Reforming Reprehensibility: The Continued Viability of Multiple Punitive Damages After *State Farm v. Campbell*

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I. INTRODUCTION

Defendants have long objected to the imposition of punitive damages in mass tort litigation, contending that such damages sanction defendants repeatedly for the same culpable conduct. Courts generally have rejected these contentions. Courts have concluded, at least in part, that even if multiple punitive damage awards in mass tort litigation sanction a defendant for the same culpable conduct, no single award of punitive

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damages punishes a defendant for the entire scope of its misconduct.[1] In other words, no single award represents total harm damages.[2] In so doing, however, courts fail to examine closely the process by which punitive damage decisionmakers are asked to determine punitive damage awards.[3]

As Professor Schwartz noted in a commentary on punitive damages in mass tort litigation almost ten years ago, "the jury often determines [the amount of punitive damages] by assessing the wrongfulness of the defendant's overall conduct, including its capacity to cause many injuries."[4] While almost all states purport to limit punitive damages to the harm to the injured plaintiff before the court, most states allow decisionmakers to increase a punitive damage award based on the "reprehensibility" of the defendant's conduct.[5] This reprehensibility factor has been used as an opportunity to present to the decisionmakers evidence of conduct directed at parties not before the court and the harm that conduct caused to the absent parties. Particularly, the reprehensibility factor has been used to allow the decisionmakers to consider the total number of victims from defendant's tortious conduct in setting a punitive award and to increase the amount of a punitive damage award based solely on the number of victims. As such, the reprehensibility factor has been used as a vehicle to invite the decisionmakers to punish the defendant not just for the harm caused to the injured plaintiff before the court but also for the harm caused to all victims of the defendant's tortious activity. In other words, reprehensibility evidence has been used to allow the punitive damage decisionmakers to impose total harm damages. Thus, contrary to the courts' characterization, multiple punitive damage awards do expose the defendant to the potential for repeated sanctions for the same misconduct in mass tort litigation.

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1. *See, e.g.*, Dunn v. Hovic, 1 F.3d 1371, 1384, 1389 (3rd Cir. 1993) (noting that the punitive damage award was intended to represent punishment for the conduct directed at the injured plaintiff before the court only).

2. Commentator Thomas Colby describes the practice of awarding, in a single case to a single victim, punitive damages to punish the defendant "for the full scope of societal harm caused by its entire course of wrongful conduct" as the practice of awarding "'total harm' punitive damages." Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 587 (2003). I adopt his terminology in this Article.

3. Punitive damages usually are awarded in a three-step process. Initially, the trier of fact (usually a jury) determines liability for and the amount of punitive damages. The trial court and an appellate court then review the award, and either court may remit the award if that court concludes that the award is excessive. I use the term "punitive damage decisionmakers" to refer to the trier of fact and both reviewing courts.

4. Gary T. Schwartz, *Mass Torts and Punitive Damages: A Comment*, 39 VILL. L. REV. 415, 430 (1994).

5. *See infra* note 16.

As commentator Thomas Colby recognized, literature on punitive damages only rarely has discussed this practice of awarding total harm damages,[6] and the practice has gone largely unaddressed by lower courts. However, the practice raises potential questions about the viability of multiple punitive damage awards in mass tort litigation.[7] In this Article, I will discuss how the Supreme Court's recent decision in *State Farm v. Campbell*[8] reformed the reprehensibility analysis and how this reformation may have the perhaps unintended consequence of eliminating the practice of awarding total harm damages. In particular, in an effort to limit the size of individual punitive damage awards, *Campbell* limits the use of evidence of conduct directed at parties not before the court. *Campbell* prohibits an increase in reprehensibility based solely on the large number of other acts or the large volume of harm from those acts. Rather, reprehensibility may be increased based on the presence of other acts only if those other acts demonstrate the defendant's knowledge of the consequences of its acts directed at the plaintiff, the deliberateness of the defendant's conduct directed at the plaintiff or the defendant's bad faith in dealing with the plaintiff. In so limiting the role of other act evidence, *Campbell* limits the potential for total harm punitive damages in mass tort litigation. At the same time, *Campbell* reforms reprehensibility into an analysis that better comports

6. *See, e.g.*, Colby, *supra* note 2, at 662; Schwartz, *supra* note 4, at 430–31. Instead, some commentators start from the assumption that multiple punitive damage awards punish a defendant for the same culpable conduct, then propose reforms to limit the impact of duplicative awards. *See, e.g.*, David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 411 (1994). Other commentators, like courts, maintain that each award punishes the defendant for a separate transaction, and hence, different culpable conduct. However, also like courts, these commentators do not consider the information given to decisionmakers to calculate awards. *See, e.g.*, Jerry J. Phillips, *Multiple Punitive Damage Awards*, 39 VILL. L. REV. 433, 443–44 (1994).

7. Commentators have noted that multiple sanctions for the same misconduct raise potential constitutional concerns. *See, e.g.*, Michael B. Kelly, *Do Punitive Damages Compensate Society?*, 41 SAN DIEGO L. REV. 1429, 1434 (2004) (outlining several due process objections to awarding punitive damages based on injuries to absent parties); Schwartz, *supra* note 4, at 430–31 (arguing that the inability to join all claims in a single forum allows for "normatively inappropriate multiple punishments"); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 140 (1986) ("[U]nrestrained punitive liability for a single course of conduct [is] arguably unconstitutional."). Likewise, awarding total harm damages raises questions about a single court's jurisdiction to award total harm damages as well as choice of law concerns.

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

with the traditional retributivist principles of criminal punishment put forth as a justification for considering reprehensibility in the first instance.

II. THE DEBATE OVER MULTIPLE PUNITIVE DAMAGES

A. Objections to Multiple Punitive Damage Awards

Opponents of multiple punitive damage awards have objected on two related grounds. First, opponents contend that multiple punitive damage awards punish a defendant for the same conduct or course of conduct and that punishing a defendant multiple times for the same course of conduct is fundamentally unfair.[9] For example, opponents would argue that in cases such as *BMW v. Gore*,[10] awarding punitive damages to every person who purchased a repaired or repainted automobile would punish BMW for the same culpable conduct—the corporate decision by BMW to sell cars without disclosing repairs which amounted to less than 3% of the total value.

Second, opponents argue that due process places some limit on the total amount of punitive damages a defendant can be forced to pay for a single act or course of conduct. While any individual punitive damage award or even a series of multiple awards would not exceed this substantive limit, opponents reason that at some point the aggregate value of multiple punitive damage awards exceeds this limit and results in "overkill."[11] For example, in a recent asbestos case, Owens Corning estimated that juries in twenty-eight cases filed across the country had awarded more than $51 million in punitive damages to plaintiffs in

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9. Glasscock v. Armstrong Cork Co., 946 F.2d 1085, 1096 (5th Cir. 1991) (discussing an asbestos defendant's argument that repeated punitive damage awards in asbestos exposure cases rely on the same culpable conduct, thus punishing the same wrongdoing, and that due process limited the number of times a corporation could be made to pay sanctions for the same culpable act); Palmer v. A.H. Robins Co., 684 P.2d 187, 215 (Colo. 1984) (noting an argument by a pharmaceutical manufacturer that the potential for multiple punitive damage awards involving the same conduct offended fundamental fairness); *see also* Hansen v. Johns-Manville Prods. Corp., 734 F.2d 1036, 1042 (5th Cir. 1984) (involving an asbestos manufacturer who argued that multiple penalties violate double jeopardy).

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

11. *See, e.g.*, Dunn v. Hovic, 1 F.3d 1371, 1384, 1402 (3d Cir. 1993) (Weis, J. dissenting); *In re* Federal Skywalk Cases, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J. dissenting):

> [T]here is surely some limit imposed by law on the amount for which [defendants] can be held liable for a single wrongful act or course of conduct. Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would violate the sense of "fundamental fairness" that is essential to constitutional due process.

lawsuits against Owens Corning arising out of the manufacturer and sale of asbestos-containing insulation. Owens Corning argued that the cumulative size of multiple punitive damage awards grossly exceeded the legitimate ends of punishment and deterrence.[12] Implicit in this argument is the same assumption which underlies the first objection—that multiple punitive damages repeatedly impose sanctions for the same misconduct.[13]

B. Judicial Responses

While courts have acknowledged concern over multiple punitive damage awards, courts generally have rejected defendants' challenges. Many of these courts have concluded that even if multiple punitive damage awards sanction a defendant for the same culpable conduct, no single award sanctions the defendant for the entire scope of that misconduct. Instead, these courts reason that each award punishes the defendant for its conduct only to the extent that it harmed the injured plaintiff before the court. Thus, for example, in cases such as *Gore*,[14] these courts would conclude that awarding punitive damages to each consumer who purchased a repainted car might punish BMW for the same culpable conduct—the corporate decision to sell cars without disclosing repairs which were made for less than 3% of the car's retail value—but that no single award to a purchaser would punish BMW for the entire scope of the decision. Instead, each award would punish BMW only to the extent that BMW's corporate policy harmed the injured plaintiff before the court. Consequently, these courts reason that multiple awards are not duplicative.[15]

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12. *See* Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 39 (Tex. 1998). Owens-Corning conceded that it had paid only approximately $3 million in punitive damage awards. *Id.*

13. *See* Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 281 (2d Cir. 1990) (noting that both the overkill argument and the repetitive sanction argument rely on the premise that the wrongful conduct sought to be punished in a subsequent suit is the same conduct that was previously punished).

14. *Gore*, 517 U.S. at 559.

15. *See, e.g.*, *Dunn*, 1 F.3d at 1384 (noting that because the district court expressly referred to the amount of compensatory damages in calculating a remitted punitive award, the remitted award was intended to represent punishment for conduct directed at the plaintiff only); King v. Armstrong World Indus., Inc., 906 F.2d 1022, 1030 (5th Cir. 1990) ("On this record this Court cannot hold that Celotex has been punished repetitively and so excessively 'as to shock the sense of mankind' in violation of the Texas Constitution. Here the jury's award of punitive damages was specifically targeted to Celotex's conduct as it affected each plaintiff."); Juzwin v. Amtorg Trading Corp., 718 F. Supp. 1233, 1235 (D.N.J. 1989), *modifying* 705 F. Supp. 1053 (D.N.J. 1989); Owens-

III. VEHICLES FOR IMPOSING TOTAL HARM DAMAGES

A. Reprehensibility as a Vehicle for Imposing Total Harm Damages

As Professor Schwartz recognized, current procedures for awarding punitive damages invite the punitive damage decisionmakers to consider the entire scope of a defendant's misconduct, including transactions with other consumers and, consequently, the harm to those other consumers. Most states instruct the trier of fact (usually the jury) to consider certain factors in deciding initially whether to award punitive damages and in what amount. Some of these factors invite the trier of fact and reviewing courts to consider the entire scope of a defendant's misconduct, including conduct the defendant directed at parties other than the injured party before the court. For example, some states require the trier of fact to consider the "reprehensibility" of the defendant's misconduct in determining the size of any punitive award.[16] These states, in turn,

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Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 412 (Ky. 1998); Eagle-Picher Indus., Inc. v. Balbos, 604 A.2d 445, 472 (Md. 1992) (rejecting the defendants' due process challenge because the defendants failed to show that the factfinder, making a previous award, understood its award to be punishment for the full extent of the defendants' misconduct rather than punishment for the injuries to the particular plaintiff before that court); Owens-Illinois v. Armstrong, 591 A.2d 544, 557–58 (Md. Ct. Spec. App. 1991) (holding that punitive damages were awarded solely for the harm inflicted upon a specific plaintiff rather than for the totality of the harm), *rev'd on other grounds*, 604 A.2d 47 (Md. 1992).

16. At least thirteen states expressly instruct the trier of fact to consider the reprehensibility of the defendant's misconduct. *See, e.g.*, **Arizona**: Hawkins v. Allstate Ins. Co., 733 P.2d 1073, 1080 (Ariz. 1987) ("[A] category of relevant evidence [for the fact finder to consider in determining a reasonable punitive damage award] is the nature of the defendant's conduct, including the reprehensibility of the conduct."); **California**: California Jury Instructions, Civil 14.71 (2004) ("In arriving at any award of punitive damages, consider the following factors: (1) the reprehensibility of the conduct of the defendant. . . ."); **Illinois**: Kemner v. Monsanto Co., 576 N.E.2d 1146, 1168 (Ill. App. Ct. 1991) ("The reprehensibility of . . . misconduct and the need to deter it are primary factors in determining the appropriate level of punitive damages."). Other states instruct the trier of fact to consider similar factors like the nature of the defendant's conduct. *See, e.g.*, **Florida**: Florida Standard Jury Instructions in Civil Cases, PD–1 6 (2004) (instructing the jury to consider "the nature, extent and degree of misconduct"); **Georgia**: Hospital Auth. v. Jones, 386 S.E.2d 120, 124 n.13 (Ga. 1989) (stating that in awarding punitive damages, the fact finder may consider "the nature and egregiousness of the defendant's conduct"), *vacated*, 499 U.S. 914 (1991), *aff'd*, 409 S.E.2d 501 (1991); **Iowa**: Iowa Civil Jury Instruction No. 210.1 (1987) (instructing the jury to consider the character and the degree of the wrong as shown by the evidence, the necessity of preventing similar wrong and "the nature of the defendant's conduct," or the defendant's culpability); *see also* **Alabama**: S. Life and Health Ins. Co. v. Turner, 586 So. 2d 854, 857 (Ala. 1991) (stating that to determine the appropriate measure of punitive damages, the fact finder must consider the "culpability of the wrongdoer"); **Colorado**: Leidholt v. District Court, 619 P.2d 768, 770 (Colo. 1980) ("[I]n determining the amount which should be awarded as punitive damages, the severity of the defendant's wrong . . . must be considered to ensure that the award will punish the defendant."); **Wisconsin**: Fahrenberg v. Tengel, 291 N.W.2d 516, 527 (Wis. 1980)

measure reprehensibility based on the entire scope of the defendant's misconduct, including transactions with other parties and the number of actual or potential victims of the defendant's misconduct. This allows the jury to increase its assessment of reprehensibility, and, hence, the amount of punitive damages, based on the existence of multiple transactions and multiple victims.[17] Other states delineate the scope of the defendant's misconduct or the duration of the misconduct as a factor for the decisionmaker to consider in and of itself.[18] The states then define the scope of the misconduct as the number of actual or potential victims. Thus, these states allow the decisionmaker to consider transactions other than the transaction with the injured plaintiff before the court.[19]

("Factors to be considered in determining the proper amount to be awarded as punitive damages include: the grievousness of the defendant's acts.").

17. *See, e.g.*, Fernandez v. N. Shore Orthopedic Surgery & Sports Med., 79 F. Supp. 2d 197, 207–08 & n.15 (E.D.N.Y. 2000) (noting that the existence of repeated instances of misconduct was an aggravating factor supporting increased reprehensibility and that repeated misconduct included misconduct directed toward parties other than the plaintiff); Stockett v. Tolin, 791 F. Supp. 1536, 1557–58. (S.D. Fla. 1992) ("In considering the nature, extent, and enormity of the wrong and all of the surrounding circumstances, courts have regularly considered acts other than the acts giving rise to the defendant's liability to the plaintiff on the issue of punitive damages.") (applying Florida law); Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1148 (Utah 2001) (noting that the defendant "repeatedly and deliberately deceived and cheated its customers"—for over two decades it "systematically harassed and intimidated opposing claimants, witnesses, and attorneys" and "engaged in a pattern of trickery and deceit, false statements, and other acts of affirmative misconduct"—in finding that the defendant's conduct was "malicious, reprehensible, and wrong") (internal quotations omitted), *rev'd*, 538 U.S. 408 (2003); Sturges v. Wal-Mart Stores, Inc., 39 S.W.3d 608, 614 (Tex. Ct. App. 1998) (holding that evidence of the defendant's interference with prior contracts was improperly excluded because such evidence demonstrated the character of the defendant's conduct and the degree of the defendant's culpability), *rev'd on other grounds*, 52 S.W.3d 711, 729 (Tex. 2001); *see also* Bowden v. Caldor, Inc., 710 A.2d 267, 285–86 (Md. 1998) (stating that lack of evidence that the defendant engaged in similar misconduct directed at other employees was a basis for reducing the punitive damage award).

18. *See, e.g.*, **Alaska**: ALASKA STAT. § 9.17.020(c)(4) (Michie 2002) (stating that in determining the amount of punitive damages, "the fact finder may consider . . . the duration of the conduct and any intentional concealment of the conduct"); **Kansas**: KAN. STAT. ANN. § 60-3701(b)(4) (1994) (stating that in determining the amount of punitive damages, "the court may consider . . . the duration of the misconduct and any intentional concealment of it"); **New Jersey**: N.J. STAT. ANN. § 2A:15–5.12(b)(4) (West 2000) (stating that in determining the amount of punitive damages, the trier of fact considers "the duration of the misconduct and any concealment").

19. *See, e.g.*, O'Gilvie v. Int'l Playtex, Inc., 821 F.2d 1438, 1447 (10th Cir. 1987) (stating that the "number of consumers whose safety was potentially impacted by [the defendant's] conduct with respect to [the product at issue]" supported an increased punitive damage award), *aff'd*, 519 U.S. 79 (1996); Burton v. R.J. Reynolds Tobacco

Consideration of such evidence may result in a trier of fact imposing sanctions to punish and deter the entire scope of conduct. Indeed, in some instances, plaintiff's counsel has invited the trier of fact to impose punitive damages to punish the entire scope of the defendant's misconduct, including the defendant's transactions with people other than the injured parties before the court.[20]

All states provide for some judicial review of the punitive damage award.[21] However, like the trier of fact, the trial court and appellate court are instructed to consider the reprehensibility of the defendant's misconduct in reviewing a fact finder's punitive award[22] or the duration

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Co., 205 F. Supp. 2d 1253, 1262–63 (D. Kan. 2002) (noting that RJR "acted intentionally to mislead the public" and that but for its misconduct "[f]ewer Kansas residents, thus, would have suffered" in finding that RJR's conduct was "extremely reprehensible").

20. *See* Colby, *supra* note 2, at 584–85 & nn.3–4 (citing instances in which plaintiff's counsel argued to the jury that a defendant should be punished for the entire scope of its misconduct and instances in which jurors reported setting awards based on the entire scope of a defendant's misconduct); *see also* Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275, 313 (1999) (noting that the distinction between punishing a defendant directly for other transactions and using evidence of other transactions to help evaluate the defendant's blameworthiness "is a fine one" and opining that juries may not be able to understand and apply it); Rachel A. Van Cleave, *"Death Is Different," Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217, 271 (2003) (noting that "it is not exactly clear whether there is a real difference" between considering conduct as a measure of reprehensibility and punishing that conduct).

21. The Supreme Court has indicated that due process requires judicial review of punitive damage awards. *See* Honda Motor Co. v. Oberg, 512 U.S. 415, 434–35 (1994).

22. At least twenty states expressly delineate the reprehensibility of the defendant as a factor to consider in reviewing the size of a jury award. *See, e.g.*, **California**: Stevens v. Owens-Corning Fiberglas Corp., 57 Cal. Rptr. 2d 525, 533 (Ct. App. 1996) (holding that in determining whether the size of an award "substantially serves the public interest in punishment and deterrence," a reviewing court should consider "the reprehensibility of the defendant's misdeeds"); **Oregon**: Parrott v. Carr Chevrolet, Inc., 17 P.3d 473, 484 (Or. 2001) (stating that in determining the monetary range that a rational juror would be entitled to award, a reviewing court should consider "the degree of reprehensibility of the defendant's conduct"). Other states direct reviewing courts to consider similar factors such as the culpability of the defendant. *See, e.g.*, **South Carolina**: Gamble v. Stevenson, 406 S.E.2d 350, 354–55 (S.C. 1991) (holding that in reviewing the excessiveness of a punitive damage award, a court considers: "(1) defendant's degree of culpability; (2) duration of the conduct; . . . (4) the existence of similar past conduct"); **Nevada**: Ace Truck & Equip. Rentals, Inc. v. Kahn, 746 P.2d 132, 137 (Nev. 1987) (stating that in determining whether a punitive damage award is excessive, a court will consider the "culpability and blameworthiness of the tortfeasor"). Some states direct reviewing courts to consider the nature or egregiousness of the misconduct. *See, e.g.*, **New Mexico**: Aken v. Plains Elec. Generation & Transmission Coop., Inc., 49 P.3d 662, 669–72 (N.M. 2002) (directing reviewing courts to consider "the enormity and nature of the wrong"); **Oklahoma**: Scribner v. Hillcrest Med. Ctr., 866 P.2d 437, 443 (Okla. Ct. App. 1992) ("[C]onsideration of the *reasonableness* of [a punitive damage] award [should be compared] in relation to . . . the nature and egregiousness of the defendant's conduct."); *see also* **Minnesota**: MINN. STAT. ANN. § 549.20 (West 2000) ("The court shall specifically review the punitive damages award

or scope of the misconduct.[23] Indeed, in *BMW v. Gore*, the Supreme Court recognized reprehensibility as "the most important indicium of the reasonableness of a punitive damages award."[24] As a recent case illustrates, reviewing courts, like juries, often consider the number of actual victims of the defendants' misconduct as a measure of reprehensibility. In *Boeken v. Philip Morris*, a Los Angeles jury imposed a $3 billion punitive damage award on Philip Morris in a case brought by a single lifelong smoker.[25] The plaintiff in *Boeken* alleged that Philip Morris had misrepresented the dangers of smoking and that Philip Morris had sold a defective product. Ultimately, the trial court remitted the punitive award. However, even after remittitur, the court awarded the plaintiff $100 million in punitive damages.[26] In explaining the substantial size of the remitted award, the court noted that the conduct of Philip Morris was "utterly reprehensible."[27] The court concluded that Philip Morris's conduct was reprehensible, in part, because Philip Morris engaged in "a nationwide pattern of deceit involving millions of American consumers."[28]

B. Other Vehicles for Imposing Total Harm Damages

Other factors guiding jury and reviewing court discretion also invite

in light of the [following] factors: . . . the seriousness of hazard to the public arising from the defendant's misconduct [and] the duration of the misconduct . . . .").

23. *See, e.g.*, **Arizona**: Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn, 907 P.2d 506, 520 (Ariz. Ct. App. 1995) ("[T]his court examines allegedly excessive punitive damage awards applying [the following] criteria . . . the reprehensibility of the defendant's conduct, including the duration of the misconduct . . . ."); **New Jersey**: Lockley v. N.J. Dep't of Corr., 828 A.2d 869, 878–79 (N.J. 2003) (reviewing courts consider the factors used by the trier of fact to determine the award, including the duration of the misconduct).

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

25. Boeken v. Philip Morris Inc., No. BC 226593, 2001 WL 1894403, at *1 (Cal. Super. Ct. Aug. 9, 2001).

26. *Id*. at *7.

27. *Id*. at *5.

28. *Id*. at *3. *State Farm v. Campbell*, 65 P.3d 1134 (Utah 2001), the case reversed by the Supreme Court, 538 U.S. 408 (2003), provides another example. The Utah Supreme Court used the number of victims nationwide as a basis to reinstate a jury punitive damage verdict after a lower court had remitted the verdict. *See id*. at 1148 (noting that "State Farm repeatedly and deliberately deceived and cheated its customers via the PP & R scheme"); *id*. at 1150 ("Because State Farm's actions have such potentially widespread effects, this factor supports a high punitive damage award."); *id*. at 1151 (noting that State Farm's willful and fraudulent conduct to Campbell and other similarly situated Utah residents supported a larger ration of punitive damages to compensatory damages).

punitive damage decisionmakers to determine the amount of punitive damages with reference to the entire scope of a defendant's misconduct and, hence, to punish the entire scope of the misconduct. For example, many states instruct decisionmakers to consider the profitability of the defendant's conduct.[29] These states frequently allow the decisionmaker to consider the profit the defendant earned on the entire scope of the misconduct[30] or the defendant's total financial condition.[31] Such guidance

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29. At least fifteen states direct the trier of fact to consider profitability. *See, e.g.*, **Arizona**: Hawkins v. Allstate Ins. Co., 733 P.2d 1073, 1080 (Ariz. 1987) (stating that the fact finder may consider several factors, including "the profitability of the defendant's conduct"); **Kansas**: KAN. STAT. ANN. § 60-3701(b)(3) (1994) ("[T]he court may consider: . . . the profitability of the defendant's misconduct."); **North Dakota**: N.D. CENT. CODE § 32-03.2-11(5)(c)(2) (1996):

> [T]he finder of fact shall find by clear and convincing evidence that the amount of exemplary damages awarded is consistent with the following principles and factors:
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> . . . .
>
> . . . The profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss . . . .

At least five states direct a reviewing court to consider the profitability of the defendant's misconduct. *See, e.g.*, **Minnesota**: MINN. STAT. ANN. § 549.20 (West 2000) ("The court shall specifically review the punitive damages award in light of the [following] factors: . . . the profitability of the misconduct to the defendant . . . ."); **Montana**: MONT. CODE ANN. § 27-1-221(7)(c) (2003) ("The judge shall review a jury award of punitive damages, giving consideration to each of the [following] matters: . . . the profitability of the defendant's wrongdoing . . . . "); **Tennessee**: Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901–02 (Tenn. 1992):

> After a jury has made an award of punitive damages, the trial judge shall review the award, giving consideration to all matters on which the jury is required to be instructed [including] . . . [w]hether defendant profited from the activity, and if the defendant did profit, whether the punitive award should be in excess of the profit in order to deter similar future behavior.

Several other states direct a reviewing court to consider the defendant's "financial condition" or "wealth." *See, e.g.*, **Arkansas**: Advocat, Inc. v. Sauer, 111 S.W.3d 346, 358 (Ark. 2003) (stating that when reviewing a punitive damage award, a court should consider "the financial and social condition and standing of the erring party"), *cert. denied*, 124 S. Ct. 535 (2003); **Illinois**: Hazelwood v. Ill. Cent. Gulf R.R., 450 N.E.2d 1199, 1207 (Ill. App. Ct. 1983) (holding that factors that the reviewing court should consider include "the financial status of the defendant"); **Pennsylvania**: Sprague v. Walter, 656 A.2d 890, 927 (Pa. Super. Ct. 1995) (stating that in reviewing a punitive damage award, the trial court shall consider "the wealth of the defendant").

30. *See, e.g.*, General Motors Corp. v. Johnston, 592 So. 2d 1054, 1061–62 (Ala. 1992) (noting that GM sold approximately 600,000 vehicles and sustaining the punitive damage award against GM, in part, because even after paying the $15 million award, the profit GM made on the total sales of the vehicle at issue would be greater than the profit GM would have made had it replaced the allegedly defective part).

31. Several states instruct the trier of fact to consider the defendant's "financial condition" or "net wealth." S*ee, e.g.*, **California**: California Jury Instructions, *supra* note 16, at 14.71 ("In arriving at any award of punitive damages, consider the following factors: . . . the amount of punitive damages which will have a deterrent effect on the defendant in the [sic] light of the defendant's financial condition."); **Florida**: Florida Standard Jury Instructions in Civil Cases, PD–1 6 (2004) (instructing the jury to consider

again invites the decisionmaker to disgorge profits earned from the entire scope of the misconduct.

Many states insist that punitive damages bear a reasonable relationship to the actual and potential harm caused by the defendant's misconduct.[32]

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the defendant's "financial resources"); **Indiana**: Stroud v. Lints, 790 N.E.2d 440, 445 (Ind. 2003) ("[I]f punitive damages are appropriate, the wealth of the defendant has for many years been held relevant to a determination of the appropriate amount.").

Several other states direct a reviewing court to consider the defendant's "financial condition" or "wealth." *See, e.g.*, **Arkansas**: *Sauer*, 111 S.W.3d at 358 (stating that when reviewing a punitive damage award, a court should consider "the financial and social condition and standing of the erring party"); **Illinois**: *Hazelwood*, 450 N.E.2d at 1207 (holding that factors that the reviewing court should consider include "the financial status of the defendant"); **Pennsylvania**: *Sprague*, 656 A.2d at 927 (stating that in reviewing a punitive damage award, the trial court shall consider "the wealth of the defendant").

See also, e.g., Weeks v. Baker & McKenzie, 74 Cal. Rptr. 2d 510, 534 (Ct. App. 1998) (sustaining a $3.5 million punitive damage award, in part, because it was only five percent of the defendant's total net worth); Lakin v. Senco Prods., Inc., 925 P.2d 107, 121 (Or. Ct. App. 1996) (sustaining $4 million punitive damage award, in part, because it was only five percent of the defendant's total net value), *aff'd*, 987 P.2d 463 (Or. 1999); *see also Campbell*, 65 P.3d at 1147 (vacating trial court remittitur and re-instating $145 million punitive damage award, noting that the award was 0.26 of one percent of the defendant's total net worth and that the defendant's large financial worth merited a larger award); Burton v. R.J. Reynolds Tobacco Co., 205 F. Supp. 2d 1253, 1259–60 (D. Kan. 2002) (holding "[t]he profitability that this court must consider is the gain realized by Reynolds from the course of conduct giving rise to plaintiff's injuries" and measuring RJR's profits based on sales of cigarettes to the entire public); Williams v. Philip Morris Inc., 48 P.3d 824, 839–40 (Ore. Ct. App. 2002) (finding that defendant's misconduct was "highly profitable" based on evidence of defendant's total net worth and its profits from all cigarette sales in 1996 and 1997).

32. At least six states expressly instruct the trier of fact to consider the relationship between the harm caused by the defendant and the amount of punitive damages. Four of these states expressly instruct the trier of fact to consider both actual and potential harm. *See, e.g.*, **New York**: N.Y. Pattern Jury Instructions—Civil 2:278 (West, WESTLAW through NY PJI (updated Dec. 2003)):

> In arriving at your decision as to the amount of punitive damages you should consider the following factors: . . . 2. The actual and potential harm created by defendant's conduct. The amount of punitive damages that you award must be both reasonable and proportionate to the actual and potential harm suffered by the plaintiff, and to the compensatory damages you awarded the plaintiff.

Virginia: Wilkins v. Peninsula Motor Cars, Inc., 59 Va. Cir. 329, 338 (2002) ("[F]actors which are relevant to determining an appropriate measure of punitive damages: (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that has actually occurred . . . .").

Fourteen additional states direct reviewing courts to consider the relationship between harm and punitive damages. Eight of these states expressly direct reviewing courts to consider potential as well as actual harm. *See, e.g.*, **Louisiana**: *In re* New Orleans Train Car Leakage Fire Litig., 795 So. 2d 364, 386 (La. Ct. App. 2001) ("We also assess the

Others instruct the decisionmaker to consider factors such as the "magnitude of the harm,"[33] "the extent and enormity of the harm," or the "severity of the harm."[34] Factors such as these ostensibly serve as limiting factors, requiring the decisionmaker to set a punitive damage award with reference only to the transaction between the plaintiff before the court and the defendant. Indeed, some courts have rejected defendants' due process challenges on the grounds that these factors demonstrated that a punitive damage award did not punish a defendant for the entire scope of its misconduct but for only that misconduct directed at the plaintiff before the court.[35] However, in practice these factors sometimes provide another opportunity for the punitive damage decisionmaker to set the damage award in reference to the total harm caused by the defendant's misconduct. Some states measure that harm not only as the harm to the injured party before the court, but also the harm to others.[36] Like using transactions with third parties as a measure of reprehensibility, such considerations also invite the punitive damage decisionmaker to impose sanctions on the entire scope of the defendant's misconduct.

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quantum of punitive damages relative to, not only the actual harm that occurred, but also relative to the potential harm that could have occurred . . . ."), *cert. denied*, Nova Chems. Inc. v. Adams, 538 U.S. 944 (2003); **Massachusetts**: Labonte v. Hutchins & Wheeler, 678 N.E.2d 853, 862 (Mass. 1997) ("In reviewing punitive damages, the judge may consider the following criteria: a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred . . . ."); **Washington**: State v. WWJ Corp., 980 P.2d 1257, 1263 (Wash. 1999) (following factor test of *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580–83 (1996), in which the Court compared the amount of the punitive award with the actual and potential harm caused by the defendant).

33. *See, e.g.*, **Alaska**: Alaskan Vill., Inc. v. Smalley, 720 P.2d 945, 949 (Alaska 1986).

34. *See* **Colorado**: Leidholt v. District Court, 619 P.2d 768, 770 (Colo. 1980).

35. *See* Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1054 (D.N.J. 1989), *modified on reconsideration*, 718 F. Supp. 1233 (D.N.J. 1989). In *Juzwin*, the court conditionally struck an award of punitive damages, concluding that subjecting defendants to multiple punitive damage awards would deprive defendants of their right to fundamentally fair proceedings. *Id.* at 1064. On reconsideration, however, the court vacated its order striking punitive damage claims before it upon competent proof of previous awards. *Juzwin*, 718 F. Supp. at 1236. The court reiterated its holding that repetitive punitive damage awards violate due process. *Id.* at 1234. However, the court reasoned that multiple awards are not necessarily repetitive. *Id.* at 1235. In reaching this determination, the court noted, in part, that many states require courts to instruct juries that the amount of a punitive damage award must bear a reasonable relationship to compensatory damages. *Id.* The court reasoned that a jury rendering an award after such an instruction might not consider the full effect of the defendant's conduct with respect to injured people other than the plaintiff. *Id.* Thus, the court concluded that a second award of punitive damages would not violate the due process clause if the first award was not intended by the jury to constitute "full" punishment for the defendant's wrongful conduct. *Id.*

36. *See, e.g.*, Williams v. Philip Morris Inc., 48 P.3d 824, 841 (Or. Ct. App. 2002) (noting in its discussion of ratio that "[i]t is thus appropriate to consider the effects of defendant's actions on persons other than [the plaintiff] in determining the amount of punitive damages"), *vacated*, 124 S. Ct. 56 (2003), *aff'd*, 92 P.3d 126 (2004).

IV. REFORMING REPREHENSIBILITY IN *CAMPBELL*

As it had done in *BMW v. Gore*,[37] the Court in *Campbell* sought to impose substantive limits on the size of individual punitive awards.[38] Although not addressing the propriety of total harm damages directly, *Campbell* attacked the reprehensibility factor as a method of reducing the size of individual awards. In so doing, *Campbell* reformed the reprehensibility analysis. *Campbell* prohibits the use of evidence of acts directed at parties other than the injured party before the court as a direct measure of reprehensibility.[39] Instead, *Campbell* limits consideration of other act evidence to use solely as a measure of the defendant's knowledge with respect to the transaction between the defendant and the plaintiff before the court. This, in turn, limits the potential for total harm damages.

In *State Farm v. Campbell*,[40] the Court struck down a state court punitive damages award, concluding that it was grossly excessive under the guideposts the Court previously had announced in *BMW v. Gore*. Campbell, a State Farm insured, had been involved in a three-car auto accident in which the driver of one car was killed and the driver of another was seriously injured. The estate of the deceased driver and the injured driver sued Campbell and offered to settle for an amount equal to the policy limits of the State Farm insurance policy covering Campbell. Even though the evidence strongly indicated that Campbell was at fault, State Farm refused to accept the settlement.[41] State Farm also assured Campbell that he was likely to prevail at trial, that his personal assets were safe, and that he need not retain counsel.[42] At trial, however, a jury awarded the two plaintiffs damages well in excess of the policy limits.[43] State Farm initially refused to pay the excess and informed Campbell that he would be personally liable for the judgment. However, after Campbell's appeal was denied, State Farm paid the entire judgment, including the amounts in excess of the policy limits.[44]

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37. *Gore*, 517 U.S. at 559.
38. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).
39. *Id.* at 410 ("Due process does not permit courts to adjudicate the merits of other parties' hypothetical claims under the guise of the reprehensibility analysis. Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct, for nonparties are not normally bound by another plaintiff's judgment.").
40. *Id*. at 429.
41. *See id*. at 412–14.
42. *Id*. at 413.
43. *Id*.
44. *Id*. at 413–14.

Campbell and his wife instituted a claim against State Farm, alleging bad faith, fraud, and intentional infliction of emotional distress. At trial on the bad faith claim, a Utah jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages.[45] The trial court reduced the awards to $1 million and $25 million respectively.[46] However, the Utah Supreme Court reinstated the $145 million punitive damage award.[47] State Farm appealed to the United States Supreme Court contending that the punitive damage award was constitutionally excessive under *BMW v. Gore*.

The United States Supreme Court found the $145 million punitive award unconstitutionally excessive. The Court reasoned that the punitive damage award impermissibly attempted to punish State Farm for its nationwide claims adjustment policies. In reaching this conclusion, the Court reiterated its holding in *BMW v. Gore* that a state may not impose punitive damages to punish extraterritorial conduct which was lawful where it occurred.[48] The Court also expanded this holding, concluding that a state does not have a legitimate interest in imposing punitive damages to punish a defendant for extraterritorial conduct that was unlawful where it occurred.[49] The Court noted that the Campbells introduced evidence regarding State Farm's nationwide claims adjustment policy, including expert testimony regarding fraudulent practices under the policy and evidence concerning State Farm's handling of first-party and non-auto insurance claims over the course of twenty years.[50] Likewise, the Court noted that counsel for the Campbells argued that State Farm's conduct toward the Campbells was part of a nationwide scheme to fraudulently keep claim pay outs low and increase profits.[51] Finally, the Court noted that both the trial court and the Utah Supreme Court relied on State Farm's nationwide policies in upholding the punitive damage award.[52] Based on the lower courts' opinions, the Court concluded that State Farm was being punished for this conduct in addition to its conduct directed toward the Campbells.

The Campbells argued that the evidence of State Farm's claim-handling policies was relevant not as a basis for punitive damages themselves but, instead, as indicia of the degree of reprehensibility in State Farm's dealings with the Campbells. The Campbells argued that

45. *Id*. at 415.
46. *Id*.
47. *Id*.
48. *Id*. at 421.
49. *Id*.
50. *See id*. at 415.
51. *Id*. at 420.
52. *Id*.

the evidence demonstrated State Farm's motive in its treatment of them. The Campbells reasoned that tactics designed to underpay first-party claimants to increase State Farm's profits were relevant to demonstrate that State Farm engaged in tactics designed to underpay third-party claimants for the same purpose—to increase profits.[53] The Court rejected this role for extraterritorial conduct. The Court noted, as it had in *Gore*, that extraterritorial conduct can be relevant to demonstrate deliberateness and culpability.[54] However, the Court concluded that extraterritorial conduct must have a "nexus to the specific harm suffered by the plaintiff" to be relevant to deliberateness and culpability.[55] Further, the Court held that a jury had to be specifically instructed that it could not use punitive damages to punish lawful extraterritorial conduct.[56] Here, the Court reasoned that evidence of State Farm's nationwide claims adjustment policies was not related to its handling of third-party claims like the claims at issue in *Campbell* and, thus, not relevant to an assessment of State Farm's reprehensibility.[57] Stripped of evidence of extraterritorial misconduct, the Court concluded that State Farm's conduct toward the Campbells was not sufficiently reprehensible to warrant such a large punitive award.[58]

Campbell is significant to reprehensibility analysis and to the viability of multiple punitive damage awards for three reasons. First, in *Campbell*, the Court recognized for the first time that other misconduct evidence introduced ostensibly to demonstrate reprehensibility may be used to sanction the defendant directly for that other misconduct. As stated above, the Campbells introduced evidence regarding State Farm's nationwide claims adjustment policy, including evidence concerning State Farm's handling of first-party and non-auto insurance claims by other insureds.[59] The Campbells contended that such evidence was relevant to establish the degree of reprehensibility of State Farm's conduct directed at the Campbells. However, the Court rejected the Campbells' characterization, concluding that the Utah courts had used this measure of reprehensibility as a "guise" to punish

53. *Id*. at 421–24.
54. *Id*. at 422.
55. *Id*.
56. *Id*.
57. *Id*. at 423–24.
58. *Id*. at 419–20.
59. *See id*. at 414–15.

State Farm for its actions toward individuals other than the Campbells.[60]

Second, in *Campbell*, the Court appears to have prohibited the use of evidence of the number of transactions with other parties as a direct measure of reprehensibility and, hence the use of reprehensibility to award total harm damages. The *Campbell* Court expressly prohibited the use of evidence of unrelated transactions as a measure of reprehensibility. Further, the Court prohibited the use of unrelated transactions precisely because the Court concluded that unrelated transaction evidence was used as a means to impose punitive damages directly for that unrelated misconduct. To this end, the Court held: "For a more fundamental reason, however, the Utah courts erred in relying upon [evidence of transactions with other parties]: The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm."[61] Likewise, in explaining why State Farm's conduct was insufficiently reprehensible to warrant the severe sanction imposed by the Utah courts, the Court noted: "The Campbells have identified scant evidence of repeated misconduct of the sort that injured them. Nor does our review of the Utah courts' decisions convince us that State Farm was only punished for its actions toward the Campbells."[62]

More importantly, this rationale would seem to prohibit the use of *related* misconduct as a direct measure of reprehensibility as well. Some language in *Campbell* ostensibly leaves open the possibility of using evidence of related misconduct as a measure of reprehensibility. For example, the Court acknowledge that "[l]awful out-of-state conduct may be probative" if it bears a "nexus to the specific harm suffered by the plaintiff."[63] Likewise, as noted above, in explaining why State Farm's conduct was insufficiently reprehensible to warrant the severe sanction the Court noted not only that the Utah courts had punished State Farm for conduct directed at other parties but also that "[t]he Campbells have identified scant evidence of repeated misconduct of the sort that injured them."[64] Finally, in explaining why the transaction between the Campbells and State Farm was the only conduct relevant to the

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60. *Id*. at 422–23. At oral argument one of the Justices remarked:

> If you've done the same thing to other people, you can be punished more. Now, you may find a significant difference between punishing you for what you did to other people, and punishing you more for what you did to this person, because it is rendered more reprehensible because of what you did to other people, but I don't see a whole lot of difference between the two.

Oral argument transcript at 15, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (No. 01-1289) (Dec. 11, 2002).

61. *Campbell*, 538 U.S. at 422.

62. *Id*. at 423.

63. *Id*. at 422.

64. *Id*. at 423.

reprehensibility analysis, the Court noted, "because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis."[65] This language suggests that if the Campbells had offered evidence of State Farm misconduct in transactions with similarly situated third parties, such as evidence of misconduct by State Farm in its handling of third-party auto insurance claims, the Court would have considered these third-party transactions to be relevant measures of State Farm's reprehensibility.

If this is so, *Campbell* would do little to prevent the use of reprehensibility to award total harm damages in mass tort litigation. The other misconduct evidence offered as a measure of reprehensibility in such actions is likely to be related to the misconduct directed at the injured plaintiff before the court. For example, in *Boeken* the California trial court found Philip Morris's conduct to be "utterly reprehensible" because "millions of American consumers" relied on the same misrepresentations that injured plaintiff before the court.[66] Conduct directed at these absent consumers would seem to be related to the conduct that injured the plaintiff before the court in *Boeken* under any definition of relatedness because the exact same conduct was directed at the absent parties and the party before the court.[67] Thus, courts could continue to use reprehensibility as a basis to sustain total harm damages.

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65. *Id*. at 424.

66. Boeken v. Philip Morris Inc., No. BC 226593, 2001 WL 1894403, at*3, *5 (Cal. Super. Ct. Aug. 9, 2001); *see supra* notes 25–28 and accompanying text.

67. Several courts have reached this conclusion post-*Campbell*. *See, e.g.*, Henley v. Philip Morris Inc., 9 Cal. Rptr. 3d 29, 71–72 (Ct. App. 2004):

> Defendant also substantially overstates this aspect of Campbell by suggesting that it rendered such evidence [of out-of-state conduct] categorically inadmissible. On the contrary, the court acknowledged that such evidence may be considered if a sufficient 'nexus' is shown to the plaintiff's claim. . . . Plaintiff's claims, in contrast [to those in Campbell], rest on a quintessential 'mass tort,' i.e., a course of more-or-less uniform conduct directed at the entire public and maliciously injuring, through a system of interconnected devices, an entire category of persons to which plaintiff squarely belongs.

See also Bocci v. Key Pharms., Inc., 76 P.3d 669, 674 (Or. Ct. App. 2003), *modified on reconsideration*, 76 P.3d 908 (Or. Ct. App. 2003) (correcting punitive damages ratio):

> [The *Campbell* Court] did not say that out-of-state conduct [evidence] is *per se* irrelevant. To the contrary, it stated that "evidence of repeated misconduct of the sort that injured" the plaintiff is entirely relevant. In this case, there was evidence that [the defendant] engaged in nationwide misconduct in disseminating false and misleading information to the FDA and to physicians about [its product] and that the dissemination of that misleading information led to [plaintiffs'] damages.

However, a closer examination of *Campbell* reveals that the underlying premise would prohibit the use of both related and unrelated misconduct as measures of reprehensibility in and of themselves. In rejecting the Utah courts' reliance on evidence of unrelated transactions, the Court explained that the problem with the use of such evidence was that it was used as a vehicle to impose sanctions directly on those unrelated transactions. The Court explained that due process prohibited a court from adjudicating and punishing hypothetical claims under the guise of reprehensibility.[68] The Court continued: "Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains."[69]

Likewise, in rejecting a state's ability to sanction unlawful extraterritorial conduct, the *Campbell* Court explained: "Any proper adjudication of conduct that occurred outside Utah *to other persons would require their inclusion*, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction."[70] This suggests that the Court's concern with the use of unrelated misconduct evidence is not solely a concern with the extraterritorial nature of such evidence and, hence, its potential interference with state sovereignty[71] or a concern that such evidence allows the defendant to be punished for its status as an "unsavory individual or business"[72] rather than for the defendant's bad acts themselves. Instead, this suggests that the Court's concern is that the use of unrelated misconduct evidence as a measure of reprehensibility may result in the defendant being punished for these unrelated acts directly and, hence, subject the defendant to the risk that it will be punished for these same acts again in a lawsuit brought by the victims of the unrelated acts.[73]

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68. *Campbell*, 538 U.S. at 423.

69. *Id*.

70. *Id*. at 421–22 (emphasis added).

71. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 (1996) ("We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."); *Campbell*, 538 U.S. at 421.

72. *See Campbell*, 538 U.S. at 423.

73. *But see* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 350 (2003). Professor Sharkey argues that a "more contextualized and nuanced reading of [*Campbell*], however, suggests that the Court was primarily concerned with limiting the extraterritorial or out-of-state reach of punitive damages." However, had the Court been concerned primarily with the extraterritorial reach of punitive damages, it would have had no need to raise its due process objection to the potential for multiple damages. *See Campbell*, 538 U.S. at 423. The Court had already held that states could not impose punitive damages to punish lawful or unlawful extraterritorial conduct, *id.* at 421, and concluded that the Utah courts had impermissibly attempted to punish State Farm for its extraterritorial claims handling practices. *See id.*

Use of evidence of related misconduct as much as use of unrelated misconduct would invite the jury to "adjudicate the merits of other parties' hypothetical claims."[74] Thus, use of related misconduct evidence as a direct measure of reprehensibility would seem to expose the defendant to the same risk of multiple punitive damage awards which the *Campbell* Court sought to eliminate. Indeed, the use of related misconduct as a direct measure of reprehensibility seems to have resulted in potentially duplicative awards in mass tort litigation.[75]

Moreover, the *Campbell* Court's overriding concern seemed to be not just that State Farm was punished for misconduct unrelated to the misconduct directed at the Campbells, but more generally that State Farm was punished for any conduct other than the conduct directed at the Campbells. On several occasions in the opinion the Court noted its concern that the other misconduct evidence had resulted in sanctions imposed directly on that misconduct. For example, in striking down the punitive award, the Court noted: "This case, instead, was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct directed toward the Campbells."[76] Likewise, in assessing the reprehensibility of the award, the Court observed: "Nor does our review of the Utah courts' decisions convince us that State Farm was only punished for its actions toward the Campbells."[77]

Even the *Campbell* Court's discussion of the role of related misconduct suggests that the Court viewed a limited role for such evidence. The Court seemed to reject the existence of related misconduct by itself as a measure of reprehensibility. Instead, the *Campbell* Court seemed to suggest that related conduct directed at parties other than the plaintiff before the court is relevant only to assess the knowledge, intent, or deliberateness of the defendant with respect to its conduct toward the

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at 422. Nonetheless, the Court continued its analysis, concluding that the Utah courts erred "[f]or a more fundamental reason." *Id.* at 422. That reason being that the Utah courts imposed punitive damages to punish and deter conduct directed at parties other than the Campbells and that such a use of punitive damages created a risk of multiple punitive damage awards for the same conduct. *See id.* at 422–23.

74. *Campbell*, 538 U.S. at 422–23.
75. *See supra* note 20 and accompanying text.
76. *Campbell*, 538 U.S. at 420.
77. *Id*. at 423.

particular plaintiff before the court. Indeed, the Court so stated: "Lawful out-of-state conduct may be probative *when it demonstrates the deliberateness and culpability of the defendant's action* in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff."[78] Thus, *Campbell* appears to foreclose the use of related misconduct as a direct measure of reprehensibility.[79]

At least one lower court has adopted this reading of *Campbell*. In *Wohlwend v. Edwards*,[80] the Indiana Court of Appeals concluded that a plaintiff who was injured by a drunk driver could not admit evidence of the defendant's driving while intoxicated on subsequent occasions. The *Wohlwend* court recognized that the *Campbell* Court spoke of "dissimilar" acts.[81] Likewise, the *Wohlwend* court acknowledged that the *Campbell* Court expressly recognized that repeated actions increased the reprehensibility of a defendant's conduct.[82] The *Wohlwend* court noted that the defendant's subsequent drunk driving convictions were similar to the conduct directed at the plaintiff before the court. However, the court concluded that evidence of the subsequent convictions were not relevant to establish reprehensibility under *Campbell* because a jury might use this evidence to punish the defendant for the subsequent convictions directly, and as such, use of the evidence would subject the defendant to the risk of multiple punishment for the subsequent incidents.[83] Further, in support of its reasoning, the court relied on cases

78. *Id*. at 422 (emphasis added). The nexus requirement is consistent with the requirement in tort law that prior incidents must be sufficiently similar to prove knowledge of defect.

79. Such a reading is consistent with the Court's discussion of related misconduct in *BMW of N. Am., Inc. v. Gore*. The Court's assessment of BMW's reprehensibility in that case suggests that the *Gore* Court also viewed related misconduct as an indicium of the defendant's culpability with respect to the conduct directed at the injured plaintiff before the court only. In *Gore*, as in *Campbell*, the plaintiff argued that evidence of BMW's failure to disclose minor repairs to other customers pursuant to the same nondisclosure policy at issue in *Gore* was relevant to establish reprehensibility. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 576 (1996). The Court recognized that a defendant who "has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful" could be subject to greater sanctions on the basis of their increased reprehensibility. *Id*. However, the Court concluded that evidence of these other transactions were not relevant to establish BMW's increased reprehensibility. *Id.* In so doing, the Court noted that BMW reasonably could have believed that state disclosure statutes created a safe harbor and, thus, that its policy was lawful in other states. *Id*. at 577–79. Likewise, the Court noted that BMW had not acted pursuant to its nondisclosure policy once the policy had been adjudged unlawful. *Id*. In this way, the Court's reasoning focused solely on BMW's knowledge at the time it engaged in the conduct. This suggests that it is the defendant's knowledge rather than the scope of its conduct that determines reprehensibility.

80. Wohlwend v. Edwards, 796 N.E.2d 781, 787 (Ind. Ct. App. 2003).

81. *Id*.

82. *Id*. at 786.

83. *Id*. at 787; *see also id*. at 789 ("In the present case, not only was there a

precluding evidence of subsequent similar conduct because such conduct could not establish the defendant's state of mind at the time it committed the conduct directed at the plaintiff.[84] Thus, the *Wohlwend* court implicitly recognized the limited role for related misconduct in establishing reprehensibility.

Finally, the rationale underlying *Campbell* would appear to preclude use of transactions with absent parties as a measure of the other factors determining the size of punitive damages awards and, hence, preclude the use of other factors to impose total harm damages. As discussed above, many states instruct the punitive damages decisionmakers to consider the profitability of the entire scope of the defendant's misconduct in setting an award.[85] Likewise, while insisting that punitive damages bear a reasonable relationship to the actual and potential harm caused by the defendant's misconduct, some states measure that harm not only as the harm to the injured party before the court, but also the harm to others.[86] While *Campbell* does not directly address the propriety of inviting the jury to consider total profitability or total harm, the reasoning behind this decision again suggests that the Court would limit consideration of profitability to the profitability of the individual transaction between the defendant and the injured parties before the court. Likewise, *Campbell* suggests that the Court would prohibit consideration of harm caused by transactions other than the transaction between the defendant and the injured parties before the court.

As discussed above, *Campbell* recognized that although evidence of transactions with parties other than the injured parties before the court is put before punitive damage decisionmakers as a measure of reprehensibility, decisionmakers may use such evidence to punish the defendant for those other transactions directly. When put before punitive damage decisionmakers as a measure of harm in relation to punitive damages, decisionmakers seem just as likely to use evidence of transactions with parties other than

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possibility that the jury based its award of punitive damages upon conduct other that than [sic] which damaged the plaintiff, it was a near certainty. The jury was encouraged to do just that.").

84. *See id*. at 787–88.

85. *See supra* notes 29–31 and accompanying text.

86. *See supra* notes 32–36 and accompanying text. *See, e.g.*, Williams v. Philip Morris Inc., 48 P.3d 824, 841 (Or. Ct. App. 2002) (noting in its discussion of ratio that "[i]t is thus appropriate to consider the effects of defendant's actions on persons other than [the plaintiff] in determining the amount of punitive damages"), *vacated*, 124 S. Ct. 56 (2003), *aff'd*, 92 P.3d 126 (2004).

those before the court to punish the defendant for those transactions directly. Likewise, inviting punitive damage decisionmakers to consider the profitability of an entire course of conduct invites decisionmakers to disgorge profits from the entire course of conduct. Indeed, some courts have done so.[87] However, such disgorgement is tantamount to a sanction imposed on the entire misconduct.

In *Campbell*, the Court prohibited use of transactions with others as a measure of reprehensibility specifically because decisionmakers might punish the defendant for those transactions directly; consequently, the defendant would be subject to the risk of duplicative punishment for those other transactions in subsequent actions brought by those absent parties who were injured in the other transactions. Because punitive damages decisionmakers may use evidence of other transactions offered as measures of harm or profitability to punish those other transactions directly, the defendant, likewise, will be subject to the risk of duplicative punishment for those other transactions in subsequent actions brought by the absent parties who were injured in those other transactions. Thus, the reasoning of *Campbell* would seem to preclude use of evidence of other transactions as a measure of profitability of the defendant's misconduct or as a measure of harm in relation to punitive damages.

Indeed, while *Campbell* does not expressly prohibit the use of harm or potential harm to others in evaluating the relationship between actual harm and punitive damages, the Court has defined harm in terms of harm to the individual plaintiff.[88] Thus, after *Gore* and *Campbell*, it is likely that states must limit consideration of harm to that suffered by the individuals before the court.[89]

Moreover, while the Court has not placed restrictions on the use of evidence of other transactions to measure profitability expressly, the Court has expressed concerns about the use of net wealth as an award

87. *See supra* notes 29–31 and accompanying text.

88. At least one lower court has expressly prohibited courts and juries from considering harm to others as a measure of actual harm. *See* Pulla v. Amoco Oil Co., 72 F.3d 648, 659–60 (8th Cir. 1995).

89. The actual harm caused by the defendant's conduct toward the plaintiff might more accurately describe the appropriate measure of actual harm. Such a measure would take account of unrecoverable externalities resulting from the defendant's misconduct. As such, this measure would be more consistent with the original purpose of punitive damages. It would also be consistent with the Court's view of the role of punitive damages. In *Campbell*, the Court notes that State Farm's conduct towards the Campbells deserves a more modest sanction, in part, because all of the Campbells' harm has been recouped through compensatory damages, and thus, punitive damages would be duplicative. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003). This suggests that the Court views the role of punitive damages, in part, as a measure to compensate victims for otherwise unrecoverable harms.

enhancer.[90] Further, at least one lower court has interpreted *Campbell* to prohibit use of evidence of other transactions as a measure of profitability and to limit the decisionmaker's ability to disgorge profits from the other transactions. In *Romo v. Ford Motor Co.*,[91] a California appellate court concluded that *Campbell* constitutionalized a "narrow view" of the goal and measure of punitive damages which limited a state's legitimate interest in imposing punitive damages to punishing only that conduct which injured the plaintiff before the court and prohibited a state from punishing a defendant for "everything else it may have done wrong."[92] As such, the *Romo* court concluded, in part, that a jury instruction directing the jury to consider "the amount of punitive damages which will have a deterrent effect on the defendant in light of defendant's financial condition" and argument of counsel that the jury should award punitive damages based on the profit the defendant made on the sale of all the same model defective product impermissibly "fail[ed] to restrict the jury to punishment and deterrence based solely on the harm to the plaintiffs."[93]

V. CONCLUSION

I view this reformation of reprehensibility and potentially other aspects of the procedures for awarding punitive damages favorably for two reasons. While I am not certain that this reformation of reprehensibility is the best solution to total harm damages, it is a solution which may eliminate the practice of awarding total harm punitive damages in mass tort litigation. This, in turn, may ensure the continued viability of punitive damage claims in mass tort litigation.[94] First, it may ensure the viability of punitive damage claims by reducing the theoretical appeal of

90. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585 (1996) ("The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business."); *Campbell*, 538 U.S. at 427 ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").

91. Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 801–02 (Ct. App. 2003).

92. *Id*. at 802.

93. *Id*. at 805.

94. As other commentators have recognized, awarding punitive damages to multiple injured parties furthers interests in retribution and compensation underlying punitive damages. *See, e.g.*, Owen, *supra* note 6; *see also* Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 181 (2003) (arguing that punitive damages, in part, compensate the injured plaintiff for her hurt feelings).

defendants' claims of duplicative punishment. Second, on a practical level, this reformation may reduce the size of punitive damage awards to current claimants, and thereby increase the pool of assets available to future claimants.[95] Limiting the consideration of other act evidence to consideration as a measure of the defendant's knowledge only should reduce the scope of other act evidence presented to punitive damage decisionmakers. As a practical matter, this could reduce the number of related transactions presented to decisionmakers. For example, while evidence of transactions occurring prior to the transaction may be relevant to a defendant's knowledge, as *Wohlwend* demonstrates, conduct subsequent to the transaction with the plaintiff would not bear on the defendant's knowledge at the time of the transaction with the plaintiff.[96] Further, only prior transactions in which the defendant became aware of harm to the injured party would be relevant to demonstrate knowledge. To the extent that punitive damage decisionmakers do impose punitive damages to sanction these other acts directly, reducing the number of other acts that the decisionmakers consider should reduce the size of punitive awards.

I also find the Court's reformation of reprehensibility appealing because it brings the process for awarding punitive damages more in line with the retributivist principles which justify consideration of reprehensibility as a measure for assessing punitive damages in the first instance. In explaining the relevance of reprehensibility, the *Gore* Court relied on what it perceived to be the well accepted retributivist principle of reciprocity. The Court observed:

> As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect "the enormity of his offense." This principle reflects

95. Admittedly, on this front some empirical research suggests that *Gore* may not have been successful. *See, e.g.*, Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions, the Impact of* BMW v. Gore *on Punitive Damages Awards, and Forecasting Which Punitive Awards Will Be Reduced*, 7 SUP. CT. ECON. REV. 59 (1999). Eisenberg and Wells report an increase in mean punitive damage awards after *Gore*. However, they also report an increase in compensatory awards and a statistically significant decrease in the ratio between punitive and compensatory damages. *Id*. at 76. Whether *Gore* has had any sizeable effect on punitive damages since 1999 remains to be measured. To this end, Eisenberg and Wells noted that at the time that they conducted their research insufficient time might have elapsed for *Gore* to have exercised significant influence on the pattern of punitive awards. *Id*. at 61. Moreover, the effects of *Campbell*, of course, cannot be known at this time.

96. *See, e.g.*, Wohlwend v. Edwards, 796 N.E.2d 781, 787–88 (Ind. Ct. App. 2003); *see also* Jimenez v. DaimlerChrysler Corp., 269 F.3d 439, 451 (4th Cir. 2001) (stating that post-design evidence does not evince defendant's contemporaneous consciousness of wrongdoing); Fullmer v. Tague, 500 N.W.2d 432, 436 (Iowa 1993) (discussing that evidence of similar conduct postdating the conduct giving rise to the litigation was not relevant to show a pattern of wrongful conduct).

> the accepted view that some wrongs are more blameworthy than others. . . . In *TXO*, both the West Virginia Supreme Court and the Justices of this Court placed special emphasis on the principle that punitive damages may not be "grossly out of proportion to the severity of the offense."[97]

Reciprocity is integral to a retributivist model of criminal punishment. Stated simply, reciprocity provides that the punishment should fit the crime. Retributivist theorists and limited retributivist theorists have explained that reciprocity demands that the punishment be measured by the seriousness of the crime and that the seriousness be measured from a social point of view, not solely from the perspective of what would be required to make the injured party whole.[98] In measuring the seriousness of the crime from a social perspective, retributivist theorists measure not only the harm to the victim, but also the seriousness of the right invasion involved.[99] Finally, retributivist theorists take into account the culpability of the offender based on his or her state of mind.[100]

Reprehensibility as reformed by the Court better comports with this model. The Court demands that punitive damages bear a reasonable relationship to the harm caused by the defendant's misconduct. Thus, the Court takes into account the harm to the victim in measuring a reciprocal sanction. The reprehensibility analysis then performs the dual function of measuring the seriousness of the right invasion and accounting for the defendant's culpability. The seriousness of the right invasion stems not from the fact that the defendant has engaged in similar invasions of rights but rather from the nature of the right itself. This comports with the retributivist ideal that punishment be for the bad act rather than for the defendant's status as a bad actor. Thus, in both *Campbell* and *Gore*, the Court emphasizes aggravating factors like the use of trickery or deceit or the vulnerability of the victim and ranks misconduct resulting in physical harm as more serious than invasions of economic interests.[101]

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97. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575–76 (1996) (citations omitted).

98. Lawrence Crocker, *The Upper Limit of Just Punishment*, 41 EMORY L.J. 1059, 1081–83, 1088–92 (1992).

99. *Id*. at 1081–83, 1094–95.

100. *Id*. at 1088–92.

101. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003); *Gore*, 517 U.S. at 576–77; *see also* Jane Mallor & Barry S. Roberts, *Punitive Damages: On the Path to a Principled Approach?*, 50 HASTINGS L.J. 1001, 1009 (1999) ("The [*Gore*] Court provided a brief taxonomy of reprehensibility and indicated that the amount of a punitive award should be in proportion to both the wrongfulness of the defendant's conduct and the plaintiff's interest that the conduct implicated.").

Additionally, the Court emphasized the mental state of the defendant, demanding full reciprocity when the defendant knowingly engaged in misconduct but allowing lesser sanctions when the defendant was merely reckless.[102]

102. *Gore*, 517 U.S. at 576.