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MARCHING TO A DIFFERENT DRUMMER: ARE LOWER COURTS FAITHFULLY IMPLEMENTING THE EVOLVING DUE PROCESS GUIDEPOSTS TO CATCH AND CORRECT EXCESSIVE PUNITIVE DAMAGES AWARDS?

N. William Hines[+]

"Even if I were prepared to accept the flexible guides prescribed in

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> *[*BMW of North America v. Gore[1]*], I would not join the Court's swift conversion of those guides into instructions that begin to resemble* marching orders*."*
> *—Justice Ruth Bader Ginsberg*[2]

> *"We therefore rely primarily on state courts to fulfill the constitutional role as primary guarantors of federal rights. But the state courts must do more than recite the constitutional rule. They also must apply it,* faithful to its letter *and cognizant of the principles underlying it. Unfortunately, such review is not always forthcoming."*
> *—Justice Sandra Day O'Connor*[3]

> *"Is it up to a state court to* sit in judgment *about whether our remand orders are in error or not?*"
> *—Justice Antonin Scalia*[4]

> *"Is there any way for us to ensure against, in effect, a* bad-faith response *[by lower courts] to our decisions?*"
> *—Justice David H. Souter*[5]

Philip Morris USA, Inc. v. Williams, which evoked exasperation from Justices Scalia and Souter at its oral arguments, appeared before the U.S. Supreme Court three times in the past decade.[6] The only question under

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

2. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 439 (2003) (Ginsburg, J., dissenting) (emphasis added).

3. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 490 (1993) (O'Connor, J., dissenting) (emphasis added).

4. Transcript of Oral Arguments at 46, Philip Morris USA Inc. v. Williams, 556 U.S. 178 (2009) (No. 07-1216) [hereinafter *Williams III* Transcript] (emphasis added) (question of Justice Scalia to State of Oregon advocate, Robert S. Peck).

5. *Id.* at 48. (commenting, while mulling over his concern, that the Oregon court's persistence in sustaining the punitive damage award given in the earlier *Williams II* decision may send a signal encouraging disobedience by other lower courts).

6. In *Williams I*, the Supreme Court granted certiorari, and remanded the case back to the Oregon courts to consider the possible effects of *Campbell*, which was decided after the Oregon Court of Appeals had reached its final decision. Philip Morris USA Inc. v. Williams (*Williams I*), 540 U.S. 801 (2003) (mem.). In *Williams II*, the Supreme Court granted certiorari to review a challenged jury instruction that was approved by the Oregon Supreme Court. Philip Morris USA Inc. v. Williams (*Williams II*), 549 U.S. 346, 349 (2007). The jury instruction at issue appeared to Justice Breyer, writing for a five-to-four majority, to cross the due process line first drawn by the Court in *Gore*. *Id.* at 352 (citing *Gore*, 517 U.S. at 547). The *Gore* decision considered actual and potential harm caused by the defendant's wrongful acts to persons other than the plaintiff. *Id.* at 353.

consideration in *Williams III* was the Oregon Supreme Court's handling of the remand in *Williams II*—to correct the constitutionality of a jury instruction regarding the calculation of a punitive damages award.[7] In its decision on remand, the Oregon Supreme Court did not implement Justice Stephen Breyer's seemingly clear directions.[8] Instead of correcting the constitutional error identified, the Oregon Supreme Court reaffirmed the original punitive damages judgment against Philip Morris on a procedural ground not previously considered during the appellate review of the case.[9] Commenting to the Court about this surprising development during the December 2008 oral arguments, Stephen Shapiro, Philip Morris's attorney, asserted:

> We are here today because the Oregon court failed to follow this Court's direction on remand and because the ground it gave is not adequate to show a forfeiture of due process rights . . . . This Court vacated [*Williams II*] after finding that the Oregon Supreme Court applied the wrong constitutional standard, and it remanded with directions to apply the standard that the Court laid out. But the Oregon court didn't do that. It never even addressed the constitutional issue.[10]

Four months later, in a curious and unexplained move, the Court summarily dismissed *Williams III* without taking further action, stating only that "certiorari [had been] improvidently granted."[11]

This was not the first time in recent years that the Supreme Court faced resistance or reluctance by a state supreme court on a remand to fully implement the Court's directions to correct punitive damages awards that were determined to be unconstitutionally arbitrary or excessive. This resistance is

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7. *Williams II*, 549 U.S. at 350–51. As read by Justice Breyer and the majority, the questionable instruction in *Williams II* could be reasonably interpreted by a jury to allow the jury to consider actual and potential harm caused by the defendant's wrongful acts to persons other than the plaintiff when calculating the size of the punitive damages award necessary to fully punish the defendant and deter future wrongdoing. *Id.* at 354. Justice Breyer stated that he thought the Court had clearly ruled in *Gore* that the Fourteenth Amendment's Due Process Clause prohibits a state from imposing punishment for harm inflicted upon strangers to the litigation, thereby rendering constitutionally defective the jury instruction that appeared to permit such punishment. *Id.* at 352–53.

8. Williams v. Philip Morris, Inc. 176 P.3d 1255, 1257 (Or. 2008), *vacated and remanded by Williams I*, 540 U.S. 801 (2003).

9. *Id.* The Oregon court ruled that the jury instruction requested by Philip Morris at the original trial so badly misstated Oregon law that, under well-settled Oregon precedent, Philip Morris was barred from appealing the plaintiff's instruction that was actually given to the jury and which formed the basis for the Supreme Court review sought by Philip Morris in *Williams II*. *Id.* at 1263–64.

10. *Williams III* Transcript, *supra* note 4, at 3.

11. Philip Morris USA Inc. v. Williams (*Williams III*), 556 U.S. 178 (2009) (per curiam); *see also* Adam Liptak, *Supreme Court Withdraws in Tobacco Case*, N.Y TIMES, Apr. 1, 2009, at B2.

also evident in the aftermath of both *BMW of North America v. Gore*[12] and *Campbell v. State Farm Mutual Automotive Insurance Co.*,[13] two leading cases on punitive damages decided before *Williams II*. In these two cases, the Court most fully developed the framework for applying the "fair notice" principle, embodied in the Fourteenth Amendment's Due Process Clause, to review punitive damages awards.[14]

Of the nine punitive damages cases the Court has decided in the past twenty-five years, only *Gore* and *Campbell* were vacated because the Supreme Court found the state courts' decisions in violation of evolving substantive due process jurisprudence as applied directly to the size of punitive damages awards.[15] In both cases, on remand, the state supreme courts only partially complied with the Court's orders and also failed to fully apply the Court's suggested analysis.[16] In *Gore*, on remand, the Alabama Supreme Court ignored the suggestion that punitive damages awards over four times the compensatory damages were excessive.[17] Although the Alabama Supreme Court did reduce the punitive damages award, it did so to a figure twelve and one-half times the compensatory award.[18] The defendant, BMW, did not seek further judicial review of the reduced award.[19]

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12. BMW of N. Am., Inc. v. Gore, 701 So. 2d 507 (Ala. 1997). *Gore* was the first case in which the Court applied its substantive due process analysis to hold a state punitive damage award excessive ($4 million punitive damages for $4000 compensatory damages). BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 509 (1996). On remand, the Alabama Supreme Court reduced its original punitive damages award from $4 million to $50,000. *Gore*, 701 So. 2d at 515. By setting the corrected punitive award at over twelve times the compensatory damages, however, the Alabama Supreme Court failed to follow the Supreme Court's recommendation that punitive damages should not exceed a single digit ratio in relation to the compensatory damages, with a preference for four-to-one ratios. *Gore*, 517 U.S. at 581. No further review of the Alabama decision was sought by the defendant. *Id.*

13. Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409 (Utah 2004). In *Campbell*, the Court remanded to the Utah Supreme Court a $145 million punitive damages award it determined to be flawed on several counts, and almost certainly unconstitutionally excessive. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 415 (2003). On remand, the Utah Supreme Court reviewed each of the issues identified in the Supreme Court's opinion as problematic and reaffirmed its earlier decision with respect to the correctness of its rulings under Utah law. *Campbell*, 98 P.3d at 412. The Utah court reduced the size of the punitive damages award from $145 million to just over $9 million. *Id.* at 410. This adjusted punitive award was still nine times the compensatory damages awarded in the case, notwithstanding the view expressed by the Supreme Court that any punitive damages award larger than a one-to-one ratio might be excessive on the facts of the case. *Id.* at 410–12. Nonetheless, the Supreme Court denied certiorari when review was sought a second time by the defendant. State Farm Mut. Auto. Ins. Co. v. Campbell, 543 U.S. 874 (2004).

14. *Campbell*, 538 U.S. at 417–18; *Gore*, 517 U.S. at 574–86.

15. *Campbell*, 538 U.S. at 429; *Gore*, 517 U.S. at 585–86.

16. *Gore*, 701 So. 2d at 515; *Campbell*, 98 P.3d at 410–12.

17. *Gore*, 701 So. 2d at 515.

18. *Id.*

19. *Id.*

In *Campbell*, Justice Anthony Kennedy rejected a punitive damages award of $145 million as grossly excessive, stating that the proper punitive damages award should be near the $1 million in compensatory damages awarded—a one-to-one ratio.[20] On remand, the Utah Supreme Court rejected State Farm's argument that the Supreme Court "mandate[ed]" a punitive damages award no higher than the compensatory damages and only reduced the award to $9 million.[21] This award had a nine-to-one ratio between the punitive and compensatory damages and thus was the greatest possible ratio within the Court's preferred single-digit ratio framework.[22] The Supreme Court denied certiorari when State Farm sought further review.[23]

This history provides a context for the concern that the lower courts might be misapplying or failing to apply Supreme Court precedent governing punitive damages. This concern was highlighted during the *Williams III* oral argument, when Chief Justice John Roberts suggested that, if there was something "malodorous" about how Oregon handled the remand in *Williams II*, perhaps articulating a clear standard regarding the proper ratio might help ease this concern and "protect [the Court's] constitutional authority" in excessive punitive damages claims.[24] The Justices, particularly Chief Justice Roberts, seem concerned that the Oregon court's rejection of their analysis in *Williams II*, on remand, may be symptomatic of other courts ignoring or misapplying Supreme Court precedent governing punitive damages.[25]

The Court's continued reluctance to establish a clear, bright-line rule for determining excessiveness in punitive damages awards draws attention to the question: Why did the Court grant certiorari in *Williams II* to review only the technical correctness of the jury instruction about possible punitive damages, when the relationship between the punitive damages award and the compensatory damages was ninety seven-to-one, far larger than what the Court

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20. *Campbell*, 438 U.S. at 425.

21. *Campbell*, 98 P.3d at 413.

22. *Id.*

23. State Farm Mut. Auto. Ins. Co. v. Campbell, 543 U.S. 874 (2004).

24. *Williams III* Transcript, *supra* note 4, at 51–52; *see also id.* at 55 (statement of Justice Berger, acknowledging that Chief Justice Roberts did, in fact, suggest "that maybe [the Court] should reach the issue of due process on the amount?").

25. *See id.* at 52–55. Professor Catherine M. Sharkey has discussed the problems of state recognition of Supreme Court precedent by noting the dissonance between the Court's recent due process jurisprudence as applied to punitive damages awards, and its repeated recognition that, as a matter of policy, questions regarding when such damages are permissible are primarily matters for the states. Catherine M. Sharkey, *Federal Incursions and State Defiance: Punitive Damages in the Wake of* Philip Morris v. Williams, 46 WILLAMETTE L. REV. 449, 449–50 (2010). Professor Sharkey's article outlined several strategies that state courts or state legislatures could follow if they wished to exert greater resistance to the Supreme Court's federalization of these issues. *Id.* at 464–77.

previously suggested to be constitutionally permissible?[26] One possible explanation is that the Supreme Court assumed that overturning the decision on

26. *Williams II*, 549 U.S. 346, 351 (2007). There is rich scholarly literature discussing the Supreme Court's recent applications of due process principles to limit punitive damages awards. For an example of the discussion before 2004, see Laura J. Hines, *Due Process Limitations on Punitive Damages: Why* State Farm *Won't Be the Last Word*, 37 AKRON L. REV. 779, 779–87 (2004). Since 2004, scholarly intrigue and discussion has grown continuously. *See, e.g.*, Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1 (2004) (explaining the wide range of methods and reasoning that have been used by the Court to invalidate awards of punitive damages and the potential for confusion they present); Melissa Michelle Davis, *Procedural Protections in Punitive Damage Cases: Ensuring that Juries Are Asking the Right Questions About Wealth Evidence*, 81 TEMP. L. REV. 1119, 1120–27 (2008) (emphasizing the importance of jury instructions and how due process may be satisfied even in the cases of high punitive damages as long as proper procedures are maintained and followed to assure consistent and fair results); Thomas H. Dupree, Jr., *Punitive Damages and the Constitution*, 70 LA. L. REV. 421, 422–24 (2010) (describing the uncertainty that surrounds punitive damages due to unclear and conflicting jurisprudence); Anthony J. Franze, *Clinging to Federalism: How Reluctance to Amend State-Based Punitive Damages Procedures Impedes Due Process*, 2 CHARLESTON L. REV. 297, 299–302 (2008) (describing the discrepancies between states' jury instructions and the Court's guidance on constitutional limits on punitive damages and the need to improve the jury instructions); F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: "Morals Without Technique?"*, 60 FLA. L. REV. 349, 350–54, 356 (2008) (citing inconsistencies in punitive damages jurisprudence as complicating their use and the problems that arise from awarding punitive damages based on harm to a third party); Jenny Miao Jiang, *Whimsical Punishment: The Vice of Federal Intervention, Constitutionalization, and Substantive Due Process in Punitive Damages Law*, 94 CALIF. L. REV. 793, 796–98, 828–29 (2006) (describing how the Court found that punitive damages fall under the Due Process Clause and arguing that the Court should focus on guaranteeing procedural due process rather than invalidating specific amounts of punitive damages as being too excessive); Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83, 95, 141–43 (2007) (arguing that the Court's restriction of punitive damages to single-digit ratios may inhibit a court's ability to account for unvalued harm that has occurred); Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 251, 327–29 (2009) (detailing a framework for the implementation of punitive damages based on the Court's past rulings); Martha T. McCluskey, *Constitutionalizing Class Inequality: Due Process in* State Farm, 56 BUFF. L. REV. 1035, 1042 (2008) (arguing that high punitive damages awards will cause businesses to account for the risk of them being imposed through raising prices and other methods, which could have detrimental effects for the company); Doug Rendleman, *A Plea to Reject the United States Supreme Court's Due-Process Review of Punitive Damages*, *in* THE LAW OF REMEDIES: NEW DIRECTIONS IN THE COMMON LAW 540–41 (Jeff Berryman & Rick Bigwood eds., 2010) (describing the differing opinions between the Justices as to what "grossly excessive" means); Sheila B. Scheuerman, *The Road Not Taken: Would Application of the Excessive Fines Clause to Punitive Damages Have Made a Difference?*, 17 WIDENER L.J. 949, 959–60 (2008) (arguing that the State's punitive damages framework should assure that juries do not seek to punish a defendant for harm done to strangers); Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 959, 973 (2007) (describing the Court's efforts to assure that punitive damages are not excessive, but also to assure that they are not awarded in an arbitrary manner that could threaten the established tort system); Sharkey, *supra* note 25, at 449–51 (describing issues that have arisen out of the Court's holdings in punitive damages cases); A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085, 1123–24 (2006) (arguing that the Court's use of due process to invalidate punitive damages awards improperly expands the Due Process Clause);

the basis of a faulty jury instruction would require a new trial, which would yield a new punitive damages award and make it unnecessary to review the original award for excessiveness.[27] Chief Justice Roberts, however, characterized the limited grant of certiorari as an indication of the Court pointedly avoiding the excessiveness issue,[28] which heightened scholarly curiosity regarding the Court's seeming indifference toward an arguably

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Tracy A. Thomas, *Proportionality and the Supreme Court's Jurisprudence of Remedies*, 59 HASTINGS L.J. 73, 92–97 (2007) (describing the Court's use of procedural and substantive due process to invalidate excessive punitive damages claims); James M. Underwood, *Road to Nowhere or Jurisprudential U-Turn? The Intersection of Punitive Damages Class Actions and the Due Process Clause*, 66 WASH & LEE L. REV. 763, 763–68 (2009) (describing the Court's initial reluctance to prohibit punitive damages to punish a defendant for harm to third parties); Benjamin C. Zipursky, Palsgraf*, Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1758–59 (2012) (describing the tensions between the Supreme Court and the Supreme Court of Oregon in deciding the issue of constitutional limits on punitive damages); Michael I. Krauss, *Response: "Retributive Damages" and the Death of Private Ordering*, 158 U. PA. L. REV. PENNUMBRA 167, 168 (2010), http://www.pennumbra.com/responses/02–2010/Krauss.pdf (describing the issues that have arisen from punitive damages jurisprudence); Dan Marke, *Reply, Punitive Damages and Private Ordering Fetishism*, 158 U. PA. L. REV. PENNUMBRA 283, 284 (2010), http://www.pennumbra.com/responses/05-2010/Markel.pdf (describing punitive damages frameworks that states may adopt to meet constitutional requirements); David G. Owen, *Response, Aggravating Punitive Damages*, 158 U. PA. L. REV. PENNUMBRA 181, 182 (2010), http://www.pennumbra.com/responses/02-2010/Owen.pdf (describing the issues that arise for litigants in cases that involve punitive damages due to the uncertainty punitive damage litigation has caused).

27. This strategy was already employed by the Court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, in which a procedural irregularity required remand and rendered it unnecessary to rule on the excessiveness claim based on a ninety-to-one ratio between punitive damages and compensatory damages. 532 U.S. 424, 441 (2001).

28. *Williams III* Transcript, *supra* note 4, at 51–51. The Oregon court awarded $821,000 in compensatory and $79.5 million in punitive damages. Williams v. Philip Morris USA, Inc., 127 P.3d 1165, 1171 (Or. 2006). In its earlier punitive damages cases, the Supreme Court articulated the constitutional limits that the Fourteenth Amendment's Due Process Clause imposes on the size of punitive damages awards. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568–70 (1996). In *Gore* and *Campbell*, the Court promulgated the three guideposts for lower courts to apply in reviewing potentially excessive punitive damages awards and to justify punitive damages: (1) the defendant's conduct must be "reprehensible;" (2) the ratio between compensatory damages and punitive damages must be reasonable; and (3) where relevant, the civil fine or criminal penalty for comparable conduct should be used as a benchmark. *Campbell*, 538 U.S. at 418; *Gore*, 517 U.S. at 574–75. The second guidepost concerning the ratio between compensatory damages and punitive damages has received the most attention by the Court. *See* Michael P. Allen, *Of Remedies, Juries, and State Regulation of Punitive Damages: The Significance of* Philip Morris v. Williams, 63 N.Y.U. ANN. SURV. AM. L. 343, 349 (2008). In *Exxon*, although due process jurisprudence was discussed favorably, it was not entirely useful in determining the acceptable size of the punitive damages award, which was reduced from $2 billion to $500 million—achieving a one-to-one ratio. Exxon Shipping Co. v. Baker, 554 U.S. 471, 481, 513–15 (2008).

excessive award and its reluctance to apply its new due process jurisprudence.[29]

Compounding the puzzle was the Court's summary dismissal of *Williams III* several months after oral arguments, stating that certiorari had been "improvidently granted" as the only explanation.[30] One potential explanation for the summary dismissal is that the Supreme Court recognized that, rather than exhibiting an unwillingness to follow precedent, the Oregon court was merely exercising its authority in supervising its own procedural domain and would provide a proper jury instruction henceforth. Later Oregon cases are consistent with this explanation and appear to demonstrate subsequent compliance with Supreme Court precedent.[31] If this "no harm, no foul" explanation is correct, once the Court decided not to send the jury instruction back to the Oregon court again, why did it not extend its original grant of certiorari to include the excessiveness issue? Perhaps the Justices preferred waiting for a case with less egregious facts to fine-tune Guidepost 2.

Another possible explanation of the summary dismissal advanced by one scholar is that it signaled the Supreme Court's retreat from its close oversight of state punitive damages awards.[32] This interpretation of *Williams III* appears difficult to sustain, however, in light of the Court's response to the punitive damages issue in *Exxon Shipping Co. v Baker*, a high-profile 2008 multi-billion dollar admiralty case arising out of the Exxon Valdez oil spill in

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29. *Williams II* evoked a significant amount of scholarly writing addressing the procedural and evidentiary questions raised. *See generally* Symposium Edition, 2 CHARLESTON L. REV. 1 (2008) (containing nine articles addressing punitive damages). *See, e.g.*, Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 407–08 (2008) (speculating that when the *Williams* Court claimed it was relying on procedural due process, it it was serious because the argument for substantive due process was untenable); Davis, *supra* note 26 (reasoning that the outcome of *Williams* may have been the result of the Supreme Court's interest in cleaning up procedural improprieties rather than refining its excessiveness review); Victor E. Schwartz & Christopher E. Appel, *Putting the Cart Before the Horse: The Prejudicial Practice of a "Reverse Bifurcation" Approach to Punitive Damages*, 2 CHARLESTON L. REV. 375, 398–401 (2008); Sharkey, *supra* note 25, at 461–62, 464 (suggesting that *Williams* demonstrates the limitations of the Supreme Court's authority and capacity within the state law realm of punitive damages but also perhaps the empowerment of state court defiance).

30. *Williams III*, 556 U.S. 178, 179 (2009) (per curiam); *see also* Sharkey, *supra* note 25, at 450 n.3 (noting that the Supreme Court does not usually provide reasons for dismissal).

31. *See* Joseph J. Solberg & Karen A. Hosack, *Punitive Damages After* Philip Morris USA v. Williams*: Has the Smoke Cleared?* 18 J. L. BUS. & ETHICS 73, 74, 87–89 (2012) (noting that the Oregon Court of Appeals reined in jury-awarded punitive damages with ratios in excess of the Supreme Court's guidance, but the Oregon Supreme Court reinstated the arguably excessive award in *Hamlin* (citing Hamlin v. Hampton Lumber Mills, Inc., 246 P.3d 1121 (2011); Goddard v. Farmers Ins. Co. of Oregon, 179 P.3d 645, 670 (2008))).

32. *See generally* Jim Gash, *The End of an Era: The Supreme Court (Finally) Butts out of Punitive Damages for Good*, 63 FLA. L. REV. 525 (2011).

Alaska.[33] In *Exxon*, despite favorably discussing its recent due process jurisprudence, the Court recognized the availability of punitive damages in admiralty cases and articulated a new federal norm of a presumptive one-to-one ratio between punitive and compensatory damages.[34]

Considering the concerns expressed by the Justices regarding whether state courts are failing to follow the Supreme Court's punitive damages directions, the question arises: Is recalcitrance to implement Supreme Court guidance an aberration among lower courts or is it relatively commonplace? Based on an extensive study of over five hundred reported cases reviewing punitive damages awards published since *Campbell* in 2003, this Article concludes that lower courts' "faithfulness" to their constitutional obligations in accepting and applying the three *Gore/Campbell* guideposts[35] is not cause for concern.

This Article focuses primarily on the issue of lower courts' faithfulness to the Supreme Court's directions as to how constitutional review of punitive damages awards should be conducted. Part I briefly traces the history of the Supreme Court's "federalization"[36] of punitive damages law under the Fourteenth Amendment's Due Process Clause through the establishment of three constitutional guideposts for lower courts to follow. Part II explores how these guideposts should work by applying them to a hypothetical case against oil industry defendants involved in the Deepwater Horizon catastrophe. Part III then considers whether there is a conventional legal understanding of lower courts' obligations when they hear cases on remand. Part IV outlines the methodology employed to identify, classify, and analyze the punitive damages cases decided by lower courts since the *Campbell* decision. This Article reports the results of a detailed examination of cases involving punitive damages claims decided since 2003, looking for evidence of whether lower courts are ignoring, resisting, or even chaffing under the new constitutional guideposts they are expected to follow. Finally, Part V asserts that lower courts are obediently following the Supreme Court's "marching orders"[37] through their own interpretations and applications of the relevant guideposts. In short, the concerns raised in *Williams III* about the faithfulness of lower

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33. Exxon Shipping Co. v. Baker, 554 U.S. 471, 476, 515 (2008); *see also* Joni Hersch & W. Kip Viscusi, *Punitive Damages by Numbers:* Exxon Shipping Co. v. Baker, 18 SUP. CT. ECON. REV. 259, 259–60 (2010).

34. *Exxon Shipping*, 554 U.S. at 480–81 (noting that the Ninth Circuit reduced the plaintiff's punitive damages award from $4 billion to $2.5 billion); *see also In re* the Exxon Valdez, 472 F.3d 600, 602 (9th Cir. 2006), *amended by and reh'g en banc denied,* 490 F.3d 1066 (9th Cir. 2007).

35. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996).

36. *See* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalism*, 53 U.C.L.A. L. REV. 1353, 1420 (2006).

37. State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 439 (2003) (Ginsburg, J., dissenting) (providing that the term "marching orders" was first used somewhat disparagingly by Justice Ginsburg).

courts to the Supreme Court's emerging punitive damages jurisprudence are not justified by how those courts are actually deciding punitive damages cases.

I. EMERGING CONSTITUTIONAL LAW GOVERNING CHALLENGES TO PUNITIVE DAMAGES AWARDS FOR ARBITRARINESS OR EXCESSIVENESS

Although based on remedial considerations different from those that animate most of Anglo-American tort law, punitive damages, in some form, have been a part of the United States' common law heritage for centuries. The English origins of punitive damages law have been well documented by judges and scholars.[38] Initially, some U.S. jurisdictions did not recognize claims for punitive damages when first encountered, but in the 1854 case of *Day v. Woodworth*, the Supreme Court acknowledged that a plaintiff's entitlement to a jury award for punitive damages to punish unusually aggravated wrongdoing by a defendant was "well established" in American common law.[39] Throughout the next century, most U.S. courts allowed juries wide discretion in determining whether punitive damages were justified and in fixing the amount of the punitive damages award necessary to punish the defendant and deter future bad conduct. During this period, judicial review of jury awards of punitive damages was highly deferential. Awards were set aside only if they were clearly the product of "prejudice, passion, or bias" on the part of the jury, or if the award "lacked evidentiary support or . . . shocked the . . . conscience" of the reviewing court.[40]

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38. *See* THEODORE SEDGWICK, MEASURE OF DAMAGES 522 (4th ed. 1868) (demonstrating that English cases in the eighteenth century that awarded private plaintiffs money beyond what they could prove as compensatory damages denoted these extra damages as "exemplary"). These early cases often involved private actions against governmental actors who had exceeded their authority. *See* J. G. SUTHERLAND, LAW OF DAMAGES 758 (1883). As the recognition of the possible availability of punitive damages migrated to America, the typical early case involved a different type of abuse of power, namely outrageous social or economic conduct deliberately intended to harm and humiliate the plaintiff. *Id.* at 726. A few state courts refused to recognize the availability of a claim for exemplary damages, the legitimacy of which was subject to vigorous debate among tort scholars. *See, e.g.*, Murphy v. Hobbs, 5 P. 119, 125–26 (Colo. 1884); Fay v. Parker, 53 N.H. 342, 397 (1873). The availability of punitive damages in the proper case appeared increasingly well settled by the middle of the nineteenth century. *See also* Barry v. Edmonds, 116 U.S. 550, 563 (1886) (noting the virtually unfettered discretion of juries to award punitive damages). During this time period, American punitive damages cases most often involved railroads and other common carriers, whose employees egregiously harmed customers. *See* Mo. Pac. R.R. Co. v. Humes, 115 U.S. 512, 522–23 (1885). In the early twentieth century, the reach of punitive damages awards was extended to egregiously fraudulent conduct in business dealings and other personal wrongs reflecting particularly reprehensible conduct by the defendant. *See* 1 DAN DOBBS, LAW OF REMEDIES § 3.11(10) n.5 (2d ed. 1993).

39. 54 U.S. (12 How.) 363, 371 (1854) (stating that a plaintiff's entitlement to punitive damages for unusually aggravated conduct by a defendant was "well established" in American law).

40. James D. Ghiardi, *Punitive Damage Awards—An Expended Judicial Role*, 72 MARQ. L. REV. 33, 35–36 (1988).

This began to change in the latter half of the twentieth century. Beginning in the 1960s, a few lower federal court opinions expressed serious concerns about the undisciplined nature and exploding size of punitive damages awards.[41] In the 1970s and early 1980s, the Supreme Court, while continuing to rule that punitive damages awards generally were not subject to constitutional scrutiny by federal courts, nevertheless held that punitive damages' unpredictability rendered them inappropriate in cases in which First Amendment rights were at issue,[42] and in actions under 42 U.S.C. § 1983 against city officials.[43] In a seminal 1982 article,[44] Professor Dorsey Ellis observed that the incidence of large punitive damages awards was rising rapidly and questioned whether such awards were the best way for society to regulate egregious misbehavior by tortfeasors.[45] Because of the escalating rate of punitive damages awards, Ellis also raised doubts that would-be tortfeasors were afforded fair notice of the severe consequences of losing a lawsuit alleging their misbehavior.[46] Later in the 1980s, several legal scholars began building arguments to constrain or eliminate punitive damages as a remedy.[47]

A. Early Supreme Court Discourse: Addressing State Courts' Punitive Damages Awards Practice

The first hint that the Supreme Court might be open to considering constitutional challenges to punitive damages awards appeared in a 1986 decision in which the Fourteenth Amendment's Due Process Clause was used to challenge an Alabama Supreme Court Justice's refusal to recuse himself when he stood to obtain a financial gain depending on the outcome of the case.[48] In *Aetna Life Insurance Co. v. Lavoie*, the plaintiffs raised other

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41. *See, e.g.*, Roginsky v. Richardson-Merrill, Inc., 378 F.2d 832, 839–41 (2d. Cir. 1967); Curtis Publ'g Co. v. Butts, 351 F.2d 702, 737 (5th Cir. 1965) (Rives, J., dissenting).

42. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349–50, 367 (1974).

43. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259–60 (1981).

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

45. *Id.* at 2, 53.

46. Ellis focused his concern on two different issues. First, he challenged the economic efficiency of private law enforcement through punitive damages. *Id.* at 31. Second, he raised a fairness issue: given the extreme unpredictability of punitive damages awards, can wrongdoers be fairly said to be on notice about the possible drastic financial consequences of their harmful actions? *Id.* at 22. On this latter point, Ellis anticipated, by almost a decade, the start of the Supreme Court giving attention to the "fair notice" element of the Fourteenth Amendment's Due Process Clause and its procedural and substantive implications regarding the need to rein in punitive damages awards challenged as arbitrary or excessive. *Id.* at 53.

47. *See* John Calvin Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 140 (1986); *see also* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 CHI. L. REV. 1, 59–60 (1982); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic that Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1157 (1984).

48. *See* Aetna Life Ins. Co. v. Lavoie, 375 U.S. 813, 815 (1986).

constitutional challenges to the amount of punitive damages awarded in addition to the recusal for bias claim.[49] The Court declined to address both the defendant's Eighth Amendment excessive fine claim and the Fourteenth Amendment Due Process claim; however, Chief Justice Warren Berger expressly stated that both raised "important issues which, in an appropriate setting, must be resolved."[50]

It did not take long for the appropriate setting to arise. Although several justices played key roles over the next two decades in expanding the scope of the Due Process Clause to encompass problematic punitive damages awards, Justice O'Connor was the most relentless champion of the enterprise.[51] When Justice O'Connor retired from the U.S. Supreme Court in 2005, she left a lasting mark on constitutional law in several important fields. In describing her legacy, however, few scholars highlighted her successful campaign to subject punitive damages awards to searching constitutional scrutiny, both procedurally and substantively. Thanks to Justice O'Connor, the Supreme Court ultimately developed a new and controversial set of constitutional standards applying the Fourteenth Amendment's Due Process Clause to evaluate possible unreasonableness or excessiveness of punitive damages awards.[52]

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49. *Id.* at 828.

50. *Id.* at 828–29.

51. *See* Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 87–89 (1988) (O'Connor, J., dissenting) (flagging, for future consideration, the idea that the Due Process Clause of the Fourteenth Amendment might impose constitutional limits on the unreasonableness or excessiveness of punitive damages awards). Justice O'Connor was persistent about applying constitutional standards to punitive damages awards. One year later, in another dissent in *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*, Justice O'Connor emphasized Professor Ellis's assessment of the burgeoning problem by asserting that punitive damages awards were "skyrocketing" and that the threat of enormous punitive awards acted as a damper on the research and development of new products. 492 U.S. 257, 282 (1989) (O'Connor, J., dissenting in part). Justice O'Connor argued unsuccessfully that the "excessive fines" provision of the Eighth Amendment should operate through the Fourteenth Amendment to impose a substantive ceiling on state punitive damages awards. *Id.* at 300. Justice O'Connor also renewed her call for applying procedural due process to the seemingly unregulated discretion granted to juries under the traditional common law process for determining both the appropriateness and size of punitive damages awards. *Id.* at 283. She justified her position by asserting that inherent in the concept of due process was the proposition that defendants were entitled to fair notice with respect to the probable consequences of their wrongdoing, and that because punitive damages were a form of civil penalty, the idea that the punishment should fit the wrong was applicable. *Id.* at 297. In discussing these issues, Justice O'Connor foreshadowed, by seven years, the eventual adoption by the Court of formal constitutional guideposts to assist lower courts in their review of jury awards of punitive damages. *Id.* at 300–01.

52. Justice O'Connor's ideas about due process imposing outside limits on punitive damages were first officially embraced by the Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). The majority opinion expressly endorsed the application of both procedural and substantive due process to jury awards of punitive damages, but nevertheless found that the traditional common law process used in Alabama met procedural due process standards because it was subjected to careful review by both the trial judge and the appellate

In the view of some constitutional scholars, the Court completely "federalized" the common law governing punitive damages in a series of decisions in which it invoked the principle of "fair notice," found embedded in the Due Process Clause.[53] Applying procedural due process principles, the Court first required all states to provide meaningful opportunities for rigorous judicial review of punitive damages.[54] The Court later extended this reasoning by requiring de novo review of the reasonableness of punitive damages awards.[55] In a 2007 ruling, oddly characterized as procedural, the Court required that jury instructions confine the jury's deliberations to the plaintiff alone and not to strangers to the litigation when considering the appropriate punitive damages size.[56] This new application of procedural due process principles to punitive damages is uncontroversial, except for several opponents who claim that it intrudes too greatly into the legitimate interests of the states to shape their laws and processes.[57] Justice O'Connor's campaign to impose both procedural and substantive constitutional limits on punitive damages continued in her dissent two years later in *TXO Production Corp. v. Alliance Resources Corp*.[58]

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court. *Id.* at 19–24. The majority also found that the punitive damages award, which was over four times the compensatory damages award, was not unconstitutionally excessive. *Id.* at 23. Justice O'Connor's dissent was lengthy and strongly worded. *Id.* at 42–54 (O'Connor, J., dissenting) (remarking that the award was "close to the line" but did not lack objective criteria). O'Connor noted that excessive punitive damages awards "have a devastating potential for harm." *Id.* at 42. She characterized the traditional common law deference to jury decision-making as so unprincipled as to be unconstitutionally "void for vagueness." *Id.* at 43. Justice O'Connor also renewed her insistence that the Court should set forth constitutional "guideposts" to assist lower courts in their decision-making regarding whether to award punitive damages and the appropriate size of awards. *Id.* at 57.

53. *See* Issacharoff & Sharkey, *supra* note 36, at 1420.

54. *Haslip*, 499 U.S. at 20–22.

55. Cooper Indus. v. Leatherman Tool Grp., 532 U.S. 424, 431 (2001).

56. *Williams II*, 549 U.S. 346, 353–55 (2007).

57. *Id.* at 364 (Ginsburg, J., dissenting) (arguing that the Court should "accord more respectful treatment to the proceedings and dispositions of state courts that sought diligently to adhere to [the Court's] changing, less than crystalline precedent"); *see also, e.g.*, Franze, *supra* note 26, at 302; Sharkey, *supra* note 25, at 477–78.

58. 509 U.S. 443, 480 (1993) (O'Connor, J., dissenting). The *TXO* majority agreed that due process standards based on fair notice applied to both the process by which punitive damages were awarded and the size of the award made. *Id.* at 458 (majority opinion). The plurality opinion, however, found that the traditional jury process was satisfactory under procedural due process norms and also held that the award, which was 526 times the size of the compensatory award, was not unconstitutionally excessive because the defendant's wrong raised the potential for great harm to the plaintiff. *Id.* at 460–62. Although Justice O'Connor agreed with the majority's principle, she condemned the traditional common law deference to the jury as standardless and argued that the award at issue was grossly excessive because there was no evidence in the record supporting the potential harm analysis. *Id.* at 484–86 (O'Connor, J., dissenting).

One year later, in *Honda Motor Co. LTD. v. Oberg*, the Supreme Court finally applied the procedural due process analysis long advocated by Justice O'Connor to strike down an Oregon

B. The Three Guideposts: Due Process and Punitive Damages

Despite repeated dissents, the Supreme Court ultimately extended the due process principle of fair notice to the size of punitive damages awards.[59] This extension of substantive due process is based on the argument that even the most egregious tortfeasors should not be unfairly surprised by the size of punitive damages awards.[60] Since 1996, the Court has utilized this fair notice analysis with respect to both deservedness and the possible excessiveness of awards.[61] To guide lower courts in implementing the newly imposed constitutional responsibility to review punitive damages awards, the Court established three guideposts in *Gore*[62] and further refined them in *Campbell*.[63] Justice Kennedy recited the three guideposts as follows: "(1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual

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court's punitive damages decision on the basis that Oregon law prevented state courts from conducting a meaningful review of jury punitive damages awards. 512 U.S. 415, 432 (1994). Justice O'Connor joined Justice Stevens's majority opinion and did not write separately. *Id.* at 416–17. The concept of a constitutionally mandated meaningful review of punitive damages awards was expanded in a later case also involving Oregon's law. *See Cooper Indus., Inc.*, 532 U.S. at 436. In this case, the Court remanded a punitive damages award ninety times the compensatory award because of a procedural defect—a lack of de novo review of the jury award by an appellate court. *Id.* The Court did not reach the excessiveness issue because the necessity of de novo review meant that the award was not final. *Id.* at 435. Justice O'Connor again joined the majority opinion written by Justice Stevens and did not write separately. *Id.* at 425.

59. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585 (1996).

60. *Id.* In 1996, the Court struck down an Alabama court's award of punitive damages on the grounds that the size of the award was unconstitutionally excessive as a matter of substantive due process. *Id.* at 585–86. In *Gore*, the punitive damages award to the plaintiff was 500 times the compensatory damages, but the defendant's misconduct was far from egregious and inflicted only minor economic harm. *Id.* at 574–75. The Supreme Court also found fault with the Alabama trial process, which allowed the jury to consider the defendant's legal business practices in other states with alleged out-of-state victims who were not parties to the litigation in Alabama. *Id.* at 572–73; *see also Williams II*, 549 U.S. 346, 353–54 (2007) (holding a similar procedural fault as the basis of remand to the Oregon courts after the jury appeared to consider harm done to non-plaintiff parties in determining the size of the appropriate punitive damages award). Justice O'Connor joined the majority opinion in *Gore* and also Justice Breyer's concurrence, arguing that the Alabama jury process was subject to other more serious deficiencies overlooked by the majority. *Gore*, 517 U.S. at 588 (Breyer, J., concurring) (stating that "[t]he standards the Alabama courts applied here are vague and open ended to the point where they risk arbitrary results"). For the first time, the Court accepted Justice O'Connor's plea to provide greater instruction to lower courts by adopting three guideposts for reviewing punitive damages decisions challenged as unconstitutionally unreasonable or excessive. *Id.* at 574–75. The guideposts, however, were not concrete rules to be strictly applied, but were rather general principles for the lower courts to adapt to the facts of individual cases. *Id.* at 585–86. Dissenters on the Court and tort scholars scoffed at the guideposts as an unprincipled incursion into the legitimate realm of state decision-making that lower courts would find very difficult to implement. *See, e.g.*, *id.* at 605 (Scalia, J., dissenting) (stating that "'guideposts' mark a road to nowhere" and provide no real guidance).

61. Dupree, *supra* note 26, at 421.

62. *Gore*, 517 U.S. at 574–83.

63. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418–28 (2003).

or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[64] The guideposts aim to assure, through "[e]xacting appellate review[,] . . . that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'"[65]

Williams II did not involve interpretation or application of the guideposts.[66] The holding was narrow and explicitly deemed procedural by Justice Breyer, thus reinforcing the principle that a jury may not constitutionally take into account harm to strangers to the litigation when calculating punitive damages awards.[67] This holding drew a fine line, however, because the Supreme Court concedes that the defendant's misconduct, which harms others *within the state*, may be taken into account by the jury when considering awarding punitive damages based on the defendant's degree of reprehensibility.[68]

C. Punitive Damages and the Unconstitutionally Excessive Standard

The court's decision in *Exxon* regarding excessive punitive damages is difficult to reconcile with the rest of its due process analysis.[69] Exercising original jurisdiction over admiralty law cases, the Supreme Court surprised tort lawyers and scholars by upholding the Ninth Circuit's four-to-four decision to allow punitive damages.[70] The Court created new federal admiralty jurisprudence on punitive damages excessiveness by upholding—but

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64. *Id.* at 418. Seven years after *Gore*, the Supreme Court granted certiorari in *Campbell*, which involved a punitive damages award of $145 million. *Id.* at 412. Expectations were raised that the Court would elaborate and refine the guideposts to provide greater direction to lower courts. The decision in *Campbell* did not fulfill these expectations to any substantial degree. *See* Lauren R. Goldman & Nickolai G. Levin, State Farm *at Three: Lower Courts' Application of the Ratio Guidepost*, 2 N.Y.U. J. L. & BUS. 509, 549 (2006) (noting that "many courts . . . resist fully implementing *State Farm*'s guidance" while others have "virtually ignored" the decision). The six-to-three decision, in which Justice O'Connor joined the majority, vacated the Utah court's decision and remanded it for reconsideration, but stated that the case was easy to decide in favor of the defendant by applying the guideposts because the punitive damages award was so grossly excessive. *Campbell*, 538 U.S. at 429. Thus, the decision did not provide an extended analysis of how the guideposts clarified that the Utah court's decision was unconstitutional. The majority opinion minimally expanded the reprehensibility factor, the ratio norms, and how substantial variance from these norms would appear. *Id.* at 419–28. The Court also said little about the comparability to sanctions for similar offenses, other than observing that criminal punishments were of limited relevance. *Id.* at 428. As elaborated in the *Campbell* opinion, the three guideposts set forth in *Gore* are intended to be operative tests for constitutional review of punitive damages awards challenged as arbitrary or excessive. *Id.* at 422.

65. Campbell, 538 U.S. at 424 (quoting *Gore*, 517 U.S. at 587 (Breyer, J., concurring)).

66. *See supra* notes 7–9 and accompanying text.

67. *Williams II*, 549 U.S. 346, 353–54 (2007).

68. *Id.* at 357.

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

70. *Id.* at 475–76, 486.

lowering—the original award by eighty percent.[71] Justice Souter, writing for the majority, approvingly described the evolution of the Court's due process tests, emphasizing the second guidepost—ratio—but declining to apply such analysis in *Exxon*.[72] Justice Souter instead chose to develop new federal admiralty standards limiting the size of punitive damages when large compensatory damages have already been awarded.[73] In applying these new principles to *Exxon*, Justice Souter lowered the punitive damages award to a one-to-one ratio, suggesting that this should be the norm in all cases with very large compensatory damage awards.[74]

Justice O'Connor's drive for increasingly aggressive Supreme Court review of state punitive damages awards has never commanded decisive majorities in cases in which her views prevailed;[75] the Court is almost always closely divided on these issues.[76] Justice Scalia has strenuously resisted using the Due Process Clause to prescribe the size of state court punitive damages awards since first broaching the issue in *Pacific Mutual Life Insurance Co. v. Haslip*.[77] Justice Clarence Thomas later joined Justice Scalia in his position.[78] Their repeated objections rest on the ground that elected legislatures, not the judiciary, should establish new due process protections.[79] The historical argument is that the common law processes for jury determination of punitive damages were already well established before the Fourteenth Amendment was enacted in 1868.[80] Thus, the dissenters argue that constitutionally limiting punitive damages with the Due Process Clause would be an impermissible

71. Hersch & Viscusi, *supra* note 33, at 259–61.

72. *Exxon*, 554 U.S. at 501–02.

73. *Id.* at 512–15.

74. *Id.* at 513–15.

75. Robert J. Rhee, *A Financial Economic Theory of Punitive Damages*, 111 U. MICH. L. REV. 33, 46 (2012) (noting Justice O'Connor's criticism of punitive damages, "advocat[ing] . . . strict constraints, and [crafting] forceful dissents in *Browning-Ferris*, *Haslip*, and *TXO* [that] may have influenced her colleagues and the Court's later thinking").

76. The landmark *Gore* decision was decided by a five-to-four margin. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 561 (1996); *see also* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 411 (2003) (six-to-three decision); *Williams II*, 549 U.S. 346, 348 (2007) (five-to-four decision). Although only tangentially related, *Exxon Valdez* was four-to-four. *Exxon*, 554 U.S. at 474.

77. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 24–28 (1991) (Scalia, J., concurring in the judgment) (arguing that the Due Process Clause cannot logically be applied to a common law practice that antedated the Fourteenth Amendment).

78. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 470 (1993) (Scalia, J., concurring) (disclosing Justice Thomas's first instance of joining Justice Scalia disputing the proposition that the Fourteenth Amendment is a "secret repository" of all sorts of substantive rights).

79. *See* RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION 166–67 (2006) (describing Justice Scalia's belief that the elected branches of government should expand due process rights, not the judiciary).

80. *See supra* notes 38–39 and accompanying text.

federal reform of what was considered an adequate judicial process prior to the Fourteenth Amendment's passage.[81] In later cases, Chief Justice Rehnquist and Justice Ginsburg joined Justices Scalia and Thomas as dissenters, albeit on different grounds,[82] and Justice Stevens joined the dissent in *Williams II*.[83] Justices Ginsberg and Stevens consistently emphasize what they characterize as unjustified incursions into state prerogatives, which violate basic federalism principles.[84]

Even in cases holding punitive damages awards unconstitutionally excessive, the Supreme Court was careful to observe that legitimate state interests exist to justify the imposition of punitive damages in proper cases to punish and deter egregious conduct on the part of defendants.[85] Although the Court has repeatedly mentioned only the two traditional tort law justifications for punitive damages—retribution and deterrence[86]—tort scholars[87] and some lower court judges have questioned whether punishment and deterrence exhaust the legitimate state interests behind the imposition of punitive damages.[88] For example, Professor Dorsey Ellis, Jr. advanced seven legal reasons that might justify the imposition of punitive damages in a particular case,[89] but confirmed that punishment and deterrence were the fundamental purposes.[90] Judge Richard Posner, in a widely cited 2003 opinion known

81. *Haslip*, 499 U.S. at 39 (Scalia, J., concurring in the judgment) (arguing that the Due Process Clause's "function is negative, not affirmative, and it carries no mandate for particular measures of reform").

82. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 607 (1996) (Ginsburg, J., dissenting).

83. *Williams II*, 549 U.S. 346, 358 (2007) (Stevens, J., dissenting) (arguing that the Court improperly limited the State's power to punish civil litigants for harms caused to non-parties).

84. *See, e.g.*, *Gore*, 517 U.S. 598–99 (Scalia, J., dissenting) (reiterating that an award of punitive damages at the "discretion of the jury, subject to some judicial review for 'reasonableness,'" in state court is sufficient due process because "there is no federal guarantee a damages award actually *be* reasonable").

85. *See, e.g.*, State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) (stating that "'[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition'" (quoting *Gore*, 517 U.S. at 568)).

86. *See id.*

87. *See, e.g.*, Christopher J. Robinette, *Peace: A Public Purpose for Punitive Damages?*, 2 CHARLESTON L. REV. 327, 327 (2008) (dismissing the promotion of peace through punitive damages); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 945–46 (1998) (noting that punitive damages may encourage market transactions to avoid potential litigation).

88. *See infra* notes 91–94 and accompanying text.

89. Ellis, *supra* note 44, at 3. Professor Ellis enumerated the seven grounds as the following: "(1) punishing the defendant; (2) deterring the defendant from repeating the offense; (3) deterring others from committing an offense; (4) preserving the peace; (5) inducing private law enforcement; (6) compensating victims for otherwise uncompensable losses; and (7) paying the plaintiff's attorneys' fees." *Id.*

90. *Id.* at 11.

among tort scholars as the "bedbug case,"[91] set forth a broader "law and economics" rationale for imposing punitive damages.[92] Posner suggested that punitive damages may be necessary to provide a needed incentive to litigate when the harm done to multiple plaintiffs is too difficult to detect, too widely distributed, or compensatory damages are likely to be too small to justify any single plaintiff bringing an action.[93] Judge Posner suggested that punitive damages awards may also help to prevent wealthy and determined tortfeasors from profiting from their ability to escape detection.[94] The Supreme Court has not accepted any of these alternative rationales for punitive damages; instead, the Court has repeatedly emphasized the state's interests in punishment and deterrence as the operative justifications.[95]

II. APPLYING THE THREE GUIDEPOSTS TO A HYPOTHETICAL SUIT AGAINST OIL INDUSTRY DEFENDANTS INVOLVED IN THE DEEPWATER HORIZON DISASTER

The infamous April 2010 Deepwater Horizon catastrophe at the Macondo Well in the Gulf of Mexico[96] presents a rich opportunity to illustrate how *Gore*'s three guideposts might be applied to an appellate court's review of a jury's large punitive damages award against British Petroleum (BP) or against one or more of the three other oil industry companies who contracted with BP for drilling the Macondo Well.[97] The companies may be sued for the wrongful

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91. Mathias v. Accor Econ. Lodging, 347 F.3d. 672 (7th Cir. 2003); *see also* Colleen P. Murphy, *The "Bedbug" Case and* State Farm v. Campbell, 9 ROGER WILLIAMS U. L. REV. 579, 581 (2004) (referring to the decision as the "Bedbug" case).

92. *See* Allen, *supra* note 28, at 366–67 (using the "Bedbug" decision as an example of "law and economics").

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

94. *Id.*

95. Recognizing that the membership of the Supreme Court has changed substantially with the death of Chief Justice William Rehnquist and the retirements of Justices O'Connor, Souter, and Stevens, the durability of these new constitutional limitations on punitive damage awards is questionable. It is noteworthy that during their first three court terms together, Chief Justice Roberts and Justice Alito often voted in majority opinions in the few decisions in which the court favored business interests by overturning longstanding precedents for the newer punitive damages jurisprudence, including joining Justice Breyer's majority opinion in *Williams II*. *See Williams II*, 549 U.S. 346, 398 (2007). Neither Justice Sonia Sotomayor nor Justice Elena Kagan have developed a judicial track record on their views about the application of due process standards to evaluate the excessiveness of punitive damages awards. As Justice Ruth Bader Ginsburg noted in her *Campbell* dissent, this new interpretation of the demands of the Fourteenth Amendment's Due Process Clause rests "on ground not long held." State Farm Mut. Life Ins. Co. v. Campbell, 538 U.S. 408, 411 (2003). The uncertainty about the newer Justices' approaches to the crucial issue of unconstitutionally excessive ratios may also partially explain the abrupt dismissal of *Williams III* after it was argued.

96. Thomas H. Koenig & Michael L. Rustad, *Reconceptualizing the BP Oil Spill as* Parens Patriae *Products Liability*, 49 HOUS. L. REV. 291, 294 (2012).

97. Such an award could also be against one of the other three oil industry companies most directly involved: Halliburton, Transocean, and Cameron International. *See id.* at 299–300.

death of the eleven workers killed or for the environmental and economic harm caused by the devastating pollution of the Gulf.[98]

A. The First Guidepost: Reprehensibility of the Wrong

Assuming the allegations are true and provable that BP, or other oil industry defendants with whom BP has "hold harmless" contracts, knowingly took unreasonable risks that endangered personnel on the drilling platform and caused the disastrous pollution of the Gulf,[99] the first determination to be made with respect to punitive damages under the framework established in *Gore* would be the degree of reprehensibility of the defendant's conduct.[100] The *Gore* Court explained the reprehensibility factor as reflecting the well-settled notion "that some wrongs are more blameworthy than others."[101] The Court has stated that the degree of reprehensibility is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award."[102] *Gore* enumerated several factors for lower courts to consider in determining the degree of reprehensibility present in a particular case;[103] the Court later clarified these factors in *Campbell*.[104] The five factors, as enumerated in *Campbell*, are: (1) whether the conduct caused physical harm versus purely economic harm; (2) "indifference to or a reckless disregard of the health or safety of others;" (3) the financial vulnerability of the plaintiff; (4) repeated instance of similar misconduct versus an isolated incident; and (5) whether "the harm result[ed] from intentional malice, trickery, or deceit" as opposed to a merely accidental happening.[105] All five factors are rarely present in a single case, so the reviewing court must apply the factors that are relevant to the specific facts. Although the presence of multiple reprehensibility factors makes sustaining the punitive damages award easier, one dominant factor can be sufficient to sustain an award. In *Campbell*, however, Justice Kennedy opined that "the absence of all of [the five factors] renders any [punitive damages] award suspect."[106]

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98. *See, e.g.*, *id.* at 294 (noting that the action would be premised on a manufacturing or design defect); *see also* David M. Uhlmann, *After the Spill Is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413, 1414 (2011).

99. *See, e.g.*, Uhlmann, *supra* note 98, at 1419 (suggesting that the oil companies involved engaged in "risky behavior" and did not adequately focus on protecting the environment and the safety of their employees).

100. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996).

101. *Id.* at 575.

102. *Id.*

103. *Id.* at 576–77.

104. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) (citing *Gore*, 517 U.S. at 576–77).

105. *Id.*

106. *Id.*

It is possible that the Deepwater Horizon incident could give rise to the rare case in which all five factors would apply.[107] First, the oil companies' conduct inflicted enormous physical harm through death and injury to humans and wildlife, likely causing long-term harm to regional ecosystems;[108] their conduct also caused monumental economic harm to the Gulf region.[109] Second, defendants' alleged relentless focus on speed and cost savings manifested an indifference to the safety of their workers, the environment, and the Gulf's regional economy.[110] Third, the fishing, seafood, and tourist industries in the Gulf region are particularly vulnerable to oil pollution. Fourth, BP's safety record regarding its oil drilling, oil transport, and oil refining activities is checkered at best.[111] Their record arguably reflects a pattern of placing profits above worker safety and environmental protection.[112] The Deepwater Horizon catastrophe was not an isolated incident.[113] As to the fifth factor, it may be difficult for a plaintiff to prove deliberate deceit or outright malice in the planning and mismanagement of the Deepwater Horizon.[114] Gross disregard for worker safety and severe damage to the environment because of reckless haste, however, are certainly in the same class of egregious conduct as the rapacious corporate practices condemned by the Court in *TXO*.[115] Taken together, there is a strong case for the proposition that this catastrophe was not merely an innocent accident.

B. The Second Guidepost: Ratio of Punitive Damages to Compensatory Damages

The Deepwater Horizon disaster also warrants application of the second *Gore* guidepost—the ratio of punitive damages to compensatory damages.[116] The numerical relationship between the amount of compensatory damages and

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107. *See id.*; *see also infra* notes 108–15 and accompanying text.

108. Uhlmann, *supra* note 98, at 1414.

109. *Id.* at 1415–16.

110. *See id.* at 1416 (noting a common perception that the oil companies involved "put profits before safety"). *But see* REPORT TO THE PRESIDENT, NAT'L COMM. ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 125 (2011) (refusing to state explicitly whether the oil spill was the result of cutting corners to save money).

111. Rebecca M. Bratspies, *A Regulatory Wake-Up Call: Lessons from BP's Deepwater Horizon Disaster*, 5 GOLDEN GATE U. ENVTL. L.J. 7, 22–25 (2011).

112. *Id.* at 25.

113. *Id.* at 22–25.

114. *See* Uhlmann, *supra* note 98, at 1419 (noting that, although it is possible investigators could ultimately find evidence of deliberate criminal conduct, the oil companies involved are more likely to be held liable under a negligence standard).

115. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462 (1993) (sustaining a jury's large punitive damages award in light of the offending company's "malicious and fraudulent course [of action]").

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

punitive damages is a significant consideration and is the most commonly cited basis for determining the excessiveness of a punitive damages award.[117] The requirement of a reasonable relationship between punitive and compensatory damages was constitutionalized in *Gore*,[118] but the exact definition of what is "reasonable" remains unsettled.[119] The Court in *Gore* recognized the common law preference for single-digit ratios[120] but refused to adopt a mathematical formula or other bright-line rule.[121] The Court observed that consideration of the ratio is fact-specific; although a larger disparity between punitive and compensatory damages is subject to close scrutiny, the Court also recognized the possibility that certain factual situations could warrant higher punitive awards.[122] The Court reaffirmed the fact-specific determination necessary to calculate the ratio of punitive to compensatory damages in *Campbell*.[123] Other pre-*Gore* decisions by the Court have stressed that the actual harm suffered by the plaintiff is not the sole factor in determining the acceptable ratio.[124] Several decisions have considered the relevance of other indices of reasonableness, including the extent of the potential harm that could have resulted.[125] For example, had the Deepwater Horizon oil spill continued into hurricane season, the impact of a Category four or five hurricane, combined with millions of gallons of oil still pouring out of the uncapped well, could have resulted in a much higher amount of harm.

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117. *Id.* at 580–81.

118. *Id.* at 574 & n.22, 575, 580 (explaining that the *Gore* guidepost restrictions on the award of punitive damages is grounded in the principle of fair notice of penalty guaranteed by the Due Process Clause).

119. *See, e.g.*, State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 424 (2003) (qualifying its application of the second *Gore* guidepost to factually specific determinations by stating, "we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award"); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1990) (expressing reluctance to establish bright-line limits to define the reasonableness consideration).

120. *See Gore*, 517 U.S. at 581 (expressing approval for punitive damage ratios of ten-to-one or lower). Indeed, in England, statutes allow double, treble, and occasionally quadruple damages awards to deter egregious wrongdoings. *Id.* at 580–81.

121. *Id.* at 582–83.

122. *Id.* at 581–82.

123. *Campbell*, 538 U.S. at 425.

124. *See, e.g.*, TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993) (explaining that "both State Supreme Courts and [this] Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages").

125. *See, e.g.*, *Williams II*, 549 U.S. 346, 354 (2007) (finding that it is "appropriate to consider the reasonableness of punitive damages awards in light of the *potential* harm the defendant's conduct could have caused"); *Campbell*, 538 U.S. at 424–25 (referencing both actual and potential harm in considering limits on the ratio between compensatory and punitive damages); *TXO*, 509 U.S. at 460 (holding that "[i]t is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to the other victims that might have resulted if similar future behavior were not deterred").

The amount of compensatory damages recovered by the plaintiffs injured by the Deepwater Horizon incident will undoubtedly be very high.[126] In December 2012, BP pled guilty to federal criminal charges, including manslaughter, and agreed to pay $4.5 billion in fines.[127] As of February 2013, BP had paid out $24 billion in clean-up costs and payments to damaged individuals, businesses, and local governments, reportedly setting aside an additional $42 billion to cover future legal obligations relating to the Deepwater Horizon disaster.[128] The anticipation of a large compensatory damages award could result in the equal expectation, according to the Court's decision in *Campbell*, of a limited punitive damages award.[129] Indeed, punitive damages could be limited to the amount of the compensatory damages award, reflecting the one-to-one ratio established in *Exxon*.[130] Conversely, the Deepwater Horizon disaster could be the paradigm of the extraordinary case that warrants higher punitive damages because of particularly egregious harm.[131] Similarly, even in the event of high compensatory damages, the deterrent effect of punitive damages could justify a more disparate ratio, especially if the history of the defendant's oil exploration activities reveals similar reckless conduct.[132] The combination of a pattern of safety infractions and the wealth of a defendant like BP could impact the applicability and effect

126. Press Release, British Petroleum, BP Establishes $20 Billion Claims Fund for Deepwater Horizon Spill and Outlines Dividend Decisions (June 16, 2010), *available at* http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7062966; *see also* Ilisja Moreland, Comment, *From the Exxon Valdez to the Deepwater Horizon: Will BP's Dollar Reach Where the Oil Didn't?*, 14 SUSTAINABLE DEV. L.J. 117, 128 (2011) (recognizing the extent of BP's potential liability).

127. Clifford Krauss, *Battle Lines for the BP Spill*, N.Y. TIMES, Feb. 20, 2013, at B8.

128. *Id.*

129. *Campbell*, 538 U.S. at 425 (noting that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee").

130. Exxon Shipping Co. v. Baker, 554 U.S. 471, 513, 515 (2008) (establishing a one-to-one ratio in maritime cases). It is possible that this ratio could apply to the Deepwater Horizon litigation, as a federal district court has determined that maritime law is applicable to the incident. *See In re* Oil Spill by the Oil Rig Deepwater Horizon, 808 F. Supp. 2d 943, 951, 962–63 (E.D. La. 2011).

131. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996) (holding that the extent of harm caused to the plaintiff, whether actual or potential, warrants a higher ratio). The idea of particularly egregious harm warranting a higher punitive damages award is reminiscent of the first *Gore* guidepost. *See id.* at 575 (finding that "some wrongs are more blameworthy than others").

132. *See Campbell*, 538 U.S. at 416; *see also Gore*, 517 U.S. at 568 (explaining that punishment and deterrence are part of the underlying rationale of punitive damages); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993) (recognizing the importance of imposing a proper punitive damages award in order to deter misconduct).

of deterrence in contemplating a larger punitive damages award.[133] In weighing the guideposts, a court could reasonably approve a high damages ratio for the purpose of warning BP, and the entire oil industry, that higher standards of safety and environmental protection are expected in the future.

C. The Third Guidepost: Comparability to Civil Sanctions

The third guidepost determines excessiveness of the punitive damages by contemplating the penalties of analogous civil actions or criminal violations.[134] It emphasizes the reasonableness of a punitive damages award when it is comparable to similar unlawful misconduct.[135] Although this rationale was applicable in *Gore*, in which there was a sizeable disparity between the $10,000 statutory fine and the original $4 million in punitive damages awarded by the jury,[136] subsequent cases have demonstrated that large differences between punitive awards and civil fines are not unusual.[137] The state's interest in punishing or deterring misconduct is not necessarily related to the policies underlying statutory penalties.[138] In practice, it is often difficult to identify and interpret germane civil or criminal sanctions; increasingly, courts look to inter-and intra-jurisdictional precedent for comparability guidance.[139] In the

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133. *TXO*, 509 U.S. at 463–64; *see also* Keith N. Hylton, *A Theory of Wealth and Punitive Damages*, 17 WIDENER L.J. 927, 928–29 (2008) (advocating for the use of a party's wealth in determining an appropriate punitive award).

134. *Gore*, 517 U.S. at 583.

135. *See id.* (explaining that "a reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue'" (quoting Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part) (internal quotation marks omitted)).

136. *Id.* at 583–84.

137. *See, e.g.*, Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409, 410, 418 (Utah 2004) (approving a $9 million punitive damages award even when the comparable statutory penalty was only $10,000).

138. Colleen P. Murphy, *Comparison to Criminal Sanctions in the Constitutional Review of Punitive Damages*, 41 SAN DIEGO L. REV. 1443, 1460–61 (2004) (demonstrating how courts have struggled in translating criminal penalties in the form of imprisonment to an appropriate punitive award); *see also* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 428 (2002) (distinguishing punitive damages from comparable criminal sanctions by explaining that "[p]unitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award"); Murphy, *supra*, at 1450–51 (drawing a distinction between punitive damages and statutory penalties by explaining the different legislative purposes and intent underlying statutory sanctions). The Court has recognized the policy interests of criminal penalties, distinguishable from that of civil sanctions, in other contexts as well. *See, e.g.*, Hudson v. United States, 522 U.S. 93, 99–100 (1997) (recognizing a wholly separate legislative intent between civil and criminal penalties in the context of double jeopardy).

139. *See, e.g.*, Hamlin v. Hampton Lumber Mills, Inc., 246 P.2d 1121, 1130–31 (Or. 2011) (finding no real comparable sanction and concluding that "the third guidepost [did] not play a significant role"); Duncan v. Ford Motor Co., 682 S.E.2d 877, 891–92 (S.C. Ct. App. 2009)

case of Deepwater Horizon, a precedential approach could result in the application of *Exxon* and other cases involving the oil industry.

The relative lack of utility of the third guidepost is reflected in the fact that comparable penalties are generally considered only after the application of the first two guideposts.[140] Rather than simply drawing analogies between degree of misconduct and similar sanctions, cases applying the third guidepost struggle to interpret and apply penalties such as the disgorgement of profits, loss of a relevant business license, or possible incarceration.[141] In *Campbell*, Justice Kennedy questioned the relevance of criminal sanctions, recognizing the challenge of applying the different presumptions and higher burdens of proof in criminal matters.[142] If the third guidepost carried more weight, uncertainty about which civil or criminal sanctions should be used as comparisons might be of more concern; however, in many cases, the third guidepost appears to offer little or no meaningful direction to lower courts.

Although the third guidepost is the least useful to reviewing courts in evaluating claims of excessiveness, it may justify higher punitive damages awards in the Deepwater Horizon calamity. The federal criminal penalty for oil pollution is a steep fine ranging from $25,000 to $100,000 per day,[143] plus full responsibility for all of the costs of cleaning up the spill.[144] In this case, BP has already settled for $4.5 billion in federal criminal penalties.[145] Other civil fines and costs are estimated to total tens of billions of dollars.[146] It may

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(recognizing a pattern of difficulty in finding and applying comparable civil or criminal penalties in South Carolina and upholding a punitive damages award based on the first two guideposts); Carlton Energy Grp., LLC v. Phillips, 369 S.W.3d 433, 460–61 (Tex. App. 2012) (finding no comparable penalties and basing the decision to sustain the punitive damages award on the first two *Gore* guideposts).

140. *See Campbell*, 538 U.S. at 428 (questioning the relevancy and utility of the third *Gore* guidepost in calculating punitive damages); *see also* Murphy, *supra* note 138, at 1444, 1461, 1464 (finding that many post-*Campbell* courts disregard the third guidepost and do not consider it a dispositive cap on punitive damages); Solange E. Ritchie, *The World After* State Farm v. Campbell*; Punitive Damages: Past, Present and Future*, 33 W. ST. U. L. REV. 89, 99–100 (2005-2006) (interpreting *Campbell* to consider the use of comparable criminal sanctions in determining reprehensibility—the first *Gore* guidepost).

141. *See Campbell*, 538 U.S. at 428 (discussing the trial court's analysis of possible criminal penalties to calculate punitive awards).

142. *Id.*

143. *See* Robert Force et al., *Deepwater Horizon: Removal Costs, Civil Damages, Civil Penalties, and State Remedies in Oil Spill Cases*, 85 TUL. L. REV. 889, 957–60 (2011) (noting that the penalty amount depends on whether the violation is found to be neglectful or knowing and whether the incident is the perpetrator's first or second violation).

144. *Id.* at 906–09. As of Spring 2012, "the federal government [had] proposed fines of $45.7 million on BP, Transocean, and Halliburton for unsafe oil drilling practices." Koenig & Rustad, *supra* note 96, at 300.

145. Krauss, *supra* note 127, at B8.

146. Pierre Bertrand, *BP Settles Deepwater Horizon Oil Spill Lawsuit for $7.8 Billion, Additional Fines Possible*, INT'L BUS. TIMES (Mar. 3, 2012, 3:23 PM),

also be relevant that the Obama Administration reached an agreement with BP under which the corporation established a $20 billion fund, administered by former 9/11 fund administrator Ken Feinberg, to compensate firms and individuals in the Gulf area who suffered damages from the Deepwater Horizon disaster.[147] Therefore, because of the well-established practice that the third guidepost does not override liability under the other two guideposts, but serves primarily as an independent benchmark for courts to consider in evaluating the award, the prospect of potentially high civil and criminal penalties appears to support a large punitive damages award, better suited to the Deepwater Horizon incident than to run-of-the-mill industrial mishaps. Also pointing toward large punitive damages is the tendency of courts to look to intra- and inter-jurisdictional precedent to determine the excessiveness of a particular punitive damages award.[148] For example, *Exxon*, where the oil company paid roughly $1.3 billion in civil and criminal penalties,[149] also supports a very high punitive damages award.

III. "MARCHING ORDERS" VERSUS AUTHORITY TO EXERCISE DISCRETION: LOWER COURTS' RESPONSIBILITY TO HIGHER COURT DIRECTIONS ON REMAND

Rich literature exists on the issue of the discretion available to lower courts in handling cases returned to them on remand from higher courts.[150] Similarly, many of these scholarly writings specifically address the responsibilities of lower courts when cases are remanded for reconsideration in light of changes in the governing law.[151] However, important to this Article is the state courts' handling on remand of a federally imposed constitutional analysis, which involves the realm of traditional federalism sensitivities. When the Supreme Court grants certiorari to a state case, this often initiates the Court's Grant, Vacate, and Remand (GVR) process—certiorari is granted, the lower court decision is vacated, and the case is remanded to the state court for further

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http://www.ibtimes.com/bp-settles-deepwater-horizon-oil-spill-lawsuit-78-billion-additional-fines-possible-419904.

147. Stephen Gidiere et al., *The Coming Wave of Gulf Coast Oil Spill Litigation*, 71 ALA. LAW. 374, 374 (2010).

148. *See, e.g.*, Baker v. Nat'l State Bank, 801 A.2d 1158, 1169–70 (N.J. Super. Ct. App. Div. 2002).

149. Moreland, *supra* note 126, at 119.

150. *See, e.g.*, Michael A. Berch, *We've Only Just Begun: The Impact of Remand Orders from Higher to Lower Courts on American Jurisprudence*, 36 ARIZ. ST. L.J. 493, 493 (2004); Erwin Chemerinsky & Ned Miltenberg, *The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages' Cases*, 36 ARIZ. ST. L.J. 513, 513–15 (2004).

151. *See, e.g.*, Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GBRs—And an Alternative*, 107 MICH. L. REV. 711, 712 (2009); Sena Ku, *The Supreme Court's GVR Power: Drawing a Line Between Deference and Control*, 102 NW. U. L. REV. 383, 383–85 (2008); Shaun P. Martin, *Gaming the GVR*, 36 ARIZ. ST. L.J. 551, 551–53 (2004).

proceedings as directed by the Court.[152] Supremacy concerns are periodically raised as to whether the state court, on remand, followed the Supreme Court's instructions.[153]

Remands from appellate courts for further proceedings below do not usually pose problems within state judicial systems or within the federal courts. Through their supervision powers, state supreme courts have the inherent capacity for dealing directly with non-responsive lower courts.[154] The same holds true of higher federal courts and remands to lower federal courts. Remands within the federal system where jurisdiction is based on diversity of citizenship appear to cause few problems for state law development because state courts are not bound by the federal courts' decisions as precedent.[155] It is only the special case of challenged state supreme court decisions to which the Supreme Court has granted certiorari, issued a ruling, and remanded the case back to the state court for further proceedings that raises concerns about the state courts' response to federal constitutional law dictates.[156]

Scholarship devoted to this issue appears in periodic clusters in response to particularly vexing supremacy issues. For example, one of the most sustained flurries is found in response to *Brown v. Board of Education* and focuses on the Supreme Court's "with all deliberate speed"[157] order.[158] Other clusters can be found in response to decisions regarding certain civil rights issues,[159] death penalty remands,[160] sentencing guidelines,[161] and, recently, punitive damages

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152. *See* Martin, *supra* note 151, at 551–62 (providing a discussion of the Supreme Court's GVR process).

153. *See infra* notes 154–55 and accompanying text.

154. *See, e.g.*, ALA. CONST. art. VI, § 140(b) (stating, "[t]he Supreme Court shall have original jurisdiction . . . to issue such remedial writs or orders as may be necessary to give it general supervision and control of courts of inferior jurisdiction"); MICH. CONST. art. VI, § 4 (declaring, "[t]he Supreme Court shall have general superintending control over all courts; power to use, hear, and determining prerogative and remedial writs; and appellate jurisdiction as provided by rule of the Supreme Court"); WASH. CONST. art. IV, § 4 (maintaining, "[t]he Supreme Court shall have . . . appellate jurisdiction in all actions and proceedings [except civil actions for less than $200]").

155. Erie R.R. v. Tompkins, 304 U.S. 64, 78–79 (1938).

156. *See supra* notes 154–55 and accompanying text.

157. 349 U.S. 294, 301 (1955).

158. *See, e.g.*, Berch, *supra* note 150, at 495–96; Jim Chen, *With All Deliberate Speed:* Brown II *and Desegregation's Children*, 24 LAW & INEQ. 1, 3–4 (2006); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 609–12 (1983); Robert B. McKay, *"With All Deliberate Speed": A Study of School Desegregation*, 31 N.Y.U. L. REV. 991 (1956); James. E. Pfander, Brown II*: Ordinary Remedies for Extraordinary Wrongs*, 24 LAW & INEQ. 47, 47–55 (2006).

159. Most mandated busing to facilitate school desegregation.

160. *See, e.g.*, Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority:* Williams v. Georgia *Revisited*, 103 YALE L.J. 1423 (1994); Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 811 (1983); Elise Borochoff, Comment, *Lower Court Compliance with Supreme Court Remands*, 24 TOURO L. REV. 849, 852–54 (2008).

awards.[162] In *Campbell*, the Utah Supreme Court provided some insight as to how to interpret a remand from the Supreme Court.[163] Justice Kennedy, writing the majority opinion, opined that the "facts of this case . . . likely would justify a punitive damages award at or near the amount of the compensatory damages."[164] On remand, State Farm argued that this language strictly mandated the Utah Supreme Court to reduce the punitive damages award to an amount equal to the compensatory damages.[165] After acknowledging its responsibility as an inferior court to honor the Supreme Court's decisions with utmost fidelity, the Utah Supreme Court expressed skepticism that its duties could "be reduced to an enumerated task list imposed by a 'mandate rule.'"[166] The Utah Supreme Court explained that, if the federal court had chosen to fix the maximum size of the punitive damages award, the state court would have no choice but to order the reduction pursuant to the Supreme Court's ruling.[167] As read by the Utah Supreme Court, the *Campbell* opinion imposed no such mandate.[168] Instead, the Utah Supreme Court reasoned that the Supreme Court was following its customary practice and entrusted the state court to calculate the precise punitive damages award that met both the legitimate objectives of the state and due process demands.[169] The Utah Supreme Court believed that, upon remand, the Supreme Court intended to vest in the state courts the discretion to determine reasonable and proportionate punitive damages awards.[170] Applying the three guideposts and expressly disagreeing with Justice Kennedy's opinion on several key points, including the appropriateness of a one-to-one ratio, the Utah Supreme Court settled on a punitive damages award of over $9 million—greater than nine times the compensatory damages.[171]

A similar issue arose upon remand to the Alabama Supreme Court in *Gore*, in which the Alabama Supreme Court rejected the defendant's argument that it was compelled to limit the punitive damages award to a ratio of less than four

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161. Tracy Friddle & Jon M. Sands, *"Don't Think Twice, It's All Right": Remands, Federal Sentencing Guidelines, & The Protect Act—A Radical "Departure"?*, 36 ARIZ. ST. L.J. 527, 527–28 (2004).

162. Chemerinsky & Miltenberg, *supra* note 150, at 514–15; Goldman & Levin, *supra* note 64, at 509–11; Douglas G. Harkin, BMW of North America, Inc. v. Gore*: A Trial Judge's Guide to Jury Instructions and Judicial Review of Punitive Damage Awards*, 60 MONT. L. REV. 367, 367–70 (1999); Michael L. Rustad, *Happy No More: Federalism Derailed by the Court that Would Be King of Punitive Damages*, 64 MD. L. REV. 461, 461–64 (2005).

163. Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409, 411–12 (Utah 2004).

164. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003).

165. *Campbell*, 98 P.3d at 411.

166. *Id.* (internal quotation marks omitted).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 412.

171. *Id.* at 420.

times the compensatory damages.[172] The Alabama Supreme Court ignored Justice Stevens' suggestion that a four-to-one ratio was most appropriate and decided on a final punitive damages award of $50,000—twelve and one half times the $4,000 compensatory damages award.[173]

It is beyond the scope of this Article to summarize the literature on this issue, but two themes commonly appear that are worth emphasizing. First, in characterizing the behavior of lower courts on remand, as illustrated in *Campbell*, much depends on the explicitness of the orders or the precision of the instructions handed down by the higher court.[174] Second, in the absence of specific orders or precise instructions, a well-developed jurisprudence on punitive damages awards has simply not emerged to guide lower courts handling cases on remand. Scholars remark that the law in this area is "fluid" and lacks guiding "neutral principles."[175] The few studies available on this issue suggest a low incidence of lower courts scrupulously fulfilling the decisional expectations of remanding courts.[176] This study of recent punitive damages decisions provides new insights into the lowers courts' fealty to what may or may not be perceived by them as "marching orders" issued by higher courts.

The "remittitur" is a procedural option not available in all jurisdictions.[177] Remittiturs strongly influence the rate at which disputed cases are remanded.[178] In jurisdictions where remittiturs are customary, a reviewing court may adjust punitive damages awards deemed unconstitutionally excessive and offer the plaintiff the opportunity to accept a reduced award by remitting damages above that level, or face a new trial on remand.[179] Most plaintiffs choose to accept the reduced award, thereby ending the litigation. Issues concerning whether or not a lower court has properly performed its duties on remand mostly arise in jurisdictions where remittitur is unavailable.

IV. THE STUDY AND ITS METHODOLOGY

In order to see whether the Justices' concerns in *Williams III* were valid regarding the lower court's faithfulness to the Supreme Court's punitive damages jurisprudence, this Article examines the reported punitive damages

172. BMW of N. Am., Inc. v. Gore, 701 So. 2d 507, 515 (Ala. 1997) (per curiam).

173. *Id.*

174. Borochoff, *supra* note 160, at 879.

175. Berch, *supra* note 150, at 508–09.

176. *See, e.g.*, *id.* at 507–08.

177. Irene Deaville Sann, *Remittiturs (and Additurs) in the Federal Courts: An Evaluation with Suggested Alternatives*, 38 CASE W. L. REV.157, 163–69 (1987-1988).

178. Brad Snyder, *Protecting the Media from Excessive Damages: The Nineteenth-Century Origins of Remittitur and Its Modern Application in* Food Lion, 24 VT. L. REV. 299, 300 (2000).

179. Irene Sann, *Remittitur Practice in the Federal Courts*, 76 COLUM. L. REV. 299, 299 (1976); *see also* Carlton Energy Grp., LLC v. Phillips, 369 S.W.3d 433, 441 (Tex. App. 2012) (explaining the plaintiff's decision to accept remittitur in lieu of a new trial).

cases decided by lower state and federal courts since the 2003 *Campbell* decision.[180] The over 500 collected opinions were classified by the type of plaintiff's claim, which varied greatly from the type of economic harm at the center of *Gore* and *Campbell*. The cases were classified into twelve different types of claims based on the criterion that at least ten cases involving the specific type of claim were required to justify a separate category.[181] A substantial number of cases did not meet the ten-case criterion and were designated as "Other Cases." The wide variety in the types of punitive damages claims that fell into the "Other Cases" category accounted for nearly ten percent of the cases reviewed.[182] Surprisingly, there were only a small handful of class action cases.

Each case was analyzed in view of the type of claim presented, the implementation of each of the three guideposts, and the final outcome of the case. Variations in the application of the guideposts were identified with particular attention given to the relationship between the compensatory damages and the punitive damages awarded. The cases were tracked through several stages of appeals with attention given to the outcome and rationale at each stage of the process.

The analysis examined how the guideposts were implemented by each court and noted difficulties experienced by courts in applying each of the relevant guideposts to the broad range of punitive damages claims in the study. Statements by a lower court suggesting resistance to the guideposts were specially noted. Resistance or hostility to applying the guideposts was found to be rare; statements of frustration with the guideposts or signs of grudging acceptance of the Supreme Court's directions were also collected. This study yielded a broad idea of how the new constitutional punitive damages regime was implemented by lower courts, particularly noting signs of a lack of faithfulness or reluctance to implement the due process guideposts.[183]

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180. *See generally Williams III* Transcript, *supra* note 4. For a list of cases included in the study, categorized by type of claim, see *infra* Appendix A.

181. The twelve claim types developed were: (1) breach of fiduciary duty; (2) employment; (3) fraud; (4) creditor abuse; (5) business torts; (6) insurance; (7) wrongful death and personal injury; (8) privacy invasion; (9) product liability; (10) property damage; (11) civil rights violations, other than Title VII; and (12) Title VII violations. *See infra* Appendix A.

182. Examples of punitive claims included in "Other Cases" were trespass to private property, securities fraud, aggravated assault and battery, false arrest, and malicious prosecution. *See generally infra* Appendix A.

183. The review also looked beyond the "faithfulness" question to other problems that presented themselves in the lower courts' implementation of the guideposts, including difficulties the lower courts were experiencing in performing their new responsibilities, specific issues for which the guideposts were not working well, and where further refinement of the guideposts by the Supreme Court or legislation could be beneficial. The results of this analysis are forthcoming in a more comprehensive article.

A. General Observations: Searching for Lack of Faithfulness

The study revealed that the type of modern cases awarding punitive damages were much more varied than the two original cases yielding the guidepost analysis. Consequently, the study required close scrutiny to determine whether the "faithfulness" concern manifested itself in particular categories of cases. The cases in which courts expressed any negative feelings toward the new punitive damages jurisprudence were so rare that no discernible trend could be identified with respect to specific types of cases.

The study also revealed a trend that most state courts treated the new constitutional jurisprudence as supplemental to, and not a replacement for, their existing state law governing punitive damages.[184] For example, if state law had developed its own multi-part test for determining the appropriateness of punitive damages in a particular case, as most states had, later state court opinions simply adjusted these existing standards to include the three Supreme Court guideposts, or they applied the guideposts as a second level of review.[185]

A significant number of cases involving punitive damages were brought in federal courts by plaintiffs who invoked the court's diversity jurisdiction. The federal court decisions based on diversity appeared to discover and apply the relevant state law on punitive damages, while carefully enforcing the evolving constitutional jurisprudence.[186]

B. Overall Trends Show that Lower Courts Follow the Supreme Court's "Marching Orders"

To the extent that general trends could be observed over the ten years of cases studied, most noticeable was that, as a body of local law developed, state or federal courts within the jurisdiction applying the guideposts increasingly referred to precedents established by earlier decisions, particularly in the application of the third guidepost.

Based on the strong concerns expressed by several Supreme Court Justices in oral argument during *Williams III*,[187] one might expect, in a study of over 500 lower court opinions, to find considerable evidence of resistance or reluctance to carry out the new constitutional "marching orders." Instead, the study found that the lower courts almost always invoked the new constitutional doctrine correctly and dutifully proceeded to analyze the reasonableness and size of the punitive damages award before them by applying the three guideposts.[188] Except for the three leading cases—*Gore*, *Campbell*, and *Williams II*, where, on remand, the state supreme courts parted company with

184. *See, e.g.*, James v. Horace Mann Ins. Co., 638 S.E.2d 667, 670–71 (S.C. 2006) (agreeing with the lower courts' additional use of the *Gamble* test).

185. *Id.*

186. *See generally infra* Appendix A.

187. *Williams III* Transcript, *supra* note 4, at 42, 48.

188. *See generally infra* Appendix A.

some aspect of the Supreme Court's analysis,[189]—the strongest negativity found in ten years of lower court opinions arose because of growing dissatisfaction with Guidepost 3. Many courts noted the absence of a relevant civil fine or other penalty for similar misconduct to use as a reference point for the size of the punitive damages award being reviewed.[190] A number of courts questioned whether possible criminal sentences or administrative sanctions are even relevant to the comparability analysis,[191] and others simply skipped or substantially downplayed Guidepost 3 in their due process analysis.[192] Increasingly, lower courts appear to be converting Guidepost 3 into a search for comparable litigation results in punitive damages cases in their own jurisdiction.[193] Some courts looked for decisions applying Guidepost 3 in other jurisdictions that were relevant to the "fair notice" origins of this substantive-due-process based review.[194]

The Montana Supreme Court's analysis in *Seltzer v. Morton*[195] exemplifies the typical perspective of state courts considering a more general application of the guideposts. In attempting to apply the guideposts to the facts of the malicious prosecution case before them, the Montana Supreme Court first stated, "we have come to appreciate the dissenting statements [in *Gore* and *Campbell*] regarding the vague nature of the *Gore* guideposts,"[196] but continued on to hold: "Of course, we are nonetheless bound to follow federal precedent here, and we have endeavored to do so meticulously."[197] The New Mexico Court of Appeals penned similar reservations, saying that "[w]eighing the guidepost factors as we must with their built-in imprecision and indeterminateness, . . . we are unable to conclude that the punitive damages award was excessive or was the result of passion and prejudice."[198] This outlook is hardly an indication of a judicial rebellion.

Similarly, the California Court of Appeals commented that "determination of the maximum constitutional amount of punitive damages is not easy or

189. *See supra* notes 8, 12–13 and accompanying text.

190. *See, e.g.*, Mendez v. Cnty. of San Bernardino, 540 F.3d 1109, 112 (9th Cir. 2008).

191. Aken v. Plains Elec. Generation & Transmission Coop., Inc., 49 P.3d 662, 671–72 (N.M. 2002) (noting that several courts that have taken issue with Guidepost 3).

192. *See, e.g.*, Duncan v. Ford Motor Co., 682 S.E.2d 877, 891–92 (S.C. Ct. App. 2009) (attempting to apply the third guidepost but noting that the state's general product liability statute "is of very little aid in [the] analysis because it does not fix civil fines").

193. *See, e.g.*, Morris v. Flaig, 511 F. Supp. 2d 282, 312 (E.D.N.Y. 2007) (titling its discussion of the third guidepost, "Disparity Between Punitive Damages and Civil Penalties in Comparable Cases," and then proceeding to cite a number of cases with similar landlord tenant complaints that resulted in punitive damages, but not addressing any actual civil penalties from the facts of the case).

194. *See supra* note 14 and accompanying text.

195. 154 P.3d 561, 600 n.19 (Mont. 2007).

196. *Id.*

197. *Id.*

198. Muncey v. Eyeglass World, LLC, 289 P.3d 1255, 1274 (N.M. App. 2012).

exact" and that an appellate court, therefore, "must rely on [the panel's] combined experience and judgment."[199] Several other courts have observed that this new regime of federal constitutional law is something for which the Supreme Court has "mandated . . . 'exacting' de novo review,"[200] and that "[a]lthough . . . the punitive damages award was reasonable under [state law], we must also review . . . under *Gore*."[201] Although these courts may be expressing a modicum of unhappiness at having to undertake the extra level of constitutional review, even this hint of reluctance is infrequent.

In recent state court decisions, the type of frustration with implementing the guideposts that Judge W. Michael Gillette of the Oregon Supreme Court expressed in his 2011 dissent is not common, but Judge Gillette may speak for a number of lower court judges:

> I add one final note: a plea to the Supreme Court of the United States. For years this court generally, and I personally, have struggled to apply *Gore* and *Campbell* faithfully to the cases before us. This case represents but one of the many problems that have cropped up in the seven years since the Court decided *Campbell*. The courts around are in need of—indeed, I will assert that we deserve—further guidance that only the Court can provide. Whether the Court agrees with my analysis, or the majority, or something in between, does not matter to me. But it would be a responsible act of comity for the Court to say something clear to help in future cases.[202]

V. RECONCILING FAITHFULNESS FINDINGS WITH THE JUSTICES' CONCERNS

Finding almost universal faithfulness on the part of lower courts in accepting and applying the guideposts raises an interesting question: Given the seriousness of the concerns expressed by three justices in the *Williams III* oral arguments,[203] why did the lower courts not express more reluctance to engage in this additional layer of federally mandated judicial review?

One possible answer lies in the very limited nature of the issue under review in *Williams III*, which elicited the concerns in the first place.[204] Unlike other punitive damages cases to reach the Supreme Court, the case involved the narrowest of issues—the questionable phrasing of a single jury instruction.[205] Even Justice Breyer's majority opinion in *Williams II* was somewhat unclear as to whether the issue was a procedural irregularity or an error of substantive

199. Miller v. Faiz, No. G042917, 2011 Cal. App. Unpub. LEXIS 2721, at *21 (Cal. App. 4th Dist. Apr. 13, 2011).

200. Johnson v. Ford Motor Co., 37 Cal. Rptr. 3d 283, 289 (Cal. App. 5th Dist. 2005).

201. James v. Horace Mann Ins. Co., 638 S.E.2d 667, 671 (S.C. 2006).

202. Hamlin v. Hampton Lumber Mills, Inc., 246 P.3d 1121, 1136 (Or. 2011) (Gillette, J., pro tempore, dissenting).

203. *See supra* notes 4–6 and accompanying text.

204. *Williams III* Transcript, *supra* note 4, at 3.

205. *Williams II*, 549 U.S. 346, 350 (2006).

law.[206] If the challenged instruction misstated the controlling constitutional law concerning how juries are to calculate punitive damages awards, it would conventionally require a substantive due process analysis. Justice Breyer, however, characterized the problem as procedural.[207] If the mistake was substantive, and Oregon subsequently acknowledged a correct understanding of the applicable constitutional law, as it did in subsequent cases,[208] then this flurry of concerns about lower court fidelity to Supreme Court precedent was much ado about nothing.

Conversely, if the error was strictly procedural and Oregon may constitutionally prescribe the method by which a defendant may preserve this type of objection to a jury instruction for appellate review, then the Oregon decision denying Philip Morris the opportunity for further review of the issue was legitimate in light of the Supreme Court's deference to the states on such litigation decisions.[209] If so, then perhaps the Justices' reaction—interjecting themselves so memorably during oral arguments to express concerns about the Oregon court's ruling, possibly encouraging noncompliance by other lower courts—was perhaps an exaggerated reaction in the heat of the moment and later regretted.[210] Under either interpretation, the apparent conflict between the Oregon Supreme Court's insistence on following its own procedural rules and the Supreme Court's concern that its earlier ruling was not being followed appears to lack a viable predicate.

The most likely explanation, however, is that the inference of possible widespread unfaithfulness drawn from the Justices' expressions of concern in the *Williams III* oral arguments[211] was nothing more than over-the-top speculation without solid information about what was actually happening in the great majority of lower courts. Punitive damages cases reach the U.S. Supreme Court very infrequently, and it is even rarer that the Court finds a constitutional error and remands to the state courts for corrective action.[212] The dynamic of a state supreme court reacting to a remand from the Supreme Court to reapply the guideposts is quite different from the ordinary review of punitive damages awards in light of the guideposts within state or lower federal court systems. With the benefit of hindsight, projecting a "faithfulness" problem from the Oregon Supreme Court's reaction to the

206. *Id.* at 349–58.

207. *Id.* at 353.

208. *See* Schwartz v. Philip Morris Inc., 235 P.3d 668, 678 (Or. 2010) (approving the corrected jury instructions).

209. Sharkey, *supra* note 25, at 449.

210. *See supra* notes 5–6 and accompanying text.

211. *Williams III* Transcript, *supra* note 4, at 46, 48.

212. Gash, *supra* note 32, at 527 (stating, "the Court is almost certainly entering an extended silent phase in its punitive damages jurisprudence and will not be reviewing any punitive damages awards for the foreseeable future").

remand in *Williams II*[213] was probably unjustified, and the study confirms this conclusion.

Interestingly, in nearly every opinion that the Supreme Court has issued involving this new substantive due process analysis to detect excessive punitive damages awards, the Court has made a point of acknowledging that, under well-established principles of federalism within the broad constitutional boundaries laid out in *Gore*[214] and *Campbell*,[215] it is the state's primary responsibility to make the ultimate decision regarding the best way to protect the state's interest through the awarding of punitive damages to produce retribution and deterrence of wrongful conduct. Thus, the constitutional doctrine that underlies these interactions between the Supreme Court and state supreme courts contemplates granting a great deal of independence and discretion to the state courts in determining the need for punitive damages and fixing the appropriate size of the award in a particular case. This federalism dynamic is less prevalent in higher state courts that review lower state courts' punitive damages awards, or federal courts of appeal reviewing district courts' diversity actions for punitive damages awards, thereby further diminishing the likelihood of "unfaithfulness."

Another possible answer to the absence of support for the "unfaithfulness" hypothesis in the lower court decisions lies in the ready availability of the remittitur device in most jurisdictions. When the reviewing court has the option of offering the winning defendant a remitter of the excessive punitive damages award or a new trial, there are fewer remands to the lower courts, and, therefore, fewer occasions for the court to whom the remand is addressed to disagree with the remanding court or complain about reapplying the guideposts as directed by the superior court.

VI. CONCLUSION

However its near total absence is explained, the "unfaithfulness" concern raised in the oral arguments in *Williams III* simply cannot be substantiated as a significant factor in the over 500 punitive damages cases studied. To the contrary, except in the handful of high profile Supreme Court cases in which inconsistency can be clearly observed between the Supreme Court's "marching orders" in the remand and the state court's subsequent disposition of the case, there is virtually no evidence of a lack of fidelity by lower courts to the constitutional guideposts governing review of punitive damages awards. Further, beyond widespread frustration with Guidepost 3, there are almost no signs of resistance or reluctance to applying the guideposts as promulgated by the Supreme Court.[216] Lower state and federal courts appear to be making

213. *See supra* notes 23–24 and accompanying text.
214. *See supra* notes 17–18 and accompanying text.
215. *See supra* notes 19–22 and accompanying text.
216. *See supra* Part IV.B.

conscientious efforts to honor the guideposts, interpret them reasonably, and apply them in the spirit in which they were promulgated.

It is certainly true, however, that not all lower courts are consistent in the way they interpret and apply the guideposts, but the differences are not based on resistance to the obligation to carry out their constitutional duties.[217] Rather, lower courts reach different results in similar cases after carefully parsing the holdings and dicta found in the key Supreme Court opinions to find respectable rationales for decision, based on the peculiar facts of a case. This remains consistent with the Supreme Court's expectations and is readily observable across the full spectrum of judicial decisions at both the state and federal levels.[218]

This is not to deny that there exist a number of perplexing problems that bubble to the surface when lower courts attempt to apply the guideposts in the manner they think the Supreme Court expects. These are the issues that will form the core of the second phase of this research project in which the same ten years of cases will be analyzed to determine how well the guideposts are working in practice to achieve the purposes for which the Supreme Court created them. To the extent certain aspects of the guideposts appear to be causing lower courts problems, analysis will be applied to offer suggestions about how the guideposts might be improved to make them more effective tools for correcting excessiveness in punitive damages awards. This larger and more important project will be reported in a forthcoming article co-authored with Professor Laura J. Hines of the University of Kansas School of Law.

217. *Cf. supra* notes 177–79 and accompanying text.

218. *See supra* Part IV; *see also generally infra* Appendix A (providing a list of the cases reviewed, categorized by type of claim).