaintiff that is difficult to quantify.[191] Table 10 details the cases in our study that explicitly apply one or more of these ratio-enhancing factors.

TABLE 10: UTILIZATION OF RATIO ENHANCING FACTORS

Radio Enhancing Factor	**Number of Cases**
Low Compensatory Damages	*107 (21%)*
Compensatory Damages Found "Low"	73 (14%)
Compensatory Damages Not Found "Low"	34 (7%)
Misconduct Hard to Detect	*35 (7.0%)*
Misconduct Found to be Hard to Detect	16 (3%)
Misconduct Not Found to be Hard to Detect	19 (4%)
Harm Difficult to Quantify	*38 (7.5%)*
Harm Found Difficult to Quantify	26 (5%)
Harm Found Not Difficult to Quantify	12 (2%)

Even at only fourteen percent of the cases in our study, by far the most commonly invoked justification for double or triple digit punitive damages ratios is a finding of very low or nominal compensatory awards

189. *Id.* at *8.

190. *See, e.g.*, Wackenhut Corr. Corp. v. de la Rosa, 305 S.W.3d 594 (Tex. App. 2009); Redmond v. Goosherst, No. 06 C 3611, 2008 WL 3823099 (N.D. Ill. Aug. 12, 2008); *cf.* Gibbons v. Bair Found., Inc., No. 1:04CV2018, 2007 WL 582314 (N.D. Ohio Feb. 20, 2007) (declining to reduce award due to statutory cap on punitive damages where award imposed against each of the defendants separately fell below the applicable cap, although exceeded the cap in aggregate).

191. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580 (1996).

coupled with a high degree of reprehensibility.[192] Where justified by the particular facts of the case, such high ratios are regularly found not to violate due process if necessary to accomplish the state's interest in retribution and deterrence. In cases involving nominal or small compensatory damages awards but high punitive damages, some lower court opinions quote extensively from *Gore* and *Campbell* on the topic of ratios, and then, based on the language quoted and virtually no further analysis of the facts, conclusively hold that the ratio in the specific case before them is, or is not, constitutionally permissible.[193]

Although some scholars have asserted that the most economically efficient approach to punitive damages requires assessment of the likelihood of detection rather than proportionality to compensatory damages generally,[194] only three percent of the courts in our sample cited that factor in their ratio analysis. Our sample reflected a similarly low incidence (five percent) of courts citing the difficulty of quantifying the plaintiff's harm as the justification for high punitive to compensatory ratios.

4. "Substantial" Compensatory Damages and the 1:1 Ratio

Dicta in the *Campbell* opinion,[195] reinforced by Justice Souter's opinion and comments in *Exxon Shipping*,[196] have created notable uncertainty among lower courts about how to handle contested punitive damages awards when the plaintiff recovers what is arguably a very large compensatory damages award. The suggestion in both cases is that recovery of "substantial" compensatory damages should drive down the constitutionally permissible punitive damages award, perhaps to a 1:1 ratio or less. In *Exxon Shipping*, Justice Souter explained in a footnote that "[t]he criterion of 'substantial' takes into account the role of punitive

192. *See, e.g.*, Howard Univ. v. Wilkins, 22 A.3d 774 (D.C. 2011) (affirming nearly $43,000 in punitive damages in defamation and retaliatory termination case where plaintiff was awarded only $1 in nominal damages).

193. *See, e.g.*, Cooley v. Lincoln Elec., 776 F. Supp. 2d 511 (N.D. Ohio 2011).

194. *See, e.g.*, Rhee, *supra* note 10, at 52 (suggesting proper punitive damages formula as plaintiff's harm multiplied by the reciprocal of the probability of being found liable); Calandrillo, *supra* note 86, at 805 ("[P]rincipled jurists understand that punitive damages should be awarded only where tortfeasors have the potential to escape liability for their actions."); Hubbard, *supra* note 4, at 372 ("Partly because it has rejected any substantial role for deterrence as a purpose of punitive damages, 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 relevance of the difficulty of detection and likelihood of being sanctioned, the costs of litigation, the possibility of financial gain, the potential harm to third parties, or the defendant's wealth.").

195. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.").

196. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 503 n.28 (2008) ("In this case, then, the constitutional outer limit may well be 1:1.").

damages to induce legal action when pure compensation may not be enough to encourage suit."[197]

Since 2008, when *Exxon Shipping* was decided, a few lower court cases have questioned whether the Court's decision under its exclusive authority over maritime law should be read to mandate 1:1 or lower ratios under the due process analysis whenever the amount of compensatory damages awarded plaintiff was relatively large. In *Jurinko v. Medical Protective Co.*, for example, the Third Circuit appeared on a casual reading to apply the Court's admiralty rubric to the due process ratio analysis.[198] In this bad-faith insurance case, a federal jury applying Pennsylvania law had found for the plaintiff, awarding compensatory damages of $1,658,345 and $6,250,000 in punitive damages.[199] Writing for the majority, Chief Judge Scirica found the punitive damages awarded to be excessive and reduced them to achieve a 1:1 ratio.[200] Chief Judge Scirica reasoned that the result followed the Court's "trend" toward lower ratios in cases involving no physical injury and where the defendant's conduct was not highly reprehensible. Although the opinion cited *Exxon Shipping* in reference to this supposed trend, the opinion went on to make clear that the decision to reduce the punitive damages award as excessive was based strictly on application of the three guideposts set out in *Gore* and *Campbell*. Citing what it referred to as "instructions" from the *Campbell* case, the opinion explained that the defendant's conduct "does not justify so high an award in light of the moderate degree of reprehensibility, the substantial compensatory award, and the large disparity between the award and civil penalties under [Pennsylvania law]."[201]

No lower court to date has ruled that *Exxon Shipping* applies directly to the due process analysis under the ratio guidepost.[202] A few cases have cited *Exxon Shipping* in passing, but declined to apply its 1:1 rationale to the facts of the case before the court.[203] The great majority of cases have explicitly rejected the argument that *Exxon Shipping* changed the standards under which reviewing courts were to apply the ratio guidepost ratio

197. *Id.* at 515 n.28.

198. Jurinko v. Med. Protective Co., 305 F. App'x 13, 25 (3rd Cir. 2009).

199. *Id.* at 15.

200. *Id.* at 30.

201. *Id.*

202. In Justice W. Jones' dissent in *Weinstein v. Prudential Property and Casualty Insurance Company*, 233 P.3d 1221, 1284 (Idaho 2010), he expressly favored treating *Exxon*'s 1:1 ratio limit as a constitutional requirement where the total compensatory damages exceeded $400,000. The majority in the *Weinstein* case, however, upheld a punitive damage award of $1,890,000 as constitutionally permissible, rejecting the defendant's argument that *Exxon* required no greater that a 1:1 ratio. *Id.* at 1262 (majority opinion).

203. *See, e.g.*, Amerigraphics v. Mercury Cas. Co., 107 Cal. Rptr. 3d 307 (Ct. App. 2010) (citing *Exxon*, but not applying its 1:1 ratio analysis).

analysis. In *Line v. Ventura*,[204] the Alabama Supreme Court rejected the defendant's claim that *Exxon Shipping* had established a new constitutional limit for ratios of 1:1 or less. The Alabama court noted that the *Exxon Shipping* decision explicitly limited its holding to federal maritime law, and emphasized that "[t]he appropriate standard for considering the excessiveness of the punitive-damages award is set out in *State Farm Mutual Automobile Insurance Co. v. Campbell* and *BMW of North America v. Gore*."[205] Similarly, in *Allstate Insurance Co. v. Dodson*,[206] the Arkansas Supreme Court reversed a lower court's remittitur and restored the jury's award of $15 million in punitive damages, which represented a 2.5:1 ratio with the compensatory damages. The high court criticized the trial court for being "influenced in its grant of the remittitur by the case of *Exxon Shipping Co. v. Baker*, where the ratio of punitive damages to compensatory damages was one to one. The *Exxon* case is not apposite in our judgment."[207]

Eighty-five cases (or seventeen percent of our total) expressly found the compensatory damages at issue to be substantial. Those cases, however, show a wide variation on the question of what amount of compensatory damages rises to the level of a "substantial" award warranting possible reduction in punitive damages to achieve a 1:1 ratio.

While *Campbell* characterized a $1,000,000 compensatory award as "substantial," courts in our study found damages far less than that to warrant a ratio reduction. Courts in about half of the cases in our study described as "substantial" compensatory damages ranging from $100,000 to $1,000,000. In *Mendez-Matos v. Guaynab*, for example, the First Circuit found that a $35,000 compensatory award to a plaintiff for unlawful detention on a construction site was too "substantial" to justify the jury's award of $350,000 in punitive damages.[208] The First Circuit mandated a reduction of the punitive award to $35,000, ensuring a 1:1 ratio.[209] Of the 181 cases in our study affirming compensatory damages in the $100,000 to $1,000,000 range, however, 142 (seventy-eight percent) did not characterize the compensatory damages as "substantial." Figure 1 shows the relevant post-review ratios of punitive to compensatory damages in cases affirming compensatory damages between $100,000 and $1,000,000.

204. 38 So. 3d 1, 13 (Ala. 2009).

205. *Id.* (internal citations omitted).

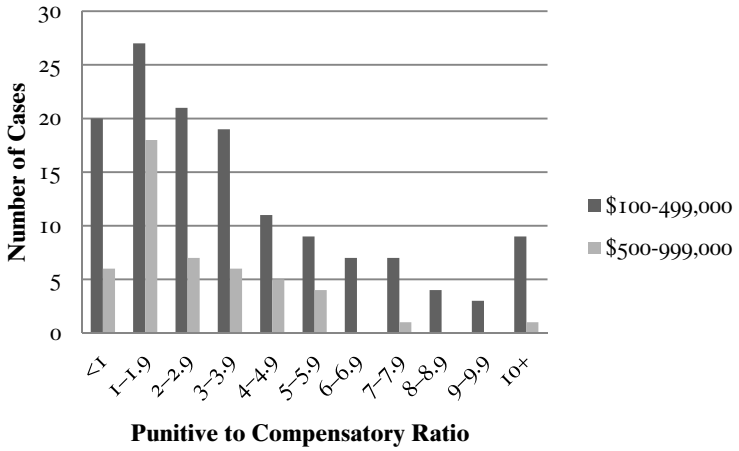
206. 2011 Ark. 19, at 31–32, 376 S.W.3d 414, 434.

207. *Id.* at 32 (internal citation omitted).

208. Mendez-Matos v. Guaynabo, 557 F.3d 36 (1st Cir. 2009).

209. *Id.* at 54–56; *see also* Allam v. Meyers, 906 F. Supp. 2d 274, 239 (S.D.N.Y. 2012) (holding $200,000 compensatory award "substantial" and accordingly reducing $300,000 punitive damages to $200,000 to achieve a 1:1 ratio).

FIGURE 1: PUNITIVE TO COMPENSATORY RATIOS BY COMPENSATORY DAMAGES $100,000–$999,000

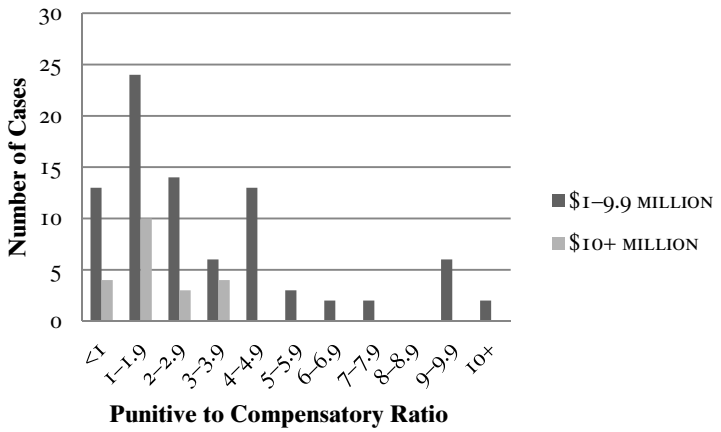


Although only twenty-one percent of the cases explicitly described the compensatory damages at issue to be "substantial," thirty-eight percent of the cases in this range fell at or below a 1.9:1 ratio. Another thirty-seven percent of the cases resulted in ratios from 2:1–4.9:1, the benchmark ratios described by the Court as nearing the constitutional limit in *Haslip*.[210] In twenty-four percent of the cases in this compensatory range, the final punitive damages ratio exceeded 5:1, with five percent exceeding a 10:1 ratio.

Courts affirmed compensatory damages in excess of $1,000,000 in thirty-four of the eighty-five cases in our study that explicitly invoked *Campbell*'s ratio-reducing "substantial" rationale. These thirty-four cases represent only thirty percent of the courts in our study affirming million or multi-million dollar compensatory awards. Figure 2 sets forth the punitive ratios in all cases affirming compensatory damages over $1,000,000.

210. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991).

FIGURE 2: PUNITIVE TO COMPENSATORY RATIOS BY COMPENSATORY DAMAGES OVER $1,000,000



As seen in Figure 2, forty-eight percent of cases involving million or multi-million dollar compensatory damages awards resulted in punitive to compensatory ratios of 1:1 or less. So even in the absence of an express invocation of the "substantial" compensatory damages rationale for lowering punitive damages, courts considering high value claims more often affirmed punitive ratios of 1:1 or lower. Another way to view this data, however, is that over fifty-two percent of cases affirming million or multimillion dollar compensatory awards nonetheless exceeded a 1:1 ratio.

In *Bullock v. Philip Morris USA, Inc.*,[211] for example, the California Court of Appeal upheld a $13.8 million punitive damages award where the compensatory damages award was $850,000. Over the dissent's argument that a 1:1 ratio was justified, the majority ruled that not only was the $850,000 compensatory award not "substantial," it was so relatively "small" that it justified a 16:1 ratio for punitive damages because of the extremely reprehensible degree of defendant's misconduct.[212] Similarly, the court in *Flax v. DaimlerChrysler Corp.*[213] ruled that a compensatory award of $2.5 million was not "substantial" in upholding a punitive damages award of over $13 million, a ratio of roughly 5:1. The Tennessee court explained that it did not believe a punitive damages award based on a 1:1 ratio would adequately punish or deter defendant's reckless conduct.[214]

211. 131 Cal. Rptr. 3d 382, 406 (Ct. App. 2011).
212. *Id.* at 406.
213. 272 S.W.3d 521, 544–45 (Tenn. Ct. App. 2008).
214. *Id.* at 539.

If the Supreme Court intends 1:1 to represent a significant restraint on punitive damages in cases involving "substantial" compensatory damages, that message is not being well received by lower courts, most of whom do not expressly consider the "substantial" rationale at all. Even among lower courts who do characterize compensatory awards as "substantial," moreover, the majority do not appear to feel particularly bound by a 1:1 ratio. The Nevada district court in *Merrick v. Paul Revere Life Insurance Co.*, for example, deemed plaintiff's $2.9 million compensatory damage award to be "substantial," but nonetheless lowered the $36 million punitive damages award only to $27 million, thereby ensuring a 9:1 single digit ratio rather than a 1:1 ratio.[215] Similarly, the Montana Supreme Court in *Seltzer v. Morton* found the $1.1 million compensatory award at issue to be "substantial" under *Campbell*, but felt compelled only to reduce the punitive ratio from 18:1 to 9:1.[216]

These cases demonstrate the dominant power of the single digit ratio even in cases where courts have explicitly recognized the rationale in favor of reducing punitive awards in cases with substantial compensatory damages. Determining when compensatory awards are sufficiently substantial to limit the punitive damages to a 1:1 ratio obviously depends heavily on how the reviewing court interprets the amount of the compensatory damages in relation to the facts of the case, particularly the degree of reprehensibility involved, and arguably interjects a disturbing degree of subjectivity into the review process. This is clearly an area where further clarification from the Supreme Court would be beneficial.

5. *Dynamic Relationship Between the Reprehensibility and Ratio Guideposts*

The degree of reprehensibility can exert a strong influence on establishing the appropriate ratio between punitive damages and compensatory damages. It is by far the most common factor lower courts rely on to evaluate the reasonableness of the disparity between a punitive damage award and the compensatory recovery the plaintiff has received. Almost half of the cases in our study, 236, considered the degree of reprehensibility in analyzing the constitutionality of a punitive damages ratio. In thirty percent of our cases, the court concluded that a particular ratio was justified due to the "highly reprehensible" nature of the defendant's conduct, while seventeen percent of the cases made express findings that the conduct at issue was not particularly reprehensible. A few courts even start their excessiveness analysis with the ratio, and then turn back to weighing the degree of reprehensibility to determine whether it

215. 594 F. Supp. 2d 1168 (D. Nev. 2008).

216. 2007 MT 62, ¶ 189, 336 Mont. 225, 154 P.3d 561.

should be adjusted down or up. After the court initially determines the existing ratio between the punitive damages and the compensatory damages, it must then determine whether the application of due process standards support affirmation of the punitive award or require the court to adjust it downward (or upward if the trial court remitted the jury's award of punitive damages).

If there is room for doubt about whether a particular punitive damages award is unconstitutionally excessive, the degree of reprehensibility can become the determinative factor in setting the upward limit of the allowable multiplier between punitive damages and compensatory damages. Today, courts routinely rank the degree of the defendant's reprehensibility on a wide spectrum that runs from very little reprehensibility,[217] through modest or intermediate reprehensibility,[218] and up to substantial or extreme reprehensibility.[219] Using the relative degree of reprehensibility as a tool to pin down the appropriate relationship between compensatory and punitive damages makes perfect sense, and this secondary use of reprehensibility is readily demonstrated in the relevant Supreme Court opinions. Therefore, it is not surprising that in implementing the ratio guidepost, lower courts routinely review contested ratios against the degree of reprehensibility already examined under the reprehensibility guidepost.[220]

Numerous cases in our study demonstrate this common secondary use of the degree of reprehensibility to ascertain the correct ratio. For

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217. *See, e.g.*, Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 308–10 (Tex. 2007) (finding only one reprehensibility factor was clearly insufficient to support punitive award seventeen times compensatory damages); Jim Ray, Inc. v. Williams, 260 S.W.3d 307 (Ark. Ct. App. 2007) (finding that defendant's conduct was at the lower end of the range of reprehensible behavior, so an award ten times compensatory damages was reduced to a 7:1 ratio).

218. *See, e.g.*, Clark v. Chrysler Corp., 436 F.3d 594 (6th Cir. 2006) (medium level reprehensibility did not support a punitive award over a 2:1 ratio with the compensatory award); Stogsdill v. Healthmark Partners, LLC, 377 F.3d 827 (8th Cir. 2004) (finding defendant's conduct was neglectful, but at most only substantially reprehensible, so no greater than a 4:1 ratio of punitive damages to compensatory damages was justified); Gober v. Ralphs Grocery Store, 40 Cal. Rptr. 3d 92, 105 (Ct. App. 2006) (sexual harassment of six plaintiffs showed only a "modest degree of reprehensibility," justifying a 6:1 ratio).

219. *See, e.g.*, Action Marine, Inc. v. Cont'l Carbon Inc., 481 F.3d 1302 (11th Cir. 2007) (finding defendant's conduct was "exceedingly reprehensible," and the "enormity of his offense" justified $17.5 million punitive damages award, even though the compensatory damages award was substantial); Romanski v. Detroit Entm't, LLC, 428 F.3d 629 (6th Cir. 2005) (finding inexplicable and egregious harm to casino patron, which produced only minimal compensatory damages, justified punitive damages award 2000 times the compensatory award); Aon Risk Servs. v. Mickles, 242 S.W.3d 286 (Ark. Ct. App. 2006) (finding defendant's outrageous deceit was highly reprehensible and justified imposition of punitive award twenty-five times compensatory damages).

220. *See Payne v. Jones*, 696 F.3d 189 (2d Cir. 2012) (holding 1:5 ratio excessive because the degree of reprehensibility was too low to justify that level of punitive damages). Similarly, in *Allam v. Meyers*, 906 F. Supp. 2d 274, 280 (S.D.N.Y. 2012), the court found a 1.5:1 ratio excessive, saying the degree of reprehensibility was not high because a brutal assault did not cause lasting physical or emotional injury to the plaintiff.

example, in a recent Nevada case, the defendant repeatedly ignored the plaintiff's warnings that roots from trees on the defendant's land were progressively undermining and destroying a boundary wall on plaintiff's land, and damaging the plumbing in plaintiff's swimming pool.[221] In upholding a punitive damages award of $100,000 against the defendant, where plaintiff recovered only $28,000 in compensatory damages when the damaged wall collapsed, the Nevada Supreme Court stated that the award was permissible, even though the ratio exceeded the provisional state law limit of 3:1.[222] In justifying a higher ratio, the court adverted specifically to defendant's continuous misconduct (failing to remove the offending trees), which exposed the plaintiff and his family to a safety hazard, as sufficiently reprehensible to make the punitive award "not grossly excessive."[223]

Moving further toward the other end of the ratio scale, a federal bankruptcy court in Louisiana upheld a punitive damages award of over $3 million against Wells Fargo Home Mortgage, Inc. for failing to honor a stay order issued by the court.[224] In discussing whether the over 10:1 ratio of the award was excessive, the court observed that the Wells Fargo's actions "were not only highly reprehensible, but its subsequent reaction on their exposure has been less than satisfactory."[225] In the last line of its opinion the court underlined the deterrent purpose of the award, saying: "This Court hopes that the relief granted will finally motivate Wells Fargo to rectify its practices and comply with the terms of court orders, plans and the automatic stay."[226]

6. Consideration of Defendant's Wealth

The Court has provided only the sketchiest of guidance as to the extent to which a defendant's wealth may properly be factored into the due process excessiveness analysis. As far back as *TXO*, the Court approved a state's punitive damages procedures that permitted consideration of defendant's wealth for the purpose of determining the size of a punitive damages award.[227] Indeed, the tort laws of most states similarly authorize

221. Prestige of Beverly Hills, Inc. v. Weber, No. 55837, 2012 WL 991696, *6 (Nev. Mar. 21, 2012).

222. *Id.* at *7.

223. *Id.*

224. *In re* Jones, No. 03-16518, 2012 WL 1155715 (Bankr. E.D. La. Apr. 5, 2012).

225. *Id.* at *10.

226. *Id.*

227. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993); *see also* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 435 (2001) (noting jury directive to consider the "defendant's income and assets"). *But see TXO*, 509 U.S. at 473 (O'Connor, J., dissenting) (observing that strong economic policy arguments suggest "permitting juries to consider a defendant's wealth is unwise, if not irrational").

the plaintiff to introduce such wealth evidence.[228] The theory behind allowing evidence of defendant's relative wealth is fairly straightforward—if the purpose of punitive damages is to advance the state's interest in punishing egregious wrongdoers and to deter repeated wrongdoing, wealthy defendants committing highly outrageous wrongs will neither be punished appropriately nor sufficiently deterred by a punitive damages award that is small relative to the defendant's wealth.[229] If a punitive damages award is to serve its social purpose, therefore, in "stinging" the defendant in retribution for a particularly egregious harm or providing a meaningful deterrent to future misconduct by the defendant or others similarly situated,[230] it must be large enough to affect the defendant's financial situation significantly.[231]

Despite the Supreme Court's affirmations of the relevance of the defendant's wealth in the assessment of punitive damages, however, its dicta on wealth in *Campbell* has created significant uncertainty among lower courts on the role of such evidence. In his criticism of the Utah Supreme Court's reference to State Farm's wealth, Justice Kennedy asserted that the "wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."[232] In other words, the mere fact that a defendant is wealthy is not, standing alone, a proper ground for awarding punitive damages,[233] but wealth remains a relevant consideration.

The defendant's wealth was cited in fifty-two cases in our study, although a number of courts expressed confusion about exactly what role wealth is supposed play in the excessiveness review. As one district court put it, the Court in *Campbell* "rendered uncertain" the constitutional soundness of considering defendant's financial condition as a justification for punitive damages.[234] Moreover, this language has proven quite frustrating to lower courts and scholars to the extent that it reflects the

228. *See* MORTON F. DALLER, TORT LAW DESK REFERENCE: A FIFTY-STATE COMPENDIUM ¶ Q (2002).

229. *See* DOBBS, HAYDEN & BUBLICK, TORTS AND COMPENSATION 602 (6th ed. 2009).

230. A few jurisdictions allow only specific deterrence of the defendants as the justification for punitive damages, as opposed to general deterrence of similarly situated potential wrongdoers. *See* Hollis v. Stonington Dev., Inc., 714 S.E.2d 904 (S.C. Ct. App. 2011).

231. *See* EPSTEIN & SHARKEY, CASES AND MATERIALS ON TORTS 886–88 (10th ed. 2012); *see also* Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 943 A.2d 866 (N.J. 2008); Parexel Int'l Corp. v. Feliciano, No. 04-CV-3798, 2008 WL 5101642 (E.D. Pa. Dec. 3, 2008) (affirming a large punitive damages award by noting that defendant was a "prosperous multi-million dollar corporation" and a smaller punitive damages award "may be wholly insufficient to influence their behavior"); Guidance Endodontics, LLC v. Dentsply Int'l, Inc., 791 F. Supp. 2d 1014, 1016 (D.N.M. 2011) (holding that defendant's wealth may be considered in deciding whether to order a remitter of nearly $36 million).

232. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003).

233. *Id.*

234. Henley v. Philip Morris, Inc., 9 Cal. Rptr. 3d 29, 74 (Ct. App. 2004); *see also* McClain v. Metabolife Int'l, Inc., 259 F. Supp. 2d 1225, 1229 (N.D. Ala. 2003) (acknowledging that post-*Campbell*, "this court is not sure whether financial impact on a defendant is a thing to be considered").

Court's reluctance to adopt defendant's relative wealth as a suitable rubric for determining the amount of punitive damages necessary to achieve optimal deterrence.[235]

California courts, in particular, have championed the use of wealth information as an important factor in calculating an award of punitive damages. Indeed, wealth of the defendant seems to be treated as a de facto fourth guidepost in California for reviewing a challenged punitive damages award for excessiveness.[236] In *Bankhead v. ArvinMeritor*, for example, the court explained that "'[b]ecause the purposes of punitive damages are to punish the wrongdoer and to make an example of him, the wealthier the wrongdoer, the larger the award of punitive damages.'"[237] In *Alcoser v. Thomas*, the California Court of Appeal responded to the defendant's argument that an award greater than a 1:1 ratio was unconstitutionally excessive by pointing out that punitive damages are intended primarily to punish and deter.[238] Therefore, the court reasoned, "[l]imiting an award to an arbitrary ratio of no more than the actual damage would do serve neither function."[239] Instead, "such a proposal 'would flatten out the variability of punitive damage awards by deemphasizing two important factors used to determine such damages: the extent of the defendant's misconduct and its wealth.'"[240] Based on a showing that defendant's wealth was between $25 million and $35 million, the court sustained a $1 million punitive damages award where the compensatory damages awarded were $130,000.[241]

Apparently undaunted by the language in *Campbell*, courts in California have continued to utilize wealth evidence in their review of punitive damages. As one court explained, "*State Farm* did not disavow the use of wealth in assessing punitive damages. The principle of federalism remains in play . . . . And *State Farm* recognizes that deterrence is one of

235. *See* Spencer, *supra* note 86, at 1102 (bemoaning the "strict proportionality principle announced by the Court, [which] does not account for the need to tailor punitive damages to the financial condition of the defendant (and prospective wrongdoers) to achieve the desired level of punishment and deterrence"); Hubbard, *supra* note 4, at 382 (criticizing the Court for "deemphasize[ing] the relevance of wealth of a defendant to the amount of punitive damages award necessary to deter that defendant (and defendants of similar wealth) from future misconduct"); *id.* ("From an economic perspective, wealth is relevant to deterrence by monetary sanctions."); Rustad, *supra* note 97, at 492 ("Corporate defendants have won a large victory in the Court's marginalization of the role of wealth in the punitive damages equation.").

236. *See, e.g.*, Liu v. Wong, No. A128668, 2011 WL 6100443, at *14 (Cal. Ct. App. Dec. 8, 2011); Boeken v. Philip Morris, Inc., 26 Cal. Rptr. 3d 638, 676 (Ct. App. 2005) (citing wealth of defendant as one of three historic factors in California's excessiveness analysis).

237. Bankhead v. ArvinMeritor, Inc., 139 Cal. Rptr. 3d 849, 856 (Ct. App. 2012) (quoting Downey Sav. & Loan Assn. v. Ohio Cas. Ins. Co., 234 Cal. Rptr. 835, 851 (Ct. App. 1987)).

238. Alcoser v. Thomas, Nos. A124848, A125994, A126464, 2011 WL 537855, at *14 (Cal. Ct. App. Feb. 16, 2011).

239. *Id.*

240. *Id.* (quoting Lane v. Hughes Aircraft Co., 993 P.2d 388, 396 (Cal. 2000)).

241. *Id.*

the primary purposes of punitive damages."[242] Courts in other jurisdictions have similarly persisted in including the defendant's financial size in their evaluation of constitutional excessiveness.[243]

Every now and then, the wealth issue before the court is focused not on how large the defendant's wealth is, but rather whether, because of very limited wealth, the defendant can possibly afford to pay the large punitive damages award levied against him. Under South Carolina law, for example, a defendant's ability to pay is treated as an essential element in determining the reasonableness of a punitive damages award.[244] It is not unusual for a court to observe that punitive damages are intended to punish and deter, but not to cause the financial ruination of the defendant. As an older Florida opinion stated: An award of punitive damages should "exact[] from [the defendant's] pocketbook a sum of money which, according to the financial ability, will hurt, but not bankrupt" the defendant.[245]

In a recent case, the California Court of Appeal confronted a claim by the defendant that he totally lacked the financial ability to pay the sizeable punitive damages award assessed against him. In *Peterson v. Stewart*, the defendant was found liable for the intentional infliction of emotional distress against three plaintiffs, each of whom was awarded $150,000 compensatory damages and $40,000 punitive damages.[246] Citing well-established California authority, the court first noted that, although the purpose of punitive damages is to punish and deter, those purposes cannot be served by financially destroying the defendant.[247] The defendant argued that he could not afford to pay the damages assessed against him. After reviewing all the evidence concerning defendant's wealth, however, the court concluded the awards were justified and would not destroy defendant financially.[248]

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242. Boeken v. Philip Morris, Inc., 26 Cal. Rptr. 3d 638, 682 (Ct. App. 2005).

243. *See, e.g.*, Jones v. Wells Fargo Home Mortg., Inc., 489 B.R. 645, 655 (E.D. La. 2013) (citing Fifth Circuit precedent holding that "the size of a corporation is a factor that is indicative of the reasonableness of a damages award"); Arizona v. ASARCO, LLC, 798 F. Supp. 2d 1023, 1040 (D. Ariz. 2011) (explaining "that sometimes a 'bigger award is needed to attract the . . . attention of a large corporation' in order to promote deterrence effectively" (quoting Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1338 (11th Cir. 1999))); Guidance Endodontics LLC v. Dentsply Int'l, Inc., 791 F. Supp. 2d 1026 (D.N.M. 2011); Dixon-Rollins v. Experian Info. Solution, Inc., 753 F. Supp. 2d 452, 467 (E.D. Pa. 2010) (remitting punitive award against billion dollar company to 9:1 ratio in part due to the importance of "consider[ing] the size and wealth of Trans Union in fashioning a proper punitive award").

244. *See, e.g.*, Mitchell v. Fortis Ins. Co., 686 S.E.2d 176, 184–85 (S.C. 2009).

245. Lehman v. Spencer Ladd's Inc, 182 So. 2d 402, 404 (Fla. 1965).

246. Peterson v. Stewart, No. A127682, 2012 WL 541521, at *4 (Cal. Ct. App. Feb. 17, 2012).

247. *Id.* at *12.

248. Interestingly, contrary to the prevailing burden-of-proof convention, the California court ruled that, if the issue of the defendant's ability to pay is raised, the burden is on the plaintiff to prove the defendant has the ability to pay the punitive damages award without suffering financial ruination. *Id.*

Most courts agree that the party who wishes to argue points based on the defendant's inability to pay has the burden of bringing forward the relevant evidence. In a recent South Carolina case, the defendant company claimed it lacked the ability to pay the punitive damages. The court responded that there was no record in the trial court about the ampleness of the defendant's financial resources, and the deterrent effect intended by the jury justified the size of the award.[249] In *Bankhead v. ArvinMeritor, Inc.*,[250] a California Court of Appeal faced a case where the defendant argued the punitive damages award exceeded the defendant's net worth. In sustaining the award, however, the court held that it was uncontroverted that the defendant was financially sound, and that the $4.5 million punitive award, though large, was not disproportionate to the company's ability to pay it. The court observed that net worth data was too easily manipulated and, without more refined financial disclosures, defendant's ability to pay should not be used to set an outside limit on the punitive damages award.[251]

Another wealth-related question that occasionally arises is what effect paying the punitive damages award at issue will have on the defendant's ability to pay subsequent judgments in favor of other plaintiffs with similar claims. The concern is that if a defendant pays a very large punitive damages award to the instant plaintiff, it may strip the defendant of the ability to pay subsequent awards to future plaintiffs with equally meritorious claims. Occasionally, a state statute may address this issue directly. For example, a Florida statute in most circumstances prohibits multiple punitive damages awards against a defendant for the same tortious act or course of conduct.[252] In one recent case, however, where the defendant raised the threat of multiple suits over the same wrongful conduct, the Florida court acknowledged that this might present a problem for future plaintiffs, but treated the matter as too speculative to justify lowering an award that was otherwise within the bounds of due process limitations.[253] In another recent case, a Louisiana bankruptcy court justified a very large punitive damages award against Wells Fargo Home Mortgage by observing that the defendant was not only the second largest mortgage lender in the United States, but that a number of earlier punitive damages awards against the defendant for the same misconduct had obviously not been large enough to deter the defendant's illegal behavior.[254]

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249. *See* Magnolia N. Prop. Owners' Ass'n v. Heritage Cmtys., 725 S.E.2d 112 (S.C. Ct. App. 2012).
250. *See* Bankhead v. ArvinMeritor, Inc., 139 Cal. Rptr. 3d 849 (Ct. App. 2012).
251. *Id.* at 860.
252. *See* FLA. STAT. § 768.73(2) (2015).
253. *See* R.J. Reynolds Tobacco Co. v. Townsend, 90 So. 3d 307 (Fla. Dist. Ct. App. 2012).
254. *In re* Jones, No. 03-16518, 2012 WL 1155715, at *10 (Bankr. E.D. La. Apr. 5, 2012).

C. Comparability Guidepost

As Justice Ginsburg observed in her dissent in *Cooper*,[255] the reprehensibility and ratio guideposts are deeply rooted in longstanding common law standards, but the comparability guidepost was an original creation of Justice Stevens in *Gore*. Perhaps because it finds no counterpart in state law, implementation of the third guidepost has perplexed many lower courts and created such difficult implementation problems that the importance of the guidepost has noticeably receded over time.[256] Indeed, in 213 or forty-two percent of the cases in our sample, courts failed to expressly engage in any comparability analysis at all. This is perhaps not surprising when one considers that guideposts one and two were quite similar to the review criteria traditionally employed by state courts to review punitive damages awards, but the comparability guidepost was somewhat novel and lower courts did not enjoy the same comfort level with it as they did with the other two guideposts.

This different reception by lower courts is understandable when it is remembered that the comparability guidepost represented the Court's most direct effort to give substantive content to the "fair notice" concerns that underlay its new due process approach to the review of punitive damages. As Justice O'Connor explained in the *Haslip* case, "the point of due process—of the law in general—is to allow citizens to order their behavior."[257] Thus, the purpose of the comparability guidepost is to insure that potential wrongdoers are provided reasonable insight by the legal system into the possible financial consequences of a serious misdeed, so that they can structure their conduct to avoid harshly adverse results.

Because lower courts had no prior experience in comparing punitive damages awards to civil sanctions or criminal penalties for similar misbehavior, Justice Scalia's prediction of the guideposts' failure to achieve the Court's objectives was much more likely to come to pass with respect to the comparability guidepost. It would be an overly generous assessment to conclude that those who predicted failure for the guideposts were prescient at least as to the problems posed by the comparability guidepost, but the problems lower courts have had with it are sufficiently difficult that the third guidepost has diminished greatly in importance since it was first announced in *Gore*. Only occasionally does a lower court give special attention to the comparability guidepost and find it to be the

255. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 447–48 (2001).

256. *See, e.g.*, Brim v. Midland Credit Mgmt., Inc., 795 F. Supp. 2d 1255, 1264–65 (N.D. Ala. 2011) (denying defendant's claim for remittitur based on the lack of comparability of the punitive award to applicable civil penalties, and citing cases from sister circuits stating that the third guidepost is not particularly helpful in federal Fair Credit Reporting Act cases).

257. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 59 (1990).

controlling factor in sustaining or lowering a punitive damages award.[258] Moreover, when review under the comparability guidepost produces a result that is inconsistent with the other two guideposts, there is a strong tendency to discount the comparability guidepost and to base the decision solely on the other two guideposts.[259] As some courts suggest, satisfying two out of three guideposts should be constitutionally sufficient to sustain or correct a punitive damages award with respect to its excessiveness.[260]

Courts have identified three major categories of comparable sanctions in applying the third guidepost: statutory or regulatory penalties, criminal penalties, and punitive damages awarded in comparable civil cases.[261] Table 11 presents the number of cases expressly applying each of those three types of comparable penalties.

TABLE 11: UTILIZATION OF COMPARABILITY FACTORS

Comparability Factor	**Number of Cases**
Statutory or Regulatory Penalty Considered	*223 (44%)*
Comparable Statutory or Regulatory Penalty Found	162 (32%)
No Comparable Statutory or Regulatory Penalty Found	61 (12%)
Comparison to Punitive Damages Allowed in Other Cases	*89 (18%)*
Comparable Punitive Damages Cases Found	73 (14%)
No Relevant Comparable Punitive Damages Cases	16 (3%)
Criminal Sanction	*59 (12%)*
Criminal Sanctions Considered	34 (7%)
Rejection of Criminal Sanction Consideration	25 (5%)

Not surprisingly, relevant statutory or regulatory penalties were the most commonly considered comparisons in our sample. Two hundred and twenty-three (or forty-four percent) of our cases show courts attempting to analyze such comparable sanctions, although only 162 (or thirty-two percent) of the cases successfully identified a relevant statutory provision. In sixty-one (or twelve percent) of the cases, courts willing to conduct a comparability review nonetheless failed to find any relevant civil penalty

258. *See, e.g.*, Bains LLC v. Arco Prods. Co., 405 F.3d 764, 775–77 (9th Cir. 2005).

259. *See, e.g.*, Alcoser v. Thomas, Nos. A124848, A125994, A126464, 2011 WL 537855, at *13 (Cal. Ct. App. Feb. 16, 2011) ("While a comparable civil penalty is a factor to be considered, it is not determinative in and of itself. It is simply one factor to be considered with all the others . . . .").

260. *See* Flax v. DaimlerChrysler Corp., 272 S.W.3d 521, 539–40 (Tenn. 2008) (after admitting its uncertainty about how to balance guideposts that point in different directions, commented that it was "inclined to give the first two guideposts considerably more weight").

261. Courts less commonly have upheld a punitive damages award by reference to the comparative value of other losses, such as the loss of a license to do business that might have been imposed as a result of defendant's misconduct. *See, e.g.*, Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co., 399 F.3d 224, 238 (3rd Cir. 2005); Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672, 678 (7th Cir. 2003). The Supreme Court mentioned these possibilities in *Campbell*. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 428 (2003).

for the particular wrong at issue[262] or disregarded proposed civil penalties as too pernicious to use as a comparative sanction.[263] In some cases, however, a relatively large civil penalty or repeated instances of misconduct allowed a compounding of civil sanctions to create large financial penalties against which to compare a significant punitive damages award.[264] The comparability guidepost is often employed when a state or Congress has adopted a statutory cap on punitive damages or set a maximum ratio between punitive and compensatory damages.[265] Even when review with respect the comparability guidepost arguably produces a conclusive result based on a specific civil fine or other penalty, a court not satisfied with the limit it imposes can hypothesize that a relatively small civil fine might be imposed a great many times to elevate the civil penalty to a level where it is comparable to the punitive damages award.[266]

In the second smaller but growing category of comparative punitive metrics, applied in fourteen percent of the cases in our study, courts compared punitive damages with those imposed in similar cases within or outside the jurisdiction.[267] In *Qwest Services Corp. v. Blood*,[268] for example, the Colorado Supreme Court found that the defendant was on notice to the possible financial consequences of its misconduct in light of both the Colorado punitive damages statute and numerous similar Colorado cases upholding large exemplary damages awards. A similar result was reached in a Texas wrongful death case, *Wackenhut Corrections Corp. v. de la Rosa*.[269] There, the Texas Court of Appeals rejected the defendant's

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262. *See, e.g.*, Arnold v. Wilder, No. 3:04CV-649-6, 2009 WL 2835783, at *2 (W.D. Ky. Aug. 31, 2009) ("The parties agree that the third guidepost is not in play. There are no civil penalties with which to make a comparison."); Brown v. Comm'r of Prob., 28 Mass. L. Rptr. 549 (Mass. Sup. Ct. 2011) (observing that neither the parties nor the court could find any civil or criminal penalties); Saunders v. Branch Banking and Trust Co. of Va., 526 F.3d. 142, 152–53 (4th Cir. 2008) (concluding that the third guidepost was inapplicable in suits under the Fair Credit Reporting Act, where Congress had not chosen to place any statutory limits on punitive damages).

263. *See, e.g.*, Duncan v. Ford Motor Co., 682 S.E.2d 877, 891–921 (S.C. Ct. App. 2009); Cook v. Rockwell Int'l Corp., 273 F. Supp. 2d 1175, 1211–13 (Dist. Colo. 2008) (electing not to engage in a comparability analysis because the penalty to be imposed under various environmental laws would prove too difficult to determine).

264. *See, e.g.*, *Willow Inn*, 399 F.3d at 238 (admitting to being "unsure as to how to properly apply this guidepost," but noting that defendant's misconduct could have amounted to multiple and escalating violations of the relevant insurance practices act).

265. *See* EEOC v. AutoZone, Inc., 707 F.3d 824 (7th Cir. 2013). *See generally* Tracy A. Thomas, *Proportionality and the Supreme Court's Jurisprudence of Remedies*, 59 HASTINGS L.J. 73 (2007); Colleen P. Murphy, *Statutory Caps and Judicial Review of Damages*, 39 AKRON L. REV. 1001 (2006).

266. *See* Action Marine, Inc. v. Cont'l Carbon, Inc., 481 F.3d 1302, 1322–23 (11th Cir. 2007). At least one court rejected this projection of the possibility of multiple violations as too speculative. *See* Stogsdill v. Healthmark Partners, LLC, 377 F. 3d 827, 834 (8th Cir. 2004).

267. *See, e.g.*, Cody P. v. Bank of America, 720 S.E.2d 473, 484–85 (S.C. Ct. App. 2011); Morris v. Flaig, 511 F. Supp. 2d 282, 310–13 (E.D.N.Y. 2007).

268. 252 P.3d 1071, 1100 (Colo. 2011).

269. 305 S.W.3d 594, 660 (Tex. App. 2009).

argument that it had no notice of the possibility that a punitive damages award against it for "malicious and grossly negligent" misconduct could possibly exceed four times the compensatory damages awarded to the plaintiff. The Texas court affirmed the jury's punitive damages award of $47.5 million, citing several earlier Texas cases affirming multi-million dollar punitive damages awards as putting the defendant on fair notice that such large awards were possible for egregious misconduct resulting in a death.[270]

This trend of looking to comparable punitive damages awards in other cases is not difficult to explain. Reviewing other judicial opinions and looking for similarities and differences is an exercise with which lower courts are much more comfortable than trying to locate and compare civil penalties for misconduct arguably similar to the defendant's actions. Just as in the field of noneconomic damages, however, comparison to other cases involving different party and claim characteristics can be fraught with inexactitude[271] and may ultimately be vulnerable to similar concerns about predictability and fairness.[272] Such comparisons may also tend overall to reduce punitive damages awards where the court cannot find a comparably high precedent.[273]

The final comparability category includes consideration of criminal penalties that might be imposed against the defendant. This metric was only considered in twelve percent of the cases in our study, and only actually employed in thirty-four (or seven percent) of cases.[274] The infrequency of comparisons to criminal sanctions can most likely be explained by Justice

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270. *Id.*

271. *See, e.g.*, Jenkins v. Few, 705 S.E.2d 457, 464 (S.C. Ct. App. 2010) ("A review of case law uncovered no case factually on point with this one. However, research revealed several comparable cases on the lower end of the single-digit spectrum."); Lens, *supra* note 66, at 33 n.192 (information about comparable punitive damages verdicts inherently "skeletal" and subject to the selection bias of courts choosing to publish punitive damages analysis).

272. *See, e.g.*, Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103 (2002); *cf.* Harry Zavos, *Monetary Damages for Nonmonetary Losses: An Integrated Answer to the Problem of the Meaning, Function, and Calculation of Noneconomic Damages*, 43 LOY. L.A. L. REV. 193 (2009).

273. *See, e.g.*, Bell v. Helmsley, No. 111085/01, 2003 WL 1453108, at *6 (N.Y. Sup. Ct. Mar. 4, 2003) ("If one and one half million dollars was the outer constitutionally permissible limit in *McIntyre*, then clearly a $10 million dollar award in the instant case is grossly excessive."); Tomao v. Abbott Labs., No. 04 C 3470, 2007 WL 2225905 (N.D. Ill. July 31, 2007) (emphasizing that the plaintiff failed to identify "any comparable cases in this jurisdiction upholding an award of $3,00,000 in punitive damages").

274. *See, e.g.*, Payne v. Jones, 696 F.3d 189, 203 (2d Cir. 2012) (noting that although the criminal penalty for misdemeanor included jail time, such a sentence was not mandatory); Allam v. Meyers, 906 F. Supp. 2d 274, 280 (S.D.N.Y. 2012) (acknowledging possible relevance of pending criminal charges against the defendant); Chavarria v. Fleetwood Retail Corp., 143 P.3d 717, 729–30 (N.M. 2006). In one of the few cases where the criminal penalty was determinative, the defendant had pled guilty to embezzlement for the same misconduct at issue in the civil case, and was already serving time. *See* Riggan v. Glass, 734 N.W.2d 486 (Iowa Ct. App. 2007).

Kennedy's dictum in *Campbell*, warning that while consideration of possible criminal sanctions might be appropriate in evaluating the severity with which to judge the reprehensibility of defendant's conduct, comparisons to criminal penalties in assessing the amount of punitive damages itself are not likely to produce the "fair notice" the Court had in mind when establishing the comparability guidepost.[275] Indeed, one scholar recently described *Campbell*'s treatment of criminal penalties as tantamount to the complete elimination of such comparisons for purposes of conducting the third guidepost.[276] In all events, the comparability guidepost has certainly not fared as well as the other two guideposts in its acceptance by, and usefulness to, courts reviewing punitive damages awards for unconstitutional excessiveness. It appears well on its way to desuetude.

D. Constraining "Outlier" Awards

To the extent that *Exxon*, admittedly not a due process decision, identified the unpredictability of outlier awards as the crux of the Court's continued interest in punitive damages, we examined the cases in our study for evidence of what the Court might regard as worrisome outliers. In *Exxon*, Justice Souter opined that while studies of median punitive damages reflected reasonable ratios, they also revealed an unacceptable "spread between high and low individual awards."[277] Addressing awards at the high end of that continuum, Justice Souter explained that "outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories."[278] The opinion fails to directly define what the Court means by a punitive damages award that "dwarfs" the compensatories, but in the same paragraph, Justice Souter cited a study showing that "fully 14% of punitive awards in 2001 were greater than four times the compensatory damages," and "a different data set found that 34% of the punitive awards were greater than three times the corresponding compensatory damages."[279]

If the Court is taking the position that awards greater than 3:1 or 4:1 could verge on "outlier" status, approximately forty-two percent of the cases in our study would qualify.[280] A significant proportion of those cases, however, would presumably be exempt from the court's approbation because the high ratios resulted from low compensatory damages. As seen above in Figures 1 and 2, even with the elimination of cases in our sample

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

276. Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 Conn. L. Rev. 109, 138 (2008).

277. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 499 (2008).

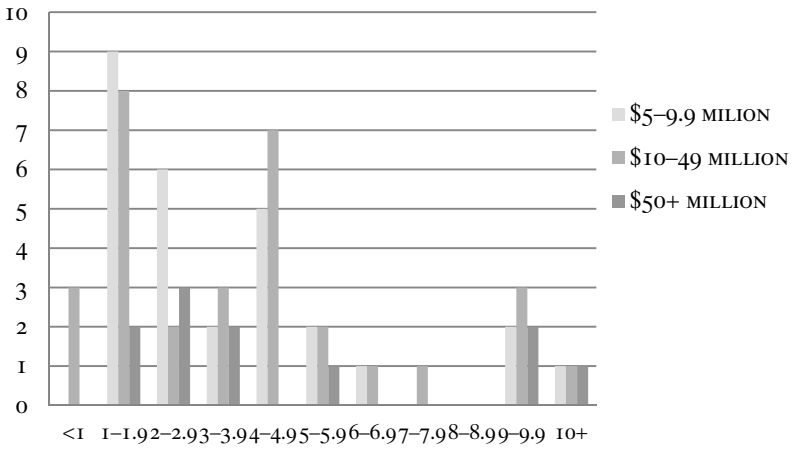
278. *Id.* at 500.

279. *Id.*

280. *See supra* Table 8.

with compensatory awards less than $100,000, sizeable numbers of cases with final ratios exceeding 3:1 and 4:1 still remain. Another way to approach the question of outlier awards is to examine ratios by the size of the final award of punitive damages. Figure 3 below presents ratio data by three categories of punitive damages, amounts from $5–9.9 million, from $10–49 million, and over $50 million.

FIGURE 3: POST-REVIEW RATIOS BY AMOUNT OF PUNITIVE DAMAGES



While a large number of cases in this set reflect ratios at or below 4:1, in each punitive amount category, a substantial percentage exceed 4:1. In the $5–9.9 million category, eleven of twenty-eight or thirty-nine percent of the cases in our study exceeded a 4:1 ratio. Of the thirty-one cases in the $10–49 million category, fifteen or forty-eight percent fell at or above 4:1. Even in the last category of punitive awards over $50 million, four of the eleven or thirty-six percent exceeded 4:1. The numbers involved in each category, especially the last one, are too small to permit broad conclusions about the frequency of outlier awards, but the Court's dicta in *Exxon* suggests it might well disapprove of the lower courts' handling of these high punitive damages cases.[281]

CONCLUSION

Our empirical research examined ten years of federal and state cases applying the mandated constitutional excessiveness review of punitive damage awards. The sample of 507 cases we studied is not, of course, representative of all punitive damages cases during that time period because

281. *See Exxon*, 554 U.S. at 512–13 & 515 n.28.

we limited our study to published opinions. Nonetheless, our sample provides insights into how lower courts have interpreted and implemented the Supreme Court's due process-driven excessiveness analysis.

While some inconsistencies in the application of the three guideposts can be expected, especially given the wide range of substantive claim categories in which punitive damages may be imposed, some inconsistencies appear to be attributable to a lack of uniform understanding regarding the guideposts themselves. One of the most fundamental areas of confusion among lower courts stems from the Court's failure to explain how each guidepost interacts with the others. For example, if application of the first guidepost leads to an assessment of high reprehensibility, may a court approve a ratio above the Court's 4:1 or single digit demarcations, or a 1:1 ratio in a case involving substantial compensatory damages?

The lower courts in our sample also varied markedly in how they analyzed the degree of reprehensibility. As demonstrated in Table 2, some courts neglected to expressly consider any of the Court's indicia of reprehensibility, while others examined one, two, three, four, or five of the factors. Given the Court's own inconsistencies on this score,[282] perhaps it only intends for lower courts to identify *some* threshold sign of reprehensibility, but that would surely justify only punitive liability itself rather than the excessiveness of any particular award. A more thorough approach that analyzes each of the five proposed indicia would better help explain a particularly high punitive award or suggest the sufficiency of a smaller amount.

Moreover, lower courts attempting to apply the Court's reprehensibility factors have often found them unavailing or frustrating in cases involving misconduct or harms beyond the economic realm. Dignitary, constitutional, or emotional harms, for example, do not fit readily into the Court's binary description of the first indicia of reprehensibility, physical versus economic harm.[283] Similarly, the Court has identified the heightened culpability of a defendant who targets plaintiffs with financial vulnerabilities, but has not yet had occasion to acknowledge other plaintiff vulnerabilities equally deserving of vindication.[284]

Finally, if the Court is serious about describing as a potential "outlier" a punitive damages award resulting in a ratio in excess of 1:1 where plaintiff has been awarded substantial (that is, non-negative value) compensatory damages,[285] it would do well to better explicate the degree of reprehensibility that might justify ratios higher than 1:1. As Figure 2 shows, courts in fifty-two percent of the cases in our sample involving

282. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 433–34 (Ginsburg, J., dissenting).
283. *See supra* notes 102 and accompanying text.
284. *See supra* notes 106–13113 and accompanying text.
285. *See Exxon*, 554 U.S. at 512–13.

compensatory damage awards in excess of a million dollars approved punitive damage to compensatory ratios of 2:1 or higher.[286]

286. *See* Figure 2 and accompanying text.