California's Punitive Damages Law: Continuing to Punish and Deter Despite State Farm v. Campbell

Kathleen S. Kizer
Notes

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KATHLEEN S. KIZER*

[P]unitive damages represent the assessment by the jury, as the
voice of the community, of the measure of punishment the
defendant deserved.'

Punitive damages are a powerful weapon. Imposed wisely and
with restrain[t], they have the potential to advance legitimate state
interests. Imposed indiscriminately, however, they have a
devastating potential for harm.³

INTRODUCTION

In August 2005, in a lawsuit filed against pharmaceutical giant
Merck & Co., jurors awarded punitive damages of $253.4 million and
compensatory damages of $24 million to the widow of Rob Ernst, a fifty-
ine-year-old marathon runner and triathlete who died after taking
Merck’s anti-inflammatory drug Vioxx for eight months.³ The thin
evidence as to causation has yielded cries of “junk science,” but
comments from jurors after the case suggest a reasoned desire to punish
Merck for employing aggressive marketing tactics while disregarding

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* J.D. Candidate, University of California, Hastings College of the Law, 2006; B.A.,
Georgetown University; Ph.D. in English, Emory University. I would like to thank Professor David I.
Levine for his encouragement, advice, and careful reading of earlier drafts of this Note. All
shortcomings are, of course, my own.

3. Ruth Rendon & Richard Stewart, Vioxx Jurors Talk About Verdict; Aggressive Marketing
Played A Role, They Say, And One Number Kept Coming Up, Hous. CHRON., Aug. 20, 2005, at A10.
The punitive damages were reduced to $1.6 million in accordance with Texas law. Alex Berenson, The
Vioxx Decision: The Overview; Jury Calls Merck Liable in Death of Man on Vioxx, N.Y. TIMES, Aug.
known risks of its drug. Well before the case went to trial, reporters described Merck’s marketing tactics:

As academic researchers increasingly raised questions about Vioxx’s heart safety, the company struck back hard. It even sued one Spanish pharmacologist, trying unsuccessfully to force a correction of an article he wrote. In another case, it warned that a Stanford University researcher would “flame out” unless he stopped giving “anti-Merck” lectures. A company training document listed potential tough questions about Vioxx and said in capital letters, “DODGE!”

Merck created an “obstacle handling guide” for internal marketing purposes entitled “Dodge Ball Vioxx.” A Stanford Medical School professor complained to Merck about “a consistent pattern of intimidation of investigators by Merck.”

The evidence of Merck’s marketing tactics convinced the jury that it needed to send Merck a message. “In interviews after the decision, jurors said they had made the large punitive award to send a message that drug makers must disclose the risks of their medicines. ... ‘Respect us, that’s the message.’” One juror felt Merck should be open, honest, and

4. See, e.g., John E. Calfee, Op-Ed, Junk Science Reigns, N.Y. Sun, Aug. 22, 2005, at 7 (arguing that in the Ernst case, “junk science” prevailed); Editorial, A Dangerous Vioxx Verdict, Chi. Trib., Aug. 24, 2005, at C20 (“But finding that the company had unethical marketing is not the same thing as finding that it caused the death of Robert Ernst.”); Mark Donald, Cause and Effect: How Merck Lost on Vioxx, Fulton County Daily Rep., Aug. 31, 2005 (“[T]he glaring weakness of the case concerned the element of causation, and on this issue, Merck rested its hopes and its defense.”); Editorial, Message To Drug Companies, Hartford Courant, Aug. 23, 2005, at A8 (“Although there was no direct evidence linking Vioxx to Robert C. Ernst’s death in 2001, jurors were swayed by company documents showing that Merck knew as early as 1997 that its arthritis painkiller carried an elevated risk of heart attacks, yet concealed that information from the public.”); Robert Goldberg, Op-Ed, Vioxx-type Danger and Legal Frivolity; Better, More Rigorous Testing is the Path to Safer Drugs, Wash. Times, Aug. 24, 2005, at A17.

Vioxx likely did not cause Mr. Ernst’s death. ... [T]he jury punished Merck for failing to change its marketing practice after its own study identified a small group of patients that had more heart problems after taking Vioxx. It’s message was, in the word of the words of one juror: “Stop doing the minimum to put your drugs on the market.”

Id.; see also Editorial, Punishment for Merck, N.Y. Times, Aug. 23, 2005, at A16.

That is an extremely flimsy scientific basis for holding Vioxx responsible, but this case was less about science than about punishing Merck for what jurors considered an egregious history of covering up evidence of risk while promoting the drug so heavily to consumers. Internal e-mail messages and documents showed that Merck scientists had been concerned about cardiovascular risks even before Vioxx went on the market and continued to be concerned thereafter, even while resisting regulatory efforts to add warnings to the drug’s label and devising strategies to dodge any concerns from doctors.

Id. For critical analyses of “junk science” in the legal system, see David Faigman, Legal Alchemy: The Use and Misuse of Science in the Law (1999); Peter W. Huber, Galileo’s Revenge: Junk Science in the Courtroom (1991).


6. Id.

7. Id.

accountable to the public. The amount of punitive damages was not pulled out of thin air. Rather, in arriving at the amount, the jury focused on a document created by Merck in which it estimated the "additional profit" it could make by delaying placement of a label warning of the drug's risk for cardiac problems, as had been demanded by the U.S. Food and Drug Administration. The additional profit was precisely the amount awarded in punitive damages.

Besides the problems with scientific proof and causation raised by commentators, the case raises questions regarding the proper way to punish a corporation like Merck when it behaves in ways we, as a society, abhor. Tort reformers have been agitating for limits on punitive damages, and many states have responded. For instance, Texas caps punitive damages and, in the case against Merck, the punitive damages award of $253.4 million had to be reduced to $1.6 million. Is $1.6 million sufficient to deter a company like Merck? Although analysts estimate Merck's liability for Vioxx litigation as high as $50 billion, it is worth noting that Merck had $22.9 billion in sales in 2004 alone, $2.5 billion per year of which was attributable to Vioxx, and annual profit of $1.4 billion. Assuming Merck merits punishment, does $1.6 million adequately punish Merck for withholding information regarding potential life-threatening risks? What amount would adequately punish Merck, given that it faces thousands of additional lawsuits and sold Vioxx to millions of consumers?

The U.S. Supreme Court has heeded calls for tort reform by decreeing that the Due Process Clause limits the amount of punitive damages that courts may award. While reviving economic substantive due process, the Court has provided equivocal guidance regarding the permissible limits of punitive damages awards. In State Farm v.

9. Verdict Warns Drug Makers Not To Suppress Known Risks, TAMPA TRIB., Aug. 23, 2005, at 10 ("'We expect accountability; we expect them to be open with us; we expect them to be honest with us,' said Marsha Robbins, forewoman of the jury.").
10. Alex Berenson, For Merck, the Vioxx Paper Trail Won't Go Away, N.Y. TIMES, Aug. 21, 2005, at A1.
11. Id.
12. See generally supra note 4.
13. See Berenson, The Vioxx Decision, supra note 3; Berenson, For Merck, the Vioxx Paper Trail Won't Go Away, supra note 10; Bloomberg News, At Vioxx Trial, Witness Says Short-Term Use Posed a Risk, N.Y. TIMES, Sept. 20, 2005, at C13. Merck's fate remains uncertain. After the verdict in the Ernst case in Texas, Merck prevailed in a case in New Jersey but suffered a mistrial in another Texas case, Plunkett v. Merck, due to a deadlocked jury. Alex Berenson, A Mistrial is Declared in 3rd Suit Over Vioxx, N.Y. TIMES, Dec. 13, 2005, at C5 ("[L]awyers not involved in the [second Texas] suit said the mistrial was a bad sign for Merck, which had been expected to win the trial relatively easily after its victory last month in a similar case in a New Jersey state court.").
14. See Berenson, For Merck, the Vioxx Paper Trail Won't Go Away, supra note 10.
Campbell, the Court held that the punitive damages awarded in a particular case must be proportional to the amount of compensatory damages awarded in that case. Specifically, the Court stated that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” The Court further noted that “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.” When compensatory damages are particularly large, an award of punitive damages should be closer to a one-to-one ratio. Although the Court refrained from setting a “bright-line ratio,” many commentators have responded by asserting that punitive damages that are more than nine times compensatory damages are presumptively unconstitutional. Courts reviewing awards after State Farm have time and again reduced punitive damages awards, using factors between four and nine in reliance on the foregoing proclamations by the Court in State Farm.

16. State Farm, 538 U.S. at 425. Schwartz and Behrens have noted that the American Bar Association, the American College of Trial Lawyers, and the American Law Institute have all advocated limiting punitive damages to a multiple of compensatory damages. See Victor E. Schwartz & Mark A. Behrens, Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in Haslip, 42 AM. U. L. REV. 1365, 1378-79 n.82 (1993).

17. State Farm, 538 U.S. at 425.

18. Id. (citations omitted). Stephen C. Yeazell hypothesizes that the Court derived the single digit multiplier from a statistical analysis of compensatory and punitive damages awards that found that eighty percent of punitive awards fell within a ratio of slightly more than eight to one. See Stephen C. Yeazell, Honoring David Shapiro: Punitive Damages, Descriptive Statistics, and the Economy of Civil Litigation, 79 NOTRE DAME L. REV. 2025, 2039-40 (2004) (citing Theodore Eisenberg et al., The Predictability of Punitive Damages, 26 J. LEGAL STUD. 623, 651 (1997)).

19. State Farm, 538 U.S. at 425.

20. See, e.g., Mark G. Bonino, The U.S. Supreme Court and Punitive Damages: On the Road to Reform, 70 DEF. COUNS. J. 432, 432 (2003) (“[T]he Court set a single-digit multiplier as the ordinary constitutional limit for the permissible ratio between compensatory damages and punitive damages.”); Don Willenburg, Fixing the Damage: California Courts are Struggling to Apply Reasonable Limits on Punitive Damages Awards in Light of State Farm v. Campbell, 27 L.A. LAW. 22, 28 (2004) (“[A] ratio should generally be no higher than 4 to 1 and almost never more than 9 to 1.”). Willenburg’s title is misleading because four of the five California cases he cited reduced punitive damages to within the ratios mentioned in State Farm. Id. at 24-27.

In addition to establishing the proportionality rule, the Court in *State Farm* asserted that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." Because punitive damages must be proportional to compensatory damages under the Court’s new methodology, it is now unclear whether a defendant’s financial condition is relevant to the punitive damages calculation. Although the Court made no firm pronouncements about the discoverability or evidentiary relevance of the defendant’s wealth, commentators have inferred that the wealth of a defendant may now be irrelevant to the calculation of punitive damages.\(^{23}\)

Both of these assertions—that punitive damages must be proportional to compensatory damages and that the wealth of the defendant is irrelevant—are inconsistent with California law prior to *State Farm*, and, as this Note argues, grossly overstated. Although California courts have long considered the amount of compensatory damages when evaluating whether a jury’s award of punitive damages is excessive, the courts have not established any particular ratio as a ceiling.\(^{24}\) Furthermore, the defendant’s financial condition has been an integral part of punitive damages jurisprudence in California.\(^{25}\) For instance, California law requires plaintiffs to present evidence of a defendant’s financial condition in order to obtain a punitive damages award.\(^{26}\) This serves to ensure that punitive damages adequately punish and deter without “financially destroying” the defendant.\(^{27}\)

California courts have begun to reconfigure California’s punitive damages jurisprudence in light of *State Farm’s* pronouncements. In many cases, California appellate courts have strictly applied the U.S. Supreme

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\(^{22}\)See *State Farm*, 538 U.S. at 427.

\(^{23}\)See, e.g., David I. Levine et al., Cases and Materials on California Civil Procedure 457, 725–26 (2d ed. 2005); Leila C. Orr, Making a Case for Wealth-Calibrated Punitive Damages, 37 Loy. L.A. L. Rev. 1739, 1740 (2004) (stating that the “Court severely limited the use of a defendant’s wealth in the calculation of punitive damages”; Willenburg, *supra* note 20, at 26 (asserting that “the U.S. Supreme Court arguably rejected the notion that punitive damages may take into consideration the defendant’s wealth”); Linda Greenhouse, Justices Limit Punitive Damages in Victory for Tort Revision, N.Y. Times, Apr. 8, 2003, at A16 (The Court declared “that juries should generally not be permitted to consider a defendant’s wealth when setting a punitive damage award.”).

\(^{24}\)See infra text accompanying notes 201–06.

\(^{25}\)See infra text accompanying notes 208–17.

\(^{26}\)E.g., Adams v. Murakami, 813 P.2d 1348, 1349 (Cal. 1991) (finding that “an award of punitive damages cannot be sustained on appeal unless the trial record contains meaningful evidence of the defendant’s financial condition”); Cal. Civ. Code § 3295(d) (Deering 2005) (“Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff.”); see also infra Part III.B.3.

\(^{27}\)Murakami, 813 P.2d at 1351–52 (“[T]he most important question is whether the amount of the punitive damages award will have deterrent effect—without being excessive. . . . *Neal* recognized that the purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy.” (citing Neal v. Farmers Ins. Exch., 582 P.2d 980 (Cal. 1978))).
Court's proportionality rule and reduced punitive damages awards. Many California courts have incorporated California's traditional emphasis on the defendant's financial condition into the *State Farm* framework. And in reviewing two cases, the California Supreme Court has shown how California courts may accommodate the U.S. Supreme Court's concerns without losing sight of the state's longstanding interest in imposing punitive damages that actually seek to deter persons from engaging in intentional tortious conduct that harms others.

This Note will evaluate the impact on California law of the U.S. Supreme Court's punitive damages jurisprudence culminating in *State Farm*. It will critique the Court's constitutional pronouncements regarding punitive damages, and suggest judicial and legislative responses so that California may continue to pursue its legitimate interest in imposing punitive damages that aim to deter reprehensible conduct. Although many commentators have inferred bright line rules from *State Farm,* this Note will show that the opposite is true. The Court has merely painted broad brush strokes, leaving the states to fill in the gaps so that awards of punitive damages are scaled to the reprehensibility of a particular defendant's conduct.

Part I of this Note will review the concerns expressed by the Court in cases preceding *State Farm*. These cases show an evolution from procedural to substantive due process, but as Justice Scalia has pointed out, the substantive due process rests on a shallow foundation. Part II will review *State Farm*'s procedural and substantive concerns. Despite its impact, the opinion is remarkably short. It borrows heavily and cites almost exclusively from the six punitive damages cases the Court decided in the dozen years preceding it. Dicta in *State Farm* appear to contradict pronouncements made in the earlier cases, but it does not appear that the Court intended to overturn them. This Note will argue that the procedural concerns of those earlier cases remain vital and that due attention to them will ensure California's compliance with the Court's punitive damages jurisprudence.

Part III will present an overview of the considerable procedural
protections California punitive damages law provides, and will outline the role of wealth in calculating punitive damages in California. Part IV will study the opinions in two California cases decided after State Farm. In Simon v. San Paolo U.S. Holding Co., the California Supreme Court reduced a punitive damages award of $1.7 million to $50,000, where compensatory damages were $5,000. In doing so, however, the court elaborated on State Farm to provide useful guidance regarding the use of potential harm as a factor in calculating punitive damages. In Johnson v. Ford Motor Co., decided on the same day as Simon, the California Supreme Court overturned an appellate court's reduction of a punitive damages award, holding that the lower court misapplied State Farm's proportionality rule and recommending an increase in the amount of punitive damages. Johnson interpreted the U.S. Supreme Court's pronouncements regarding the relevance of evidence of other bad acts by the defendant and explained how that evidence may justify augmentation of a punitive damages award in certain cases.

Simon and Johnson show that strict adherence to ratios is neither necessary nor reasonable. These cases should provide guidance to other courts seeking to impose meaningful punitive damages without a slavish reliance on the proportionality rule. Thus, although the California Supreme Court's cases do not address every issue raised by the newly imposed substantive limits, they demonstrate that by carefully interpreting the U.S. Supreme Court's punitive damages jurisprudence, California courts may continue to impose punitive damages that serve the state's interest in deterring and punishing particularly egregious tortious conduct.

Part V will address potential changes in California's punitive damages jurisprudence, while recognizing that no single approach and no single mathematical formula should be applied to all cases in which punitive damages are sought. Rather, courts ought to follow a much more nuanced approach than the proportionality rule, one that responds to the particular facts of each case. Further, when a defendant's financial condition is relevant to the issue of punitive damages—whether that evidence be presented in the form of profits earned, costs avoided or net worth—California courts should continue to permit such evidence with utmost procedural protection.

Although California courts have begun to adapt California's punitive damages jurisprudence to the new federal due process concerns, California courts and legislature should continue to review and revise its procedures to ensure that defendants are provided more than sufficient procedural protection. By providing the utmost in procedural

35. 113 P.3d 63 (Cal. 2005).
36. 113 P.3d 82 (Cal. 2005).
protections, ensuring evidentiary relevance, and recognizing that no single approach will suffice in all cases, California courts can justify both their continued use of evidence of the defendant’s financial condition and, in appropriate cases, affirmation of awards greater than nine times compensatory damages.

I. THE U.S. SUPREME COURT’S PUNITIVE DAMAGES JURISPRUDENCE BEFORE STATE FARM

Six cases form the backdrop for State Farm, beginning with a 1989 case that held that the Eighth Amendment’s Excessive Fines Clause does not apply to punitive damages awards in civil disputes between private parties. These cases evince an ongoing struggle by the Court to articulate standards for the imposition of punitive damages. Taken as a whole, the pronouncements in these cases are equivocating and imprecise, providing little guidance to courts reviewing punitive damages awards. Nevertheless, these cases help flesh out and contextualize State

37. The cases preceding State Farm are, in chronological order: Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) (holding that the Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages awards in civil suits between private plaintiffs); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 90 (1991) (holding that due process is satisfied by jury instructions and appellate review according to established standards); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993) (holding that the potential for considerable harm justified a punitive damages award dramatically disproportionate to the actual damages incurred); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994) (declaring unconstitutional an amendment to Oregon’s Constitution that prohibited judicial review of punitive damages awards unless there was no evidence to support the award); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) (holding that federal courts must review punitive damages awards de novo); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) (declaring unconstitutional punitive damages award of $2,000,000 where compensatory damages were $4,000, and holding that out-of-state conduct could not be considered in awarding punitive damages). See Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Textron Fin. Corp., 534 U.S. 947 (2001). On remand, the California Supreme Court affirmed the judgment. Textron Fin. Corp. v. Nat’l Fire Union Ins. Co. of Pittsburgh, Pa., No. S108979, 2002 Cal. LEXIS 6248 (2002) (unpublished decision). The case made its way back to the U.S. Supreme Court again, which remanded it again for reconsideration in light of State Farm. See Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Textron Fin. Corp., 538 U.S. 974 (2003). On its final disposition, the appellate court reduced the punitive damages to $360,000, which was “four times the compensatory damages awarded on the claims for breach of the implied covenant of good faith and fair dealing and fraud.” Textron, 13 Cal. Rptr. 3d at 605. In calculating the amount of punitive damages relative to compensatory damages, the court disregarded compensatory damages awarded for a breach of contract cause of action. Id.

In Gore, the Court’s first affirmation of a substantive due process right to reasonable punitive damages, Justice Scalia dissented from the majority opinion, which he criticized for providing “no real guidance at all.” 517 U.S. at 605 (Scalia, J., dissenting). Scalia amplified his criticism:

These criss-crossing platitudes yield no real answers in no real cases. And it must be noted that the Court nowhere says that these three “guideposts” are the only guideposts; indeed,
Farm’s markedly qualified language and unclear guidance. Because State Farm lacks clear rules, it is instructive to study the procedural concerns the Court expressed in its earlier opinions, particularly given State Farm’s heavy reliance on language from those opinions. These cases also demonstrate the shifting attitudes of several of the Justices during the years leading up to State Farm, a six-to-three decision that embraced many of the arguments Justice O’Connor made in dissents in cases preceding State Farm; depended on Justice Kennedy’s about-face regarding substantive due process; and revealed an inexplicable voting pattern by Chief Justice Rehnquist.

A. THE BEGINNING OF A PROPORTIONALITY RULE: JUSTICE O’CONNOR’S DISSENT IN BROWNING-FERRIS

In an opinion penned by Justice Blackmun, the Court signaled its willingness to hear a due process challenge to punitive damages in 1989, when it rejected a defendant’s argument that the Eighth Amendment’s Excessive Fines Clause constrained punitive damages awarded in disputes between private parties. The case, Browning-Ferris Industries
of Vermont, Inc. v. Kelco Disposal, Inc., concerned antitrust violations and tortious interference with contract on account of Browning-Ferris Industries' attempts to drive Kelco Disposal out of business. Employing an abuse of discretion standard, the Court affirmed the award of $6 million in punitive damages where compensatory damages were approximately $50,000. The Court explained its short-lived deferential standard of review:

It is not our role to review directly the award for excessiveness, or to substitute our judgment for that of the jury. Rather, our only inquiry is whether the Court of Appeals erred in finding that the District Court did not abuse its discretion in refusing to grant petitioners' motion for a new trial or remittitur. Applying proper deference to the District Court, the award of punitive damages should stand.

Justice O'Connor wrote a separate opinion, joined by Justice Stevens, in which she laid out the framework that would later be refined by Justice Kennedy in his opinion for the Court in State Farm. Adapting the Court's proportionality analysis from criminal sentencing, Justice O'Connor advocated "substantial deference" to legislative judgments by the reviewing court; punitive damages relative to the gravity of the defendant's conduct; and comparison of civil and criminal penalties imposed for similar conduct. Significantly, Justice O'Connor rejected arguments that "the wealth of the defendant should not, as a constitutional matter, be taken into account in setting the amount of an award of punitive damages." In doing so, however, she evinced a greater concern with setting a ceiling on punitive damages than with

punishment, our cases have long understood it to apply primarily, and almost exclusively, to criminal prosecutions and punishments. Therefore, it is inappropriate to apply the Excessive Fines Clause in the context of civil jury awards. Id. at 262–63. For an argument that the Excessive Fines Clause should apply to punitive damages, see Calvin R. Massey, The Excessive Fines Clause and Punitive Damages: Some Lessons From History, 40 VAND. L. REV. 1233 (1987) (applying the Excessive Fines Clause to punitive damages is "consistent with the historical development of the textual antecedents of the eighth amendment," id. at 1234).

46. Id. at 260–61.
47. Id. at 262, 280. The State Farm Court did not disaffirm this opinion despite the 120-to-1 ratio of punitive to compensatory damages.
48. A dozen years later, in Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001), the Court reversed course and held that punitive damages awards must be reviewed de novo.
49. Browning-Ferris, 492 U.S. at 278.
50. O'Connor's opinion is a partial concurrence and partial dissent. She concurred as to the Court's finding that due process claims were not properly raised but dissented as to the Court's holding that the Excessive Fines Clause was inapplicable to private civil litigation. See id. at 283. Her opinion sets forth the limits she believes the Excessive Fines Clause imposes on punitive damages awards. See id. at 300–01. That analysis is easily translatable to the limits she believes are imposed by the due process clause. See infra text accompanying notes 69–75 (discussing Justice O'Connor's dissent in Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)).
51. Browning-Ferris, 492 U.S. at 300–01. O'Connor borrows the "proportionality framework" from the Court's cruel and unusual punishment jurisprudence. Id.
52. Id. at 300.
establishing a method to ensure that punitive damages are fairly calculated to achieve their goals of punishment and deterrence.\(^5\)

Justice O’Connor’s opinion in *Browning-Ferris* suggests a fundamental unease with the deterrent purpose of punitive damages. The opinion commenced with an alarmist declaration: “Awards of punitive damages are skyrocketing.”\(^6\) After reciting statistics about the “skyrocketing” punitive damages awarded in the 1980s, which pale in comparison with those awarded since then,\(^7\) Justice O’Connor asserted:

> The threat of such enormous awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead

5. See id. (“[T]he Excessive Fines Clause is only a substantive ceiling on the amount of a monetary sanction, and not an economic primer on what factors best further the goals of punishment and deterrence.”).


Jane Mallor and Barry Roberts summarized the debate:

In his comprehensive review of punitive damages, however, Professor Michael Rustad presents convincing data that such claims are horror stories and are not supported by the evidence. Professor Rustad reviewed nine empirical studies on punitive damages trends and concluded that “[e]very empirical study of punitive damages demonstrates that there is no nationwide punitive damages crisis.” In fact, he stated that the clear convergence of findings is that “overall rate and level of punitive damages are low.” Professor Theodore Eisenberg adds that “[a]ll credible sources suggest that punitive damage awards are rare,” and that concerns are greatly exaggerated. . . . In fact, the research also reveals that punitive damages are most frequently imposed in business tort and intentional tort cases and not in personal injury cases and that they are substantially and significantly correlated to the size of the compensatory damages awarded.

Jane Mallor & Barry S. Roberts, *Punitive Damages: On the Path To a Principled Approach?*, 50 Hastings L.J. 1001, 1004-05 (1999) (citations omitted) [hereinafter Mallor & Roberts, *On the Path*]. Nevertheless, the popular perception that punitive damages were out of control led nearly all of the state legislatures to enact some form of limitation on the imposition and award of punitive damages.

Id.

55. Justice O’Connor asserted that the largest product liability punitive damages award “a decade ago” was $250,000. See *Browning-Ferris*, 492 U.S. at 282 (O’Connor, J., concurring in part and dissenting in part) (citing David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1329-32 (1976)). In the 1980s, O’Connor noted, “awards more than 30 times as high have been sustained,” including awards of $10 million, $8 million and $6.2 million. Id. (citations omitted).
to awards of punitive damages. 56

As sole support for her assertion regarding pharmaceutical companies’ reluctance to introduce new drugs, Justice O’Connor cited the amicus brief of the Pharmaceutical Manufacturers Association. 57 It appears a raw instance of judicial “capture.” 58

Justice O’Connor did not appear to consider the possibility that if manufacturers have become hesitant to market unsafe products, then punitive damages have had the proper deterrent effect. Perhaps punitive damages imposed on pharmaceutical companies represent the community’s desire not to be guinea pigs for reckless experimentation. 59 Nor did Justice O’Connor acknowledge that without effective regulatory oversight, society is dependent on the tort system and punitive damages to police intentional, reprehensible conduct. 60 If, on the other hand, punitive damages are being imposed on manufacturers of products that inadvertently or unexpectedly cause harm and those manufacturers address the harm in a responsible manner, then punitive damages are being incorrectly imposed. For instance, had Merck solicited and listened to the many warnings of researchers about Vioxx’s potential cardiac risks, rather than seek to squelch critiques, it likely would not be faced

56. Id. The recent case of Merck’s Vioxx drug certainly contradicts O’Connor’s assertion that pharmaceutical companies are constrained from marketing new drugs because of the threat of punitive damages. See supra notes 4–13 and accompanying text.


59. For example, Toole v. Richardson-Merrell Inc. concerned one pharmaceutical company’s disregard for the health of consumers in its marketing of a cholesterol-reducing drug. 395 S.W.2d 719 (Tex. App. 1965). “Although the company’s own experiments showed abnormal blood changes and eye opacities in animals, the defendant repeatedly covered up reports of these experiments, fictionalized data, and misrepresented facts to both the medical profession and the Food and Drug Administration.” Jane Mallor & Barry Roberts, Punitive Damages: Toward a Principled Approach, 31 Hastings L.J. 639, 652 (1980) [hereinafter Mallor & Roberts, Principled Approach]. When a pharmaceutical company engages in egregious conduct like misleading the public, falsifying data, and withholding information about known risks, substantial punitive damages are a necessary remedy. If punitive damages constrain a company from withholding information and disregarding health risks, then that is a desirable outcome. It seems reasonable to expect public confidence in such industries to be impacted by companies’ irresponsible actions. That low opinion is reduced to a monetary indicator by virtue of juries’ punitive damages awards. The example of Merck & Co. is particularly relevant. See supra notes 4–13 and accompanying text.

60. See David G. Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1277–79 (1976). Recent news stories have revealed the failure of the U.S. Food and Drug Administration to police adequately the medical device industry. See, e.g., Barry Meier, F.D.A. Had Report of Short Circuit in Heart Devices, N.Y. Times, Sept. 12, 2005, at A1 (reporting that F.D.A. knew of potentially fatal problem in Guidant Corp.’s implantable heart defibrillator three months before the flaw caused the death of a college student implanted with the device).
with the tremendous liability it now anticipates. But Justice O'Connor did not suggest that punitive damages were being awarded in situations when they should not; rather, she seemed primarily concerned about the amounts awarded. It is as though, shocked senseless by headlines announcing enormous verdicts, Justice O'Connor was unable to consider the reasons and purpose for awarding large amounts of punitive damages. The result is a muddied approach to determining whether such awards are excessive.

B. PROCEDURAL PROTECTIONS SUFFICE: PACIFIC MUTUAL LIFE INSURANCE CO. v. HASLIP

In its next case addressing punitive damages, the Court evaluated the procedural protections employed in Alabama, in an opinion written by Justice Blackmun and joined by Chief Justice Rehnquist and Justices White, Marshall and Stevens. In Pacific Mutual Life Insurance Co. v. Haslip, an agent for two insurance companies defrauded Roosevelt City, Alabama, when he sold the city health and life insurance for its employees. Several city employees were left uninsured as a result of the agent's fraud, and Pacific Mutual was held accountable for its agent's conduct under the principle of respondeat superior.

Noting that unlimited jury and judicial discretion "invite extreme results that jar one's constitutional sensibilities," the Court nonetheless affirmed an award that was "more than 4 times the amount of compensatory damages [and] more than 200 times the out-of-pocket expenses" of the plaintiff. Although the amount "may be close to the line" of being constitutionally excessive, the Court nonetheless found that the defendant was afforded sufficient due process. Specifically, it

61. Justice O'Connor also neglected to discuss the possibility that the higher amounts may be due to the failure of lower amounts to deter abhorrent conduct.


63. Id. at 4-5.

64. See id. at 12-15. "Alabama's common-law rule is that a corporation is liable for both compensatory and punitive damages for the fraud of its employee effected within the scope of his employment." Id. at 14. The Court explained the rationale for Alabama's long-standing common law rule:

Imposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position "to guard substantially against the evil to be prevented." ... Imposing liability without independent fault deters fraud more than a less stringent rule. It therefore rationally advances the State's goal. We cannot say this is a violation of Fourteenth Amendment due process.

Id. (citation omitted). In contrast to Alabama law, California limits imposition of punitive damages on employers under the theory of respondeat superior. See Cal. Civ. Code § 3294(b) (requiring that a plaintiff seeking punitive damages show that the employer had "advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct").

65. Id. at 18, 23.
was protected by jury instructions, as well as appellate and state supreme court review according to established standards. In addition, the Court found that the amount of the award was based on "objective criteria" and the individual defendant could have faced imprisonment. Most significantly in light of State Farm's proportionality rule, the Court insisted that it could not "draw a mathematical bright line between the constitutionally acceptable and constitutionally unacceptable that would fit every case."

Again, Justice O'Connor dissented. Unlike her opinion in Browning-Ferris, however, Justice O'Connor focused in Haslip on the need for better procedural protections. She asserted that "strong procedural safeguards" are necessary because the "punitive character of punitive damages means that there is more than just money at stake." Her most persuasive argument attacked the vagueness of the jury instructions and the grant of complete discretion to the jury both in deciding whether to award punitive damages and in setting the amount. Although she applauded the standards the Alabama courts employed on appeal, Justice O'Connor asserted that postverdict review "is incapable of curing a grant of standardless discretion to the jury." She recommended instead that the courts create meaningful jury instructions using the discretionary "Green Oil" factors employed by Alabama's appellate courts in reviewing punitive damages.

66. Id. at 20 ("As long as the discretion is exercised within reasonable constraints, due process is satisfied."). The jury was instructed about the discretionary nature of punitive damages and their deterrent and punitive purpose, and they were told to consider the "character and degree of the wrong as shown by the evidence and necessity of preventing similar wrong." Id. at 6 n.1. Notably, the Court did not reject the use of the defendant's net worth in setting the amount of punitive damages. Rather it cautioned that juries must consider other factors in addition to net worth so that "plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." Id. at 22.
67. Id. at 23.
68. Id. at 18.
69. Id. at 54 (O'Connor, J., dissenting) (stating that "punitive damages are quasi-criminal punishment" and that an award is accompanied by a "stigma").
70. Id. at 42-48. O'Connor complained that the jury instructions "defy rational implementation," which enables juries "to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth." Id. at 43.
71. Id.
72. See id. at 51-52. The Supreme Court of Alabama established the following "Green Oil factors" to guide review of punitive damages awards:

(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater. (2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility. (3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss. (4) The
Justice O'Connor also applauded legislative efforts to impose limits on punitive damages, including the establishment of ranges for potential awards. She advocated a "clear-and-convincing evidence" standard that would limit "punitive damages to the more egregious cases." Notably for California's interests and the proposals set forth later in this Note, Justice O'Connor asserted that "concerns of federalism and judicial restraint counsel that this Court should not legislate to the States which particular method [of procedural reform] to adopt. I would thus leave it to individual States to decide what method is most consistent with their objectives."

C. AFFIRMING DISPROPORTIONATE PUNITIVE DAMAGES IN RECOGNITION OF POTENTIAL HARM: TXO PRODUCTION CORP. v. ALLIANCE RESOURCES CORP.

The defendant in TXO Production Corp. v. Alliance Resources Corp. attempted to cast a cloud on title to property conveyed by the plaintiff to the defendant and thereby cheat the plaintiff out of oil and gas royalties. The plurality opinion written for the Court by Justice Stevens affirmed a punitive damages award of $10 million where the "actual" damages were only $19,000 because of the egregious nature of the defendant's conduct, which could have caused considerably more damage had the defendant succeeded in its fraudulent endeavor. The Court wrote: "It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended financial position of the defendant would be relevant. (5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial. (6) If criminal sanctions have been imposed on the defendant for this conduct, this should be taken into account in mitigation of the punitive damages award. (7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.

Id. The Green Oil factors got their name from Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989).

73. See Haslip, 499 U.S. at 57 (O'Connor, J., dissenting).
74. Id. at 58.
75. Id.
76. See 509 U.S. 443, 460-62 (1993). Justice Stevens summarized the case as follows:
On this record, the jury may reasonably have determined that petitioner set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it had ceded to Alliance. The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.

Id. at 462.

77. Justice Stevens was joined by Chief Justice Rehnquist and Justice Blackmun. Justice Kennedy joined the plurality opinion as to Parts I (factual recitation) and IV (addressing procedural issues and affirming the award), and filed a separate concurring opinion explicitly rejecting the plurality's argument that the Due Process Clause imposes substantive limits on punitive damages. Justice Scalia filed an opinion concurring in the judgment, in which Justice Thomas joined. Justice O'Connor wrote a dissenting opinion joined by Justice White and, in part, by Justice Souter.
victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." 8 In affirming the award, a plurality of the Court refused to consider the defendant’s attack on the jury instructions, which took into account the defendant’s wealth, because that challenge had not been raised previously. 79 Nonetheless, the Court reiterated what it said in Haslip: the “financial position of the defendant [is] one factor that could be taken into account in assessing punitive damages." 80

In a concurring opinion, Justice Kennedy (who would later write for the majority in State Farm) explicitly rejected the plurality’s argument that the Due Process Clause imposes substantive limits on the amount of punitive damages that may be awarded.

I am not in full agreement, however, with the plurality’s discussion of the substantive requirements of the Due Process Clause in Parts II and III, in which it concentrates on whether the punitive damages award was “grossly excessive.” . . . To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what? . . . As I have suggested before, a more manageable constitutional inquiry focuses not on the amount of money a jury awards in a particular case but on its reasons for doing so. 81

Kennedy found the award in TXO justified by the defendant’s malicious conduct, which was “part of a pattern and practice by TXO to defraud and coerce those in positions of unequal bargaining power.” 82

Once again, Justice O’Connor dissented, bemoaning “what is rapidly becoming an arbitrary and oppressive system.” 83 As in Haslip, O’Connor expended ink on the necessity of providing better guidance to juries. 84 However, the bulk of the opinion addresses how punitive damages should be calculated. Central to her analysis is that punishment be proportionate to the offense. 85 When punishment appears disproportionate, “searching review” of the verdict is required to ensure

78. Id. at 460.
79. See id. at 464.
80. Id.
81. Id. at 466-67 (Kennedy, J., concurring) (emphasis added).
82. Id. at 469.
83. Id. at 473 (O’Connor, J., dissenting). Justice White joined Justice O’Connor’s dissent, and Justice Souter joined as to Parts II-B-2 (arguing that because the jury was not instructed to address potential harm, it is an improper consideration for affirming the amount of punitive damages, id. at 489), II-C (addressing possible jury bias against a wealthy out-of-state defendant, id. at 489-95), III (asserting that the state appellate court’s review of the punitive damages award was constitutionally inadequate, id. at 495-500), and IV (complaining of increased size and frequency of punitive damages awards and the need for better appellate review than the plurality opinion provides, id. at 500-01).
84. Justice O’Connor was particularly critical of the post hoc justification of the award; the issue of potential harm was not presented to the jury, and thus justifying the award by reference to potential harm was “little more than an after-the-fact rationalization invented by counsel to defend this startling award on appeal.” Id. at 484-85.
85. See id. at 478.
that it is not the result of "bias, caprice, or passion." In TXO, the ratio between the punitive and compensatory damages was, in O'Connor's mind, "dramatically irregular, if not shocking" and certainly enough to "raise a suspicious judicial eyebrow." O'Connor equated such disproportionate punishment with jury bias.

D. SUBSTANTIVE DUE PROCESS AFFIRMED: BMW OF NORTH AMERICA, INC. V. GORE

For the first time, the Court in 1996 invalidated a punitive damages award for being "grossly excessive," in an opinion authored by Justice Stevens and joined by Justices O'Connor, Kennedy, Souter, and Breyer. BMW of North America, Inc. v. Gore involved the sale in Alabama of new cars that had been repainted without disclosing the fact of such repainting to the buyer. The jury awarded the plaintiff $4,000 in compensatory damages (reflecting expert testimony supporting a ten percent reduction in the value of the $40,000 car the plaintiff had purchased) and $4 million in punitive damages, which the Alabama Supreme Court, applying the Green Oil factors, reduced to $2 million.

Justice Kennedy joined Justice Stevens's opinion for the majority in Gore—providing the crucial fifth vote—despite having, only three years previously in TXO, explicitly rejected the notion that the Due Process

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86. Id. at 481.
87. Id.
88. Id. at 475 (asserting "it cannot be denied that the lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict"); id. at 489 ("[I]t seems quite likely that the jury in fact was unduly influenced by the fact that TXO is a very large, out-of-state corporation.").
Between the 1993 decision in TXO and the 1996 decision in Gore, the Court issued a decision in Honda Motor Co., Ltd. v. Oberg, in which the Court declared unconstitutional an amendment to Oregon's Constitution that prohibited judicial review of punitive damages awards unless there was no evidence to support the award. 512 U.S. 415 (1994). Justice Stevens wrote the opinion in Oberg, and was joined by Justices Blackmun, O'Connor, Scalia, Kennedy, Souter and Thomas. Justice Ginsburg, in an opinion joined by Chief Justice Rehnquist, filed a dissenting opinion in which she argued that since Oregon provided sufficient procedural protection in light of Haslip and TXO, the Court should affirm. Id. at 437–44 (citations omitted).
90. See Gore, 517 U.S. at 563–64, 567; BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 626 (Ala. 1994). The plaintiff's complaint in Gore had sought "$500,000 in compensatory and punitive damages, and costs." Gore, 517 U.S. at 563. On appeal, seeking to justify $4 million in punitive damages, the plaintiff multiplied the $4,000 reduction in value per vehicle times approximately 1,000 repainted cars sold nationally by BMW without disclosing the repainting. Id. at 564. Only fourteen of those cars were sold in Alabama, id., which fact influenced the Alabama Supreme Court in reducing the punitive damages by fifty percent. See Gore, 646 So. 2d at 625–26 ("If there have been other civil actions against the same defendant, based on the same conduct, this fact should be taken into account in mitigation of the punitive damages award."). In a case with facts almost identical to Gore, the jury awarded no punitive damages. Id. at 626 (citing Yates v. BMW of N. Am., Inc., 642 So. 2d 937 (Ala. Civ. App. 1993)).
Clause set substantive limits on the amount that can be awarded.\footnote{See TXO, 509 U.S. at 466–67 (1993) (Kennedy, J., concurring); supra notes 81–82 and accompanying text.}

The Gore opinion is curious for two additional reasons. One, it expounded at length on a non-issue: the impropriety of imposing punitive damages based on conduct in other jurisdictions.\footnote{See Gore, 517 U.S. at 568–74. It is a “false issue,” as Justice Ginsburg’s dissent rightly pointed out, because the Alabama Supreme Court had already reduced the award in acknowledgement of the jury’s incorrect consideration of BMW’s undisclosed sales of repainted cars in other states. Id. at 607 (Ginsburg, J., dissenting). Even Justice Stevens acknowledged as much. See id. at 573 (“The Alabama Supreme Court therefore properly eschewed reliance on BMW’s out-of-state conduct and based its remitted award solely on conduct that occurred within Alabama.” (citation omitted)).} Second, the “guideposts” that the majority used to conduct its excessiveness review were adopted—without attribution—from Justice O’Connor’s dissents in Browning-Ferris and TXO. The three guideposts are: degree of reprehensibility; ratio of punitive damages to “the actual harm inflicted on the plaintiff”; and comparison to statutory criminal and civil sanctions that could be imposed for like conduct.\footnote{Id. at 574–83. O’Connor suggested the first and third guideposts in Browning-Ferris, and the second guidepost in TXO. See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 300–01 (1989) (O’Connor, J., concurring in part and dissenting in part); TXO, 509 U.S. at 478 (O’Connor, J., dissenting).}

The Gore guideposts also represent a pared down version of Alabama’s seven Green Oil factors discussed approvingly by both the majority and Justice O’Connor’s dissent in Haslip.\footnote{See Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21–22, 51–52 (1991); see also supra note 72.} This fact is noteworthy for three factors that were eliminated altogether without explanation\footnote{One of the Green Oil factors is the “relationship between the punitive damages award and the harm likely to result from the defendant’s conduct as well as the harm that actually has occurred.” Haslip, 499 U.S. at 21 (emphasis added). Although the Court in State Farm referred to this factor—including the reference to potential harm—it essentially subsumed the factor in its proportionality rule. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418, 424–25 (2003); see also infra Part II.}

\begin{enumerate}
\item “the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss”;\footnote{Haslip, 499 U.S. at 22. Justice Breyer acknowledged that this factor has the potential “to limit awards to a fixed, rational amount.” Gore, 517 U.S. at 591 (Breyer, J., concurring) (emphasis added).}
\item “the ‘financial position’ of the defendant”;\footnote{Haslip, 499 U.S. at 22 (emphasis added).}
\item “all the costs of litigation,” the recovery of which is meant “to encourage plaintiffs to bring wrongdoers to trial.”
\end{enumerate}

Had they been included, the three omitted factors would have better ensured that the defendant was unable to absorb painlessly the punitive damages award, and hence would have provided more effective
deterrence than the three factors the Court retained. Of the three *Gore* guideposts—reprehensibility, proportionality, and comparison to statutory sanctions—the latter two serve to constrain the amount of punitive damages, and none actually serves a deterrence purpose. The Court's cherrypicking of the *Gore* guideposts exemplifies the Court's move away from punitive damages that truly aim to deter persons from engaging in tortious conduct.\(^9\)

The *Gore* Court's discussion of reprehensibility provides useful guidance about the types of conduct that merit "significant" punitive damages awards.\(^{10}\) Harm that is "purely economic in nature" is not sufficiently reprehensible unless it affects "performance or safety features"; the conduct otherwise evinces an "indifference to or reckless disregard for the health and safety of others"; or the conduct is intentional and targets the "financially vulnerable."\(^{101}\) It is unclear whether the concern for the financially vulnerable includes Justice Kennedy's prior approval in *TXO* of imposing greater punitive damages when a defendant takes advantage of unequal bargaining power.\(^{102}\) In keeping with the Court's criminal jurisprudence, repeat offenders deserve greater punishment.\(^{103}\) Where there are "deliberate false

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9. See Anthony Geraci, *Gore's Metamorphosis in State Farm v. Campbell: When Guideposts Make a Detour*, St. Thomas L. Rev. 1, 19–22 (2004) (*State Farm* eliminated the deterrence purpose of punitive damages so that "[c]orporations are now effectively able to make a cost-benefit analysis on every decision and can now effectively decide whether or not to violate the law."). On remand, the Alabama Supreme Court held that a new trial would be held unless *Gore* accepted a remittitur of punitive damages to $50,000. BMW of N. Am., Inc. v. *Gore*, 701 So. 2d 507, 626 (Ala. 1997). In a concurring opinion, Alabama Supreme Court Justice Cook asserted that the proper amount of punitive damages should have been $56,000, representing fourteen (the number of repainted cars sold in Alabama) times $4,000 (the diminished value per vehicle). *Id.* at 516 (Cook, J., concurring). One justice on the Alabama Supreme Court wrote a special concurrence solely to note his opinion that "the deterrent effect of the original award, which changed BMW's national policy in a way that benefited purchasers of its automobiles, has been unduly minimized as this case has proceeded through successive stages of review." *Id.* (Almon, J., concurring).

10. *See Gore*, 517 U.S. at 576. In *State Farm*, Justice Kennedy referred to these elements as helping merely to sustain a punitive damages award—rather than supporting a significant punitive damages award. *Compare id.* (noting the absence of "aggravating factors associated with particularly reprehensible conduct" that "justify a significant sanction in addition to compensatory damages"), *with State Farm*, 538 U.S. at 419 ("The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect."). In the two opinions the same aggravating factors are described, but their function shifts from supporting a significant punitive damages award to merely helping support an award (but not being sufficient alone to sustain an award).


102. *See supra* notes 81–82 and accompanying text.

103. *See Gore*, 517 U.S. at 576–77 ("Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law."). However, the Court greatly diminishes this criterion by subsuming it under its "reprehensibility" analysis. *See State Farm*, 538 U.S. at 427. In addition, it greatly reduces the impact of repeat conduct by narrowly defining what constitutes similar conduct. *See id.* at 437–38 (Ginsburg, J., dissenting).
statements, acts of affirmative misconduct, or concealment of evidence of improper motive, such as were present in Haslip and TXO," greater punishment is warranted. The Court distinguished the more reprehensible "deliberate false statement" from the less serious "omission of a material fact... particularly when there is a good-faith basis for believing that no duty to disclose exists." The threat of unrealized but potential harm from the defendant's conduct may be considered to augment an award. Furthermore, where compensatory damages are low but the conduct is "particularly egregious," or where the injury is difficult to quantify, a higher proportion of punitive damages relative to compensatory damages may be warranted. Higher punitive damages are also merited where a defendant had notice that its conduct could result in severe punishment.

In a concurring opinion joined by Justices O'Connor and Souter, Justice Breyer addressed the Green Oil factors ignored by the majority opinion. In particular, Justice Breyer acknowledged the relevance of the defendant's wealth for ensuring that a "poor person" is not punished more severely than a "wealthy one" by a "fixed dollar award." But he also expressed concern for the possibility that considerations of the defendant's wealth could "provide an open-ended basis for inflating awards when the defendant is wealthy." However, he argued, "[t]hat fact does not make its use unlawful or inappropriate; it simply means that [the defendant's wealth] cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct." By implication, it seems that Justice Breyer would permit considerations of the defendant's

104. Gore, 517 U.S. at 579.
105. This distinction is particularly important in Gore, because the defendant's nondisclosure policy was in keeping with the most stringent state statutory requirement. See id. at 565. For example, the State of California mandates disclosure of repairs that cost three percent or more of the retail price of the vehicle. Id. at 578 (citing CAL. VEH. CODE ANN. § 9990 (West Supp. 1996)). Thus, a $600 repair on a $40,000 car (as was the case in Gore) would not require disclosure in California or in any other state that similarly defines "materiality." The jury in Gore based its verdict on Alabama's codified common law cause of action for fraud, which at the time did not define "materiality." Id. at 563 n.3. In 1993 after the jury verdict in Gore, Alabama's legislature enacted a law requiring disclosure of material repairs, which it defined as repairs costing in excess of the greater of $500 or 3% of the manufacturer's suggested retail price for the automobile. BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 623 (Ala. 1994) (citing ALA. CODE § 8-19-5 (1993)).
107. Gore, 517 U.S. at 582.
108. See id. at 584.
109. Id. at 591.
110. Id.
wealth only to reduce a punitive damages award but not to ensure that the amount has sufficient sting so as not to go unnoticed.

Justice Scalia wrote a bristling dissent in *Gore*, joined by Justice Thomas, in which he catalogued the many faults of the majority opinion’s “new federal law of damages.”112 Like Justice Ginsburg, who wrote a separate dissent joined by Chief Justice Rehnquist, Justice Scalia asserted that the substantive limits imposed by the Court constitute “an incursion into the province of state governments.”113 In Justice Scalia’s view, the Court improperly substituted its perspective for that of the jury.114 The bulk of Justice Scalia’s dissent faulted the majority for its weak legal precedent in establishing a substantive due process right to punitive damages that are “fair”:

There is no precedential warrant for giving our judgment priority over the judgment of state courts and juries on this matter. The only support for the Court’s position is to be found in a handful of errant federal cases, bunched within a few years of one other, which invented the notion that an unfairly severe civil sanction amounts to a violation of constitutional liberties. . . . Although they are our precedents, they are themselves too shallowly rooted to justify the Court’s recent undertaking.115

In short, Justice Scalia’s argument boils down to his belief that “there is no federal guarantee a damages award actually be reasonable.”116

II. *STATE FARM*’S PUNITIVE DAMAGES JURISPRUDENCE

Affirming his recent embrace of substantive due process limits on punitive damages, Justice Kennedy wrote the opinion for the Court in *State Farm v. Campbell*, joined by Chief Justice Rehnquist and Justices Stevens, O’Connor, Souter and Breyer.117 Justice Kennedy’s presentation

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112. *Gore*, 517 U.S. at 605 (Scalia, J., dissenting).
113. Id. at 598; see also id. at 607 (Ginsburg, J., dissenting) (“The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the States’ domain . . . .”).
114. Justice Scalia wrote: At the time of adoption of the Fourteenth Amendment, it was well understood that punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved. . . . Today’s decision, though dressed up as a legal opinion, is really no more than a disagreement with the community’s sense of indignation or outrage expressed in the punitive award of the Alabama jury, as reduced by the State Supreme Court.
115. *Id.* at 600 (Scalia, J., dissenting).
116. *Id.* at 600–01.
of the facts in his opinion for the Court in State Farm evinces a distaste for undeserving plaintiffs receiving a windfall in punitive damages." The plaintiffs prevailed in a bad faith insurance case against State Farm, but the incident that led to the action involved a reckless disregard for others by the plaintiff, Curtis Campbell. While driving on a two-lane highway in Utah, Campbell tried to pass six vans and caused head-on collision with a car coming from the opposite direction. The death of one driver and permanent disability of another resulted. As the Court noted, "[t]he Campbells escaped unscathed." The plaintiffs prevailed in a bad faith insurance case against State Farm, but the incident that led to the action involved a reckless disregard for others by the plaintiff, Curtis Campbell. While driving on a two-lane highway in Utah, Campbell tried to pass six vans and caused head-on collision with a car coming from the opposite direction. The death of one driver and permanent disability of another resulted. As the Court noted, "[t]he Campbells escaped unscathed." The Campbells filed a bad faith insurance action because State Farm refused to settle Campbell's accident case within the $50,000 policy limit. In the accident case, State Farm contested Campbell's liability, and, when a jury found Campbell liable for $136,000 beyond his policy limit, State Farm initially refused to pay the excess. The jury in the bad faith action awarded the Campbells "$2.6 million in compensatory damages and $145 million in punitive damages, which the trial court reduced to $1 million and $25 million, respectively." State Farm appealed the judgment, and the Utah Supreme Court applied the Gore guideposts—reprehensibility, proportionality, and comparison to other penalties— which ironically resulted in reinstatement of the full $145 million in punitive damages. The U.S. Supreme Court overturned the award, finding that its own application of the Gore guideposts "likely would justify a punitive damages award at or near the amount of compensatory and illogically, Justice Rehnquist has joined her half the time. For example, in Honda Motor Co. v. Oberg, Justice Ginsburg insisted that the Court defer to the State of Oregon and permit it to limit judicial review of punitive damages awards. 512 U.S. 415, 451 (1994) (Ginsburg, J., dissenting). Chief Justice Rehnquist joined that opinion. But in Cooper Industries, Inc. v. Leatherman Tool Group, Inc., Chief Justice Rehnquist did not join Justice Ginsburg's dissent; instead, he joined the majority in holding that punitive damages awards be reviewed de novo. 532 U.S. 424 (2001). Inexplicably, he was willing to defer to the States in Oberg, but when faced with the extent of review of State courts' awards, he chose de novo rather than the prior deference standard. Kennedy's and Rehnquist's waffling positions in these cases underscore the difficulty the Court has had in arriving at, and articulating, meaningful standards for awarding punitive damages. 118. The procedural history of State Farm is somewhat complicated and need not be detailed here. Although Campbell was the plaintiff in the bad faith insurance action against State Farm, ninety percent of the damages recovered in State Farm were to be paid to Campbell's victims because of a settlement reached in the case pertaining to the car accident. See id. at 413-14. 119. Id. at 412. 120. Id. at 413. 121. The Court is vague as to the timeline of the matter. The accident occurred in 1981; a verdict in the accident case was issued at some point prior to or during 1984; the appeal was pending in 1984, at which point the settlement agreement was reached by Campbell and the parties to the accident suit, and the decision to pursue the bad faith insurance action was reached; in 1989, the appeal was denied; and sometime thereafter State Farm paid the full judgment. See id. at 413-14. The Court describes the Campbell's case against State Farm as amounting to "a year and a half of emotional distress." Id. at 426. It is unclear how that period is calculated. 122. Id. at 415.
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The Court said a lower amount was justified in large part because "of the substantial compensatory damages awarded (a portion of which contained a punitive element)." 124

A. THE FIRST GORE GUIDEPOST: REPREHENSIBILITY

While Justice Kennedy's discussion of reprehensibility commenced with a restatement of the "aggravating factors" described in Gore, 125 and an acknowledgment that State Farm's conduct "merits no praise," 126 it faulted the Utah court's analysis of evidentiary issues. Specifically, the Utah court erred in considering evidence of State Farm's national policies of underpaying claims, which the Supreme Court deemed impermissible "dissimilar and out-of-state conduct." 127 Justice Kennedy repeated what the Court asserted in Gore: "A State cannot punish a defendant for conduct that may have been lawful where it occurred." 128 Nor may a State punish a defendant for illegal conduct that took place outside the state. 129

The Court's pronouncements on evidence of the defendant's other acts show that plaintiffs must walk a fine line. A plaintiff may still present evidence of acts committed by a defendant in other states if those acts "have a nexus to the specific harm suffered by the plaintiff." 130 However, in such a case, the jury must be instructed not to use that evidence to punish the defendant for conduct directed at persons other than the plaintiff. "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." 131 Punishing a defendant for conduct committed against others "creates the possibility of multiple punitive damages awards for the same conduct." 132 Nevertheless, a recidivist may be punished more severely than a first-time offender so long as "the conduct in question replicates the prior transgressions." 133 We are left with a narrow middle ground: Similar act evidence is relevant to the issue of reprehensibility, but it cannot be used to augment punitive damages except where it shows the defendant to be

123. Id. at 429.
124. Id.
125. See supra text accompanying notes 100-08.
126. State Farm, 538 U.S. at 419.
127. Id. at 420.
128. Id. at 421 (citations omitted).
129. See id. at 421.
130. Id. at 422.
131. Id. at 423.
132. Id. The Court's concern with multiple punishment is inconsistent with its criminal punishment jurisprudence. See infra notes 159-61 and accompanying text.
133. State Farm, 538 U.S. at 423 (citation omitted). The Court's requirement of similar conduct for punishing a recidivist represents a significant departure from its criminal jurisprudence, but the Court provides no rationale for that difference. The reference to similar past conduct derives from the Green Oil factors established by Alabama's Supreme Court. See supra note 72.
a recidivist. The chief problem with the majority's formulation as applied in *State Farm* is that it very narrowly construed what constitutes "similar" conduct.  

B. **THE SECOND GORE GUIDEPPOST: PROPORTIONALITY**

The most discussed part of the *State Farm* opinion concerns the second *Gore* guidepost: the ratio between the actual or potential harm suffered and the amount of punitive damages awarded. In a textbook illustration of equivocation, the Court repeatedly alternated between rejecting and asserting specific numerical ratios. It began by rejecting the imposition of a "bright-line ratio" or "simple mathematical formula." It followed this rejection with an assertion, in heavily qualified language, of specific ratios. For example, it stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." It reminded us that *Haslip* "concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." Then the Court returned to qualifying its pronouncements: "[T]hese ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process."  

After setting forth the foregoing ballpark figures, the Court announced that the ratio in *State Farm*, 145-to-1, raises a "presumption" of unconstitutionality. The use of the word "presumption" suggests that, in the proper case, such a ratio may be acceptable so long as there is sufficient evidence to overcome the presumption. After all, the Court affirmed higher ratios in earlier cases. In *Browning-Ferris*, the Court affirmed a 117-to-1 ratio; in *TXO*, the approved ratio was 526 to 1; and in *Haslip*, the punitive damages were four times compensatory damages and two hundred times the plaintiff's expenses. The imprecise and
equivocal language used in State Farm suggests that those cases remain good law; certainly State Farm does not criticize or overrule them. Thus, if presented with a case of similar evidentiary weight as TXO or Browning-Ferris, where the defendant clearly engaged in intentionally malicious conduct that could never be equated with an exercise in business judgment, an award significantly higher than a single-digit ratio may pass muster. As the Court acknowledged, "because there are no rigid benchmarks... ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'

The Court's analysis of the harm that State Farm caused the Campbells suggests that where compensatory damages primarily compensate for emotional distress, punitive damages will be subject to stricter review and, hence, the strong potential for reduction. The Court wrote that the Campbells were paid "$1 million for a year and a half of emotional distress." Because the Campbells suffered no physical injuries and "only minor economic injuries," the Court felt it was likely that the compensatory award already included a punitive element. Thus, the punitive damages award was, in essence, double recovery. "Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element." The Court's conclusion that the Campbell's compensatory damages award included a punitive element implies that damages paid for emotional distress claims for purely economic injury are inherently punitive rather than compensatory. Thus, to avoid double recovery and overcompensation,

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142. The Court's finding that State Farm merely made a bad business decision when it chose not to settle Campbell's accident suit for $50,000 suggests that the Court was not willing to find State Farm's conduct as reprehensible as that of TXO or Browning-Ferris, despite that in both TXO and Browning-Ferris, the plaintiffs were relatively sophisticated business entities.

143. Accord Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672 (7th Cir. 2003) (Posner, J.) (rejecting the defendant's argument that State Farm required reduction of punitive damages to no more than four times compensatory damages; asserting that State Farm establishes a mere presumption against punitive damages that bear a high ratio to compensatory damages; and affirming punitive damages more than 37 times compensatory damages).

144. State Farm, 538 U.S. at 425. It is worth noting that in the case often cited as the first modern case imposing punitive damages, Huckle v. Money, the ratio of punitive to compensatory damages was fourteen to one. See Browning-Ferris, 492 U.S. at 274 n.20 (citing Huckle v. Money, (1763) 95 Eng. Rep. 768 (K.B.)). The Court noted that the total award was three hundred pounds where the injury to the plaintiff was valued at twenty pounds; thus punitive or "exemplary" damages would be two hundred eighty pounds and compensatory damages twenty pounds, a ratio of fourteen to one.

145. State Farm, 538 U.S. at 426.

146. Id. It is difficult to believe the Court did not also consider the fact that Curtis Campbell himself caused great harm to others with his reckless driving. See supra text accompanying notes 119-20.

147. State Farm, 538 U.S. at 426 (internal citation omitted).
the Court found it necessary to reject the "massive award."\(^{148}\)

The Court disapproved the Utah Supreme Court's reliance on State Farm's wealth as a factor in awarding punitive damages, but it did not suggest how, if ever, a defendant's wealth might be applicable. Nor did it hold that consideration of wealth is never permissible. Rather, the Court merely asserted that wealth "cannot justify an otherwise unconstitutional punitive damages award."\(^{149}\) It seems that if a plaintiff could show a correlation between a defendant's wealth and the harm caused by the defendant's conduct (perhaps by showing profits gained or costs avoided by engaging in the tortious conduct, or abuse of greater economic bargaining power), then some measure of the defendant's financial condition could be relevant.\(^{150}\) Certainly this was the approach approved of by the plurality opinion in \(TXO\) penned by Justice Stevens and joined by Chief Justice Rehnquist and Justice Blackmun. The jury instructions in that case explained that "the law recognizes that to in fact deter such conduct may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances."\(^{151}\)

Perhaps the only way to understand the Court's analysis in \(State Farm\) is to recognize that the Court did not view State Farm's conduct as especially egregious.\(^{152}\) As a result, the Court did not think the case merited substantial punitive damages, and thus any reference to the defendant's wealth was irrelevant because it "cannot justify an otherwise unconstitutional" award.\(^{153}\)

In \(TXO\), Justice O'Connor cautioned that proportionality must be based on "objective criteria" because "[o]ne judge's excess very well may be another's moderation."\(^{154}\) But in focusing on the proportion of punitive to compensatory damages without regard to principles of disgorgement or abuse of unequal bargaining power, the Court seemed to view compensatory damages as the only "objective criteria" worth considering. One problem with the proportionality rule is that it assumes that compensatory damages are an objective measure of the defendant's tortious conduct. Such an approach implies that a defendant who

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\(^{148}\) Id. In its analysis of harm, the Court did not address the issue of potential harm.

\(^{149}\) Id. at 427 (emphasis added).

\(^{150}\) The Court provided this rather unhelpful sentence: "Here the argument that State Farm will be punished in only the rare case, coupled with reference to its assets (which, of course, are what other insured parties in Utah and other States must rely upon for payment of claims) had little to do with the actual harm sustained by the Campbells." Id.


\(^{152}\) This is precisely the problem addressed by Justice Scalia's dissent in \(Gore\): the Court substitutes its judgment for that of the jury, who are supposed to represent the moral outrage of the community, in violation of the Seventh Amendment. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting).

\(^{153}\) \(State Farm\), 538 U.S. at 427.

\(^{154}\) \(TXO\), 509 U.S. at 480–81.
defrauds an individual of his entire but meager life savings is less deserving of punishment than one who embezzles millions of dollars from a corporation with billions of dollars in assets. That corporation is not objectively harmed more than the individual, yet the proportionality rule dictates that the corporation receive greater punitive damages than the individual of lesser means. If punitive damages are to punish a defendant because of egregious conduct, then the level of harm caused should not be the sole measure of punishment. To analogize to criminal law, as Justice O'Connor frequently did in this context, treating harm (e.g., death) as a measure of conduct (killing) would result in identical punishment for manslaughter and first degree murder. While the amount of harm caused should certainly be taken into consideration, it is important to recognize that it is not an accurate measure of the egregiousness of a defendant's tortious conduct. This problem lies at the heart of the Court's proportionality rule.

C. THE THIRD GORE GUIDEPOST: OTHER SANCTIONS

The Court gave short shrift to the third guidepost—"the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases.'" Although the Utah court had referred to the potential for criminal sanctions, the Court disregarded that fact because it depends on "the broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct." The Court also ignored Utah's ability to revoke State Farm's business license or to require disgorgement of profits. Such sanctions were too "speculative" for the Court and were based on State Farm's nationwide practice of refusing to pay claims. While the Court deflated the impact that the availability of criminal sanctions may have on the determination of punitive damages in this case, it nonetheless made assertions that imply that, with the proper procedural protections, a state could impose significant punitive damages for conduct that is codified as criminal.

156. State Farm, 538 U.S. at 428.
157. See id.
158. The State Farm Court wrote:
   The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

Id.; see also Thomas M. Melshheimer & Steven H. Stodghill, Due Process and Punitive Damages:
When compared to its deferential attitude toward states’ imposition of punishment in criminal cases, the U.S. Supreme Court’s setting of substantive limits to punitive damages awards seems completely misguided. For example, as Professor Erwin Chemerinsky and others have pointed out, the disproportionate punishment in criminal cases compared to civil cases is particularly stark in light of the Court’s approval of California’s three strikes law in two cases decided only a month before the Court decided State Farm. Professor Chemerinsky wrote:

In BMW and State Farm, the Court emphasized the need to consider the ratio between the compensatory and punitive damages. Yet, in Ewing and Andrade, the Court paid absolutely no attention to the ratio between the penalty enhancement and the punishment that otherwise would have been imposed. For example, in Andrade, the maximum punishment for two counts of petty theft with a prior is three years, eight months in prison, but Andrade received a sentence of life imprisonment with no possibility of parole for fifty years. This is a ratio of 16:1, larger than the single digits that the Court endorsed in punitive damages cases in State Farm.


What the Court, along with many critics of the current system, has simply ignored is that to the extent there exists a problem of constitutional dimensions in the punitive damages system, it is a problem of procedural due process. Punitive damages awards should not be suspect solely because of the size of the award. Under the right circumstances, punitive damages in the millions or tens of millions could be appropriate. Consequently, substantive limits on such awards are not sensible and are reminiscent of the Court’s jurisprudence in the Lochner era. Nonetheless, punitive damages remain suspect in our current system because of the clumsy, half-in-the-dark process that we foist upon jurors in determining an appropriate award.

Id. at 336 (citing Lochner v. New York, 198 U.S. 45 (1905)).

159. See, e.g., Ewing v. California, 538 U.S. 11 (2003) (affirming sentence of twenty-five years with no possibility for parole for defendant’s third felony conviction involving the theft of three golf clubs, and asserting that “sentence is justified by the State’s public-safety interest in incapacitating and deterring recidivist felons”); Lockyer v. Andrade, 538 U.S. 63, 66, 77 (2003) (affirming two consecutive twenty-five year terms without possibility of parole for two separate incidents of theft of videotapes, worth a total of approximately $150, from two Kmart stores).

160. Ewing, 538 U.S. 11; Andrade, 538 U.S. 63; Erwin Chemerinsky, The Constitution and Punishment, 56 Stan. L. Rev. 1049 (2004) (arguing that the Supreme Court has developed inconsistent approaches to the “four major types of punishments that courts can impose: death sentences, imprisonment, fines, and punitive damages”). Chemerinsky explained that the U.S. Supreme Court requires proportionality analysis when reviewing death penalty and punitive damages cases, but not in evaluating the length of prison sentences. “Indeed, the Court’s decisions provide that taking away too much money is unconstitutional, but too many years in prison is not.” Id. at 1062. Chemerinsky also noted that the Court defers to state legislatures when evaluating prison sentences but not when evaluating punitive damages. Chemerinsky also argued that there is greater historical support for proportionality analysis in prison sentences than in punitive damages awards. Id. at 1065.


161. Chemerinsky, supra note 160, at 1061 (discussing Lockyer, 538 U.S. at 66, and Ewing, 538 U.S.
How can the same Constitution that permits states to impose the death penalty restrict punitive damages sanctions imposed on intentionally willful or recklessly indifferent tortious conduct? The Court has expressed concern about arbitrary awards imposed without the protections of due process, but the proportionality rule is no less arbitrary than leaving the decision to the discretion of a jury and trial court judge. Even worse, the Court’s methodology bears no relation to the state’s legitimate interest in deterring wrongdoing. It is possible to recognize the need for procedural protections without completely undermining the purpose of punitive damages awards, as California’s punitive damages jurisprudence demonstrates.

III. PUNITIVE DAMAGES IN CALIFORNIA

A. REQUIREMENTS FOR PUNITIVE DAMAGES AT TRIAL

Awards of punitive damages have long been permitted in California. The California Code contains extensive provisions regarding punitive damages. It has been suggested that punitive damages are difficult to obtain in California because of statutory limitations. For example, California plaintiffs may not seek punitive damages in actions “arising from contract” unless a tort is alleged, such as breach of the covenant of good faith and fair dealing. California also

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162. How can a $550,000 fine for a briefly bared breast during the Super Bowl be permissible while a $1.7 million punitive damages award for fraud is deemed constitutionally excessive? See Geraldine Fabrikant, CBS Fined Over Super Bowl Halftime Incident, N.Y. TIMES, Sept. 23, 2004, at C1 (reporting FCC fine); Textron Fin. Corp. v. Nat’l Union Ins. Co. of Pittsburgh, Penn., 13 Cal. Rptr. 3d 586 (Ct. App. 2004) (reducing from $1.7 million to $360,000 the punitive damages awarded against an insurance company that engaged in fraud). Those who support the FCC’s crackdown contend such fines affirm and uphold community values. One commissioner of the FCC complained the fine was too low. “I find today’s remedy totally inadequate,” he wrote. “After all the bold talk, it’s a slap on the wrist that can be paid with just seven and a half seconds of Super Bowl ad time.” Fabrikant, supra. In a similar vein, punitive damages awards based on a defendant’s wealth seek to ensure that parties do not engage in—or profit from—conduct that disrupts the social order. See Marc Galanter & David Luban, Poetic Justice: Punitive Damages and Legal Pluralism, 42 AM. U. L. REV. 1393, 1430, 1436–38 (1993).

163. See Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 380 (Ct. App. 1981) (noting that punitive damages were permitted under “the common law of this state long before the Civil Code was adopted” and were enacted into statute in 1872 (citations omitted)).

164. See, e.g., LEVINE ET AL., supra note 23, at 156–57; CAL. CIV. CODE §§ 3294, 3295 (Deering 2005); see also CAL. CIV. CODE CIV. PROC. §§ 425.10, 425.11. For example, a plaintiff may not plead a specified amount of punitive damages. See CAL. CIV. CODE § 3295(e).

165. See LEVINE ET AL., supra note 23, at 156.

166. See CAL. CIV. CODE § 3294(a) (“In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.”). Thus an insured may bring action against an insurance company even though the action arises from a contractual relationship. See, e.g., Neal v. Farmers Ins. Exch., 582 P.2d 980 (Cal. 1978). For a persuasive argument that punitive damages should be permitted for willful breaches of contract, including both opportunistic and efficient
limits the imposition of punitive damages on employers for the conduct of an employee, and plaintiffs alleging medical malpractice must obtain court approval before seeking punitive damages. Several statutes also cap the amount of punitive damages that may be awarded for specific causes of action. In contrast, Justice O'Connor cited a 1987 study that found that "punitive damages were assessed against one of every ten defendants who were found liable for compensatory damages in California." Regardless, California is one state where punitive damages breaches, see William S. Dodge, The Case For Punitive Damages in Contracts, 48 DUKE L.J. 629 (1999).

Justice O'Connor attributed much of the increase in punitive damages awards to a change in the substantive law that permits such awards in actions for bad faith breach of contract. See Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 61 (1991) (citing RAND INSTITUTE FOR CIVIL JUSTICE, PUNITIVE DAMAGES—EMPIRICAL FINDINGS iii (1987)). Jane Mallor and Barry Roberts explain:

Several writers have suggested that the trend toward imposing punitive damages in contract cases reflects courts' efforts to protect vulnerable parties against abuse of bargaining power by dominant parties. . . . If a breaching party is unable to advance some reasonable basis in law or in fact for failing to perform contractual obligations, an inference of bad faith is unavoidable. When this bad faith is coupled with disparity in bargaining power, the sanction of punitive damages is appropriate.

Mallor & Roberts, Principled Approach, supra note 59, at 662–63 (citations omitted).

In more than 30 instances, the Legislature has provided for double or treble damages as a punishment for wrongful acts. (See, e.g., Bus. & Prof. Code, §§ 17537.4 [unlawful advertising], 21140.4 [violations of regulations governing fuel franchises]; Civ. Code, § 1812.9 [willful violation of laws governing retail installment sales], 1947.10 [evictions based on fraudulent intent to occupy], 3345 [unfair or deceptive practices against senior citizens or disabled persons]; Lab. Code, § 206 [failure to pay certain wages].)


A study published in 1997 found that punitive damages are awarded in only three percent of jury trials and in six percent of jury trials where the plaintiff prevailed. See Yeazell, supra note 18, at 2037 (citing Theodore Eisenberg et al., The Predictability of Punitive Damages, 26 J. LEGAL STUD. 623, 634 (1997)). Of course, given the number of cases that never make it to trial, reciting the percentage of jury verdicts that include punitive damages does not give an accurate picture of the frequency of punitive damages. Such awards might be embedded in settlements and may be awarded in arbitration.

Furthermore, while Justice O'Connor cited the number to support her assertion that punitive damages awards are skyrocketing (a fact that has been much disputed, see supra note 54), the figure standing alone is ultimately meaningless. It does not tell us whether that percentage is high relative to other states or the nation as a whole. It does not indicate whether it is historically high, and even if it were, that fact does not necessarily support the implication that punitive damages are running wild in California. It may simply reflect a reality in which the community is less willing to turn a blind eye to tortfeasors' willful conduct; it may reflect an increasing consensus that persons should not be permitted to purchase the right to cause harm to others.

The American Bar Association has determined that while "punitive damages awards have grown in frequency and size over the past twenty-five years, the bulk of this growth has been in cases of intentional torts, unfair business practices, and contractual bad faith. The punitive damages picture in personal injury cases has changed very little in 25 years." Melsheimer & Stodghill, supra note 158, at
jurisprudence is a far cry from the unbounded discretion of which the U.S. Supreme Court has complained.\textsuperscript{71}

1. Specific Intent Required to Award Punitive Damages in California

California punitive damages law places special emphasis on the mental state of the defendant, who must act with specific intent.\textsuperscript{72} To recover punitive damages in California, a plaintiff must show that the defendant "has been guilty of oppression, fraud, or malice." Each of those terms is statutorily defined.\textsuperscript{74} For example, "malice" is defined as conduct intended to cause injury or, alternatively, despicable conduct that willfully and consciously disregards the rights or safety of others.\textsuperscript{75}

For example, to justify a punitive damages award in \textit{Neal v. Farmer's Insurance Exchange}, it was not enough to show that the defendant insurance company breached its "duty to deal reasonably and in good faith with its insured." Rather, the plaintiff had to prove that the defendant "acted with the quality of intent that is requisite to an award of punitive damages."\textsuperscript{77} The plaintiff proved that intent by presenting evidence that included a claims manual instructing insurance agents how to capitalize on the vulnerability of the insured.\textsuperscript{78} The plaintiff in \textit{Neal v. Farmers Ins. Exch.}, 582 P.2d 980, 986 (Cal. 1978) (citations omitted). This approach is in keeping with the longstanding history of punitive damages, which were initially imposed only for intentional torts. Schwartz & Behrens, \textit{Punitive Damages Reform, supra} note 16, at 1369.

\textsuperscript{332} Melsheimer and Stodghill argue that anecdotal evidence of skyrocketing punitive damages awards disregards the fact that many punitive damage awards are "substantially reduced or overturned on appeal." \textit{Id.}

\textsuperscript{171} See, e.g., Haslip, 499 U.S. at 18 (noting that "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities"); Browning-Ferris Indus. of VT., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan, J., concurring) (describing the jury instructions as "scarcely better than no guidance at all").

\textsuperscript{172} Neal v. Farmers Ins. Exch., 582 P.2d 980, 986 (Cal. 1978) (citations omitted). This approach is in keeping with the longstanding history of punitive damages, which were initially imposed only for intentional torts. Schwartz & Behrens, \textit{Punitive Damages Reform, supra} note 16, at 1369.

\textsuperscript{173} \text{CAL. CIV. CODE} § 3294(a).

\textsuperscript{174} "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." \text{CAL. CIV. CODE} § 3294(c)(1).

"Oppression carries with it an attitudinal element, for it implies knowledge of power over a weaker party and use of that power as leverage to gain one's own ends." Mallor & Roberts, \textit{Principled Approach, supra} note 59, at 653.

"Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." \text{CAL. CIV. CODE} § 3294(c)(3) (emphasis added).

\textsuperscript{175} \text{CAL. CIV. CODE} § 3294(c) (emphasis added).

\textsuperscript{176} \textit{Neal}, 582 P.2d at 986.

\textsuperscript{177} \textit{Id.}

\textsuperscript{178} \textit{Id.} at 987. The manual stated: "It is important for the claims representative to learn how to sense opportune times for settlement... Such things as a marriage or death in the family, the purchase of a home or automobile will present the ordinary claimant with a financial situation which will suggest to him the advisability of getting his money out of his claim." \textit{Id.} at 987 n.8. The plaintiff in
had informed her agent that because she was suffering from cancer, she was eager to receive payment of the amount owed under her insurance contract.\textsuperscript{7} As instructed by the claims manual, the defendant’s agent pounced on this opportunity and tried to force the insured to accept a much lower amount.\textsuperscript{8} The court viewed the evidence as strongly supporting the jury’s determination that the defendant engaged in oppressive conduct by taking advantage of the plaintiff’s financial vulnerability.\textsuperscript{8}

2. \textit{Clear and Convincing Evidence Required in California}

In addition to statutorily defining the requisite mental state required to impose punitive damages, California law requires that the plaintiff prove by clear and convincing evidence that the defendant engaged in “despicable conduct.”\textsuperscript{9} This is a more stringent standard than the preponderance of the evidence standard used to prove liability in civil actions. The U.S. Supreme Court approved, but did not require, this standard in \textit{Haslip}.\textsuperscript{10} It has been argued that this heightened standard impresses on juries the need for extra consideration in awarding punitive damages.\textsuperscript{11}

California has long provided pattern instructions to advise the jury as to the basic law regarding punitive damages. Use of the approved

\textit{Neal} had informed her agent that because she was suffering from cancer, she was eager to receive payment of the amount owed under her insurance contract. \textit{Id.} at 984. The court viewed the evidence as strongly supporting the jury’s determination that the defendant engaged in oppressive conduct by taking advantage of the plaintiff’s financial vulnerability. \textit{Id.} at 986. \textit{Neal} is similar to \textit{State Farm v. Campbell}, in which:

\begin{quote}
[The trial court noted the testimony of several former State Farm employees affirming that they were trained to target “the weakest of the herd”—“the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit” . . . . The Campbells themselves could be placed within the “weakest of the herd” category.]
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\textit{Id.} at 987 (stating that the defendant’s conduct was “designed to utilize the lamentable circumstances in which Mrs. Neal and her family found themselves, and the exigent financial situation resulting from it, as a lever to force a settlement more favorable to the company than the facts would otherwise have warranted”).
\end{quote}

\begin{quote}
\textit{Id.} at 986. The jury awarded the plaintiff approximately $1.54 million in punitive damages and approximately $10,000 in compensatory damages. The California Supreme Court reduced the punitive damages award to $740,000. \textit{Id.} at 983.
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\textit{Schwartz & Behrens, supra} note 16, at 1381–82. Justice O’Connor asserts that “the clear-and-convincing-evidence requirement [constrains] the jury’s discretion, limiting punitive damages to the more egregious cases.” \textit{Haslip}, 499 U.S. at 58 (O’Connor, J., dissenting). \textit{But see Melsheimer & Stodghill, supra} note 158, at 347 (A higher standard of proof for imposing punitive damages “makes no sense and has no real parallel anywhere in the law. Moreover, making punitive damages harder to prove rewards the defendant for gross misconduct and, from an economic efficiency standpoint, does not provide the proper disincentive for undesirable behavior.”).
\end{quote}
instructions is not mandatory, as the parties may submit to the judge for approval their own written instructions. However, these instructions certainly set a standard for shaping jury deliberation as to whether clear and convincing evidence was presented during the trial. For cases in which punitive damages are sought, the Judicial Council of California has promulgated different jury instructions for various scenarios, taking into account such factors as whether the defendant is an individual or an entity; whether the trial is bifurcated, with damages tried separately; and whether employer liability stems from the conduct of an employee. The instructions explain the purpose of punitive damages, the clear and convincing evidence standard of proof, the statutory specific intent required to impose punitive damages, and the factors to be considered in calculating the amount of punitive damages to award.

California's jury instructions provide a great deal more guidance than those criticized by Justice O'Connor in her dissent in Haslip. In that case, the jury was told: “Imposition of punitive damages is entirely discretionary with the jury, that means you don’t have to award it unless this jury feels that you should do so.” Justice O'Connor faulted such instructions for providing no guidance as to how the jury should exercise its discretion.

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185. See 7 Witkin, California Procedure: Trial § 287B (4th ed. Supp. 2004); id. §§ 274–275 (4th ed. 1997). Parties' attorneys may present special instructions to the judge for approval. They “should be accurate, brief, understandable, impartial, and free from argument,” and they “must include a citation to authority.” Levine et al., supra note 23, at 677 (quoting Cal. R. Court 229(d)).

186. See Judicial Council of California Civil Jury Instructions (CACI) nos. 3940–3949. Before adoption of the CACI in 2003, California courts had available pattern jury instructions, known as BAJI, promulgated by the Superior Court of Los Angeles County. Levine et al., supra note 23, at 665, 677.

187. For instance, CACI 3945 includes the following instructions, as well as numerous others:

You may award punitive damages against [name of defendant] only if [name of plaintiff] proves that [name of defendant] engaged in that conduct with malice, oppression, or fraud. If you decide to award punitive damages, you should consider all of the following in determining the amount:

(a) How reprehensible was [name of defendant]'s conduct?
(b) Is there a reasonable relationship between the amount of punitive damages and [name of plaintiff]'s harm?
(c) In view of [name of defendant]'s financial condition, what amount is necessary to punish it and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [name of defendant] has substantial financial resources. [Any award you impose may not exceed [name of defendant]'s ability to pay.]

188. Haslip, 499 U.S. at 6 n.1, 44.
189. See id.
B. APPELLATE REVIEW OF PUNITIVE DAMAGES IN CALIFORNIA BEFORE STATE FARM

California’s heightened standard of proof is buttressed by a searching appellate review. An award is affirmed only if it is supported by “substantial evidence.” At least since 1978, when the California Supreme Court set forth guidelines in Neal v. Farmers Insurance Exchange, California courts have reviewed punitive damages awards based on the reprehensibility of the defendant’s conduct, the amount of compensatory damages awarded, and the wealth of the defendant. These principles are analogous to the U.S. Supreme Court’s Gore guideposts, except that the California guideposts actually seek to deter persons from intentionally engaging in reprehensible conduct that harms others. Rather than having as their primary goal the limitation of an award, as the Gore guideposts do, California courts aim for a happy medium: “The channeling of just the correct quantum of bile to reach the correct level of punitive damages.” In other words, California courts recognize that punitive damages can be either too high or too low, depending on the facts of a particular case; there is no one-size-fits-all approach.

1. Reprehensibility Analysis in California

California’s analysis of reprehensibility is essentially the same as the Gore guidepost: “the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal.” In Gore, the U.S. Supreme Court identified reprehensibility as the most important factor in awarding punitive damages. However, if courts are constitutionally prohibited from awarding punitive damages greater than a single-digit ratio to compensatory damages, as the Court implies in State Farm, and as many courts and commentators have inferred, the California guideposts are the same as those set forth in Gore. See supra text accompanying note 93. The third guidepost in Gore involves a comparison to civil and criminal sanctions for similar conduct, whereas California’s third guidepost is the wealth of the defendant. Murakami, 813 P.2d at 1350.

190. See Schwartz & Behrens, supra note 16, at 1382; see also Haslip, 499 U.S. at 58 (O’Connor, J., dissenting) (stating that the higher standard “would also permit closer scrutiny of the evidence by trial judges and reviewing courts”). But see Melsheimer & Stodghill, supra note 158, at 349 (arguing that heightened standards of proof “devalue the role of the jury as the purveyor of justice in our society”).
193. California’s first and second guideposts are the same as those set forth in Gore. See supra text accompanying note 93. The third guidepost in Gore involves a comparison to civil and criminal sanctions for similar conduct, whereas California’s third guidepost is the wealth of the defendant. Murakami, 813 P.2d at 1350.
195. Neal, 582 P.2d at 990 (citations omitted).
196. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996) (“Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.”). Perhaps that “perhaps” should have alerted us to the Court’s equivocation on the matter.
197. See supra text accompanying notes 136–39.
198. See supra notes 17–21 and accompanying text.
then reprehensibility is no longer the most important factor in evaluating the amount awarded. Rather, the proportionality rule assumes central importance.99 In contrast, the California Supreme Court "has emphasized that none of the three Neal factors can be dispensed with in calculating punitive damages awards."200

2. Comparison of Punitive Damages to Compensatory Damages in California

While California's procedure resembles the Gore guidepost in comparing punitive damages to the amount of compensatory damages awarded, California courts have rejected imposing any particular ratio as a constitutional ceiling.201 Thus, while "punitive damages should bear a reasonable relationship to actual damages suffered... there is no fixed ratio by which to determine the reasonableness of that relationship."202 A random sampling of awards compiled by one California appellate court in 1984 found that such ratios have ranged from one to one to 476.2 to

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99. One review of appellate courts' responses to State Farm nationwide affirmed the impression that the proportionality rule has seized hold of the appellate process and overridden other factors in evaluating the size of awards. See Birnbaum & Dunham, supra note 21, at 160-70.


201. There has been support, however, on the California Supreme Court for judicially imposing a cap on punitive damages. In Lane v. Hughes Aircraft Co., which concerned the standard of review to be used by an appellate court of a trial court's granting of a new trial, then-Justice Janice Rogers Brown penned both the majority opinion and a concurring opinion in which she gave a lengthy tirade on the arbitrariness of punitive damages awards. Id. at 398-404. In that concurring opinion, which was longer than her opinion for the majority, Justice Brown advocated the imposition of a fixed ratio of three to one. Id. at 399. She arrived at the factor of three by pointing to statutory limits on punitive damages, none of which permit punitive damages more than three times compensatory damages. See supra note 169.


Justice Mosk wrote a separate opinion solely addressing Justice Brown's concurring opinion. Lane, 993 P.2d at 395-98 (Mosk, J., concurring). He points out that Justice Brown's analysis ignored the fact that the legislature has imposed caps in only specified circumstances. Id. at 396-97. The California Code also includes numerous provisions authorizing punitive damages without setting a cap. See id. at 397. The two opinions juxtapose nicely the arguments made in the debate about punitive damages. Justice Mosk countered Justice Brown's argument:

Indeed, my research reveals that there are over 150 California statutes that address punitive or exemplary damages. Taking the concurring opinion's figure that double and treble damages are used in "more than 30 instances," we must conclude that the Legislature has used double or treble damages as a limit on punitive damages in a small minority of the statutes in which it has chosen to address punitive damages... Rather, all we can safely generalize, after observing the entire patchwork of punitive damages statutes, is that the Legislature has enacted a number of statutes containing a variety of responses to punitive damages, some providing double damages, some treble damages, some providing monetary caps, some prohibiting punitive damages altogether, and many statutes permitting punitive damages without limitation.

Id. at 397 (citation omitted).

Justice Brown relied heavily in her opinion on a study of jury deliberation conducted by legal scholars. See id. at 399-401 (repeatedly citing Cass R. Sunstein, Daniel Kahneman & David Schkade, Assessing Punitive Damages (with Notes on Cognition and Valuation in Law), 107 YALE L.J. 2071 (1998)). Such work has been the subject of much criticism in large part because it was funded by the Exxon Corporation. See, e.g., Lempert, supra note 54, at 867; Vidmar, supra note 54, at 1360 n.2.

That court endeavored to "discern from the cases a single formula for calculating punitive damages. . . . Instead of making a mathematical breakthrough [they] discovered what everyone probably already knows: the formula does not exist." The court embraced the lack of a discernible ratio as an affirmation of the human element in the law:

Although we may now live in a highly computerized society, it is important to recognize the justice system need not and should not mirror a mechanistic view of life. The life of the law should continue to be experience. The concept of justice connotes a human process, performed by judges and juries in good faith, exercised with compassion, still tinged with sufficient subjectivity to conform the rules of law to the realities of life.

Any effort to set a fixed ratio inevitably deprives the law of that human element. Where punitive damages express the community's values and its desire to punish and deter reprehensible conduct, that human element is essential.

3. The California Defendant's Financial Condition

The third factor in a California court's review of punitive damages is the financial condition of the defendant. "A reviewing court cannot make a fully informed determination of whether an award of punitive

203. See id. app. at 211.
204. Id. at 208-09.
205. Id. at 209.
206. Legal scholars have criticized the imposition of limits on punitive damages as an infringement on the role of the jury. See, e.g., Melsheimer & Stodghill, supra note 158, at 348. Melsheimer and Stodghill quoted then-Justice Rehnquist (writing in the context of res judicata):

"The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny . . . a safeguard too precious to be left to the whim of . . . the judiciary. . . . Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense . . . and thus keep the administration of law in accord with the wishes and feelings of the community. . . . Those who favored juries believed that a jury would reach a result that a judge either could not or would not reach."

207. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting) ("At the time of adoption of the Fourteenth Amendment, it was well understood that punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved."); see also David G. Owen, The Moral Foundations of Punitive Damages, 40 Ala. L. Rev. 705 (1989) (exploring the moral underpinnings of punitive damages and finding such damages supported by our cultural conceptions of equality and freedom).

Each person is a morally special, autonomous creature who has the ability and right to control his own destiny and a duty to do so in a manner respectful of the similar right of others. Each person, therefore, is entitled to be treated as an end in himself, who should not be used to his detriment merely as a means to someone else's end. . . . The law [of punitive damages] reaffirms the equal worth of all and the duty of each person to respect—to assign equal worth to—the rights of others.

Id. at 708, 711 (citations omitted).
damages is excessive unless the record contains evidence of the defendant's financial condition.\textsuperscript{208} The defendant's "wealth is an important consideration" because "the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective" of punishing and deterring.\textsuperscript{209} "[O]bviously, the function of deterrence ... will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort."\textsuperscript{210} Likewise, "the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter."\textsuperscript{211} Recognizing that punitive damages are not intended to destroy a defendant financially, California courts have reduced punitive damages awards upon consideration of the defendant's financial condition.\textsuperscript{212}

In California courts, the plaintiff must present evidence of the defendant's financial condition in order to obtain a punitive damages award.\textsuperscript{213} On one hand, such evidence seeks to ensure that a punitive award is sufficiently large to deter the defendant and others from engaging in similar conduct in the future.\textsuperscript{214} "An award which is so small that it can be simply written off as a part of the cost of doing business would have no deterrent effect."\textsuperscript{215} On the other hand, such evidence ensures that the award is not larger than necessary to deter.\textsuperscript{216} "Absent evidence of a defendant's financial condition, a punitive damages award can financially annihilate him."\textsuperscript{217}

As discussed above, the U.S. Supreme Court has cast doubt on this practice.\textsuperscript{218} However, it should be noted that California's use of financial condition as a factor in awarding punitive damages involves significant

\textsuperscript{208} Adams v. Murakami, 813 P.2d 1348, 1351 (Cal. 1991).
\textsuperscript{210} Neal, 582 P.2d at 990.
\textsuperscript{211} Id.
\textsuperscript{212} See Murakami, 813 P.2d at 1351-52 (noting several cases in which courts reduced the punitive damages award because it comprised too great a proportion of the defendant's income or net worth).
\textsuperscript{213} See, e.g., id. at 1349 ("[A]n award of punitive damages cannot be sustained on appeal unless the trial record contains meaningful evidence of the defendant's financial condition."); see also Cal. CIV. CODE § 3295(d) (Deering 2005) ("Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff."). "Net worth generally is considered the best measure of a defendant's 'wealth' for purposes of assessing punitive damages." Devlin, 202 Cal. Rptr. at 210 (citing Little v. Stuyvesant Life Ins. Co., 136 Cal. Rptr. 653, 663 n.5 (Ct. App. 1977)). However, since courts also consider other figures that show an ability to pay punitive damages, "wealth" and "financial condition" are used interchangeably in this Note where they are meant to signify in general defendant's ability to pay punitive damages.
\textsuperscript{214} See Murakami, 813 P.2d at 1350.
\textsuperscript{216} See Murakami, 813 P.2d at 1351.
\textsuperscript{217} Id. at 1353.
\textsuperscript{218} See text accompanying notes 22-23, 149-51.
procedural protections for the defendant. For instance, to protect against prejudicing the jury against a wealthy defendant, evidence of the defendant's financial condition is not presented until after the jury has determined that the defendant's conduct falls within the statute's definition of malice, oppression or fraud. If more than one defendant is on trial, such evidence is permitted only with regard to the particular defendant found liable for acts of malice, oppression or fraud. California also prevents fishing expeditions into a defendant's financial condition by requiring court approval for such discovery. Specifically, the plaintiff must convince the judge that there is a "substantial probability" that the plaintiff will succeed in proving that the defendant acted with the requisite malice, oppression or fraud.

California courts may reverse an award of punitive damages if the plaintiff fails to present evidence of the defendant's financial condition as required by statute. Although a defendant's net worth is the preferred measure of a defendant's financial condition for assessing punitive damages, it has never been viewed as the only type of evidence permitted. For example, one court permitted evidence of the defendant's monetary gain from its misconduct as sufficient to support an award. In Cummings Medical Corp. v. Occupational Medical Corp., the plaintiff did not have the opportunity to obtain and present evidence of the defendant's net worth because the court entered a default judgment against the defendant. However, because the record contained evidence of the amount the defendant profited from his allegedly fraudulent actions, the

219. See Cal. Civ. Code § 3295(d). Upon request, a defendant may obtain a bifurcated trial so that the liability phase is not tainted with evidence relevant only to the question of punitive damages. Id.; see also Melshemer & Stodghill, supra note 158, at 349 ("[B]y separating the issue of whether the defendant is liable from whether the defendant should be punished... the risk that the issue of the defendant's wealth will taint the liability determination is minimized, if not completely eliminated."); Schwartz & Behrens, supra note 16, at 1382 ("Bifurcated trials are equitable because they prevent evidence that may be relevant only to the issue of punitive damages, such as evidence of a defendant's net worth or profits, from being heard by the jury when it is determining basic liability.").


221. See Cal. Civ. Code § 3295(c); see also Jabro v. Superior Court, 115 Cal. Rptr. 2d 843, 845 (Ct. App. 2002) ("[T]he statute is 'intended to protect defendants from being pressured into settling non-meritorious cases in order to avoid divulging their financial privacy in civil discovery.'" (citation omitted)). The standard of proof, "substantial probability," is greater than that required to avoid dismissal on a defendant's motion for summary judgment. See id. at 845.


225. Id. at 587, 591.
appellate court permitted a total award of compensatory and punitive
damages equal to, but no more than, the defendant's net profit from its
misconduct.\textsuperscript{226}

4. California's Punitive Damages Serve a Public Purpose

California recognizes that punitive damages serve a public
purpose.\textsuperscript{227} That purpose "is to punish wrongdoing and thereby to protect

\textsuperscript{226} Id. at 591. This approach implies support for disgorgement or a restitutionary approach in
certain cases.

\textsuperscript{227} Adams v. Murakami, 813 P.2d 1348, 1359 (Cal. 1991). Many commentators also refer to the
public function of punitive damages. See, e.g., E. Jeffrey Grube, Note, \textit{Punitive Damages: A Misplaced
function, punitive damages should be paid to the State rather than the plaintiff. \textit{Id.} Others have argued
that plaintiffs serve as "private attorneys general" and that punitive damages compensate them for
performing a function that the state cannot perform without a cumbersome bureaucracy. See, e.g.,
Galanter & Luban, \textit{supra} note 162, at 1445; Mallor & Roberts, \textit{ Principled Approach, supra} note 59, at
649–50. Galanter and Luban argue that "the use of punitive damages can be viewed as a partial offset
to weak administrative controls" and that "[n]o federal agency has or could have the resources to carry
out so many investigations, nor would we be likely to welcome a federal agency that is such a nosey
intruder." Galanter & Luban, \textit{supra} note 162, at 1426, 1441. While Grube recommended that punitive
damages be paid to the state, he recognized the public function plaintiffs serve and, when
compensatory damages are low, recommended that the state pay a portion of the punitive damages to

In contrast, Martin H. Redish and Andrew L. Mathews argued that punitive damages themselves
are unconstitutional because private actors are not legally empowered to vindicate the public interest. See
Martin H. Redish & Andrew L. Mathews, \textit{Why Punitive Damages are Unconstitutional}, 53 Emory
L.J. 1 (2004). Rather, they argue, only the state should be permitted to punish private actors:

\begin{quote}
\[\text{[A]llowing private plaintiffs to exercise purely public authority in the manner authorized by the existence of punitive damages perversely upsets the delicate balance, within a liberal democracy, between the pursuit of private and public interests. As a result, state power that in a democratic society is presumed to be exercised by those who are required to act only in the public interest and are subject to some form of ultimate democratic accountability is transferred to private individuals who lack both the objectivity and accountability normally associated with the exercise of pristine public power.}\]
\end{quote}

\textit{Id.} at 3. While their argument may appeal to a rigidly formalistic perspective, it ignores both the long
history of imposing punitive damages in civil actions and the pragmatic recognition that leaving the
state to punish especially egregious tortfeasors would either result in lax punishment (and hence
minimal deterrence) or a huge bureaucracy, as Galanter and Luban point out, \textit{supra} note 162, at 1445.
Redish's and Mathews' likening of such private punishment to "the legal version of vigilantism and
blood feuds" also disregards the state functions performed by the jury, reviewing judge and appellate
review. See Redish & Mathews, \textit{supra}, at 3. The authors also assumed the existence and necessity of an
extreme private/public dichotomy. See \textit{id.} at 3–4, 30–34 (arguing that "our constitutional structure
must prevent private power from invading the public sphere"). "Critical legal studies theorists have
attacked the public-private dichotomy on the grounds that the distinction is neither normatively nor
empirically justifiable. Because critical legal studies scholars completely reject the liberal democratic
values associated with individual integrity, however, their attacks must be deemed inconsistent with
the proper normative foundations of American democracy." \textit{Id.} at 31 n.132 (citing MORTON HORWITZ,
The Transformation of American Law, 1780–1860 (1977)). For a critique of formalistic
public/private legal distinctions, see Angela P. Harris, \textit{Rereading Punitive Damages: Beyond the
Public/Private Distinction}, 40 Ala. L. Rev. 1079, 1090–99 (1989) (tracing the public/private distinction
to eighteenth-century legal commentators).

California has temporarily imposed a seventy-five percent tax on punitive damages awards, with
the proceeds paid to the Public Benefit Trust Fund. See \textit{Cal. Civ. Code} § 3294.5 (Deering 2005). For
criticism of payment of punitive damages to the state, see Victor E. Schwartz et al., \textit{I'll Take That:
[the public] from future misconduct, either by the same defendant or other potential wrongdoers. The essential question therefore in every case must be whether the amount of damages awarded substantially serves the societal interest. 228 California courts' focus on the public purpose of punitive damages distinguishes it from the U.S. Supreme Court's orientation toward more private concerns, as seen in its focus on the defendant's harm to the specific plaintiff and its de-emphasis on deterring harm to others. 229

IV. APPELLATE REVIEW OF PUNITIVE DAMAGES IN CALIFORNIA AFTER STATE FARM

California courts have, for the most part, dutifully heeded the Supreme Court's proportionality rule. They have repeatedly reduced awards, and they have paid particular attention to the ratio of compensatory damages to punitive damages. 230 However, in a few cases, California courts have tweaked the analysis so as to affirm a higher punitive damages award than might otherwise be permitted under a strict application of State Farm's proportionality rule. 231 Three of these cases—including two decided by the California Supreme Court on the same day—are discussed in this Part.

A. CALCULATING POTENTIAL HARM: SIMON V. SAN PAOLO U.S. HOLDING CO.

Simon v. San Paolo U.S. Holding Co. has been reviewed twice by the U.S. Supreme Court and remanded for reconsideration of the punitive damages award. 232 After each remand, the California Court of Appeal

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228. Murakami, 813 P.2d at 1350 (citations omitted).

229. But see Part IV.B.2 for the California Supreme Court's critique of the assumption that the U.S. Supreme Court adopted a narrow, strictly private view of punitive damages in State Farm.

230. See supra note 21.

231. For example, in City of Hope Nat'l Med. Center v. Genentech, Inc., 20 Cal. Rptr. 3d 234 (Ct. App. 2004), rev. granted, 105 P.3d 543 (Cal. 2005), a case involving the withholding of royalties due for patent licenses, an appellate court affirmed an award of $200 million in punitive damages where the compensatory damages were approximately $300 million. In doing so, it gave only cursory attention to the principles laid out in State Farm (perhaps resting comfortably in the two-to-three ratio). See id. at 272-73. The court found the large award justified by the defendant's decades-long practice of intentionally withholding royalties owed to the plaintiff and concealing the existence of licensing agreements from the plaintiff in breach of an agreement between the parties. Id. at 273. The court acknowledged that the harm suffered was merely economic, but seemed to justify the substantial award by reference to the plaintiff's humanitarian role as a provider of health care: "While Genentech did not directly jeopardize anyone's life, safety, or health, it damaged an entity that is in the business of providing medical care to the poor, often at City of Hope's own expense." Id. at 273. The California Supreme Court has agreed to hear this case. 105 P.3d 543 (Cal. 2005).

affirmed the jury's award of $1.7 million in punitive damages, where compensatory damages were $5,000. In its most recent remand, the appellate court applied the *Gore* guideposts and *State Farm*’s proportionality rule, and arrived at the same result. The California Supreme Court heard this case and predictably reduced the punitive damages award to $50,000.233

Simon involved promissory fraud in the context of a real estate transaction.234 The defendant, San Paolo, was the subsidiary of a bank, with a net worth in the range of $45 to $55 million.235 The plaintiff, Simon, was the owner of a small paper and printing business that competed with larger businesses like Office Depot and Staples.236 His assets were said to be approximately $1 million.237 Simon sought to purchase a building owned by San Paolo that could house his business. He negotiated the purchase with Duane King, a vice president of San Paolo.238 The facts are somewhat complicated, but essentially King did not deal honestly with Simon.239 The jury determined that San Paolo (through King) failed to negotiate exclusively with Simon in good faith as promised in a letter of intent: while negotiating with Simon, King also negotiated with another buyer, to whom the building was eventually sold.

When the negotiations fell apart, Simon sued for specific performance of


234. Simon v. San Paolo U.S. Holding Co., 7 Cal. Rptr. 3d 367, 376, 378 (Ct. App. 2003), rev’d, 113 P.3d 63 (Cal. 2005). The court explained that "promissory fraud requires proof of an unperformed promise, made about a material fact, without any intention of performing it, and with the intent to deceive the plaintiff or to induce entry into a transaction; and upon which the plaintiff justifiably and injuriously relies." *Id.* at 378.

235. *Id.* at 394-95.

236. *Id.* at 390 n.15.

237. *Id.* at 384 n.9.

238. *Id.* at 379.

239. *Id.* at 376. Simon, who had a law degree and was not represented by counsel until the deal fell apart, negotiated and approved a letter of intent that included the word “binding” in it. *Id.* at 379-81. When San Paolo’s representative faxed him a revised letter of intent for Simon’s signature, the word “binding” had been removed. *Id.* at 380. However, Simon assumed it was still binding; he had specifically negotiated for a binding agreement to negotiate exclusively because King had previously repeatedly changed the terms of the deal. *Id.* at 379-80 & n.7. Simon signed the letter of intent (without the word “binding” in it) and sent it to San Paolo. That same day (June 12, 1996) he was told that King had signed it also and that “[w]e have a deal.” *Id.* That evening, however, Simon received a faxed copy of the fully signed letter of intent; the fax cover included the note, “Signed Letter of Intent (nonbinding).” *Id.* The next day, King demanded new terms, but Simon refused, demanding instead that King honor the letter of intent; King refused to do. *Id.* at 380-81. Two days after signing the letter of intent, on June 14, Simon received a fax from King terminating negotiations. *Id.* at 381.

In the meantime, King had been negotiating with a second buyer for the same building and, on June 14, opened escrow for that transaction. *Id.* Inexplicably, on June 17, King contacted Simon and agreed to the letter of intent, but at a price of $1,500,000, which was $400,000 more than the price set forth in the letter of intent. *Id.* at 381, 379. Negotiations ended, and Simon filed suit on June 21, seeking specific performance for the sale of the property. *Id.* at 375-76.
the sale of the building.\textsuperscript{240}

Simon's request for specific performance was dismissed but the cause of action for promissory fraud went to trial. A jury found for Simon, awarding him $5,000 in compensatory damages and $2.5 million in punitive damages.\textsuperscript{241} When Simon refused a reduction in punitive damages to $250,000, the court granted a new trial on the issue of punitive damages. The second jury awarded $1.7 million.\textsuperscript{242} It was this verdict that the U.S. Supreme Court twice remanded for reconsideration.

1. The Appellate Court's Erroneous Analysis of Harm in Simon

After the second remand, the California Appellate Court applied the \textit{Gore} guideposts. Under its reprehensibility analysis, the court acknowledged that the case lacked many of the aggravating factors set forth by the U.S. Supreme Court in \textit{Gore} and reiterated in \textit{State Farm}.\textsuperscript{243} Nevertheless, the court found the aggravating factors of "intentional trickery or deceit" and a "pattern of deceit," rejecting the defendant's "characterization of its misconduct as a single incident of only a false promise" or "just a business deal gone awry."\textsuperscript{244} San Paolo's pattern of deceit consisted of the perfidious conduct of King while negotiating with both Simon and a second buyer, as well as King's "lying to the trial court" both in testimony and in filing "false declarations."\textsuperscript{245}

Under the second guidepost, "disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award," the court found that the compensatory damages did not reflect the actual harm suffered by the plaintiff.\textsuperscript{246} Rather, the substantive law provided that "a defrauded purchaser of real property, who does not succeed in acquiring the property, may recover only his or her out-of-pocket losses, not benefit-of-the-bargain damages."\textsuperscript{247} In other words, the \textit{Simon} court acknowledged that compensatory damages do not necessarily reflect the harm suffered by the plaintiff.\textsuperscript{248} The court found that Simon's actual harm included the loss of the bargain, which the court calculated as the difference between the sales price of $1.1 million set forth in the letter of intent and the building's appraised value of $1.5 million.\textsuperscript{249} Thus, with actual harm of $400,000, the ratio of punitive

\begin{itemize}
\item \textsuperscript{240} Id. at 381, 375–76.
\item \textsuperscript{241} Id. at 376.
\item \textsuperscript{242} Id.
\item \textsuperscript{243} See supra text accompanying notes 100–08, 125.
\item \textsuperscript{244} Simon, 7 Cal. Rptr. 3d at 385.
\item \textsuperscript{245} Id.
\item \textsuperscript{246} Id. at 386–87, 390.
\item \textsuperscript{247} Id. at 388 (citing Kenly v. Ukegawa, 19 Cal. Rptr. 2d 771 (Ct. App. 1993); CAL. CIV. CODE § 3343).
\item \textsuperscript{248} Other California courts have made the same observation. See supra text accompanying note 355.
\item \textsuperscript{249} See Simon, 7 Cal. Rptr. 3d at 390. Both parties agreed the appraised value was $1.5 million. Id.
damages to compensatory damages was "just over 4 to 1." The court justified its analysis by noting that "the Supreme Court did not prohibit consideration of harm to the plaintiff that is not reflected in the compensatory-damage award. Indeed, the Court has approved a similar factor, [permitting consideration of] the harm that is likely to result from the defendant’s conduct."

Under the third guidepost, the court noted statutes that permit treble damages "for economic injury to senior citizens or disabled persons through unfair or deceptive practices" and "for eviction based on a fraudulent intent to occupy." Because King deceived Simon into believing that San Paolo was negotiating exclusively with Simon, the court found these statutes to be instructive. The court proceeded to analyze the ratio in light of California’s punitive damages precedent, including consideration of the defendant’s wealth. The court concluded that the award "was not excessive on its face" because it represented less than five percent of the defendant’s net worth.

There are two significant problems with the appellate court’s analysis in Simon. One, its reprehensibility analysis overstates the case. While King certainly engaged in conduct that would frustrate any honest businessperson, it is difficult to believe that his conduct merited $1.7 million in punitive damages when Simon’s out-of-pocket costs were only $5,000. Simon was not physically injured or defrauded of property. Instead, he wasted time negotiating with a feckless person. The level of deception involved was also overstated. The court’s presentation of the evidence showed that Simon knew that King was unreliable.

The court bolstered its analysis with a reference to unquantifiable harm: “Simon also lost a unique opportunity. Small office buildings rarely come on the market in the location of the subject five-story office building, and Simon found it to be perfect for his paper and printing business . . . .” Id. at 390 n.15.

Id. at 390.  
251. Id.  
252. Id. at 393 (citing CAL. CIV. CODE §§ 3345, 1947.10).  
253. Id. (“Thus, a multiplier of at least three is appropriate in a case involving deceptive practices.”).  
254. Id. at 395. Under California precedent, “punitive damages awards are generally limited to 10 percent or less of the defendant’s net worth.” Id. (citing Weeks v. Baker & McKenzie, 74 Cal. Rptr. 2d 510 (Ct. App. 1998)).  
255. See id. at 379–80 & n.7. For instance, two months before entering into the letter of intent, King repeatedly changed the terms of the deal, first accepting $1.1 million then $1.29 million, then $1.35 million. Id. at 379 n.7. Simon sought an exclusive dealing clause in the letter of intent because he knew that Simon was unreliable. Id. at 379. Presumably these offers and acceptances were not sufficient to establish a contract because the jury held that no contract for the sale of the building was formed. Id. at 376. The court’s opinion does not state whether this was because these offers were merely oral or because they were conditional offers. The court’s summary of the issue of contract formation in the case is confusing. As the court notes, the jury was not instructed to determine whether a contract was formed but whether a binding and enforceable contract existed. "The jury's finding of fraud implies that it found that the parties did enter into a contract, but the contract was
Furthermore, Simon was not an uneducated, financially vulnerable target. He was a businessperson with a law degree. While he was not a sophisticated real estate buyer, certainly he was able to see that the deal was full of holes, especially since King refused to negotiate honestly. While none of these factors excuses King’s unprincipled conduct, neither do they seem as reprehensible as an insurance company taking advantage of financially vulnerable persons to whom they are contractually obligated, an automobile manufacturer knowingly manufacturing an unsafe automobile, or a pharmaceutical company marketing a drug while concealing knowledge of its harmful effects.

The appellate court’s analysis of Simon’s harm raises another problem. While it is logical and seems legally permissible to take into consideration harm not reflected in the amount of compensatory damages, the court overstated the harm suffered by the plaintiff. The court awarded Simon punitive damages based on his loss of bargain, but it disregarded the fact that there was no contract for the sale of the building. The promise that San Paolo failed to keep—the promise at the heart of the promissory fraud cause of action—consisted of the promise to negotiate exclusively and in good faith, as set forth in the letter of intent. Without question, King failed to uphold his end of that bargain, as the jury determined. However, it seems incongruous to award damages based on contract terms that were never agreed upon.

unenforceable. We cannot conclude that the jury found that no contract was formed in the first instance.” Id. at 377–78. The court is unclear as to the nature of the contract in its discussion of the jury verdict. Presumably, because the signed document was a letter of intent, then the letter of intent is the contract at issue, and thus, the promise pertained to negotiating in good faith and not to the specific terms for selling the building.

256. See id. at 384 n.9.
257. Id.
260. See, e.g., supra note 59.
261. Simon, 7 Cal. Rptr. 3d at 376 (stating that “the jury found that there was no enforceable contract between the parties”).
262. The letter of intent included the following: “Seller and buyer agree to exclusively negotiate upon execution of this letter.” Id. at 380. The letter of intent was also conditioned on the approval of King’s superiors. Id. at 379.
263. The case also raises the issue of whether a party should be punished for what is essentially an efficient breach. Certainly the jury verdict represents a rejection of that principle. Professor Dodge has argued that punitive damages should be permitted even for “efficient” breaches of contract because compensatory damages do not actually put the non-breaching party in its rightful position once litigation costs are factored into the equation. See Dodge, supra note 166, at 663–78. Since the transactional costs of negotiation are generally lower than the costs of litigation, Professor Dodge argued, it is more efficient to negotiate a release than to litigate a breach; punitive damages provide
Awarding $1.7 million as punishment for causing a few months of genuine aggravation invites headlines mocking runaway jury verdicts. It does not reflect a principled application of the legal principles set forth in either State Farm or earlier punitive damages jurisprudence.

2. California Supreme Court Reduces Simon’s Punitive Damages Award While Affirming the Relevance of Potential Harm

In an opinion by Justice Werdegar, the California Supreme Court analyzed the punitive damages award in Simon in terms of whether $400,000 accurately represented the actual or potential harm caused by San Paolo’s conduct. By framing the issue in this way, the court affirmed the propriety of considering the “use of measures of harm beyond the compensatory damages.” The court thus rejected a slavish reliance on compensatory damages as the sole measure of harm and broadened the proportionality rule from the simple compensatory-to-punitive damages ratio to a “punitive damages-to-harm ratio.” The court found ample support for measuring punitive damages against potential harm in U.S. Supreme Court precedent.

The court discussed at length situations where factors other than the amount of compensatory damages—such as uncompensated harm and potential harm—may be appropriate in calculating punitive damages. For example, when compensatory damages are limited by statute, they do not adequately measure the harm caused. In such a case, the measure of harm may include factors other than compensatory damages. However, the court rejected Simon’s argument that he suffered uncompensated harm.

The court also acknowledged that potential harm was an appropriate measure but found that Simon failed to show potential harm of a type that is reasonably foreseeable. It found the valuation of Simon’s harm at $400,000 to be in error because the jury determined that the parties did not have a contract for the purchase of the building. Distinguishing between “fraudulent promises to negotiate exclusively” and breach of a sales contract, the court noted that “San Paolo Holding’s promissory fraud did not deprive [Simon] of property he would otherwise have

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added incentive to a party to negotiate a release from contractual performance. Id. at 666–67.


265. Id. at 74.

266. Id. at 71 (noting that the U.S. Supreme Court “referred to the relationship between punitive damages and both ‘the amount of harm’ and ‘the general damages recovered,’ impliedly recognizing that these two are not always identical’”).

267. Id. at 73. The court noted that Neal v. Farmers Insurance Exchange, 582 P.2d 908 (Cal. 1978) was such a case.

268. Simon, 113 P.3d at 72.

269. Id. at 74–75.
obtained; it merely led him, as the jury indeed found, to spend $5,000 to retain an attorney in anticipation of opening escrow." Only when harm is reasonably foreseeable does a defendant have adequate notice that punitive damages may result from the defendant’s conduct. Simon’s harm did not include benefit-of-the-bargain damages because Simon never had a contract to purchase the property. Thus, the court concluded, $5,000 “must be considered the true measure of the harm (or potential harm) San Paolo Holding’s tortious act caused to Simon.”

After establishing the proper measure of harm, the court applied the Gore guideposts. It analyzed the degree of reprehensibility according to the factors mentioned in Gore and State Farm, and determined that San Paolo’s conduct was “of relatively low culpability” because it exhibited only one of the aggravating factors mentioned by the Court. With respect to the second Gore guidepost—which it characterized as the ratio of punitive damages to actual or potential harm rather than compensatory damages—the court deemed the proportionality rule a mere “presumption.” Specifically, ratios that are “significantly greater than nine or io to one are suspect and, absent special justification (by, for example, extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages), cannot survive appellate scrutiny under the due process clause.” The court dispensed with the kind of quibbling other courts have engaged in as to whether the U.S. Supreme Court’s “single-digit” ratio sets a nine-to-one or a ten-to-one ratio as the “constitutional trigger point”: “The question is of little or no importance, however, as the presumption of constitutionality applies

270. Id. at 72.
271. Id. at 74.
272. Simon also attempted to characterize as potential harm the cost he would have incurred had he ended his current lease in anticipation of purchasing the building. The court rejected that as well due to the lack of an enforceable purchase contract. Only after entering into a binding purchase contract would it be foreseeable to San Paolo that Simon would terminate his current lease. Id. at 74–75.
273. Id. at 75.
274. See supra text accompanying notes 100–08.
275. Simon, 113 P.3d at 76. That factor was intent, which already serves as a prerequisite to obtaining punitive damages under California law:

True, a comparison to accidentally caused harm is of little value in assessing a California punitive damages award, as accidentally harmful conduct cannot provide the basis for punitive damages under our law. At a minimum, California law requires conduct done with “willful and conscious disregard of the rights or safety of others” or despicable conduct done “in conscious disregard” of a person’s rights.

Id. (citing Cal. Civ. Code § 3294(c)(1)–(2)).
276. Id. at 77.
277. Id. (emphasis added).
only to awards exceeding the single-digit level "to a significant degree,"1278
The court reiterated this point several times,279 recognizing that State Farm
left the door open for a significant disparity between compensatory
and punitive damages in certain cases.

The court found the third Gore guidepost—comparison to
comparable civil penalties—of little usefulness.280 But, because Simon’s
award of $1.7 million “was 340 times his $5,000 award of compensatory
damages,” and could not be justified on the basis of being especially
reprehensible, it required reduction.281

After analyzing the Gore guideposts, the court addressed the
defendant’s financial condition, thereby affirming its continued relevance
under California punitive damages jurisprudence.282 The court repeated
the policies underlying the role of the defendant’s financial condition as
developed by California case law.283 In particular, the court asserted:

[T]he defendant’s financial condition is an essential factor in fixing an
amount that is sufficient to serve these goals [of punishment and
deterrence] without exceeding the necessary level of punishment.
“[O]bviously, the function of deterrence . . . will not be served if the
wealth of the defendant allows him to absorb the award with little or
no discomfort.” . . . “[P]unitive damage awards should not be a routine
cost of doing business that an industry can simply pass on to its
customers through price increases, while continuing the conduct the
law proscribes.” . . . On the other hand, “the purpose of punitive
damages is not served by financially destroying a defendant.”284

After setting forth the rationale for including wealth as a factor, the court
reiterated its commitment to deterrence as a goal for punitive damages.

The state’s legitimate interest in deterrence justifies the court’s
consideration of a defendant’s financial condition. “Because a court
reviewing the jury’s award for due process compliance may consider
what level of punishment is necessary to vindicate the state’s legitimate
interests in deterring conduct harmful to state residents, the defendant’s
financial condition remains a legitimate consideration in setting punitive
damages.”285 The court found support for its approach in the U.S.
Supreme Court’s “decisions as a whole.”286 Wealth “cannot alone justify a
high award” but it may nonetheless inform a reviewing court’s analysis.287

278. Id. at 77 n.7 (quoting State Farm v. Campbell, 538 U.S. 408, 425 (2003)) (emphasis added).
279. See id. at 76–77 (repeating four times “significant degree” or “significantly greater” in
reference to the proportionality rule).
280. Id. at 78.
281. Id.
282. See id. at 78–81.
283. Id. at 78–79; see also supra Part III.D.
284. Simon, 113 P.3d at 78–79 (citations omitted).
285. Id. at 79.
286. Id.
287. Id. (emphasis added).
For instance, where a defendant's conduct is particularly reprehensible but has resulted in low compensatory damages, the defendant's financial condition may "justify an extraordinary ratio between compensatory and punitive damages." With respect to *Simon*, the court found that the relatively low degree of reprehensibility did not merit significant augmentation of punitive damages due to the defendant's wealth.

The California Supreme Court reduced the punitive damages award in *Simon* to ten times the compensatory damages. In doing so, it rationalized its decision on several grounds. One, it noted that the compensatory damages were low and accurately reflected the harm caused; thus, it was not a case where the harm was unquantifiable or greater than the compensatory damages. Finally, it determined that $50,000 causes sufficient sting for "even a prosperous company," especially since its tortious conduct was itself not profitable for the defendant.

B. REAFFIRMING THE PUBLIC PURPOSE OF PUNITIVE DAMAGES: REPEATED SIMILAR CONDUCT AS EVIDENCE OF GREATER REPREHENSIBILITY IN *JOHNSON* V. *FORD*

1. Recidivism in the Civil Context

The California Supreme Court addressed the difficult question of the role of repeat conduct in assessing punitive damages when it reversed the Fifth District Court of Appeal in *Johnson v. Ford*, in an opinion written by Justice Werdegar and released the same day as his opinion for the court in *Simon*. In *Johnson*, the purchaser of a used Ford automobile prevailed on a fraud cause of action as a result of the concealment of the automobile's history of repairs in violation of California's "Lemon Law." The plaintiff showed that Ford engaged in a widespread practice of deliberately misinterpreting the Lemon Law so as to avoid complying with that law's repurchase and disclosure requirements. The jury awarded $10 million in punitive damages and $17,812 in compensatory damages. Johnson had argued that Ford saved between $6 million and $10 million per year in California by not

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288. Id. at 80.
289. Id.
290. Id. at 81.
291. Id. at 82.
293. See id. at 85–88; see also CAL. CIV. CODE §§ 1790–1795.7 (Deering 2005) (Song-Beverly Consumer Warranty Act).
294. See Johnson, 113 P.3d at 85–88 (noting the appellate court's determination that the "defendant's entire customer response program was structured precisely to short-circuit lemon law claims whenever defendant plausibly could").
295. Id. at 85.
complying with the Lemon Law. However, the appellate court reduced the punitive damages award to $53,435 (approximately three times the compensatory damages) based on its understanding that State Farm prohibited an award of punitive damages that punished conduct engaged in against persons other than the present plaintiff.

The California Supreme Court held that the lower court erred when it determined that State Farm required courts to punish only the defendant's conduct toward the plaintiff in question without regard to any broader course of tortious conduct. By carefully interpreting the U.S. Supreme Court's various pronouncements on the matter, the court resolved that while evidence of repeat conduct—whether in-state or out-of-state—cannot be used as "multiplier in computing" punitive damages, "such evidence may be relevant to the determination of the degree of reprehensibility of the defendant's conduct." The court noted that in Gore, the U.S. Supreme Court "acknowledged that recidivism increases the wrongfulness of a defendant's conduct and may justify greater punishment." The court quoted the many, varied pronouncements in State Farm on the issue of repeated conduct and determined that such conduct remains relevant as evidence of reprehensibility so long as the other acts are similar to the conduct at issue in the case at hand. Thus where a defendant engages in a

296. Id. at 87.
298. Johnson, 113 P.3d at 97.
[A] defendant's recidivism is relevant to the reprehensibility of its conduct. To the extent the evidence shows the defendant had a practice of engaging in, and profiting from, wrongful conduct similar to that which injured the plaintiff, such evidence may be considered on the question of how large a punitive damages award due process permits.

Id.
299. Id. at 89 (citing TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462 n.28 (1993); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 n.21 (1996)).
300. Id. at 90. The California Supreme Court quoted the U.S. Supreme Court in Gore: "Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance." Id. (quoting Gore, 517 U.S. at 576-77).
301. Id. at 90-91.
While both BMW and State Farm were cases in which the evidence state courts had considered of conduct toward others was impermissibly broad, the United States Supreme Court's analysis in both cases makes clear that due process does not prohibit state courts, in awarding or reviewing punitive damages, from considering the defendant's illegal or wrongful conduct toward others that was similar to the tortious conduct that injured the plaintiff of plaintiffs. We therefore join the numerous courts holding that a civil defendant's recidivism remains pertinent to an assessment of culpability.

widespread practice of committing similar acts of tortious conduct, as in *Johnson*, evidence of that practice increases the reprehensibility indicium and, hence, the amount of punitive damages.

2. **California Supreme Court Reaffirms the Public Purpose of Punitive Damages**

The California Supreme Court expended considerable ink in critiquing the Fifth District Court of Appeal’s pronouncements in *Romo v. Ford Motor Co.*, which that appellate court decided on the same day it decided *Johnson*, and on which it relied in *Johnson*. *Romo* made broad assertions about the purpose of punitive damages that the California Supreme Court held to be erroneous. The plaintiffs in *Romo* were three children whose parents and a sibling were killed in an accident involving a Ford Bronco. The plaintiffs themselves were also injured in the crash, which resulted when Juan Romo swerved to avoid another car that cut in front of them. The Bronco rolled over and the entire roof collapsed, despite the “false appearance of the presence of an integral roll-bar.”

The case went to a jury, which found that Ford “willfully and consciously” ignored the fact that the design of the 1978 model was defective; Ford failed to test the strength of the roof even though its design was contrary to Ford’s own safety standards. The jury awarded the Romo children collectively $5 million in compensatory damages and $290 million in punitive damages. After a series of appeals affirming the judgment, the case made its way to the U.S. Supreme Court, which vacated the judgment and remanded it for reconsideration in light of *State Farm*.

Finding a fundamental conflict between *State Farm* and California’s “broad view” of punitive damages, the appellate court in *Romo* determined that California must “reexamine the purpose and nature of punitive damages.” The court explained that California’s “broad view” of punitive damages recognizes that a faulty product harms not just the plaintiff but the public at large. For instance, California would punish Ford for “put[ting] at risk all who drove or rode in this model Bronco.” Thus, under this broad view, punitive damages vindicate the public
interest.\textsuperscript{312} However, according to the appellate court, \textit{State Farm} "impliedly disapproved this broad view."\textsuperscript{313} Instead, it affirmed the "narrow view" of punitive damages that "focuses primarily on what defendant did to the present plaintiff."\textsuperscript{314} Thus under \textit{State Farm}'s narrow view, punitive damages do not serve a true deterrence purpose.\textsuperscript{315} Rather than seeking to punish Ford for risking the lives of every passenger of the 1978 model, the goal under \textit{State Farm} is merely to inflict punishment for the harm to the present plaintiff. The goal of deterring Ford's "reckless disregard of consumers' safety and lives" implicitly falls out of the equation.\textsuperscript{316} Because the \textit{Romo} jury's award of $290 million "was justified only as a means to actually punish and deter an entire course of conduct that harmed not only plaintiffs but, potentially, untold others," the appellate court in \textit{Romo} deemed it necessary to reduce that award to approximately $24 million to comply with \textit{State Farm}'s narrow view of punitive damages.\textsuperscript{317}

\textsuperscript{312} See id. at 801.

\textsuperscript{313} Id.

\textsuperscript{314} Id.

\textsuperscript{315} Id. at 802–03 ("The issue...is not whether a particular punitive damages award is sufficient \textit{actually and in fact} to dissuade the course of conduct but, instead, whether such award punishes and deters to an extent found sufficient historically." (emphasis added)).

\textsuperscript{316} Id. at 806. The court asserted that the U.S. Supreme Court "limited the goal that the states are permitted to reach through punitive damages: 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis.'" \textit{Id.} at 802. Even if the appellate court's interpretation of \textit{State Farm} is erroneous as to the private nature of punitive damages, its repeated references to California's "actual" deterrence nevertheless underscores the emptiness of the Supreme Court's narrow view of deterrence. \textit{See id.} at 801–03.

\textsuperscript{317} See id. at 802. Seeming constrained by \textit{State Farm}'s assertion that a lower ratio of punitive damages to compensatory damages is proper when compensatory damages are particularly high, as in this case, the \textit{Romo} court expended much effort justifying a ratio of approximately five to one. \textit{See id.} at 807–12. Notably, the court explained how, due to erroneous or confused jury instructions, substantive law limiting compensatory damages, and confusing categorization of damages in the verdict form, the plaintiffs' recovery in compensatory damages did not reflect their actual harm. \textit{Id.} Because the estates of the deceased Romo family members could not recover punitive damages, the court held that in this case higher punitive damages were warranted:

In this context of malicious conduct, as opposed to ordinary negligence actions, public policy and legitimate interests of the state in the protection of its people require a mechanism to punish and deter conduct that kills people. It would be unacceptable public policy to establish a system in which it is less expensive for a defendant's malicious conduct to kill rather than injure a victim. Thus, the state has an extremely strong interest in being able to impose sufficiently high punitive damages in malicious-conduct wrongful death actions to deter a "cheaper to kill them" mindset, while still maintaining limits on wrongful death compensation in cases of ordinary negligence. \textit{Id.} at 810–11 (citations omitted). In affirming a ratio of five to one, where punitive damages were already significant, the court sought to ensure that it was not cheaper for the defendant to have caused death than injury. \textit{Id.}

Since the California Supreme Court did not take issue with the appellate court's calculation of harm in \textit{Romo}, it seems reasonable to believe the higher court viewed the appellate court's higher ratio as being in keeping with \textit{Simon}'s pronouncements regarding the relevance of uncompensated...
In *Johnson*, the California Supreme Court explicitly rejected the reasoning of the *Romo* appellate court and, in doing so, affirmed the public purpose of punitive damages. In its view, *Gore* "expressly affirms a state's constitutional freedom to use punitive damages as a tool to protect the consuming public, not merely to punish a private wrong." In addition, the court asserted, *State Farm* "did not bar deterrence of future public injuries as a goal of punitive damages." Thus in the California Supreme Court's view, the public purpose is served by imposing punitive damages with sufficient sting to serve as a deterrent to repeat conduct, and *State Farm* did not eliminate that public purpose.

3. California Supreme Court Rejects a Disgorgement Theory but Profitability Remains Relevant

With questionable reasoning, the California Supreme Court in *Johnson* rejected an aggregate disgorgement theory of punitive damages. Nonetheless, the court deemed the profitability of the defendant's tortious conduct relevant to the quantification of punitive damages by virtue of its relevance in the reprehensibility analysis. But the court's pronouncements on reprehensibility in *Johnson* are troublesome to the extent that they equate profitability with reprehensibility. Why should conduct be deemed more reprehensible simply by virtue of being more profitable? The court does not address that question. Rather, it deems profitability "relevant to reprehensibility and hence to the size of award warranted . . . to meet the state's interest in deterrence."

If punitive damages are to be tied to the profitability of the defendant's conduct, it seems that the court should embrace a disgorgement theory. Although the court acknowledged the merit of removing profits earned by the defendant from its actions toward the plaintiff, it exhibited great concern for an aggregate disgorgement approach because it raises the problem of multiple punitive damages

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319. *Johnson*, 113 P.3d at 92.

320. *Id.* at 93 ("To recognize that recidivism remains relevant is not to approve plaintiffs' aggregate disgorgement theory of punitive damages."). However, the court did not categorically reject an aggregate disgorgement approach: "We need not decide whether a plaintiff could ever, consistent with due process, justify the size of an award on a total profits basis." *Id.* at 96.

321. *Id.* at 93 ("The scale and profitability of a course of wrongful conduct . . . remain relevant to reprehensibility and hence to the size of award warranted, under the guideposts, to meet the state's interest in deterrence.").

322. *Id.*

323. See *infra* Part V.A.
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verdicts repeatedly disgorging the same profits. For instance, if the Johnsons were granted the entire profit from Ford's abusive avoidance of California's Lemon Law, then the next plaintiff to sue Ford for the same conduct during the same time period would either receive no punitive damages on the grounds that Ford had already been relieved of its profits from that conduct, or Ford would be disgorged of its profits a second time. However, if no other plaintiffs bring suit, a likely possibility, then the lack of aggregate disgorgement may result in the defendant profiting from its conduct.

V. RECOMMENDATIONS FOR THE FUTURE IMPOSITION OF PUNITIVE DAMAGES IN CALIFORNIA

Punitive damages jurisprudence should not be viewed as a one-size-fits-all endeavor. No single mathematical formula or programmatic analysis can suffice for the imposition of punitive damages in cases involving different kinds of conduct, different kinds of parties, and different kinds of injury. The different statutory limits on punitive damages for different causes of action in California reflect this fact. Thus, punitive damages should not simply be tied to compensatory damages but should vary depending on the type of conduct and the parties involved, as well as the many factors discussed by the U.S. Supreme Court in its cases preceding State Farm. For example, the methodology employed to calculate punitive damages should vary depending on whether the defendant's conduct: (i) resulted in purely economic harm to one or many persons; (ii) put at risk the plaintiff's health and safety; (iii) put at risk the health and safety of numerous individuals; (iv) resulted in physical injury or death; or (v) involved abuse of power against someone in a relatively weaker position. In short, imposition of punitive damages awards requires a much more nuanced approach than that provided in State Farm. What follows are merely examples of how such analyses may be conducted under different fact scenarios.

A. PUNITIVE DAMAGES IN CASES OF PURELY ECONOMIC HARM

In cases of purely economic harm, punitive damages should

324. See Johnson, 133 P.3d at 93–94; see also Thomas B. Colby, Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs, 87 MINN. L. REV. 583, 592–602 (2003) (arguing the unfairness of awarding “total harm” punitive damages to a single plaintiff); Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 48–53 (Tex. 1998) (acknowledging that “repeatedly imposing punitive damages on the same defendant for the same course of wrongful conduct may implicate substantive due process constraints,” but holding that the defendant’s “financial position is not so precarious that further punitive damages awards against it should be disallowed”).

recognize inequalities of bargaining power, as Justice Kennedy argued in his concurring opinion in *TXO.* For instance, fraud committed by a corporate entity in the context of dealings with another corporate entity should be treated differently than fraud committed by a corporate entity against an individual who lacks legal sophistication or economic power. Thus, an insurance company defrauding the sick, elderly and impoverished, as was the case in *Neal,* should be punished more harshly than a seller of real estate who refuses to negotiate in good faith, as was the case in *Simon,* or a car manufacturer that fraudulently fails to disclose that a new car received paint damage in transit and was thus repainted, as was the case in *Gore.* Physical injury should be punished more harshly than purely economic harm. Thus, a car manufacturer that fails to disclose a history of repairs, as in *Johnson,* should incur greater punishment because of the threat to safety posed by poorly operating automobiles. And a pharmaceutical company that knowingly markets drugs with potentially life-threatening side effects should be punished more harshly than a pharmaceutical company that engages in price-fixing. However, if that price-fixing resulted in lower-income individuals being unable to afford a life-sustaining medication, then that fact should be permitted to augment an award in a price-fixing case.

1. **Disgorgement**

In certain types of cases, disgorgement represents a reasonable and ethical means of calculating punitive damages. Professor Dagan explained that the selection of a remedial measure reflects a value choice, and that a disgorgement remedy better “vindicat[es] the cherished libertarian value of control over one’s entitlements.” Dagan’s analysis centers on the notion of a “plaintiff’s entitlement,” which I translate into the plaintiff’s right to choose her destiny and be free of harm. A tort reflects a nonconsensual deprivation of the plaintiff’s entitlement and thus an infringement of her right to be unharmed. By depriving the defendant of all benefit from its wrongful conduct, disgorgement recognizes the plaintiff’s inherent right to control her destiny. In comparison, a remedy measured by the harm suffered by the plaintiff may enable the wrongdoer to benefit from the harm caused without the victim’s consent and thus does not adequately reflect the principles of freedom and equality. Dagan essentially advocates

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326. See supra text accompanying note 82.
328. “[T]he harm measure can be understood as a form of limited institutionalized altruism: a legal device that calls for other-regarding action and seeks to inculcate other-regarding motives.” Id. at 215.
In other words, the victim subsidizes the defendant’s wrongdoing by receiving as a remedy an amount equal to her harm rather than the defendant’s gain; the gain retained by the defendant above the measure of the harm represents the subsidy. In contrast, “a profits remedy discourages potential invaders from circumventing the bargaining process and appropriating the protected interest without
selection of a remedial measure based on the nature of the wrong and the value we place as a society on preventing that type of wrong. Where deterrence is the goal, deprivation of all profit is essential.

While the California Supreme Court's concerns with aggregate disgorgement in Johnson are valid to an extent, it nevertheless deserves serious reconsideration. When compared to the multiple punishment permitted with respect to criminal defendants, it seems that courts and commentators have overstated the problem of multiple punishment in the civil context. It is reasonable for a state to award punitive damages that reflect the entire amount of profit gained from the specific tortious conduct within the state during a specific period of time. And in cases
of particularly reprehensible conduct, disgorgement of amounts in excess of profits should be permissible.

The proposed Restatement (Third) of Restitution and Unjust Enrichment takes the approach that "[a] conscious wrongdoer may not lawfully profit from a wrongful act." Proposed section 3 provides: "A person who interferes with the legally protected rights of another, acting without justification and in conscious disregard of the other's rights, is liable to the other for any profit realized by such interference." The comments distinguish between the "overlapping theories of liability" that measure damages in terms of "the benefit to the defendant" and "the injury to the plaintiff." By emphasizing State Farm's proportionality rule and relying on compensatory damages as the measure of the plaintiff's injury, the U.S. Supreme Court disregards this important distinction and downplays the necessity of depriving the wrongdoer of the benefit of his conduct. The Court's proportionality rule measures damages in terms of the harm to the plaintiff, thereby reflecting a value choice that compensating a plaintiff for injury is more important than punishing the defendant and deterring similar conduct in the future. The proportionality rule does not adequately reflect our values of freedom and equality or our right not to be intentionally mistreated. In Professor Dagan's words, the proportionality rule does not reflect the "cherished libertarian value of control over one's entitlements."

2. Disgorgement Insufficient Where Economic Harm Combined With Other Harm or Where Harm Unquantifiable

Disgorgement of profits as the measure of punitive damages would only be appropriate in cases of purely economic harm, however. When a company disregards the health and safety of others when recklessly or intentionally engaging in tortious conduct, it should suffer punishment greater than mere disgorgement of profits. Furthermore, where the profitability of the defendant's conduct is slight, such that the punitive damages award would not adequately represent the reprehensibility of the defendant's conduct, a disgorgement measure would not be

the statute of limitations. (The one-year period for the measure of profits is a convenient albeit arbitrary choice. It may make sense in other cases to employ a longer period.)

For a much more detailed proposal of a similar nature, see Sharkey, supra. Sharkey advocates creation of an "ex post" class action governed by Federal Rule of Civil Procedure 23, which would create a fund to compensate absent plaintiffs or "quasi-plaintiffs" not before the court. Id. at 391-410. She refers to aggregate punitive damages imposed for repeat conduct against parties not presently plaintiffs as "societal damages" in recognition of the fact that certain types of conduct cause harm much beyond the present plaintiff. Id. at 389.

333. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Tentative Draft), § 3 cmt. a (2000).
334. Id. § 3.
335. Id. § 3 cmt. a.
336. DAGAN, supra note 327, at 214.
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appropriate. But in cases similar to that of Johnson, it seems an adequate solution to the difficult problem of multiple punishment and the desirability of disgorgement for deterrence purposes.

Even in a case of purely economic harm, punitive damages greater than profits may be merited where that conduct cannot be quantified. For instance, an award of $5 million in punitive damages for a breach of contract action in which compensatory damages were only $50,000, may be warranted by virtue of a wealthy defendant’s racist motivation, as in Bains LLC v. Arco Products Co. The plaintiff in Bains was a company wholly owned by Indian Sikhs that transported gasoline by tanker truck under contract with Arco. The Bains employees (most of whom were Sikhs) were subjected to repeated racist epithets and discriminatory treatment by various employees of the defendant, and Bains eventually had its contract terminated after complaining of the treatment to upper management. A jury awarded compensatory damages of $50,000 for breach of contract and one dollar for the section 1981 violation, and punitive damages of $5 million. However, the Ninth Circuit ordered a reduction in punitive damages to fit within the State Farm “ratio approach.” Specifically, it determined that under State Farm, the award required reduction to between $300,000 and $450,000. The court noted that this was a case of purely economic harm and hence “not the ‘rare case’ for which State Farm leaves room” for punitive damages significantly higher than a single digit ratio above compensatory damages.

By strictly applying the proportionality rule, the Ninth Circuit’s analysis in Bains completely disregarded the nature of the defendant’s conduct, which involved much more than a breach of contract and deprivation of employment opportunities. Instead of ordering a reduction in punitive damages, the Ninth Circuit should have affirmed the award in recognition of the fact that the plaintiff was constrained, in suing in its capacity as a limited liability company, from seeking compensation for its many employees who were subjected to the defendant’s ongoing malevolent, discriminatory treatment. Further, the Sikh owners of the company suffered much more than economic harm; they suffered ongoing degradation and humiliation that no party should be forced to endure. The Ninth Circuit’s approach to this case exemplifies the point that punitive damages cannot be imposed in a mechanical fashion without due regard to the reprehensibility of the defendant’s conduct. The court’s opinion supports the argument made by

337. 495 F.3d 764 (9th Cir. 2005).
338. Id. at 767-68.
339. Id. at 769.
340. Id. at 777.
341. Id.
one commentator regarding an overly rigid application of ratios: "Further refinement of the reprehensibility factor may prove particularly critical if State Farm's ratio instructions result in punitive damages awards that under-deter defendant misconduct by adhering too strictly to the Court's 4:1 benchmark or applying its 1:1 ratio too aggressively."342

B. PRESENTING EVIDENCE OF THE DEFENDANT'S WEALTH

Since State Farm's proportionality rule was expounded, California courts have continued to consider evidence of the defendant's financial condition, recognizing that State Farm did not disavow the use of wealth in assessing punitive damages. However, because "wealth cannot justify an otherwise unconstitutional award," courts have used that evidence either to sustain or reduce punitive damages awards.343 In Boeken v. Philip Morris, Inc., one court noted:

The principle of federalism remains in play: "[E]ach State may make its own reasoned judgment about what conduct is permitted or

342. Laura J. Hines, Due Process Limitations on Punitive Damages: Why State Farm Won't Be The Last Word, 37 Akron L. Rev. 779, 799 (2004). Hines argued that the Court left several issues ambiguous or unresolved in State Farm, which will necessitate further attention. Those issues include the nature of reprehensibility, what factors warrant a higher ratio, what factors merit a lower ratio, the role of the defendant's wealth, and aggregate punitive damages. Id. 799–811.

343. See, e.g., Czarnik v. Illumina, Inc., No. D041024, 2004 Cal. App. Unpub. LEXIS 10999, at *31 (Ct. App. Dec. 3, 2004) (stating that "the use of a defendant's wealth as a factor in assessing punitive damages is not inappropriate," but refusing to justify a ratio higher than one to one where compensatory damages were $2.2 million, because State Farm wrote that wealth "cannot justify an otherwise unconstitutional punitive damages award"); Streetscenes, L.L.C. v. ITC Entm't Group, Inc., No. B168835, 2004 Cal. App. Unpub. LEXIS 10671, at *18 (Ct. App. Nov. 23, 2004) (stating that even if a punitive damages award satisfies federal due process, it must still be evaluated for excessiveness under California law, which requires consideration of the defendant's wealth); Alberts v. Franklin, No. D040310, 2004 Cal. App. Unpub. LEXIS 5698, at *97 (Ct. App. June 16, 2004) (affirming the use of jury instructions that included consideration of the defendant's financial condition because State Farm did not prohibit "use of the defendant's wealth as a factor in assessing punitive damages"; rather, "it simply 'cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award'").

The defendant's financial condition thus continues to be relevant in affirming punitive damages awards. See Rodriguez v. Padilla, No. B169431, 2004 Cal. App. Unpub. LEXIS 7735, at *16 (Ct. App. Aug. 24, 2004) (rejecting the defendant's claim that punitive damages of $250,000 were excessive in relation to defendant's net worth of approximately $164,500). But see Textron Fin. Corp. v. Nat'l Union Fire Ins. Co., 118 Cal. App. 4th 1061, 1084 (Ct. App. 2004) (rejecting the plaintiff's argument that the wealth of the defendant justified a ratio of punitive to compensatory damages of ten to one because the amount must "comport[] with due process. The Supreme Court has recognized that '[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award'").

California courts also continue to evaluate the defendant's financial condition for purposes of lowering punitive damages awards. See, e.g., Laursen v. Pope & Pope, No. H026495, 2003 Cal. App. Unpub. LEXIS 11064, at *20–22 (Ct. App. Dec. 2, 2004) (reducing punitive damages from $750,000 to $295,000 because the higher amount comprised approximately twenty-five percent of the defendant's net worth, which was "excessive as a matter of law"); Rogers v. Franck, No. A100655, 2004 Cal. App. Unpub. LEXIS 3078, at *58–59 (Ct. App. Apr. 5, 2004) (finding award of $400,000 in punitive damages where defendant had a negative net worth "excessive as a matter of law," even though the ratio of punitive to compensatory damages was not excessive under State Farm).
proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.\textsuperscript{344}

The court in \textit{Boeken} held that although the punitive damages award of $3 billion was not excessive in relation to the tobacco company defendant's wealth, nonetheless it required reduction to $50 million, representing approximately nine times the compensatory damages awarded.\textsuperscript{345}

Many argue that presenting evidence of the defendant's wealth, even after the decision to impose punitive damages has been made, prejudices the jury's determination of the amount of punitive damages.\textsuperscript{346} Others counter that such a view denigrates the jury function that forms the basis of our civil justice system.\textsuperscript{347} Still others argue that without such evidence, "a jury will be encouraged (indeed, required) to speculate as to a defendant's net worth in seeking to return a verdict that will appropriately punish the defendant."\textsuperscript{348} Resolving this matter requires a policy judgment as to whether it is preferable to avoid jury speculation or bias against wealthy defendants. Alternatively, one might ask whether jury speculation poses a greater problem than jury bias. There is no easy answer. The U.S. Supreme Court has expressed concern about juries' unguided discretion. Providing evidence of the defendant's financial condition arguably provides some guidance. On the other hand, the Court has also expressed concern about jury bias. California courts currently review jury awards of punitive damages and uphold them if there is "substantial evidence" to support the jury's finding.\textsuperscript{349} This review combined with the higher standard of proof may be sufficient to justify presenting evidence of the defendant's financial condition.

However, given the Supreme Court's expressions of concern about the presentation of evidence of the defendant's wealth to the jury,\textsuperscript{350} it
might be necessary—or at least prudent—to change California’s current practice. One solution to this problem would be to permit only evidence regarding the profitability of the defendant’s conduct during the punitive damages portion of the trial. Profitability ensures that evidence is directly relevant to the issue, provided California authorizes a disgorgement approach. If the defendant engaged in an ongoing course of conduct, then evidence pertaining to profits gained from that entire course of conduct would be relevant. Likewise, if the defendant is not a repeat offender, then only the profitability of the defendant’s conduct vis-à-vis the plaintiff would be relevant. In situations where a defendant’s conduct may not have been economically beneficial, or where the benefit is difficult to quantify, then evidence of the defendant’s wealth may be relevant to prove inequality of bargaining power or to ensure sufficient punishment. If a plaintiff can show that the defendant took advantage of its position of greater wealth and power (i.e., to manipulate the plaintiff into denying its rights or to defraud the plaintiff), then the financial condition of the defendant would be particularly relevant evidence for the purpose of punitive damages.

In cases where the foregoing scenarios do not apply, California could restrict the use of financial evidence to judicial review. For example, if the defendant contests the amount of punitive damages awarded on grounds that it is excessive relative to the defendant’s financial condition, then the defendant could be required to submit evidence of its financial condition to the reviewing judge. This would shift the burden of proof from the plaintiff—who is currently required to present evidence of the defendant’s financial condition to obtain an award of punitive damages—to the defendant.

In *State Farm*, the Supreme Court expressed concern about imposing punitive damages that are equivalent to criminal penalties without providing the kinds of protections available in a criminal proceeding. The California Supreme Court could reaffirm the imposition of punitive damages without regard to a fixed ratio by emphasizing the many procedural protections the state has in place for defendants. To further strengthen an already strong system, California should consider further statutory changes. For one, the legislature could increase the standard of proof as to whether the defendant had the requisite intent to beyond a reasonable doubt. The state could require that the jury impose punitive damages only upon a unanimous decision, and that the jury unanimously

accompanying notes 109–11.

351. See Schwartz & Behrens, *supra* note 16, at 1377 (“Legislatures can correct this prejudicial approach by allowing courts to consider wealth in determining whether an award is excessive or inadequate, but they should not allow the ‘wealth factor’ to be paraded before juries.”).

352. See *State Farm*, 538 U.S. at 417.

353. See *supra* notes 172–74 and accompanying text.
reach a determination of the amount of the punitive damages. These requirements would ensure that the jury speaks as the voice of the community in identifying and punishing truly despicable conduct. So as to prevent juries from being swayed by passion and prejudice, evidence of the defendant's wealth could be reserved for the reviewing judge, unless it is shown to be directly relevant. Or, such evidence could be reserved for a motion for reconsideration of a verdict on excessiveness grounds. This would prevent wealth from being a factor that artificially inflates punitive damages awards. Instead, it would assist the reviewing judge in determining if the award exceeds the defendant's ability to pay. At minimum, the courts must recognize that no single one-size-fits-all approach will satisfy the legitimate deterrence and punishment objectives of punitive damages. "Due process cannot be satisfied by resort to such a sledgehammer approach.... While confusing and imprecise, State Farm's proportionality instructions require a far more nuanced and fact-specific inquiry into the constitutionality of any award."354

C. CALIFORNIA COURTS SHOULD AVOID AN UNCritical ADHERENCE TO THE PROPORTIONALITY RULE

Establishing a ratio between compensatory and punitive damages does not necessarily ensure that punishment is proportionate to the offense. Compensatory damages might not reflect the harm inflicted or the degree to which the public abhors the defendant's conduct. California Supreme Court Justice Mosk wrote:

Our case law reveals a number of instances of intentionally harmful conduct in which only nominal actual damages were awarded because such damages were difficult to quantify, but in which punitive damages hundreds or thousands of times greater were assessed.... In these cases, the seriousness of the defendant's misconduct was more important than actual damages in gauging the appropriate amount of the punitive damages award.355

The U.S. Supreme Court's proportionality rule does not take into consideration the substantive law that may limit compensatory damages. For example, in Neal v. Farmers Insurance Exchange, discussed above,356 the plaintiff died before the trial, and her estate was prohibited by law from recovering on her emotional distress claim.357 As such, the plaintiff's

356. See supra text accompanying notes 176-81.
357. See Neal v. Farmers Ins. Exch., 582 P.2d 980, 985 n.3 (Cal. 1978). In Rufo v. Simpson, the estates of Ronald Goldman and Nicole Brown Simpson were limited by statute from recovering compensatory damages in excess of the personal property damage incurred during their murders. See 103 Cal. Rptr. 2d 492, 522 & n.14 (Ct. App. 2001) (citing CAL. CODE CIV. PROC. § 377.34). A strict ratio of compensatory to punitive damages would thus have resulted in nominal punitive damages being awarded to the victims' estates for their murders. Instead, the court affirmed awards of $12.5 million in punitive damages to each victim's estate. The parents of Ronald Goldman were awarded $8.5 million
compensatory damages were less than $10,000. For these reasons, sole reliance on the proportion between compensatory and punitive damages arrives at arbitrary results.

A perhaps even worse result is that imposing a ceiling on punitive damages makes it theoretically possible for parties to calculate in advance whether they can profit from tortious conduct. Professors Galanter and Luban argue:

[W]ith lenient punitive damages awards, offenders will be tempted to treat the law not as a norm demanding compliance but merely as a type of tax on activity such as predatory pricing. Only by imposing punitive damages of a different order from compensatory damages can a jury convey the message that a norm is categorical, that it demands compliance and not cost-benefit analysis. The point is to make the numbers on the balance sheet so ridiculous that the offender stops looking at the balance sheet.

As the California Supreme Court has noted, "the function of deterrence... will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." Enabling defendants to factor potential punitive damages into the cost of doing business deprives courts and society of the ability to achieve the legitimate goals of punishment and deterrence.

**CONCLUSION**

California courts should resist blindly applying a fixed ratio of punitive damages to compensatory damages. The U.S. Supreme Court does not demand it, and California's interests are antithetical to it. When the facts of a case warrant a higher ratio, California courts should not hesitate to vindicate the state's legitimate interest in policing intentional egregious tortious conduct. California should continue to recognize that wealthy defendants should not be permitted to purchase the right to engage in despicable conduct or to profit from such conduct. True deterrence can only be achieved by an appropriate calculus—one that acknowledges that a defendant's own cost-benefit analysis can defeat the
state's effort to proscribe harmful conduct.\textsuperscript{362}

California can defend its continued use of the defendant's financial condition as an evidentiary tool by pointing to its long history, its justifications, and the U.S. Supreme Court's failure to reject its use entirely.\textsuperscript{353} In addition, by providing the most stringent procedural protections possible within a civil justice system, California can comply fully with the Court's many legitimate procedural due process concerns without blindly following its ill-considered substantive due process. As the Court stated, "[g]reat care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed."\textsuperscript{364} If the state provides heightened procedural protections, then significant punitive damages awards in appropriate cases should survive a due process challenge.

\begin{footnotesize}
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\item \textsuperscript{362} See Geraci, \textit{supra} note 99, at 19–22.
\item \textsuperscript{363} See \textit{State Farm}, 538 U.S. at 427.
\item \textsuperscript{364} \textit{Id.} at 428.
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