Constitutional Limitations on Punitive Damages: Ambiguous Effects and Inconsistent Justifications

I. INTRODUCTION

Punitive damages occupy a special place in the U.S. legal system. Courts award them in very few cases, yet they have been the center of tort reform efforts because of their controversial nature.[1] This controversy centers around the purposes for which punitive damages are awarded—to punish reprehensible conduct and to deter future bad acts.[2] While compensatory damages exist to redress specific harms and to compensate a victim for a particular harm suffered, punitive damages exist to further the much broader social goals of retribution and deterrence.[3]

Because punitive damages must be calibrated to achieve these broad social goals, they necessarily involve more discretion on the part of the adjudicator awarding them. Adjudicators may receive some guidance when setting the final award amount, but this guidance is often minimal when provided at all.[4] The broad discretion exercised by adjudicators combined with a lack of guidance has created a system with the potential to impose very large and unpredictable punitive damages awards on defendants.[5] While punitive damages can efficiently deter defendants when compensatory damages are not large enough to induce defendants to take the appropriate amount of caution in their activities,[6] large and unpredictable awards tend to have a chilling effect on desirable activities. Empirical evidence has demonstrated that punitive damages do not actually provide strong incentives for defendants to take extra precautions in their activities and that they can even systematically harm consumers.[7]

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1. For a full list of tort reforms concerning punitive damages, see *Punitive Damages Reform*, AM. TORT REFORM ASS'N, http://www.atra.org/issues/punitive-damages-reform (last visited Feb. 10, 2013).

2. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 415–23 (2003) (discussing the standards for awarding punitive damages established by Cooper Indus. v. Leatherman Tool Grp., 532 U.S. 424, 432 (2001), and BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996)).

3. *Id.* at 415–23.

4. *See* Alison Del Rossi & W. Kip Viscusi, *The Changing Landscape of Blockbuster Punitive Damages Awards*, 12 AM. L. & ECON. REV. 116, 117 (2010) (discussing the shortcomings of juries in awarding punitive damages when they lack meaningful guidance).

5. *Compare* Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997) (undertaking a thorough empirical study on punitive damages and finding a predictable and insignificant effect), *with* A. Mitchell Polinsky, *Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al.*, 26 J. LEGAL STUD. 663 (1997) (disagreeing with this interpretation).

6. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 243–47 (2004).

7. *See generally* Paul H. Rubin, John E. Calfee & Mark F. Grady, BMW v. Gore: *Mitigating the Punitive Economics of Punitive Damages*, 5 SUP. CT. ECON. REV. 179 (1997); W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and*

Because of the potential for very large and unpredictable awards, both legislatures and courts have taken action to limit punitive damages awards.[8] Recently, the Supreme Court has invoked the Due Process Clause to place constraints on punitive damages and "grossly excessive awards."[9] The Court began by limiting the discretion of judges and juries to award punitive damages, and the Court's restrictions culminated in essentially placing a cap on the ratio of punitive to compensatory damages that could be awarded in a given case.[10]

Currently, the Court's doctrine on punitive damages is somewhat nebulous. While it has articulated what goals punitive damages may accomplish—punishment and deterrence—it has provided no guidance on how states may accomplish those goals.[11] Additionally, while it has announced some general limitations on awards through a vague reasonableness inquiry, the only specific limitation has proven both arbitrary and ineffective. This Note demonstrates that the current limitations on punitive damages are inconsistent with the stated goals of these damages and have an inconsistent effect across the full range of punitive damages awards.

More specifically, this Note addresses punitive damages in two contexts. First, it provides a thorough empirical evaluation of the current doctrine, focusing on the virtual cap imposed by the Court in *State Farm Mutual Automobile Insurance Co. v. Campbell* to determine what effects that cap has had on punitive damages awards. This Note builds on and extends previous empirical research regarding punitive damages and demonstrates that even though the cap should have decreased award amounts, it has not had that effect. In fact, some evidence suggests that awards may have actually increased after the Court imposed the cap. Second, this Note discusses how the lack of the intended effect combined with other fundamental flaws in the reasoning underlying the current limitations on punitive damages indicates the need for a new doctrine.

The new doctrine proposed here replaces the current punitive damages framework with a simplified version that requires individual

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Safety Torts, 87 GEO. L.J. 285 (1998); W. Kip Viscusi, Reply, *Why There Is No Defense of Punitive Damages*, 87 GEO. L.J. 247 (1998).

8.   *See* AM. TORT REFORM ASS'N, *supra* note 1 (discussing reforms, listed by state, and the problems they are intended to solve).

9.   BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 567 (1996).

10.   *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (discussing how greater than single-digit ratios of punitive to compensatory damages will almost never be allowed to stand out of due process concerns).

11.   *See, e.g.*, *id.*, at 425–30; *Gore*, 517 U.S. at 562–69.

courts to match punitive awards to civil fines or penalties authorized by state legislatures in similar cases. This new framework eliminates both the vague reasonableness inquiry and the ratio cap from the current doctrine. While the framework proposed here does not perfectly address all of the shortcomings of the current doctrine, it does have three important advantages. First, because state legislatures can authorize civil fines and penalties as they see fit, policymakers have enough flexibility to address specific problems on a more individualized basis if they choose. Second, because the proposed framework is based on the current doctrine, the Supreme Court could adopt it in the next punitive damages case it decides without reworking the constitutional underpinnings of its punitive damages jurisprudence. Third and most importantly, because the proposed doctrine requires that adjudicators determine all punitive awards by matching them to similar civil penalties or fines authorized by a legislature, defendants can easily predict what liability they may face.

Part II of this Note briefly outlines the history of the constitutionality of punitive damages under the Due Process Clause of the Fourteenth Amendment and provides some background on the economic theory of punitive damages. Part III both builds upon previous research by presenting an empirical evaluation of the current doctrine and demonstrates that the current framework does not effectively limit typical punitive damages awards. Part IV outlines the most salient problems with the Court's current punitive damages doctrine. Part V presents a new framework that mitigates some of the old doctrine's most glaring problems, while still allowing punitive damages to accomplish the constitutionally permissible purposes for which they are designed. Part VI concludes the discussion.

II. THE CONSTITUTIONALITY AND ECONOMIC THEORY OF PUNITIVE DAMAGES

A. The Constitutionality of Punitive Damages

The Supreme Court has addressed the constitutionality of punitive damages in several contexts. It began by upholding the constitutionality of punitive damages under the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment.[12] After providing a general authorization of punitive damages in its early

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12.   *See* United States v. Halper, 490 U.S. 435, 447–50 (1989), *overruled by* Hudson v. United States, 522 U.S. 93 (1997) (double jeopardy); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) (Excessive Fines Clause).

cases, the Supreme Court began developing limitations on punitive damages under the Due Process Clause of the Fourteenth Amendment.[13] The Court first addressed them under the Due Process Clause in *Pacific Mutual Life Insurance Co. v. Haslip,* holding that, in general, the Clause does not prohibit the imposition of punitive damages.[14] While the Court in *Pacific Mutual* did not fully insulate litigants from the threat of punitive damages,[15] it did place some limitations on awards. In general, the Court sought to limit "grossly excessive" punitive damages awards, holding that such awards violate the Due Process Clause.[16] Grossly excessive awards violate the Due Process Clause because defendants lack notice that they may be subject to such large awards and these large awards violate notions of fundamental fairness.[17]

Contrary to what it would later imply, the Court held in *Pacific Mutual* that it could not "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable [amount of punitive damages] that would fit in every case."[18] Instead of using a formula or bright-line test to restrict punitive damages, the Court held that "general concerns of reasonableness" will play an important role in determining whether an award is grossly excessive or constitutional.[19] The Court further explained that the most important factors in determining the constitutionality of a given award concern "whether [the] punitive award is reasonably related to the goals of deterrence and retribution."[20]

The Court next examined punitive damages in *TXO Production Corp. v. Alliance Resources Corp.*, holding again that reasonableness, not any kind of mathematical formula, would determine whether a punitive damages award passes constitutional muster.[21] The Court held that the ratio of punitive to compensatory damages in the case, a ratio of 526 to one, was reasonable and therefore did not violate due

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13. *See* Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1573–85 (1997) (providing a detailed description of all the ways in which the Court has addressed punitive damages through 1997).

14. 499 U.S. 1, 23 (1991).

15. *Id.*

16. *Id.* at 20–22.

17. *Id.* at 16–18.

18. *Id.* at 18.

19. *Id.*

20. *Id.* at 21. The Court listed seven factors that courts should consider when determining whether a punitive damages award furthers these two goals. These factors essentially became a totality of the circumstances test. *Id.*

21. 509 U.S. 443, 458 (1993).

process.[22] *TXO* did little to clarify the reasonableness inquiry that lower courts would be required to use when evaluating the constitutionality of punitive damages awards. The Court gave no further guidance on which factors were most important, holding that no single factor was determinative of whether an award was grossly excessive.[23]

In *BMW of North America, Inc. v. Gore*, the Court provided much clearer guidance on the nature, purpose, and limitations of punitive damages.[24] Consistent with prior cases, the Court held that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[25] The Court also explained that "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment."[26] The Court offered more guidance than the general reasonableness test articulated in earlier decisions by providing three "guideposts."[27] When determining whether an award is grossly excessive, a lower court should consider the degree of reprehensibility of the conduct, the disparity between the harm or potential harm suffered by the plaintiff and her punitive damages award, and the difference between the remedy and the civil penalties authorized or imposed in comparable cases.[28]

The Court provided even more concrete guidance on what types of awards would likely violate the Due Process Clause in *State Farm Mutual Automobile Insurance Co. v. Campbell*. In *State Farm*, the Court provided a full discussion of the nature and purpose of both compensatory and punitive damages, as well as a full discussion of how the latter may violate the Due Process Clause.[29] The Court began by explaining that while compensatory and punitive damages are almost always levied against the same individual for the same act, they serve entirely different purposes.[30] Compensatory damages provide plaintiffs with redress for a specific and concrete injury and have no role beyond that remedial purpose.[31] On the other hand, the

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22.   *Id.* at 462.

23.   *See* Pace, *supra* note 13, at 1601 (discussing the lack of guidance provided by the Supreme Court).

24.   517 U.S. 559 (1996).

25.   *Id.* at 567.

26.   *Id.* at 562.

27.   *Id.* at 574.

28.   *Id.*

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

30.   *Id.* at 416.

31.   *Id.*

Court reiterated that punitive damages serve retributive and deterrent functions.[32]

After differentiating between the nature, function, and goals of compensatory and punitive damages, the Court described how punitive damages may be constitutionally problematic. Awarding grossly excessive punitive damages violates notions of fundamental fairness, fails to provide adequate notice to parties that they might be subject to such large damages awards, and fails to further legitimate interests of the state.[33] The Court also held that the reprehensibility of the defendant's conduct is the most important factor in determining the reasonableness of a particular award.[34] While *State Farm* rectified many of the deficiencies in punitive damages jurisprudence by providing lower courts with clearer guidelines for how to evaluate the constitutionality of awards, its most important contribution was its virtual cap on the ratio of punitive to compensatory damages.[35] The Court held that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[36] Thus, the Court held that ratios of ten to one or higher will almost always violate due process.

While both scholars and lower courts have interpreted this as an actual cap on punitive damages,[37] the cap in *State Farm* is somewhat different from the statutorily imposed ratio caps that some states have used to control punitive damages. While those caps place a clear limit on the ratio of punitive to compensatory damages, the cap in *State Farm* does not place a hard-and-fast limit on that ratio.[38] The Supreme Court specifically declined to impose a bright-line ratio cap that no punitive damages award could exceed.[39] Instead, the ratio cap imposed was the result of a presumption that arose from past constitutional jurisprudence concerning punitive damages and from experience with this jurisprudence, rather than from any

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32.   *Id.*

33.   *See id.* at 416–17 (describing the constitutional limitations of punitive damages).

34.   *Id.* at 419.

35.   *See id.* at 425 (discussing punitive damage ratios).

36.   *Id.*

37.   *See* Theodore Eisenberg & Michael Heise, *Judge-Jury Difference in Punitive Damages Awards: Who Listens to the Supreme Court?*, 8 J. EMPIRICAL L. STUD. 325, 347 (2011) (explaining how most scholars and lower courts have interpreted the *State Farm* cap).

38.   *Compare State Farm*, 538 U.S. at 425 (imposing a general cap that may be exceeded in some situations), *with* FLA. STAT. ANN. § 768.73 (West 2012) (imposing a cap on punitive damages that can never be exceeded for any reason).

39.   *State Farm*, 538 U.S. at 425.

mathematical considerations.[40] In other words, the Court opted for a more discretionary ratio cap than those chosen by state legislatures.

The Court in *State Farm* also prohibited the imposition of punitive damages for conduct that occurred outside the scope of a given case.[41] The Court reiterated and expanded this prohibition in *Philip Morris USA v. Williams*.[42] Specifically, the Court explained that evidence of harm to nonparties can be used to demonstrate that a defendant's conduct posed a risk to the general public and was therefore more reprehensible. However, adjudicators may not award punitive damages to punish a defendant for harms to nonparties to the litigation.[43]

Overall, the Supreme Court's jurisprudence on punitive damages permits courts to use the awards to achieve two goals: deterrence and punishment/retribution. Within this framework, the Court has limited grossly excessive awards that violate fundamental fairness and required that awards be reasonable.[44] In determining the reasonableness of an award, lower courts must consider the three guideposts from *Gore*, with the degree of reprehensibility being the most important guidepost.[45] Most importantly, under the current doctrine, ratios of punitive to compensatory damages that are greater than single digits will most likely violate the Due Process Clause.[46]

Before considering how effective the current doctrine has proven in eliminating grossly excessive punitive damages awards, it is important to consider more carefully the goals that doctrine seeks to achieve. First, an inquiry into the reprehensibility of a defendant's conduct neatly encompasses the goal of punishment and retribution. Since reprehensibility is part of the reasonableness inquiry to determine the appropriateness of a punitive damages award, only

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40.   *See id.* (describing how "[the Court's] jurisprudence and the principles it has now established" provided information on ratios that were acceptable in practice). The Court explicitly discusses ratios in *Pacific Mutual Life Insurance v. Haslip*, 499 U.S. 1 (1991), and *BMW of North America v. Gore*, 517 U.S. 559 (1996).

41.   *See State Farm*, 538 U.S. at 422–23 ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis of punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.").

42.   127 S. Ct. 1057 (2007).

43.   *Id.* at 1064.

44.   *See State Farm*, 538 U.S. at 416–18 (discussing constitutional problems with punitive damages and factors to consider on review).

45.   *Id.* at 418–19.

46.   *Id.* at 425 ("[F]ew awards exceeding a single-digit ratio between punitive damages and compensatory damages, to a significant degree, will satisfy due process.").

reprehensible actions will be punished under the current doctrine.[47] By punishing only reprehensible acts, the current doctrine will likely adequately accomplish the goal of punishing defendants who deserve that punishment. Second, the goal of deterrence is somewhat more complicated. The current inquiry into punitive damages does not involve any direct considerations of deterrence in the same way it does for reprehensibility, so the goal of deterrence is slightly more elusive. The next Section considers the goal of deterrence in more detail.

B. The Law and Economics of Deterrence

Although it is unclear when a punitive damages award designed to deter becomes unconstitutionally large, the economic theory of deterrence is much clearer.[48] This theory provides useful insight into one of the problems with the current doctrine—it is logically inconsistent. Essentially, the theory posits that the optimal level of punitive damages is the amount that forces a defendant to fully internalize the cost of the harm it imposes on society.[49] Once the defendant fully internalizes the cost it imposes on others, it will have the correct incentives to prevent imposing that harm in the first place. By forcing a defendant to pay compensatory damages, a court can force it to internalize the cost of the harm it imposes.[50] However, compensatory damages alone do not, in general, induce a defendant to take the *optimal* amount of care.[51] If a defendant is not held liable every time it harms someone, then it does not fully internalize the cost of that harm and, accordingly, will fail to take enough care to prevent

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47. *See id.* at 418–19 (describing the degree of reprehensibility guidepost for a review of punitive damages and stating that "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment and deterrence").

48. For a general treatment of the economic theory of deterrence, see SHAVELL, *supra* note 6, at 243–47. For a thorough review of the economic theory of deterrence as well as punitive damages more generally, see Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998).

49. *See* SHAVELL, *supra* note 6, at 243–45 (discussing how damages exceeding actual losses may be appropriate in certain situations, such as escape from suit and illicit utility from causing harm, where additional damages must be imposed for the actor to fully internalize the costs of his or her actions).

50. *See id.* at 243–44 ("If damages are set equal to losses, incentives to reduce risk will generally be desirable.").

51. Optimal care is the level of care at which the marginal cost of taking additional care to mitigate or prevent harms is equal to the marginal benefit of taking additional care. This care is optimal for society because any additional care forces society to incur more costs than the savings that would result from that care. *See id.* at 243–47 (describing factors that are not accounted for in compensatory damages that may lead to inadequate incentives to reduce risk).

causing the harm in the first place.[52] Punitive damages can raise the defendant's liability so that it does internalize the full cost it imposes on others, inducing it to take the optimal amount of care.

For example, if a defendant knows that every time it acts it causes a harm worth $100 but only has a 50% chance of being held liable for that harm, it does not have an incentive to invest in the amount of safety precautions society would prefer. Society would be better off if the defendant paid $75 to eliminate the risk of harm, but the defendant would not be willing to invest in that precaution because it only faces an expected cost of $50.[53] It would rather face the expected cost of $50 (and continue inflicting the harm) than face a certain cost of $75 to prevent the harm. To induce the defendant to invest in precautions that are socially worthwhile (i.e., to take the optimal level of care), its expected liability must equal the actual costs it imposes on society. In this example, imposing a punitive damages award of $100 in addition to a compensatory award of $100 (the value of the harm inflicted) brings the defendant's total liability to $200. Multiplying this amount by the probability of actually facing that liability, 50%, the defendant faces an expected cost of $100, which is exactly the cost of the harm it inflicts on society. With this punitive damages award, the defendant now finds it worthwhile to invest in precautions that cost less than $100, which is the socially efficient outcome. In other words, the punitive damages in this example achieve optimal deterrence by aligning the defendant's incentives with society's preferences.

Obviously, the above example is a gross simplification, but it illustrates that punitive damages can serve an important function in achieving optimal deterrence. Formally, the punitive damages award necessary to achieve optimal deterrence is determined by the compensatory award[54] multiplied by the reciprocal of the probability that the defendant will be held liable.[55] Where *PD* denotes the

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52. *See id.* at 244 ("If injurers who sometimes escape suit are made to pay only the usual level of damages on those occasions when they are sued, then their expected payments will be less than the expected losses they generate. Consequently, their incentives to reduce risk will be inadequate.").

53. The expected cost in this context is the cost of being held liable ($100) discounted by the probability of being held liable (50%).

54. This analysis assumes that the compensatory damages award perfectly represents the harm imposed by the defendant.

55. For the underpinnings of optimal deterrence, see SHAVELL, *supra* note 6, at 243–47. The treatment of optimal deterrence and punitive damages here is very similar to the analysis in Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1, 3–4 (2004). I skip the full derivation of the optimal amount of punitive damages here for the sake of brevity.

punitive damages award, *CD* denotes the compensatory damages award, and *p* denotes the probability with which a court will hold a defendant liable, the formula that determines the punitive damages award necessary for optimal deterrence is given by the following equation:

$$PD + CD = \left(\frac{1}{p}\right) * CD$$

This equation can be rewritten to solve explicitly for the punitive damages award necessary for optimal deterrence:

$$PD = \left(\frac{1-p}{p}\right) * CD$$

Using this formula, a court can theoretically determine the punitive damages award necessary to induce optimal deterrence; however, actually applying this straightforward formula can prove problematic for a number of practical reasons.

 State Farm and the associated punitive damages doctrine do not allow for a full consideration of optimal deterrence,[56] and Part V discusses how *State Farm* actually hinders achieving optimal deterrence. However, before discussing the problems *State Farm* creates for deterrence, Part III presents an empirical analysis of *State Farm* to determine what effect, if any, it has had on punitive damages awards.

III. AN EMPIRICAL EVALUATION OF *STATE FARM*'S EFFECTIVENESS IN LIMITING PUNITIVE DAMAGES AWARDS

 While the Court in *State Farm* explicitly stated that it was avoiding any strict mathematical formulas for punitive damages awards, it did impose a generally applicable mathematical limit on punitive damages that many scholars and courts have interpreted as a functional cap on punitive damages.[57] This cap could have important implications for both the retributive and deterrence functions of punitive damages by restricting the ability of courts to tailor damages to these functions. However, because the Court was unclear about how the cap should actually be applied, it is possible that lower courts have not implemented it correctly, which might mean that the cap is not

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

57.   Eisenberg & Heise, *supra* note 37, at 346.

functioning to satisfy the requirements of due process by limiting the predictability of punitive damages for defendants.

This Section provides an empirical evaluation of the effect of this cap on actual awards. Other researchers have explicitly examined the effect of the *State Farm* cap on "blockbuster" punitive damages awards,[58] finding that the cap does, in fact, decrease the size of such awards.[59] However, scholars have not directly addressed the effect of the *State Farm* cap on "everyday" punitive damages awards.[60] Some scholars have addressed the question of how effective the ratio cap has been in limiting punitive damages awards, but they have only done so as part of a larger examination of the effect of having a jury trial rather than bench trial has on these awards.[61]

This Section provides a new empirical analysis focusing on the effect of *State Farm*. Throughout the analysis, I work from the basic hypothesis that, all else equal, *State Farm* should reduce the number of awards violating the single-digit cap. This hypothesis implies that punitive damages awards should decrease overall since lower courts must reduce some awards to comply with the ratio cap. Additionally, the relationship between compensatory and punitive damages should change so that, after *State Farm*, a given increase in compensatory damages should lead to a smaller increase in the accompanying punitive damages award. This change, which is actually a change in the elasticity between compensatory and punitive damages, should occur because after *State Farm*, lower courts are prohibited from awarding higher levels of punitive damages for a given level of compensatory damages in a way they were not prior to *State Farm*.

I find no support for the hypothesis that *State Farm* reduced the number of awards violating the single-digit cap or that *State Farm* decreased punitive damages awards overall. However, I find evidence that *State Farm* actually had the surprising (and presumably unintended) effect of increasing punitive damages awards. This

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58.   Hersch and Viscusi define a "blockbuster" award as any award exceeding $100 million, and while these are the most visible and salient punitive damages awards, they are not representative of typical awards. *See* Hersch & Viscusi, *supra* note 55, at 4–5.

59.   Del Rossi & Viscusi, *supra* note 4.

60.   By "everyday" awards, I mean punitive damages that are awarded in typical cases seen across the country, as opposed to "blockbuster" awards, which occur only rarely and are the exception rather than the rule in punitive damages awards. For the purposes of this empirical analysis, "everyday" refers exclusively to punitive damages awards imposed by State Courts because the Civil Justice Survey of State Courts only contains information on state court awards.

61.   The most important and most extensive study to date has been conducted by Professors Eisenberg and Heise. I review this study below. *See* Eisenberg & Heise, *supra* note 37, at 346 (evaluating the impact of the *State Farm* decision on punitive damages awards using 2005 damages data).

surprising result has important implications for the limitations that the Supreme Court has placed on punitive damages; namely, the Court may need a new doctrine to ensure that those awards satisfy due process.

Before delving into the empirical analysis and the implications of the results of that analysis, this Section first briefly reviews the previous empirical work on punitive damages. It then describes the data and empirical methodology used in the analysis and discusses how this methodology differs from previous work. It analyzes summary statistics and concludes with a regression analysis that controls for decision type, litigant pair, case type, and location, thus isolating the impact of *State Farm*.

A. Prior Work on Punitive Damages and State Farm*'s Effectiveness*

Most of the prior empirical work on punitive damages has been conducted with the goal of identifying and explaining the determinants of these awards. This research generally asks two different questions: what factors increase the likelihood that punitive damages will be awarded and what factors are associated with higher awards.[62] In general, studies have found that higher levels of compensatory damages are associated with both a higher likelihood that punitive damages will be awarded and higher punitive awards.[63] The type of case can also have a significant effect on both the

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62.   *See* Del Rossi & Viscusi, *supra* note 4, at 117 (updating preexisting data on blockbuster awards and examining jurors' ability to award punitive damages proportionate to the reprehensibility of behavior); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263, 264–73 (2006) (concluding that jury and judge behavior regarding the size of punitive damages is relatively stable over time, but varies over time regarding other factors of damage awards); Eisenberg et al., *supra* note 5, at 626–30 (drawing on one year of jury trial data to determine when punitive damages are likely and what factors affect the size of the award); Eisenberg & Heise, *supra* note 37, at 346 (assessing *State Farm*'s possible impact on punitive damages level awards in 2005 data); Hersch & Viscusi, *supra* note 55, at 3–4 (applying law and economics theory to estimate optimal punitive damages awards to achieve maximum deterrent effect); Polinsky, *supra* note 5, at 666, 671–73 (concluding that punitive damages are a significant factor in litigation and are awarded randomly); Neil Vidmar & Mirya Holman, *The Frequency, Predictability, and Proportionality of Jury Awards of Punitive Damages in State Courts in 2005: A New Audit*, 43 SUFFOLK U. L. REV. 855, 855, 860 (2009) (focusing on jury verdicts only to determine trends in punitive damages awards in state courts).

63.   *See* Eisenberg & Heise, *supra* note 37, at 346–47 (explaining the Court's commitment to proportionality between punitive and compensatory awards); Hersch & Viscusi, *supra* note 55, at 29 (explaining regression results and the association between jury trials and higher levels of compensatory damages awards).

probability of awarding and the size of the award.[64] For example, intentional tort, products liability, premises liability, and fraud cases all have higher probabilities and higher average amounts of punitive damages than other types of cases.[65] In addition to the type of case, the type of litigants involved in the case affects the award probability and amount.[66] For example, when an individual sues an individual, courts are more likely to both award punitive damages and award larger amounts.[67]

Perhaps the most significant debate in the punitive damages literature involves the performance of judges and juries when awarding punitive damages. Two studies using the 1996 Civil Justice Survey of State Courts ("CJSSC")[68] found different results: Hersch and Viscusi identified a significant positive effect of having a jury trial on both the probability of award and the size of the award, while Eisenberg et al. did not find these effects.[69] These two studies differed in the methodologies they used, and Hersch and Viscusi identified several potential reasons why Eisenberg et al. did not find that juries had a significant effect on punitive damages awards.[70] Thus, a disagreement in the literature exists with respect to how judges and juries may award punitive damages differently.

More recently, Eisenberg and Heise analyzed all four years in which the CJSSC was collected and considered whether juries award punitive damages differently than judges.[71] Eisenberg and Heise found that the "2005 data suggest, for the first time, systematic

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64. *See* Hersch & Viscusi, *supra* note 55, at 29–30 (noting that individual plaintiff versus individual defendant cases have a negative influence on compensatory awards as compared to multiple plaintiff cases).

65. For a full list of the types of cases associated with a higher probability of award and higher award levels, see Eisenberg & Heise, *supra* note 37, at 373 (summarizing the characteristics of selected case types in punitive damage cases); Hersch & Viscusi, *supra* note 55, at 29 (analyzing the impact of fifteen different types of cases on compensatory damages awards).

66. Hersch & Viscusi, *supra* note 55, at 29.

67. For a complete list of the effects of the types of litigants, see *id.* (detailing the relationship between litigant pair and awards).

68. Although I do not use the 1996 survey, this dataset is part of the same series I use in my empirical analysis. *See infra* Part III.B for a full description of later years in this dataset.

69. *Compare* Hersch & Viscusi, *supra* note 55, at 3–4 (explaining why the study reached opposite conclusions from the study by Eisenberg et al. regarding judge and jury awards), *with* Eisenberg et al., *supra* note 62, at 766–67 (explaining the impact of judge or jury cases on the punitive damage award).

70. Hersch & Viscusi, *supra* note 55, at 1–2 (noting that the previous study included an analysis that ignored differences across counties and a specification that induced multicollinearity).

71. I use the last two years of the CJSSC in my analysis, and the data for 2001 and 2005 are described below.

differences between judges and juries in the punitive-compensatory relation."[72] In the context of analyzing the systematic difference between judges and juries, Eisenberg and Heise also considered the effect *State Farm* may have had on this difference. They noted that *State Farm*, which was decided in 2003, could account for the systematic difference between judges and juries that they found in the 2005 data and did not find in the three years of data collected prior to the *State Farm* decision.[73] Specifically, the authors hypothesized that judges would be more affected (i.e., tend to award lower levels of punitive damages for a given level of compensatory damages) by a Supreme Court decision limiting punitive damages awards than juries would be because judges are more attuned to the law and have greater incentives to avoid being reversed on appeal.[74] However, the authors did not find support for their hypothesis in the data. They found mixed evidence of a decrease in the size of punitive damages after *State Farm*. They also determined that juries' awarding behaviors changed more after *State Farm* than judges' did.[75] Therefore, the authors rejected *State Farm* as a likely explanation for the systematic difference they found between judges' and juries' awarding behaviors in 2005.[76] The authors considered and rejected alternative explanations for the results they found, including more personal injury cases in 2005 relative to other years, the inclusion of additional counties in the 2005 sample, and changes in the data coding for the 2005 sample.[77] The authors ultimately concluded that the most likely

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72. Eisenberg & Heise, *supra* note 37, at 325.

73. *Id.* at 348–49.

74. *Id.*

75. Eisenberg and Heise arrived at this conclusion by comparing the relationship between compensatory damages and punitive damages for judges and juries separately in both the 2005 sample and the pre-2005 samples. They found mixed evidence of a *State Farm* effect on judges and juries. They found that for lower levels of compensatory damages, judges awarded more punitive damages in 2005 than in the other sample years, while for higher levels of compensatory damages, judges awarded less punitive damages than in other sample years. They found an opposite, and less dramatic, difference for juries. Specifically, the authors found that for compensatory damages up to about $100,000, judges actually awarded more punitive damages per dollar of compensatory damages in 2005 than in the years before *State Farm*. Juries, on the other hand, awarded higher levels of punitive damages per dollar of compensatory damages for compensatory awards over about $10,000. Additionally, the authors provide locally weighted scatterplot-smoothing models that are consistent with these results. Eisenberg & Heise, *supra* note 37, at 346–51.

76. *Id.*

77. *Id.* at 348–53.

explanation for their results was different unobserved factors driving the selection of cases for judges and juries.[78]

While Eisenberg and Heise addressed some important questions about the effect *State Farm* has had on punitive damages awards, they focused on explaining the effect's relevance to the difference between how judges and juries behave.[79] They did briefly address the potential effect of *State Farm* on punitive damages more generally, but an explicit test for a more general *State Farm* effect was not the focus of the authors' work.[80] For judges, the authors briefly mention unreported regression models that tested generally for a *State Farm* effect, stating, "Regression models confirm the absence of a significant effect of a dummy variable for 2005 trials or an interaction term between this dummy variable and the compensatory award."[81] For juries, the authors briefly mention a similar unreported regression model that supports the absence of a significant *State Farm* effect, explaining, "Regression models, both ordinary least squares models and multilevel models with local and state as levels, confirm a highly significant effect ($p = 0.001$) of a dummy variable for 2005 trials."[82]

The potential effect of *State Farm* has assumed a more central role in the examination of blockbuster awards. Viscusi and Hersch first defined and identified blockbuster awards in 2004, finding sixty-three punitive damages awards exceeding $100 million between 1985 and 2003.[83] Del Rossi and Viscusi later updated this list, identifying one hundred blockbuster cases decided between 1985 and 2008.[84] As part of this update, Del Rossi and Viscusi examined the possible determinants of blockbuster punitive damages awards by rigorously evaluating each one.[85] The individual case characteristics they examined included the industry involved in the case, the location of the case, the type of trial (jury or bench), and the type of litigants involved.[86]

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78.   *Id.* For a (separate) thorough empirical analysis of how litigants demand jury trials, see Joni Hersch, *Demand for a Jury Trial and the Selection of Cases for Trial*, 35 J. LEGAL STUD. 119 (2006).

79.   *See id.* at 346–51 (discussing behavioral, educational, and other explanations for the disparate behavior between judges and juries).

80.   *Id.* at 350.

81.   *Id.*

82.   *Id.*

83.   Hersch & Viscusi, *supra* note 55, at 3–6.

84.   Del Rossi & Viscusi, *supra* note 4, at 117.

85.   *Id.* at 116.

86.   *Id.* at 144–47.

The authors considered how *State Farm* affected punitive damages awards controlling for the effects of other potentially relevant events: the Master Settlement Agreement of the tobacco litigation of the late 1990s and *Engle v. Ligget Group, Inc.*, [87] which involved an extremely large punitive damages award.[88] In considering the effects *State Farm* had on punitive damages awards, they first compared the mean and median of the ratio of punitive to compensatory damages from before and after the case and found that both decreased after the Supreme Court decided *State Farm*.[89] Through empirical analysis, the authors found that *State Farm* had a statistically significant negative impact on the number of blockbuster punitive damages awards.[90] They also came to two important conclusions regarding the effect that *State Farm* had on the amount of punitive damages awarded.[91] First, while blockbuster punitive damages had been trending upward in the years leading up to *State Farm* as well as in the years after *State Farm*, the decision eliminated about three-fourths of the upward trend in punitive damages.[92] Second, *State Farm* changed the way in which the amount of compensatory damages influenced the amount of punitive damages awarded.[93] After *State Farm*, a one percent increase in compensatory damages was associated with a smaller increase in punitive damages than before *State Farm*.[94]

Taken together, these findings indicate that *State Farm* had a significant negative effect on punitive damages in blockbuster cases.[95] Del Rossi and Viscusi demonstrated that the *State Farm* decision had a negative effect on the ratio of punitive to compensatory damages, the number of cases in which punitive damages were awarded, and the amount of punitive damages awarded as part of blockbuster awards.[96]

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87.   Engle v. Liggett Grp., Inc., 945 So.2d 1246, 1263 (Fla. 2006).

88.   Del Rossi & Viscusi, *supra* note 4, at 133–37.

89.   The mean decreased from over seven hundred to about fourteen while the median decreased from about twelve to two. *Id.* at 135.

90.   *Id.* at 139–41.

91.   *Id.* at 141–42.

92.   *Id.*

93.   *Id.*

94.   Specifically, Del Rossi and Viscusi estimated that before the *State Farm* decision, a one percent increase in compensatory damages was associated with a roughly one percent increase in punitive damages, but after *State Farm*, a one percent increase in compensatory damages was associated with only about a half percent increase in punitive damages. *Id.*

95.   *Id.*

96.   *Id.*

The above-mentioned studies are the only empirical evaluations of the *State Farm* effect,[97] and an important problem is immediately obvious from their work. A substantial discrepancy exists between the effect of *State Farm* on blockbuster and everyday cases. *State Farm* has had a significant impact on blockbuster punitive damages awards,[98] but Eisenberg and Heise found that it has not had the expected impact on everyday awards.[99] Because of this discrepancy and because the effect of *State Farm* on everyday awards has never been explicitly examined, I conduct a new empirical analysis of this effect on everyday cases.

B. The Data

To examine directly what effect, if any, *State Farm* has had on everyday punitive awards, I conduct an empirical analysis that extends and broadens the analysis conducted by Eisenberg and Heise. To conduct this analysis, I use the 2001 and 2005 samples from the Civil Justice Survey of State Courts. The CJSSC is a project of the Bureau of Justice Statistics and the National Center for State Courts and provides data on tort, contract, and property cases tried to verdict in 2001 and 2005.[100] The data cover trials in state courts of general jurisdiction, and the data were collected directly from clerks' offices in those courts.[101] The information from each trial includes the types of trial (jury or bench), types of litigants involved (individual, government, business, insurance company, etc.), and the types of claims by plaintiffs and counterclaims by defendants (motor vehicle accident, professional malpractice, conversion, fraud, etc.).[102] The data also include the amount of both compensatory and punitive damages

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97.   There is one more study that only considers cases after *State Farm*. *See generally* Theodore Eisenberg, Michael Heise, Nicole L. Waters & Martin T. Wells, *The Decision to Award Punitive Damages: An Empirical Study*, 2 J. LEGAL ANALYSIS 577, 578–79 (2010) (relying on data from a 2005 Bureau of Justice Statistics CJSSC, collected two years after *State Farm* was decided).

98.   Del Rossi & Viscusi, *supra* note 4, at 154–55.

99.   *See generally* Eisenberg & Heise, *supra* note 37, at 325 (presenting evidence that any shifts in the 2005 CJSSC are not attributable to *State Farm*).

100.   Neither the 2001 sample nor the 2005 sample contains information on cases that were settled prior to trial. THOMAS H. COHEN & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001 (2004) [hereinafter BJS 2001], *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ctcvlc01.pdf; LYNN LANGTON & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005 (2008) [hereinafter BJS 2005], *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf.

101.   BJS 2001, *supra* note 100, at 1; BJS 2005, *supra* note 100, at 1.

102.   *See generally* BJS 2001, *supra* note 100; BJS 2005, *supra* note 100.

awarded at each trial.[103] Because trained coders worked directly with court clerks' offices in collecting damages amounts, these data do not suffer from problems of overstatement in the same way self-reported awards may.[104]

The 2001 sample was collected from a random set of forty-five of the seventy-five most populous counties in the United States.[105] The 2005 sample was collected from the same set of counties used in the 2001 sample.[106] The 2005 sample also contains a random sample of 110 smaller counties drawn from over three thousand smaller counties.[107] To keep the two samples comparable, the empirical evaluation below excludes all observations in the 2005 sample from counties that were not also included in the 2001 sample.[108] For 2005, the included trials represent about thirty percent of all trials in American state courts.[109] Throughout the analysis, I report all of the results and statistics in 2005 dollars. All of the dollar amounts from the 2001 sample have been inflation adjusted to reflect 2005 dollars using the Consumer Price Index.[110]

When analyzing the CJSSC data, I focus on the 2001 and 2005 samples to isolate the effects of *State Farm* on punitive damages awards.[111] Limiting the analysis to samples collected two years before and two years after the *State Farm* decision minimizes the possibility that unobservable trends are driving the results.[112]

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103. *See generally* BJS 2001, *supra* note 100; BJS 2005, *supra* note 100.

104. Eisenberg & Heise, *supra* note 37, at 330; s*ee also* BJS 2001, *supra* note 100, at 11–12 (detailing the sampling methodology); BJS 2005, *supra* note 100, at 11 (same.

105. BJS 2001, *supra* note 100, at 11.

106. BJS 2005, *supra* note 100, at 11.

107. BJS 2005, *supra* note 100, at 11.

108. This procedure is similar to that found in Eisenberg & Heise, *supra* note 37, at 336–37.

109. Eisenberg & Heise, *supra* note 37, at 329. The CJSSC is not a true nationally representative sample in the sense that it was randomly collected from all trials conducted in the country for a given year, but the datasets are the closest to being nationally representative that are currently available. Additionally, because the CJSSC datasets contain information only on completed trials, the results apply only to judgment amounts, not to settlements. *See* BJS 2001, *supra* note 100, at 11–12 (describing collection of dataset); BJS 2005, *supra* note 100, at 11 (same).

110. Bureau of Labor Statistics, *Consumer Price Index*, BUREAU LAB. STAT., http://www.bls.gov/cpi/tables.htm (last visited Jan. 21, 2013).

111. I take additional measures to mitigate the effect of confounding factors, and those are described below.

112. For example, the mix of cases appearing before courts will be less likely to change over four years than over a longer period (using all of the CJSSC samples would involve a mix of cases brought thirteen years apart). By considering samples two years before and after *State Farm*, I also minimize the possibility that shifts occurred in the legal system that would create a false *State Farm* effect or obscure a true *State Farm* effect. One such concern may be tort reform, which sometimes targets punitive damages. A review of Ronen Avraham's database of state tort reform indicates that the period between 2001 and 2005 involved few tort reform actions, while

C. Data Analysis

Tables 1 and 2 report summary statistics for the 2001 and 2005 samples of the CJSSC for all trials as well as jury trials and bench trials separately. Table 1 reports statistics for cases decided before *State Farm* was binding precedent while Table 2 reports statistics for cases subject to the *State Farm* ratio cap. Panel A of both tables reports basic statistics about the number of trials sampled and the number of trials involving punitive damages, and in many respects, the two samples are similar. In both 2001 and 2005, around 7,500 trials were sampled, and about three-fourths of those trials were jury trials. Plaintiffs' success rates across different trial types and all trials were also similar across the two years. However, conditional on a plaintiff winning, courts were slightly less likely to award punitive damages in 2005 than 2001.

Panel B of both tables presents a basic picture of compensatory damages across different types of trials, and those results show that the characteristics of compensatory awards were similar across the two years. Conditional on compensatory damages being awarded, juries awarded an average of about three times the amount of compensatory damages that judges did in each year. However, the median compensatory award for juries was not even twice as large as the median compensatory award for judges in each year.

Panel C of both tables reports summary statistics for cases in which the court awarded punitive damages to at least one plaintiff. The average amount awarded decreased by about half for all trials from 2001 to 2005, with judges awarding about $80,000 more and juries awarding almost $4 million less. These statistics are roughly consistent with what Eisenberg and Heise found in their more systematic analysis of judges and juries; although, I compare only 2001 with 2005 as opposed to the aggregate of 1992, 1996, and 2001 with 2005.[113] In contrast with the change in the mean award amounts, the median punitive damages award for all trials increased from 2001 to 2005, and the median amount awarded by judges and juries decreased and increased respectively. These effects are exactly opposite from the effects observable in the mean award amounts. Thus, the raw data on punitive damages amounts do not paint a clear picture of the effect of *State Farm*.

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the period from 1992 to 2001 involved comparatively more reforms. *See generally* Ronen Avraham, *Database of State Tort Law Reforms (DSTLR 4th)* (Univ. of Tex. School of Law, Law & Econ. Research Paper No. 184, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902711.

113. Eisenberg & Heise, *supra* note 37, at 346.

Finally, Panel D of each table reports basic statistics for the ratio of punitive to compensatory damages. Similar to the statistics for punitive damages amounts, the mean and median ratios move in opposite directions from 2001 to 2005. The mean ratio decreases, and the median ratio increases; although, both the mean and median remain under the ratio cap imposed by *State Farm*. Panel D of each table also reports the number of cases exceeding the single-digit ratio imposed by *State Farm*. In both years, this number was less than ten, but 2005 saw fewer awards violate the ratio limit, and no judges imposed awards beyond the limit after *State Farm* was decided.

To determine if *State Farm* affected the number of awards that violated the ratio limit, I use a binomial test. This test determines whether there was a statistically significant difference in the proportion of awards that violated the single-digit-ratio limit after *State Farm* relative to before *State Farm*. This test is nonparametric, so it does not rely on any distributional assumptions. Using the binomial test, I am unable to reject the hypothesis that the proportion of awards violating the single-digit ratio is the same before and after *State Farm* ($p = 0.878$). In other words, there is no statistical evidence that *State Farm* affected the number of awards involving multi-digit ratios. A chi-squared test and test of proportions confirm the results of the binomial test.

Table 1: Summary Statistics for the 2001 CJSSC Sample

	Jury Trials	Bench Trials	All Trials
Panel A: General Characteristics			
Number	5,846	1,947	7,793
Percent of Sample	75%	25%	100%
Number of Which Plaintiff Won	3,013	1,223	4,236
Percent of Which Plaintiff Won	52%	63%	54%
Number in Which PD Awarded	155	57	212
Percent in Which PD Awarded	5.14%	4.66%	5.00%
Panel B: Characteristics of Compensatory Damages (if CD>0) (2005 dollars)			
Mean	757,303	229,408	604,711
Standard Deviation	5,334,138	1,708,301	4,596,398
Median	44,829	28,718	38,568
Number of Observations	3,008	1,223	4,231
Panel C: Characteristics of Punitive Damages (if PD>0)(2005 dollars)			
Mean	7,024,798	186,891	5,186,304
Standard Deviation	42,000,000	467,888	36,000,000
Median	83,250	56,055	67,155
Number of Observations	155	57	212
Panel D: Characteristics of PD/CD Ratio (if PD>0 and CD>0)			
Mean	8.269	2.006	6.544
Standard Deviation	52.297	5.508	44.657
Median	0.623	0.490	0.622
Number of Observations	150	57	207
Number Exceeding Single-Digit Ratio	7	2	9

Data Source: Civil Justice Survey of State Courts, 2005 Sample. Note that *CD* = compensatory damages and *PD* = punitive damages. Also note that all award amounts are reported in 2005 dollars.

Table 2: Summary Statistics for the 2005 CJSSC Sample

	Jury Trials	Bench Trials	All Trials
Panel A: General Characteristics			
Number	5,454	2,028	7,482
Percent of Sample	73%	27%	100%
Number of Which Plaintiff Won	2,578	1,272	3,850
Percent of Which Plaintiff Won	47%	63%	51%
Number in Which PD Awarded	118	45	163
Percent in Which PD Awarded	4.58%	3.54%	4.23%
Panel B:Characteristics of Compensatory Damages (if CD>0)(2005 dollars)			
Mean	772,045	253,972	600,796
Standard Deviation	4,875,988	1,870,459	4,138,786
Median	48,000	31,743	40,000
Number of Observations	2,566	1,267	3,833
Panel C: Characteristics of Punitive Damages (if PD>0)(2005 dollars)			
Mean	3,118,837	266,055	2,331,259
Standard Deviation	11,800,000	662,386	10,100,000
Median	187,413	50,000	114,000
Number of Observations	118	45	163
Panel D: Characteristics of PD/CD Ratio (if PD>0 and CD>0)			
Mean	2.646	1.449	2.328
Standard Deviation	4.178	1.414	3.686
Median	1.000	1.000	1.000
Number of Observations	116	42	158
Number Exceeding Single-Digit Ratio	6	0	6

Data Source: Civil Justice Survey of State Courts, 2001 Sample.
Note that CD = compensatory damages and PD = punitive damages. Note also that all awards amounts are reported in 2005 dollars.

In the next Section, I employ a detailed regression analysis, which allows me to control for various factors that may be masking

the effect of *State Farm* in the raw data. For example, if intentional tort cases involve particularly large punitive damages awards (or particularly large ratios of punitive to compensatory damages) and courts heard more of these cases in 2001 than 2005, then the mean punitive damages award may be higher in 2001 because of the larger number of intentional tort cases rather than the absence of *State Farm*'s prescribed ratio. Controlling for other factors, like the type of case, will allow me to isolate the effect of *State Farm*.

D. Regression Analysis

1. Empirical Motivation

To disentangle the effect of *State Farm* from other case- and year-specific factors that may influence award amounts, I use linear regressions and quantile regressions. The analysis presented here includes more controls than previous analyses, and those controls act to truly isolate the effect of *State Farm* from other case-specific factors that may influence punitive damages awards. These controls include the type of case, the type of litigants involved, the type of adjudicator, and the jurisdiction in which the case is heard. This analysis allows me to better test my hypothesis about the effect of *State Farm* because while it cannot hold "all else equal," it can net out the effect of *State Farm* from the effect of the other control variables included in the analysis.

My regression analysis differs in several important respects from previous work. First, it includes more control variables than prior work that has considered *State Farm*'s effect on everyday awards.[114] Second, it includes different types of variables to test whether *State Farm* had an effect on overall punitive damages amounts and whether *State Farm* had an effect on the relationship between punitive and compensatory damages. Eisenberg and Heise considered the first type of effect but not the second in their analysis of everyday awards,[115] while both types of effects have been considered for blockbuster awards.[116] My analysis provides a more complete picture of how *State Farm* affected everyday awards. Third, my analysis includes only the samples of the CJSSC two years before and after *State Farm* was decided to mitigate concerns that unobservable

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114. Eisenberg and Heise do examine the effect of *State Farm* with regression models, but they do not indicate that they used any control variables when examining this effect. *See id.* at 350.

115. *Id.*

116. Del Rossi & Viscusi, *supra* note 4, at 141.

trends are driving any results, which was one of Eisenberg and Heise's explanations for their results.[117] While the regression analysis can control for many case-specific factors, it cannot completely isolate the effect of *State Farm* from all factors. Using only data that brackets the decision by two years mollifies the impact of unobservable trends (such as the changing influence of plaintiffs' bars), which may influence the results but are very difficult to measure and control for. Finally, I employ quantile regressions as well as linear regressions in my analysis because previous work, as well as the data analysis presented above, has suggested that the mean and median award amounts present mixed evidence of the effect of *State Farm*.[118] While quantile regressions have been used to evaluate the effect of *State Farm* on blockbuster awards, they have not been used to examine that effect for everyday awards. Thus my analysis fills in this gap and provides more comparability across the studies that have considered everyday awards and those that have considered blockbuster awards.

I use the following general specification throughout my analysis:[119]

$$PD_i = \alpha + \theta State\ Farm_i + \delta jury_i + \gamma \log(CD_i) + \beta X_i + \varphi W_i + \omega Z_i + \varepsilon$$

In this equation, *PD*, the dependent variable, assumes different values for different measures of punitive damages. First, it takes on the value of the natural logarithm of punitive damages.[120] This measure allows me to isolate the effect of *State Farm* on the amount of punitive damages awarded. Second, *PD* takes on the value of the ratio of punitive to compensatory damages, which allows me to examine the effect *State Farm* has had on the actual limitation that it created.

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117. Eisenberg & Heise, *supra* note 37, at 348–53.

118. Eisenberg and Heise noted that the mean and median ratios evidenced a different impact of *State Farm*, as the mean ratio decreased but the median ratio increased. *Id.* at 347–48.

119. This specification is similar to that previous work. *See* Hersch & Viscusi, *supra* note 55, at 17–21.

120. Using the logarithm instead of the actual amount of punitive damages is consistent with prior research. *See, e.g.*, Eisenberg & Heise, *supra* note 37 (using the natural logarithm of punitive damages); Hersch & Viscusi, *supra* note 55 (same). Using the same measure as prior work facilitates the comparison of findings across studies. In general, previous authors have chosen the logarithmic form of punitive damages because of its distributional properties. The distribution of punitive award amounts is skewed, and prior work has been unable to reject the hypothesis that the logarithm of punitive damages is normally distributed. *See* Hersch & Viscusi, *supra* note 55, at 24 (discussing their choice of the logarithmic form). I employ the same technique as prior work when dealing with cases involving zero compensatory or punitive damages. The logarithm of zero does not exist, so I add one to all damages awards and then calculate the logarithm. *See* Hersch & Viscusi, *supra* note 55, at 14.

State Farm is the variable of interest, and it also assumes two different values. First, it is an indicator variable that takes on a value of one if a case was heard after *State Farm* was binding precedent, and zero otherwise. Essentially, this is an indicator variable for whether the case was heard in 2005, and it captures whether *State Farm* caused an increase or decrease in the dependent variable. Second, *State Farm* is an interaction term between the indicator variable for whether the case was heard after *State Farm* was decided and the logarithm of compensatory damages. This form of the *State Farm* variable captures the influence of *State Farm* on the relationship between punitive and compensatory damages. The coefficient of interest in all specifications is θ, which is an estimate of the effect *State Farm* had on the relevant punitive damages measure.

Each of the other variables controlled for in the regressions are case-specific variables which may have an effect on punitive damages independent of *State Farm*. *Jury* is an indicator variable for whether a jury or a judge made the award and takes on a value of one when a jury decided the case, and zero otherwise. *Log(CD)* is the natural log of compensatory damages.[121] *X* is a vector of two indicator variables for the types of litigants involved: one indicator variable takes a value of one when the case involves an individual versus another individual, and the second indicator variable takes on a value of one when the case involves an individual against a hospital, corporation, or government. *W* is a vector of indicator variables for different counties that had multiple punitive damages awards.[122] Finally, *Z* is a vector of indicator variables for different types of claims (such as intentional torts or professional malpractice), and *i* indexes each case.[123]

This general specification isolates the effect of *State Farm* from the effect of the other variables. These controls allow me to examine the effect of *State Farm* on cases with similar characteristics, and as a result, the coefficient on *State Farm* represents the actual effect of

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121. Consistent with prior work, I add one to all damages awards prior to calculating the logarithm. *See id.*

122. The vector includes indicator variables for the following counties: Alameda, Los Angeles, and Orange counties in California; Fairfax County in Virginia; Franklin County in Ohio; Maricopa County in Arizona; and Harris and Dallas counties in Texas. I include these specific counties because, across both samples, they had the greatest number of punitive damages awards. This procedure is similar to the procedure used by Professors Hersch and Viscusi. *Id.* at 17–21.

123. Indicator variables for the following types of cases are included in *Z*: premises liability; intentional tort; professional (including medical and dental) malpractice; slander, libel, or defamation; negligence; fraud; breach of contract (either buyer or seller breach); employment dispute or discrimination; contract disputes involving mortgage foreclosure, rental disputes, or other contractual disputes; and real property disputes. Again, this procedure is consistent with the approach of Hersch and Viscusi. *Id.*

State Farm and not the effect of the other case-specific variables that I am able to control for and that may be correlated with *State Farm*. For example, if the particular jurisdictions changed how they awarded punitive damages between 2001 and 2005, the conclusions drawn from the raw data may erroneously attribute the effect of these changes to *State Farm*. However, the regressions described above isolate the effect of the *State Farm* decision, netting out the effects of the case attributes discussed above.

2. Results

Table 3 reports the results of ordinary least squares ("OLS") regressions with the natural logarithm of punitive damages as the dependent variable. Columns 1 and 2 report the results of regressions in which the variable of interest is an indicator variable for whether the award was imposed after *State Farm*. The regression reported in Column 1 omits most of the control variables discussed above, and the regression in Column 2 includes all of the control variables. In the interest of conciseness, all of the results tables report only the estimates for the variable of interest and the control variables for compensatory damages and jury trials. The tables omit the estimates for all other control variables but indicate when those control variables were included in the reported regression results.

The regression results in Columns 1 and 2 indicate that *State Farm* did not have a negative effect on the amount of punitive damages awarded by state courts. In both the regression with controls and the one without controls, *State Farm* is actually associated with an increase in award amounts; however, this effect is only statistically significant in the regression that does not control for other case attributes.[124] In the regression without additional controls, the coefficient estimate on the *State Farm* variable indicates that *State Farm* was associated with about an 80% increase in punitive damages.[125] In the regression reported in Column 2, the coefficient estimate on the *State Farm* variable indicates that the decision was associated with about a 53% increase in punitive damages; however,

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124. Because the *State Farm* variable is an indicator variable and the dependent variable is in logarithmic form, the coefficient reported in Table 3 is not the actual effect of *State Farm* on punitive damages awards. To find the actual effect, the coefficient must be transformed using the formula: $exp(\theta) - 1$ (where θ is the relevant coefficient). Robert Halvorsen & Raymond Palmquist, *The Interpretation of Dummy Variables in Semilogarithmic Equations*, 70 AM. ECON. REV. 474, 474–75 (1980).

125. Using the formula described above, $exp(.588) - 1 = .800$ or 80%.

this coefficient is insignificant.[126] The coefficient estimates on the compensatory damages and jury trial variables are positive and significant, which is consistent with the existing literature.[127] These two regression models provide some evidence that *State Farm* had a positive effect on punitive damages generally, but they do not directly address the relationship between compensatory and punitive damages, which is what the holding in *State Farm* actually addressed. To examine this relationship, I estimate models with an interaction term between the compensatory damages variable and the *State Farm* variable.

Columns 3 and 4 of Table 3 report the results of two regressions with this interaction term included. In both the regressions with all controls and the regressions without all control variables included, the estimated coefficient on the interaction term is positive and significant, indicating that *State Farm* did change the relationship between compensatory and punitive damages, but in the opposite way of what was expected. The results in Column 4 indicate that prior to *State Farm*, the elasticity between compensatory and punitive damages was .448 (the estimated coefficient on the logarithm of compensatory damages),[128] which means that a 1% increase in compensatory damages was associated with about a .448% increase in punitive damages. In general, a measure of elasticity captures how a percentage change in one variable (here, compensatory damages) affects another variable (here, punitive damages). Adding the coefficient on the interaction term to the coefficient on the logarithm of compensatory damages gives the estimated elasticity between compensatory and punitive damages after *State Farm*, which is .4874. Therefore, after *State Farm*, a 1% increase in compensatory damages is associated with about a .487% increase in punitive damages. In other words, *State Farm* is associated with about an 8.8% increase in the elasticity between compensatory and punitive damages.[129] Overall, the evidence provides no support for the assertion that *State Farm*

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126. Using the formula described above, $\exp(.423) - 1 = .526$ or 53%.

127. Because for the logarithm of compensatory damages both the dependent and independent variables involve logarithmic transformations, the coefficient here is interpreted as an elasticity. In the simple regression, for example, the elasticity is 0.519, meaning that a 1% increase in compensatory damages is associated with a 0.519% increase in punitive damages. This result is comparable with prior studies. *See, e.g.*, Del Rossi & Viscusi, *supra* note 4, at 142 (showing an elasticity in the range of 0.5–0.6); Eisenberg & Heise, *supra* note 37, at 343, 354 (finding an elasticity of about 0.8).

128. The estimated coefficient on the compensatory damages variable is interpreted as an elasticity because this variable and the dependent variable are both in logarithmic form. Del Rossi & Viscusi, *supra* note 4, at 142.

129. This percentage increase is calculated as follows: $\frac{.0394}{.448} = .087946$ or about 8.8%.

caused a decrease in punitive damages amounts. On the contrary, the results from the OLS regression models suggest that *State Farm* is actually associated with an increase in the elasticity between compensatory and punitive damages, which is exactly the opposite effect from the one the Court would likely have expected it to have.

Table 3: The Effect of *State Farm* on Punitive Damages Awards

Variables	(1) OLS	(2) OLS	(3) OLS	(4) OLS
log(CD)	0.519**	0.465**	0.495**	0.448**
	(0.0743)	(0.0736)	(0.0761)	(0.0742)
State Farm	0.588**	0.423		
	(0.221)	(0.258)		
log(CD)x*State Farm*			0.0529**	0.0394*
			(0.0169)	(0.0200)
Jury	0.495*	0.614*	0.476*	0.596*
	(0.230)	(0.261)	(0.231)	(0.260)
Litigant-Pair Controls	no	yes	no	yes
County Controls	no	yes	no	yes
Case-Type Controls	no	yes	no	yes
Number of Observations	375	375	375	375

Data Source: Civil Justice Survey of State Courts, 2001and 2005 Samples.
Notes: These results are for OLS regressions. The dependent variable in all specifications is the natural logarithm of punitive damages. Robust standard errors are reported in parentheses. The sample is composed of jury and bench trials won by plaintiffs. *, ** indicate significance at the 5% and 1% levels, respectively.

Table 4 reports the results of quantile regressions with the logarithm of punitive damages as the dependent variable. Similar to Table 3, the first two columns report results with an indicator variable for *State Farm* included and the last two columns report results with an interaction term between that variable and the logarithm of compensatory damages included. I estimate quantile regressions for several reasons. First, previous work and the data analysis above demonstrate that the mean and median punitive damages award before and after *State Farm* suggest different effects of *State Farm*.[130]

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130. Eisenberg & Heise, *supra* note 37, at 347–48.

OLS regressions estimate the conditional mean of a variable while quantile regressions estimate the conditional median.[131] Because *State Farm* appears to have had a different effect on the mean and median punitive damages award, quantile regressions help provide a more comprehensive picture of the relationship between variables.[132]

Second, because prior research has demonstrated that punitive damages tend to follow distributions with a number of outliers, quantile regressions at the median can provide additional evidence that any positive shift in punitive damages observed after *State Farm* is a meaningful change in behavior and not simply the result of a few large awards influencing the OLS coefficients. Because quantile regressions focus on the conditional median and not the conditional mean like OLS regressions, they can confirm that outliers are not driving the results and that the shift in punitive damages after *State Farm* occurred near the middle of the distribution of awards and not just at the higher end. This confirmation is particularly important given that the results demonstrate an unintended consequence of the Supreme Court decision. Before recommending a solution to this unintended consequence, I need to ensure that these consequences do exist and are affecting award levels in the middle of the distribution.

Columns 1 and 2 of Table 4 report the results of quantile regressions that include an estimate of *State Farm*'s effect on punitive damages awards. Similar to the OLS results, the estimates on the *State Farm* indicator variable are positive in both columns, and both are statistically significant. The estimates are roughly consistent with the OLS estimates, and *State Farm* is associated with a meaningful increase in punitive damages awards. Because these results are derived from estimating the conditional median, they indicate that a few large awards are not driving the increase in punitive damages awards associated with *State Farm*. In other words, these results indicate that *State Farm* is associated with an increase in awards near the middle of the distribution of awards and not just in the largest awards.

Columns 3 and 4 of Table 4 report the results of quantile regressions that include an interaction term between the *State Farm* indicator variable and the compensatory damages variable. Similar to the results of the OLS regressions, *State Farm* is associated with an increase in the influence of compensatory damages on punitive

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131. Quantile regressions can estimate other conditional quantiles, but throughout my analysis, I only consider the conditional median.

132. *See generally* Roger Koenker & Kevin F. Hallock, *Quantile Regression*, 15 J. ECON. PERSPECTIVES 143 (2001) (describing the usefulness of quantile regressions in elucidating the relationships between variables).

damages. This increase of about 8.4% is consistent with the increase observed in the OLS results. Overall, the results in Table 4 suggest that *State Farm* led to larger punitive damages awards both in absolute terms and relative to a given increase in compensatory damages. Therefore, no evidence supports the hypothesis that *State Farm* reduces either overall punitive damages amounts or the influence of compensatory damages on punitive damages. On the contrary, the results support the conclusion that *State Farm* had the unexpected consequence of increasing punitive damages awards. However, *State Farm* did not deal directly with the amount of punitive damages but with the ratio of those damages to compensatory damages. Therefore, the next part of the analysis considers the effect of *State Farm* on the ratio of punitive to compensatory damages.

Table 4: The Effect of *State Farm* on Punitive Damages Awards

Variables	(1) Quantile	(2) Quantile	(3) Quantile	(4) Quantile
log(CD)	0.708**	0.634**	0.688**	0.618**
	(0.0358)	(0.0353)	(0.0395)	(0.0518)
State Farm	0.525*	0.633**		
	(0.223)	(0.229)		
log(CD)x*State Farm*			0.0448*	0.0520+
			(0.0202)	(0.0279)
Jury	0.568*	0.566*	0.426	0.530
	(0.249)	(0.245)	(0.269)	(0.350)
Litigant-Pair Controls	no	yes	no	yes
County Controls	no	yes	no	yes
Case-Type Controls	no	yes	no	yes
Number of Observations	375	375	375	375

Data Source: Civil Justice Survey of State Courts, 2001and 2005 Samples.
Notes: These results are for quantile regressions. The dependent variable in all specifications is the natural logarithm of punitive damages. Robust standard errors are reported in parentheses. The sample is composed of jury and bench trials won by plaintiffs. +, *, ** indicate significance at the 10%, 5%, and 1% levels, respectively.

Table 5 reports the results of OLS and quantile regressions with the ratio of punitive to compensatory damages as the dependent variable. In all of the reported specifications, the logarithm of

compensatory damages is included as a control variable. This creates a problem of endogeneity bias because the logarithm of compensatory damages will be correlated with the error term in the regression. I include the compensatory damages variable primarily to maintain comparability with the results of Eisenberg and Heise, but it is important to note that Del Rossi and Viscusi did not include a variable for compensatory damages when they analyzed the ratio of punitive to compensatory damages for blockbuster awards.[133] I confirm in unreported regressions that the qualitative results are not different when the compensatory damages variable is excluded.

The first two columns of Table 5 report the results of OLS regressions. The estimate of the coefficient on the *State Farm* variable is insignificant in both of these columns, meaning that *State Farm* has not had a significant impact on the amount of punitive damages awarded; however, the estimate of the *State Farm* effect is negative. When the compensatory damages variable is excluded, the effect of *State Farm* remains negative and insignificant with a slight change in the magnitude of the estimates. None of the results in the first two columns support the hypothesis that *State Farm* decreased the ratio of punitive to compensatory damages, but unlike prior results, these results do not provide evidence of unintended consequences in the form of higher ratios after *State Farm*.

Columns 3 and 4 of Table 5 report the results of quantile regressions, and unlike Columns 1 and 2, these results do provide evidence that *State Farm* generated unintended consequences in the form of higher ratios. With and without additional controls, the estimate of the coefficient on the *State Farm* variable is positive and significant, indicating that *State Farm* is associated with a significant increase in ratios. These results do not change when the compensatory damages variable is excluded. These results provide the strongest evidence of unintended consequences stemming from *State Farm*. If lower courts followed the Supreme Court's guidance, they would have lowered all ratios greater than ten to a lower number. However, none of the awards with ratios below ten should have been affected, and they certainly should not have risen if lower courts implemented *State Farm* without changing the way they imposed punitive damages awards otherwise. The fact that the conditional median is significantly and positively impacted by *State Farm* suggests that lower courts did not simply implement *State Farm* to reduce multi-digit ratios but

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133. *See* Del Rossi & Viscusi, supra note 4, at 152 (excluding the compensatory damages variable); Eisenberg & Heise, *supra* note 37, at 356 (including the compensatory damages variable).

changed how they impose awards in other ways so that the ratio of punitive to compensatory damages actually increased after *State Farm*.

Table 5: The Effect of *State Farm* on the Ratio of Punitive to Compensatory Damages

Variables	(1) OLS	(2) OLS	(3) Quantile	(4) Quantile
log(CD)	-4.236+	-3.586+	-0.115**	-0.133**
	(2.393)	(1.879)	(0.0278)	(0.0183)
State Farm	-3.039	-3.579	0.400**	0.484**
	(2.399)	(2.948)	(0.140)	(0.0919)
Jury	7.422+	6.941+	0.149	0.0559
	(4.225)	(3.909)	(0.157)	(0.100)
Litigant-Pair Controls	no	yes	no	yes
County Controls	no	yes	no	yes
Case-Type Controls	no	yes	no	yes
Number of Observations	365	365	365	365

Data Source: Civil Justice Survey of State Courts, 2001 and 2005 Samples.
Notes: The dependent variable in all specifications is the ratio of punitive to compensatory damages. Robust standard errors are reported in parentheses. The sample is composed of jury and bench trials won by plaintiffs involving positive compensatory and punitive damages. The first two columns report results for OLS regressions, and the second two columns report results for quantile regressions. Ten observations are dropped in the results of this table because they involved zero compensatory damages. Compensatory damages must be positive for the ratio of punitive to compensatory damages to exist. +, *, ** indicate significance at the 10%, 5%, and 1% levels, respectively.

E. An Ineffective Doctrine with Unintended Consequences

Collectively, the empirical evidence above demonstrates that *State Farm* has not had the effect one would expect it to have and suggests that it has actually caused some unintended effects. The evidence provides no support for the assertion that *State Farm* has effectively lowered either the amount of punitive damages or the ratio of punitive to compensatory damages. On the contrary, evidence suggests that *State Farm* is associated with an increase in the medians of both of those measures for everyday awards.

However, the evidence above pertains only to everyday punitive damages awards and looks very different than the evidence for blockbuster punitive damages awards. Contrary to that for everyday awards, the evidence for blockbuster awards suggests that *State Farm* had a negative effect on punitive damages.[134] In other words, the effect of *State Farm* is inconsistent across different sizes of awards. The inconsistent effect of a Supreme Court decision would be troubling in any context, but in the context of punitive damages, it is particularly troubling. From the beginning of its punitive damages jurisprudence, the Court identified predictability (or lack of notice to defendants) as the primary problem it was seeking to address.[135] Under the current ratio cap, defendants will still likely have difficulty predicting the amount of liability they may face; moreover, they will have little idea how much protection, if any, they will receive from *State Farm* since that decision seems to have affected blockbuster and everyday awards very differently. In other words, when the Court attempted to make punitive damages awards more predictable in *Gore* and *State Farm*, it actually introduced another layer of unpredictability for defendants, compounding the problem it originally sought to address. Before *State Farm*, defendants attempted to predict their punitive liability, but now they must predict that liability as well as the likelihood they will face liability high enough for *State Farm* to offer some protection. Therefore, the current limitations on punitive damages could be characterized as inconsistent, ineffective, or ambiguous depending on how one views the cases before courts today, but certainly these limitations have generated problems that did not exist before in the form of less predictability and increased awards (for everyday awards).

One possible explanation for the increase in everyday awards after *State Farm* is anchoring. Several studies have evaluated the effects of imposing caps on damages and found that individuals awarding damages anchor to the amount of the cap and that this anchor can increase their final award amount relative to what it would have been without the cap in place.[136] While *State Farm* did not impose an actual cap, it did impose a limitation which individuals could easily calculate and then use as an anchor when determining a punitive damages award. For example, if a jury determined that a

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134. Del Rossi & Viscusi, *supra* note 4, at 142.

135. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416–18 (2003).

136. For a general review of how individuals exhibit anchoring behavior when damages caps are imposed, see Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103 (2002).

plaintiff deserved $100,000 in compensatory damages, it could easily calculate that $1 million would be the effective cap on punitive damages under *State Farm*'s single-digit-ratio limit. Thus, the jury would have a cap on which to anchor when determining punitive damages and which could serve to increase its final punitive damages award. This cap may be particularly important in the context of punitive damages since juries generally receive no specific guidance on how to set awards,[137] meaning they may be drawn to the cap as a useful anchor.

Instead of anchoring, another possible explanation is that adjudicators simply perceived *State Farm* as permission to increase punitive damages awards as long as those awards do not violate the ratio cap. Before *State Farm*, adjudicators may have wanted to award higher levels of punitive damages but feared those awards would violate the holdings of *Gore* or other cases. However, after *State Farm*, they know how large they can make their awards before violating the due process rights of the defendant. As a result, the adjudicators could increase awards from what they awarded previously while remaining under the ratio cap. In other words, adjudicators may not have been anchoring to any specific amount, but may have felt that the Court had implicitly given them permission to raise their awards.

Whether anchoring, receiving implicit permission, or a different unintended consequence caused the effect, the evidence suggests that *State Farm* is associated with a significant increase in the size of punitive damages awards and the ratio of punitive to compensatory damages. However, the analysis above cannot completely rule out that some factor other than *State Farm* caused the increase. I control for as many case-specific factors as possible, but other unobservable changes may still have caused the increase in awards. However, these changes would need to have been pervasive; they would need to have affected a number of courts across the United States in a similar way since the CJSSC surveyed state courts across the country. It is unlikely that something other than a universally binding decision by the Supreme Court of the United States could have this effect, but I cannot rule out all other causes with complete certainty.

Below, I propose a new framework to limit punitive damages, but before doing so, I use the next Part to briefly outline some additional inconsistencies and problems with the current doctrine, beyond its unintended consequences. Understanding why the current doctrine is inconsistent will assist in constructing a new doctrine that

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137. Del Rossi & Viscusi, *supra* note 4, at 117.

avoids past mistakes and effectively limits punitive damages in a manner consistent with how the Supreme Court has applied the Due Process Clause in this area of constitutional jurisprudence.

IV. IDENTIFYING ADDITIONAL PROBLEMS WITH THE PUNITIVE DAMAGES DOCTRINE

In addition to causing unintended consequences, the doctrine behind *State Farm* suffers from three other problems. These three problems almost certainly contribute to the ineffectiveness of *State Farm* demonstrated by my regression analysis, but they stand alone as independent problems as well. I discuss these problems here not to explain *State Farm*'s ineffectiveness, but to demonstrate that the current constitutional doctrine on punitive damages suffers from other problems independent of any effect it may have on punitive damages awards themselves. First, the *State Farm* ratio cap undermines the Supreme Court's deterrence justification for punitive damages because it mathematically prevents courts from achieving optimal deterrence.

Second, even if the doctrine were logically consistent, implementing optimal deterrence through juries (which, as demonstrated by Tables 1 and 2, award a substantial proportion of punitive damages) would likely prove nearly impossible.[138] Third, while the Court has held that reprehensibility is the most important factor in determining the reasonableness of an award, juries have significant difficulty in actually translating a determination of reprehensibility into a monetary award. Essentially, the second and third problems imply that juries cannot effectively implement the goals of deterring wrongful conduct and punishing reprehensible actions through punitive damages. These three issues taken together demonstrate that the current constitutional doctrine is flawed and incapable of effectively ensuring that punitive damages awards are predictable and that defendants receive adequate notice of their potential liability.

A. Internal Logical Inconsistency

Under the Due Process Clause, the Court has held that deterrence is one of the fundamental justifications of punitive damages.[139] Returning to the basic framework of deterrence theory

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138. CASS R. SUNSTEIN, REID HASTIE, JOHN W. PAYNE, DAVID A. SCHKADE & W. KIP VISCUSI, PUNITIVE DAMAGES: HOW JURIES DECIDE 29–61 (2002).

139. *State Farm*, 538 U.S. at 408; BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 567 (1996).

described in Part II.B, the amount of punitive damages that induces optimal care and provides optimal deterrence is given by the following equation:[140]

$$PD = \left(\frac{1-p}{p}\right) * CD$$

The optimal amount of punitive damages is completely determined by the amount of compensatory damages multiplied by what is termed the liability ratio: $\left(\frac{1-p}{p}\right)$.

Using this equation for punitive damages, it is possible to examine the ratio of punitive to compensatory damages that was the focus of the virtual cap established by *State Farm*.[141] The ratio to which *State Farm* referred is equivalent to the liability ratio, and this can be seen by rearranging the equation above to isolate the ratio of punitive to compensatory damages (PD/CD) on one side and the liability ratio on the other. The following equation demonstrates that the ratio of punitive to compensatory damages is exactly equivalent to the liability ratio:

$$\frac{PD}{CD} = \frac{1-p}{p}$$

Thus, by simply rearranging the equation that determines the optimal amount of punitive damages, one can solve for the very ratio that *State Farm* sought to limit. This equation demonstrates that the optimal ratio of punitive to compensatory damages is exactly equivalent to the liability ratio. In other words, by placing a limitation on the ratio, *State Farm* implicitly placed a limitation on the liability ratio.[142] This limitation thus presents a fundamental problem because there is absolutely no guarantee that the liability ratio will assume a value less than ten.[143] Moreover, under deterrence theory, the liability ratio must be able to assume any value in order to achieve optimal deterrence.[144] When the liability ratio is arbitrarily limited to less

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140. The full analysis and derivation of this equation is presented *supra* Section II.B.

141. *State Farm*, 538 U.S. at 425.

142. *Id.*

143. Because the probability of being held liable, as well as the probability of escaping liability, can take on any value between zero and one, deterrence theory requires a liability ratio that varies from zero to infinity.

144. SHAVELL, *supra* note 6, at 243–47.

than ten in the manner the Court required in *State Farm*, optimal deterrence becomes a mathematical impossibility.[145]

Returning to the example used to illustrate deterrence in Part II.B: The defendant faced a 50% chance of being held liable for the harm it caused, which inflicted damages of $100. By adding $100 in punitive damages to the $100 in compensatory damages, the defendant internalized the full cost of its actions and took optimal precautions against inflicting the harm in the first place. In this example, the equation relating the ratio of punitive to compensatory damages to the liability ratio was:

$$\frac{\$100}{\$100} = \frac{.5}{.5}$$

In the above case, the liability ratio is equal to one, clearly under the *State Farm* ratio cap. However, suppose that instead of facing a 50% chance of being held liable, the defendant faces a 5% chance of being held liable. This would imply a liability ratio of $\frac{.95}{.5}$, which simplifies to nineteen; this means that to achieve optimal deterrence, the ratio of punitive to compensatory damages would also need to be nineteen. The problem here is that nineteen clearly exceeds the single-digit ratio cap imposed by *State Farm*. In other words, a lower court could never achieve optimal deterrence in this example. In fact, any defendant that faces less than a $\frac{1}{11}$ chance of being held liable can never be optimally deterred under the *State Farm* ratio cap.[146]

Therefore, by limiting the liability ratio to less than ten, the Court implicitly held that under the Fourteenth Amendment, courts are prohibited from achieving optimal deterrence in many situations, despite the fact that the Court has reiterated throughout its punitive damages jurisprudence that deterrence is one of the primary goals of punitive damages.[147] The Court claimed it based its ratio on past experience with punitive damages rather than any mathematical

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145. More formally, the liability ratio $\frac{(1-p)}{p}$ can take on any value between zero and infinity so that $\frac{(1-p)}{p} \in [0, \infty)$. As the probability of being held liable becomes very small, the liability ratio becomes very large so that (with a slight abuse of notation) $\lim_{p \to 0} \frac{(1-p)}{p} = \infty$. As a result, by artificially limiting this ratio to less than ten, the liability ratio cannot become large enough to achieve optimal deterrence when the probability of being held liable becomes very small.

146. Formally, any probability of being held liable, p, that satisfies the following inequality will necessarily result in a ratio of punitive to compensatory damages that violates the *State Farm* cap: $10 < \frac{(1-p)}{p}$. Solving this equation yields $p < \frac{1}{11}$.

147. *State Farm*, 538 U.S. at 425; BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 567 (1996).

considerations.[148] However, by ignoring the mathematical considerations, the Court handicapped lower courts attempting to implement the Court's directive that punitive damages should deter defendants. Perhaps the Court made an unstated assumption that providing defendants with notice was more important than achieving deterrence, but without a decision to that effect, and in light of the Court's strong emphasis on the goal of deterrence, the current doctrine remains logically inconsistent.

The above analysis does assume that the Court intended to implement a system that achieved optimal deterrence, but this assumption appears well-founded. A system that achieved any other level of deterrence would be, by definition, inefficient, and it is exceedingly unlikely that the Court intended to implement a level of deterrence other than optimal deterrence—if it did, it provided no criteria to determine this other level of deterrence. Of course, the Court may have intended that the goals of deterrence and retribution be implemented together, but it has never stated how those goals should interact or that the goal of retribution should trump the implementation of the optimal level of deterrence.

The logical inconsistency in the Court's current framework is interesting for its legal significance and demonstrates that the Court has not adequately considered all aspects of that framework, but ultimately, the fact that the current framework is inconsistent may not matter. In the next Section, I discuss why implementing any level of deterrence will likely prove impossible as long as juries are involved.

B. Juries Cannot Implement Deterrence

Assuming that the Court sought to implement a specific level of deterrence, optimal or otherwise, the Court's goal will likely never be achieved because juries have trouble translating their judgments of liability and blameworthiness into award amounts that achieve a specific level of deterrence.[149] Scholars have suggested implementing a limit on punitive damages that directly achieves optimal deterrence.[150] Polinsky and Shavell offered a set of specific jury instructions designed to encourage juries to achieve optimal deterrence; it directs a jury to consider, in setting the punitive damages award, the probability that a defendant would be held liable for the harm it

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148. *State Farm*, 538 U.S. at 425.

149. SUNSTEIN ET AL., *supra* note 138, at 142–70.

150. *Id.*

caused.[151] Though these instructions were posed in the abstract, prior to *State Farm*,[152] the Court has noted both before and after *State Farm* that increasing punitive damages is warranted when the wrongful conduct is difficult to detect.[153] However, experimental evidence suggests that instituting jury instructions to achieve optimal deterrence would not succeed.[154]

Viscusi explicitly tested the instructions written by Polinsky and Shavell by presenting mock jurors with scenarios in which a defendant was held liable with some probability.[155] The mock jurors were given tables to aid them with the probability calculations necessary to arrive at the optimal punitive damages award; even with these aids and explicit instructions to do so, they did not award the optimal level of punitive damages.[156] Instead, Viscusi found that jury awards were not sensitive to changes in the probability that the defendant would be caught; furthermore, the awards suffered from the same unpredictability with the Polinksy and Shavell instructions as under more traditional regimes.[157]

Based on this evidence, the fact that the Supreme Court's current doctrine on punitive damages with respect to deterrence is logically inconsistent may not matter that much. If juries (which, as demonstrated in Tables 1 and 2, are responsible for a substantial percentage of punitive damages awards) cannot effectively implement optimal deterrence, then a limit on their discretion to achieve optimal deterrence may be relatively meaningless. However, that arbitrary limit will likely prove more salient for judges awarding punitive damages. Viscusi, in a separate experimental study, concludes that judges are more capable of the types of analyses and calculations necessary to achieve optimal deterrence.[158] If judges are capable of implementing optimal deterrence, then the arbitrary limit of the *State Farm* cap would affect their ability to do so in the cases in which they directly award punitive damages and would also affect their ability to

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151. Those instructions are too long to reproduce here. *See* Polinsky & Shavell, *supra* note 48, at 957–61 (describing jury instructions designed to achieve optimal deterrence).

152. However, these instructions were not used in an actual case.

153. Exxon Shipping Co. v. Baker, 554 U.S. 471, 494–95 (2008) ("[H]eavier punitive awards have been thought to be justifiable when wrongdoing is hard to detect . . . ."); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996) ("A higher ratio may also be justified in cases in which the injury is hard to detect . . . .").

154. SUNSTEIN ET AL., *supra* note 138, at 142–70.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 142–70, 186–207.

"correct" jury awards through post-trial motions and the appellate process.

C. Juries Cannot Translate Reprehensibility into a Monetary Award

Under the Due Process Clause, the reprehensibility of the defendant's conduct is the most important determinant of the reasonableness of punitive damages, and the Court has held that punitive damages awards should be calibrated to the "reprehensibility of the defendant's conduct."[159] However, the Court has never provided clear guidance on how courts should tailor the amount of punitive damages to the reprehensibility of a defendant's conduct. This lack of guidance is an important failure because juries generally agree on the reprehensibility of a given act but cannot effectively translate that agreement into a dollar amount.[160]

Specifically, research has demonstrated that jurors are quite consistent in judging the moral reprehensibility of different wrongful acts and generally agree on the relative ranking of which harmful acts are more reprehensible than others.[161] However, despite this general consensus on the relative reprehensibility of different acts, jurors are notoriously bad at translating this consensus into dollar awards.[162] Individual jurors can arrive at very different dollar amounts for acts they agree are equally reprehensible, and moreover, experimental evidence indicates that jury deliberations can actually shift the final punitive award to a level much higher than the median juror award.[163] Naturally, this process creates substantial unpredictability in punitive damages.[164]

Therefore, using reprehensibility as the primary factor for determining the reasonableness of a given punitive damages award presents a fundamental problem: the award amount will likely never reflect the actual reprehensibility of the defendant's conduct. Certainly, courts can recognize the unpredictability of jury awards and "correct" those awards *sua sponte*, on a post-trial motion or on appeal. However, while the evidence suggests that judges may impose more predictable awards,[165] there is no guarantee that these awards

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159. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 409 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 567 (1996).
160. SUNSTEIN ET AL., *supra* note 138, at 29–61.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 44.
165. *Id.* at 142–70, 186–207.

will be, on the whole, reflective of the actual reprehensibility of the defendant's conduct. Additionally, Eisenberg and Heise suggest that judges may actually be worse at heeding the guidance of the Supreme Court in the area of punitive damages.[166] This means that while judges are superior to jurors in the types of analyses and calculations needed to arrive at reasonable damages awards, there are reasons to doubt that they could effectively implement the Supreme Court's guidance on punitive damages.

In terms of the empirical results presented above, if jurors are simply incapable of implementing deterrence or arriving at an award consistent with a given level of reprehensibility, then the ineffectiveness of *State Farm* is not surprising. When a court instructs a jury to award a punitive damages amount to achieve the goals of deterrence and retribution (by punishing reprehensible acts), research clearly demonstrates they will be unable to do so. Therefore, a decision that puts additional constraints on a jury will likely prove relatively meaningless since jurors do not appear to be capable of implementation in the first place. Additionally, if judges are not willing to heed the directives of the Supreme Court in the area of punitive damages, as Eisenberg and Heise suggest, then they will not provide a meaningful check on jury awards that are inconsistent with the Supreme Court's emphasis on reprehensibility.

To combat the inability of juries to arrive at consistent punitive awards, I propose a new framework below that removes the discretion of juries (and judges) to set whatever award amount they wish and provides them with a concrete point from which to set awards. I propose this new framework, which is fairly general in nature, as a practical solution that can be implemented immediately even if it does not solve all of the problems associated with punitive damages.

V. TOWARD A FEASIBLE SOLUTION

The current constitutional doctrine governing punitive damages is flawed. The ratio limit imposed by *State Farm* has not reduced everyday punitive damages awards, and the evidence suggests it has actually increased them. The current doctrine is also internally inconsistent and effectively undermines one of the primary goals of punitive damages by preventing courts from achieving optimal deterrence. Even if the current doctrine were internally consistent, research suggests that juries are underequipped to actually implement the doctrine to achieve the two primary goals of deterrence

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166. Eisenberg & Heise, *supra* note 37, at 346–51.

and retribution. In this Part, I propose a new solution that allows lower courts to better achieve the original goals articulated in *Gore* and *State Farm*—providing defendants with fair notice and increasing the predictability of punitive damages[167]—and mitigates the current problems with achieving deterrence and retribution.

In the next case concerning punitive damages that comes before the Court, the Court should abandon its current doctrine and establish a new framework that simplifies the determination of punitive damages and provides adjudicators with a concrete point of comparison to set awards that better achieve deterrence and retribution while remaining predictable. To do this, the Court should abandon the current three guideposts from *Gore*, augmented by the ratio cap from *State Farm*, and require that punitive damages be awarded as part of a two-part test in order to satisfy due process. First, the relevant adjudicator (whether judge or jury) should determine whether the defendant's conduct is sufficiently reprehensible to warrant punitive damages. Second, if the court determines punitive damages are warranted, the court should set the actual award using only the third guidepost from *Gore*: "the difference between [the] remedy and the civil penalties authorized or imposed in comparable cases."[168] This new framework achieves the goals of deterrence and retribution with a simpler system, and it avoids the problems of asking adjudicators to translate their desire for punishment and deterrence into a dollar amount, making the resulting awards much more predictable for defendants.

To establish this new framework, the Court may adopt something similar to the following language in its next decision concerning punitive damages: To satisfy the requirements of due process, a punitive damages award must be explicitly authorized by the adjudicator when the defendant's conduct is sufficiently reprehensible and set at an amount consistent with civil penalties authorized in similar cases. Using language similar to this, the Court could establish that due process requires the two-step process described above and ensure that lower courts across the country adopt the procedure. Obviously, the Supreme Court cannot rewrite state or federal laws to require this two-step procedure explicitly, but by holding that due process requires this procedure, it can certainly require that lower courts use it or otherwise have their punitive damages awards overturned. While restricting how courts may award

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167. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003); BMW of N. Am. v. Gore, 517 U.S. 559, 567 (1996).

168. *Gore*, 517 U.S. at 574 (1996).

punitive damages, this two-step process still allows lawmakers sufficient leeway to set civil penalties to achieve the level of deterrence they determine is most appropriate.

This new framework achieves the goals of punishment and deterrence better than the current doctrine does, and considering the Supreme Court's holding in *Philip Morris USA v. Williams*,[169] as I describe below, I believe this new framework is actually required by due process. I do not propose this framework as a grand solution that will solve all of the problems associated with punitive damages immediately. However, it does alleviate the main problems currently associated with punitive damages including the internal logical inconsistency, the inability of juries to set appropriate amounts of punitive damages, and the unintentional consequences of increased punitive damages after S*tate Farm*. I also do not claim that the proposed new framework is necessarily the only solution to the problems that researchers and the Court itself have identified with punitive damages. However, it is a convenient solution in that the Court could adopt it immediately and in that it will allow states maximum flexibility in adopting measures they deem appropriate for achieving the goals of punitive damages while still providing defendants with sufficient notice of their potential liability. The rest of this Part describes the mechanics of the new framework and why it (or something similar) is required by due process.

A. The Mechanics of the New Framework

1. Threshold Question: Reprehensibility

The use of the reprehensibility of a defendant's act to determine punitive damages awards has the appealing quality of serving the goal of retribution by punishing only the most blameworthy acts. Additionally, the Supreme Court has consistently recognized that the reprehensibility of a defendant's actions is the most important factor in determining whether a given award is reasonable.[170] The problems with reprehensibility only occur when juries are asked to translate their moral outrage at the defendant's conduct into a dollar amount.[171] Therefore, in order to retain the benefits of punishing only reprehensible actions while avoiding the problems associated with asking juries to arrive at a dollar amount,

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169. 127 S. Ct. 1057, (2007).

170. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 409 (2003); *Gore*, 517 U.S. at 567.

171. SUNSTEIN ET AL., *supra* note 138, at 29–61.

the Court should simply require an up/down vote from the jury on whether punitive damages are warranted in a given case.

Requiring that the jury authorize punitive damages without setting an amount directly preserves the role for the jury and takes advantage of the fact that juries are relatively adept at determining the reprehensibility of an action.[172] This process also allows individual juries to determine which actions warrant retribution without settling on a definitive theory of retribution.[173]

The Supreme Court could thus allow lower courts to retain discretion to punish only those actions they believe are abhorrent enough to warrant awards beyond compensatory damages. While the Court would remove the constitutional authority of lower courts to set the amount of punitive damages as they see fit, the lower courts would retain full authority to determine when those damages are warranted. This means that as future research or new methods of setting punitive damages became available, the appropriate legislature (or other rulemaking body) could implement them immediately.

2. Similarity to Civil Penalties

The first part of my proposed framework for punitive damages accomplishes the goal of retribution by allowing courts to punish those actions they determine are reprehensible enough to warrant punishment, but it ignores the goal of deterrence. To achieve deterrence, courts will award punitive damages in an amount consistent with "the civil penalties authorized or imposed in comparable cases," which is the third guidepost of determining the reasonability as outlined in *Gore*.[174] Civil penalties are fines established by government authorities to punish different infractions. They are set by either legislatures or regulatory authorities that possess the institutional competence necessary to set those penalties at a level to deter individuals from engaging in wrongful conduct. These government authorities have the luxury of conceptualizing an entire area of law and determining how best to deter wrongful acts in that area, as well as having the resources to set those penalties to achieve the desired level of deterrence.[175]

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172. *Id.*

173. For a review of how different theories of retribution may impact punitive damages awards, see generally Polinsky & Shavell, *supra* note 48.

174. *Gore*, 517 U.S. at 574.

175. Detailing all of the institutional competencies of legislatures and agencies is beyond the scope of this Note, but for a general overview, see LISA SCHULTZ BRESSMAN, EDWARD L. RUBIN & KEVIN M. STACK, THE REGULATORY STATE (2010).

The parties could obviously disagree over what constitutes a comparable case and what civil penalty would be imposed in that case, but courts are perfectly capable of hearing such arguments and making appropriate decisions. As opposed to setting punitive damages awards in a complete vacuum with no guidance other than a vague notion of reprehensibility and deterrence, courts would determine awards based on what the relevant legislature or regulatory authority has already authorized as an appropriate civil penalty. Thus, the level of deterrence achieved by punitive damages will be consistent with what the relevant government authority has determined is appropriate. In general, setting punitive awards in this manner will not achieve the optimal level of deterrence, but since that level is practically and mathematically unachievable under the current doctrine, the level of deterrence determined by the legislature or regulatory body is certainly an appropriate alternative. Using the level of deterrence deemed appropriate by competent authorities is certainly preferable to blindly attempting to achieve optimal deterrence through unqualified jurors. At the very least, this level of deterrence will not be arbitrarily limited to a specific ratio.[176]

Setting punitive damages consistent with the third guidepost in *Gore* after a determination of reprehensibility by the adjudicator is advantageous for a number of reasons. First, the guideposts of reprehensibility and consistency with comparable civil penalties have already been approved by the Court as constitutional.[177] Second, this new framework, while constraining courts in how they can award punitive damages in general, allows the relevant legislatures or regulatory authorities to take as large or small of a role as they see fit. If the legislature determines that in the face of this new punitive damages doctrine, current civil penalties constitute sufficient guidance on setting awards, it need take no action. If the legislature determines that it wants to impose a detailed prescription for how courts award punitive damages, it can alter the civil penalties to that effect.

For example, if in ten years scholars determine a perfect system for how juries should award punitive damages to achieve

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176. This new framework does not explicitly concede that optimal deterrence can never be achieved. Rather, it simply concedes that the current level of deterrence is arbitrarily determined. Determining deterrence consistent with what legislatures and agencies have promulgated is superior to allowing juries to set awards without much guidance and then capping those awards at an arbitrary level.

177. *Gore*, 517 U.S. at 574.

optimal deterrence in every case,[178] the legislature or regulatory authority could simply enact that system as a civil penalty and require courts to use it in setting all punitive damages awards. In other words, the concept of a civil penalty is sufficiently broad in this doctrine to include basically any system a government authority wishes to use. However, if legislatures decide not to take any action on punitive damages, then courts still receive sufficient guidance in setting predictable awards based on the current civil penalties in place—they simply have to determine what constitutes a comparable case.[179] Ideally, state legislatures would take some action to provide courts with some guidance after the implementation of this new framework since some types of conduct are not traditionally associated with civil penalties, but if they do not, courts will have to look harder to find a comparable case for the purposes of determining the relevant civil penalty.

Finally, this new framework encourages predictability while maintaining the benefits that the *State Farm* case endorsed. One of the main criticisms leveled against punitive damages has been their unpredictability,[180] but by tying the awards directly to civil penalties, potential defendants can simply look up the relevant civil penalty to determine the degree of their liability.[181] Similarly, if an individual jurisdiction decides to enact a more complicated punitive damages regime, then a defendant could determine exactly what that regime is and adapt accordingly. In either case, courts will be constrained in what they can award in punitive damages, but these constraints will vary across different case types. This variation reflects a more nuanced approach than the current single-digit ratio and alleviates many of the concerns associated with imposing an arbitrary cutoff for punitive damages that has led to unpredictability across award sizes and has increased award sizes for smaller awards. For example, a legislature may authorize a civil penalty that would lead to the

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178. For example, scholars may determine in the future that implementing the Polinsky and Shavell jury instructions with additional information and guidance can achieve the optimal level of deterrence.

179. The new framework requires no assumptions about legislatures' or regulatory authorities' willingness to participate. It would likely achieve better results if those bodies decided to take a more active role, but since civil penalties already exist for many infractions and harms, courts can use the current statutory and regulatory scheme to guide their punitive damages awards without lawmaking bodies providing explicit guidance.

180. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416–18 (2003).

181. Whatever liability defendants may face will be written down as a statute or regulation somewhere, and while litigants may dispute which statute or regulation is most relevant, defendants will, at the very least, be able to determine what range of monetary liability they may face for inflicting a particular harm.

equivalent of a ratio of five to one in one case and a civil penalty that would lead to the equivalent of a ratio of five hundred to one in another case.

Defendants obviously receive greater notice of their potential liability under this proposed framework, and to the extent that the *State Farm* ratio has been successful in reducing punitive damages awards (i.e., in the arena of blockbuster awards), those successes will be maintained under the new framework. The limit on punitive damages imposed by *State Farm* was arbitrary, but it was a limit required by the Court's view of the Due Process Clause nonetheless. The new framework sets limits as well, and while those limits may vary across case types, adjudicators must still set awards under some type of guidance. At first glance, it seems that the more concrete the guidance and the more discernible the limits provided under this new regime, the more likely it will be to produce the desirable results of providing defendants with sufficient notice of their potential liability. However, whether the new regime will be superior to the current one in terms of reducing arbitrarily high awards is ultimately an empirical question that cannot be answered until the new regime is actually in place.

B. The Constitutionality of the New Framework

With the mechanics of the new doctrine as well as its benefits over the current regime laid out, I now consider whether this new framework is required by the Due Process Clause and whether the new framework is, itself, constitutional. Because the Court has consistently held that retribution and deterrence are the most important (and only permissible) goals of punitive damages,[182] the obvious first question is whether the new framework achieves those goals. As discussed above, by having a jury or judge authorize punitive damages only when a defendant's conduct is sufficiently reprehensible, the goal of punishing reprehensible actions will certainly be achieved. The new framework also accomplishes the goal of deterrence by requiring that lower courts set punitive damages consistent with civil penalties.

However, simply because the proposed framework achieves the goals of punitive damages does not mean that due process requires this framework. Additionally, because the proposed framework goes much further in regulating how lower courts award punitive damages than *Gore* and *State Farm*, which simply provided rules that address

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

when an award was grossly excessive, some may object to the new doctrine as not only not required by due process, but beyond the Court's authority under the Due Process Clause. On both of these points, the Court's recent decision in *Philip Morris USA v. Williams* is instructive.[183]

The Supreme Court explained in *Philip Morris USA v. Williams* that "the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as 'grossly excessive.' "[184] In fact, in *Williams*, the Court declined to even consider whether the award was "grossly excessive" and based its ruling solely on the procedures used to impose the award, which it held violated the requirements of due process.[185] Therefore, the fact that the proposed framework limits the process by which lower courts award punitive damages does not put it beyond the authority of the Court under the Due Process Clause. The Court demonstrated in *Williams* that it can limit the procedures used by lower courts when awarding punitive damages, and the new framework simply places stricter limits on the award process than the Court imposed in *Williams*.

The fact that the Court has the authority to impose this new framework does not imply that it should impose it even if doing so is good policy. However, *Williams* is instructive on when the Court must limit the process of awarding punitive damages. The Court explained in the context of due process:

> Given the risks of unfairness that we have mentioned, it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one. And given the risks of arbitrariness, the concern for adequate notice . . . —all of which accompany awards that, today, may be many times the size of such awards in the 18th and 19th centuries—it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance.[186]

Thus, the Court identified the risk of arbitrariness and the concern for adequate notice as the determinants of what due process requires in terms of limiting the procedures by which juries impose punitive damages awards. It even pointed out the lack of guidance juries receive in setting awards as a salient problem with the current system.

Given the Court's holding in *Williams*, it is clear that due process requires the new framework (or something similar), which directly addresses the concerns noted in that case. By requiring that

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183.   127 S. Ct. 1057 (2007).
184.   *Id*. at 1062.
185.   *Id*. at 1064.
186.   *Id*.

juries only authorize punitive damages for reprehensible actions and set awards consistent with civil penalties, the Court can ensure that defendants receive adequate notice of their potential liability since that liability is based on civil penalties that must be publicly available. The new framework also ensures that juries ask the right questions by specifically limiting their decisions to two questions directly related to the goals of punitive damages. Finally, by eliminating juries' discretion to award whatever amount of damages they want subject to an arbitrary ratio limitation (which itself may induce anchoring behavior), the new framework eliminates any risk of arbitrary awards.

Given the empirical evidence that *State Farm* has not effectively lowered either punitive damages in general or the ratio of punitive to compensatory damages and is actually associated with the unintended consequence of increased award levels and decreased predictability, a new doctrine is needed to effectively limit punitive damages awards consistent with due process. The Court in *Williams* identified arbitrariness and concern for notice as the primary factors to consider when determining what type of limits on the process of awarding punitive damages are required by due process.[187] The proposed framework is thus the best choice to replace the current doctrine since it increases predictability, eliminates arbitrary awards, and provides defendants with more notice of their potential liability.

Because due process requires that the new framework replace the current doctrine, the only potential barrier to its implementation is the Seventh Amendment, which guarantees the right to trial by jury. The proposed framework removes a significant amount of discretion from juries, which may infringe on litigants' rights to have their case decided by a jury. The Supreme Court explained in *Dimick v. Schiedt* that "the common law rule as it existed at the time of the adoption of the [U.S.] Constitution" was that "in cases where the amount of damages was uncertain, their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it."[188] However, that case referred to compensatory damages, and nothing in this new framework restricts the jury's determination of compensatory damages. In fact, the Supreme Court explicitly exempted punitive damages from the requirements of the Seventh Amendment right to trial by jury because "[u]nlike the measure of actual damages suffered . . . [the amount of punitive damages is] not

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187. *Id.* at 1064.

188. Dimick v. Schiedt, 293 U.S. 474, 480 (1935) (quoting JOHN D. MAYNE, MAYNE'S TEATISE ON DAMAGES 571 (1894)).

really a 'fact' 'tried' by the jury."[189] Therefore, any limitations on a jury's ability to award punitive damages would not run afoul of constitutional requirements pertaining to the discretion of juries or to jury trials more generally.

Some states have struck down caps on damages as violating a state constitutional right to trial by jury. For example, the Supreme Court of Georgia struck down a cap on noneconomic damages in medical malpractice cases under the state constitution.[190] This cap pertained to compensatory damages,[191] however, and the Supreme Court has explicitly exempted punitive damages from the type of analysis used in Georgia.[192] Even if it had not, a requirement under the Due Process Clause of the Fourteenth Amendment would obviously supersede any state constitutional requirements. Therefore, removing the jury's discretion to award punitive damages is not problematic under the Constitution.

C. A Brief Example

Having established that the new framework not only solves a number of important problems with the current doctrine on punitive damages but also may be required by due process, I now provide a brief example of how the new doctrine might operate. I provide this only as an example since many states would likely find it worthwhile to institute new statutory or regulatory guidelines equivalent to civil penalties that would guide how courts impose punitive damages.

I present an example here that is more involved than a straightforward application of looking up a monetary penalty and applying it to a given case. Consider a physician practicing in the state of Georgia. Suppose this physician negligently harms a patient as part of a medical procedure, then the patient files suit and obtains a compensatory damages award of $100,000 that fully compensates her for the harm she suffered. However, in this case, suppose the physician engaged in some egregious behavior (e.g., performed surgery while intoxicated) that the patient thinks deserves punishment and believes should be deterred.

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189. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 446 (2001) (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)).

190. Atlanta Oculoplastic Surgery v. Nestlehutt, 691 S.E.2d 218, 223 (Ga. 2010) (invalidating a cap on noneconomic damages under the state constitution).

191. *Id.*

192. *Dimick*, 293 U.S. at 480.

After the plaintiff makes her case for punitive damages, the jury (assuming it is a jury trial) would need to determine whether the physician's conduct is sufficiently reprehensible to warrant punitive damages. If the jury determines that the physician's conduct was not sufficiently reprehensible, then it would not authorize punitive damages. If punitive damages are authorized, then the jury must authorize a specific amount consistent with the civil penalties. Georgia does not authorize monetary penalties for medical malpractice, so the attorneys in the case could not simply cite a specific statutory provision that provided a penalty.

However, Georgia does empower a regulatory authority to suspend medical licenses for different types of conduct.[193] The attorneys in this case could, therefore, present evidence on how long the regulatory authority typically suspends a medical license for the relevant conduct. Suppose the jury determines that the relevant conduct typically warrants a suspension of one year. Thus, the jury has a civil penalty in front of it and only needs to translate it into a monetary award. However, this translation is significantly easier than setting an award in a vacuum. The jury could simply determine the average physician income for the state (with the help of the attorneys in the case) and use that amount to determine the final monetary penalty. Assuming that the average physician income is $500,000, the jury would award punitive damages in the amount of $400,000, which combined with the compensatory damages award would equal the total civil penalty.[194]

This example demonstrates that even without a state taking action to enact a new punitive damages regime that provides courts with concrete civil penalties for all cases, lower courts can still arrive at meaningful punitive damages awards consistent with existing civil penalties. In this example, translating the length of suspension of a medical license into a monetary award using the average physician salary is easier than setting a punitive damages award in a vacuum. However, this new regime would function best and provide the greatest predictability if the state of Georgia took action to specify civil penalties for medical malpractice that courts could look to.

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193. GA. CODE ANN. § 43-34-8 (West 2012).

194. The state has determined (implicitly) that the optimal level of deterrence involves a penalty of $500,000. Therefore, to achieve this level of deterrence, the jury must impose a total judgment of $500,000. Since the jury has already determined that this case warrants $100,000 in compensatory damages, it must impose a punitive damages award of $400,000 to arrive at a final award of $500,000.

Defendants receive substantially more notice of their potential liability even without a specific regime of civil penalties, and with a specific regime, they would receive maximal notice. In either case, awards imposed under this new constitutional framework would not be arbitrary amounts drawn from an underequipped jury.

VI. CONCLUSION

This Note makes two principal contributions. First, it extends and broadens the empirical analysis of punitive damages awards that other scholars have attempted and demonstrates that *State Farm* has not been effective in reducing everyday punitive damages awards and that it actually had the unintended effect of increasing awards. Second, it identifies additional shortcomings of the *State Farm* doctrine and demonstrates that this framework has caused unintended effects in the form of higher awards. Based on these conclusions, it advocates for a new constitutional doctrine on punitive damages. This proposed framework involves a two-part test specifically designed to maintain continuity with the Court's current doctrine while more effectively achieving the goals of punitive damages that the Court has repeatedly acknowledged. First, a judge or jury determines whether the defendant's conduct is reprehensible enough to warrant punitive damages. Second, the court sets the amount of punitive damages consistent with civil penalties authorized by the legislature. Because the new framework flows directly from the Supreme Court's own guideposts for determining what punitive damages are acceptable, the Court could easily endorse it in the next punitive damages case it decides. While it will not immediately achieve all of the benefits of an ideal framework for punitive damages, it is simple enough and flexible enough to maintain the current benefits while allowing future policymakers to adjust it to achieve specific benefits.

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