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Damaged Goods: Why, In Light of the Supreme Court's Recent Punitive Damages Jurisprudence, Congress Must Amend the Federal Rules of Evidence

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I. INTRODUCTION

Since the 1980s, a wide range of courts and commentators have expressed concern over large punitive damages awards handed out by civil juries against a wide array of tortfeasors. A late 2001 study revealed that from 1985 to 2001, eight multi-billion dollar punitive damages awards were granted, with four of them being handed down in the years 1999 to 2001 alone.[1] Not surprisingly, all but one of these verdicts were handed down against large corporations.[2] Among the current members of the U.S. Supreme Court, Justice John Paul Stevens in particular has regularly noted the especially dangerous tendency the current punitive damages regime poses:

> We have admonished that "[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences."[3]

While many commentators note that punitive damages awards are still so rare that this should not pose a concern, others disagree, and still others posit that an even more pressing threat is the havoc that expectations of punitive damages awards can wreak on settlement negotiations.[4]

Within the past nine years, the United States Supreme Court has issued two landmark tort decisions, *BMW of North America v.*

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1. Richard W. Murphy, *Punitive Damages, Explanatory Verdicts, and the* Hard Look, 76 WASH. L. REV. 995, 996 (2001).

2. *Id.* at 997-98. The one exception was a multi-billion dollar punitive damages verdict levied against a doctor who helped to subject almost forty plaintiffs (or their relatives) to rape, torture, and genocide. *Id.* at 996.

3. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003) (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994)) (discussing the tendency of punitive damages awards to create a concern "over the imprecise manner in which punitive damages systems are administered").

4. *See, e.g.*, Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 174-75 (2002) (reviewing a study finding that litigants are less likely to settle when punitive damages are uncapped, because of a greater disparity between the plaintiffs' and defendants' estimates of trial outcomes).

Gore, and *State Farm Mutual Automobile Insurance Co. v. Campbell*, holding in both instances that excessive punitive damages awards, which were upheld by their respective state supreme courts, violated the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.[5] In light of the fact-specific nature of these cases, as well as the Court's refusal to adopt a bright-line rule as to when punitive damages awards should be deemed excessive,[6] questions remain regarding the precedential value of these cases and if the principles they espouse will be applied faithfully by the state courts that review punitive damages verdicts. In fact, it is unclear whether these two decisions will have any effect at all in causing lower courts to rein in punitive damages awards in post-verdict appellate review.[7] The Supreme Court itself has acknowledged this worry, stating that "[b]ecause no two cases are truly identical, meaningful comparisons of such awards are difficult to make."[8]

With these worries in mind, many commentators have suggested imposing additional constraints to reduce the risk of excessive punitive damages rendered by juries, or alternatively, to make such awards easier to strike down once they are rendered.[9] Somewhat surprisingly, the Supreme Court entered the fray in *Gore* by identifying a limit on excessive punitive damages awards imposed by substantive due process.[10] While *Gore* and its progeny ostensibly focus on after-the-fact checks on civil juries, this Note asserts that a more prudent and efficient means of ensuring reasonable and "non-

5. *State Farm*, 538 U.S. at 429; BMW of No. Am., Inc. v. Gore, 517 U.S. 559, 574-75 (1996). For further discussion of the *Gore* and *State Farm* cases, see *infra* Section II. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution reads: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

6. *E.g.*, *Gore*, 517 U.S. at 582-83; TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 458 (1993) (Stevens, J., plurality opinion); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

7. *See, e.g.*, Michael A. Burch, *We've Only Just Begun: The Impact of Remand Orders from Higher to Lower Courts on American Jurisprudence*, 36 ARIZ. ST. L.J. 493, 496 n.12, 507 n.85 (2004) (discussing the precedential effect of the Supreme Court's opinion on various California cases remanded for decision after *State Farm*).

8. *TXO*, 509 U.S. at 457 (Stevens, J., plurality opinion). In her dissenting opinion, Justice O'Connor recognized the same fear, stating that "[b]ecause no two cases are alike, not all comparisons will be enlightening." *Id.* at 483 (O'Connor, J.,dissenting).

9. *See generally* Murphy, *supra* note 1 (calling for states to amend their rules of evidence, and for Congress to amend Federal Rule of Evidence 606(b) to require juries to return special verdicts in punitive damages cases and to cite specific reasons for their decisions, thus facilitating more meaningful judicial review of punitive damages awards by appellate courts). For a discussion of the potential role of judges in assessing punitive damages awards vis-à-vis juries, see Colleen P. Murphy, *Judicial Assessment of Legal Remedies*, 94 NW. U. L. REV. 153, 181-86, 193-202 (1999).

10. *Gore*, 517 U.S. at 562.

excessive" punitive damages verdicts would be to prevent juries from even hearing the type of evidence that *Gore* and *State Farm* chastised trial courts for admitting in the first place. The most effective way to accomplish this constitutionally required goal would be to have Congress amend the Federal Rules of Evidence to take some discretion away from trial judges in situations analogous to *Gore* and *State Farm*. In particular, the Federal Rules should be amended to render inadmissible all types of evidence describing wrongful conduct by the defendant which: (1) bears minimal relation to the tort at issue; (2) occurred in another jurisdiction; (3) was legal when and where it occurred; or (4) for some other reason has no "nexus to the specific harm suffered by the plaintiff."[11]

This Note will begin by offering in Part II a brief overview of the punitive damages landscape, and how the determination of whether a punitive damages award is "grossly disproportionate" was changed by *Gore* and *State Farm*. Next, Part III will argue that these two cases, by invoking the Due Process Clause of the Fourteenth Amendment to strike down awards based on evidence admitted pursuant to state procedural rules, requires Congress and state legislatures to draft a new rule of evidence that presumes that these types of aforementioned evidence must be excluded from trial in cases where punitive damages are sought. In Part IV, this Note will then explore the alternative argument that even if a new rule is not constitutionally mandated, a new Federal Rule of Evidence along these lines should nevertheless be added as a matter of sound policy. Finally, Part V of this Note will suggest the substance of the new rule and apply it to specific examples from prior cases.

II. BACKGROUND

*A. The Supreme Court's Pre-*BMW *Punitive Damages Jurisprudence*

1. *Bankers Life* and *Browning-Ferris*

In the late 1980s, several tort defendants who were held liable for seven-figure punitive damages verdicts sought judicial review alleging, *inter alia*, that the sheer amount of punitive damages levied against them was so excessive as to violate the Due Process Clause of

11. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003).

the Fourteenth Amendment.[12] In the first of these cases, *Bankers Life and Casualty Co. v. Crenshaw*, the Supreme Court simply declined to address the question, stating that it would not be prudent to review the issue at that time, as the issue was a secondary argument that was not given much attention in the parties' briefs or at oral argument.[13]

The following year, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, the Supreme Court expressly rejected an Eighth Amendment argument that certain awards might be deemed "excessive fines," but again refused to decide the due process issue, in part because the petitioners failed to raise the argument before the lower courts and again failed to mention it in their petition for certiorari.[14] In a departure from *Bankers Life*, however, several of the Justices "wondered aloud" whether the award of such a high amount of punitive damages could potentially violate a defendant's Fourteenth Amendment right not to be deprived of property "without due process of law."[15] Justices Brennan and Marshall, in a concurring opinion, indicated some support for the proposition that "the Due Process Clause forbids damages awards that are 'grossly excessive,' " and stated that they joined the majority only on the understanding that in some instances, the Fourteenth Amendment constrains punitive damages verdicts.[16] In a separate concurrence, Justices O'Connor and Stevens relayed that they shared Justice Brennan's view, but went further in indicating that the Court's opinion also did not foreclose a due process challenge to the "method by which [punitive damages awards] are imposed."[17]

2. *Haslip*

With the new decade came a new stance by the Supreme Court on punitive damages and the Due Process clause. In 1991, in *Pacific Mutual Life Insurance Co. v. Haslip*,[18] an insurance company alleged that a punitive damages award levied against it after its agent defrauded a municipality in the sale of health insurance policies violated the Due Process Clause. Though they upheld the award, a

12. Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 276 (1989); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 76 (1988).

13. 486 U.S. at 88 (O'Connor, J., concurring in part and concurring in the judgment).

14. 492 U.S. at 275-77.

15. JOHN C.P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 971 (2004).

16. *Browning-Ferris*, 492 U.S. at 280 (Brennan, J., concurring).

17. *Id.* at 283 (O'Connor, J., concurring in part and dissenting in part).

18. 499 U.S. 1, 1 (1991).

substantial majority of the Supreme Court posited that the Due Process Clause requires adequate procedural safeguards if the imposition of punitive damages were to survive judicial review.[19] Hence, although the court upheld the common-law method for assessing punitive damages in *Haslip*, it hinted that future challenges to the imposition of punitive damages could succeed.[20] Writing for the Court, Justice Blackmun stated, "[i]t would be . . . inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional. We note again our concern about punitive damages that 'run wild.' "[21] With this in mind, the Court reasoned that punitive damages must have an "understandable relationship to compensatory damages," and opined that an award where punitive damages were more than four times greater than actual damages was "close to the line" of constitutional permissibility.[22] In essence, the Court seemed to foreclose Due Process challenges against the common-law punitive damages regime in general, but seemed willing to entertain challenges related to the specific imposition of punitive damages to an individual defendant, both in terms of the procedures used and the amount of the award itself.

3. *TXO*

Two years later, in *TXO Production Corp. v. Alliance Resources Corp.*, the Court seemed to both move forward and retreat from some of its earlier language in *Haslip*. In moving forward, several members of the Court, in a case involving a slander of title claim resulting in a $10 million punitive damages award, but only $19,000 in compensatory damages, stated more explicitly that the Due Process Clause not only mandates adequate procedural protections for defendants, but also "sets a substantive limit" on the amount of the

19. GOLDBERG, *supra* note 15, at 971. This "substantial majority" consisted of seven of the eight Justices participating in the case—Chief Justice Rehnquist and Associate Justices Blackmun, White, Marshall, Stevens, Kennedy, and O'Connor. *Haslip*, 499 U.S. at 2, 23-24. Justice Souter took no part in the case, but would later acquiesce in this view in BMW of No. Am., Inc. v. Gore, 517 U.S. 559, 586-87 (1996) (Breyer, J., concurring). Only Justice Scalia would not go as far. Concurring separately, Scalia stated that the common law process at issue in the case, which had predated the drafting of the Fourteenth Amendment and was not alleged to have violated the Bill of Rights, necessarily constituted due process and thus no further inquiry into its "reasonableness" was needed. *Haslip*, 499 U.S. at 24-25.

20. *Haslip*, 499 U.S. at 17-18.

21. *Id.* at 18 (citations omitted).

22. *Id.* at 22-23.

punitive damages verdict.[23] Moving backward, however, the Court failed to strike down this punitive damages award, which was 526 times greater than the amount of compensatory damages awarded to the plaintiff,[24] or, in other words, a ratio over 130 times greater than that which the Court stated in *Haslip* was "close to the line" of unconstitutionality.[25] In an effort to explain this retreat, the majority pointed to several facts which suggested that this case was far from the average punitive damages case. The Court pointed to the fact that a mathematical bright-line rule would be counterproductive, that the defendant's tortious conduct in *TXO* was found to be willful and malicious, and that, if successful, the "illicit scheme" attempted by the tortfeasors could potentially have resulted in actual damages in excess of the punitive damages award, bringing the ratio down to one-to-one or smaller.[26]

This rationale, however, failed to satisfy at least three members of the Court. Justice Kennedy urged the majority to formulate a new test for determining "grossly excessive" penalties, but felt that he could not dissent from the opinion.[27] He reasoned that because this defendant committed an intentional tort, that fact alone may be enough to satisfy Due Process in the absence of a more specific test of "reasonableness."[28] Justices O'Connor and White dissented, stating that the size of the award suggested it was the product of bias or passion, and that without a greater level of constitutional scrutiny, "the Court's judgment renders *Haslip*'s promise a false one."[29]

4. *Oberg*

The final punitive damages case before *Gore* was the first in which the Supreme Court used the Due Process Clause to reverse a

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23. GOLDBERG, *supra* note 15, at 971. The Court, a year later, assented to the proposition that a plurality of the Court in *TXO*, as well as Justice O'Connor, had suggested, namely that " 'grossly excessive' punitive damages would violate due process." Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994).

24. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453, 462 (1993).

25. *Haslip*, 499 U.S. at 23.

26. *TXO*, 509 U.S. at 458, 462 (Stevens, J., plurality opinion). In this case, the defendant repeatedly misrepresented the nature and quality of property they wished to sell to the plaintiffs. *Id.* at 446-450. In upholding the award, the majority appeared to give substantial weight to the fact that the plaintiffs claimed their "potential loss" could have topped $1 million, that the defendant acted "with malice" toward the plaintiffs, and that their repeated efforts demonstrated a "pattern and practice" of attempted fraud in their dealings with the plaintiffs. *Id.* at 462, 468-69.

27. *Id.* at 466-68. (Kennedy, J., concurring in part and concurring in the judgment).

28. *Id.* at 468-69.

29. *Id.* at 472-73, 481-82 (O'Connor, J., dissenting).

punitive damages award, though the Court refused to hold the award itself substantively unreasonable.[30] In *Honda Motor Co. v. Oberg*, seven members of the Court agreed that an amendment to the Oregon Constitution prohibiting judicial revision of punitive damages awards unless there was "no evidence to support the verdict" violated the Due Process Clause of the Fourteenth Amendment.[31] Although the Court failed to examine whether the amount of the punitive damages award at issue in the case—which amounted to a ratio of almost seven-to-one[32]—violated substantive due process, the majority definitively stated that *Haslip* stood for the proposition that the Constitution does impose a limit on the size of punitive damage awards.[33] Thus, *Oberg* set the stage for determining two years later how punitive damages awards are "excessive" under the Due Process Clause.

B. How Gore *and* State Farm *Changed the Punitive Damages Landscape*

BMW v. Gore truly was a landmark case. In *Gore*, the Court held unconstitutional a multimillion dollar punitive damages award based on an intentional corporate decision to not disclose to buyers the repainting of luxury cars which had sustained minimal cosmetic damage en route to the United States.[34] Not only did the Supreme Court fulfill the "promise" of *Haslip* by finally striking down a punitive damages award as violative of the Due Process Clause, but the majority also formulated a balancing test for determining when punitive damages awards are excessive. The three *Gore* "guideposts" for determining the excessiveness of a punitive damages award included: (1) the reprehensibility of the act in question; (2) the ratio of punitive to compensatory damages; and (3) a comparison of the punitive damages award to comparable civil and criminal sanctions which could apply to comparable misconduct.[35] The rationale given for articulating such a test is that the Due Process Clause dictates that a person should receive fair notice *not only* of the conduct that subjects

30. *See* Honda Motor Co. v. Oberg, 512 U.S. 415, 415 (1994) (focusing the inquiry "on Oregon's departure from traditional procedures").

31. *Id.* at 418.

32. Although some commentators describe the ratio involved in this case as just over five-to-one, it should be noted that the amount of compensatory damages actually paid out to the plaintiff amounted to just over $735,000 after being reduced due to a finding of contributory negligence by Oberg. As the punitive damages amounted to $5 million, the actual ratio is closer to seven-to-one. *Id.* at 418.

33. *Id.* at 420.

34. BMW of No. Am., Inc. v. Gore, 517 U.S. 559, 585-86 (1996).

35. *Id.* at 575, 580, 583.

him to punishment, but also of the potential severity of the penalty for such conduct.[36] These guideposts provide the requisite indicia that defendants had "adequate notice of the magnitude of the sanction."[37]

Perhaps the most important aspect of the Court's decision in *Gore*, at least for purposes of this discussion, was its handling of the evidentiary issues pertaining to the newly enunciated guideposts. In *Gore*, the Court used several rationales to express why it was error to introduce evidence, for purposes of assessing punitive damages, of the fact that BMW instituted a nationwide policy of repainting minimally damaged cars without disclosing this fact to prospective buyers.[38] First, in concluding the reprehensibility of BMW's conduct was relatively low, the Court pointed to the fact that Gore argued at trial that BMW's nondisclosure of cosmetic repairs to his car "formed part of a nationwide pattern of tortious conduct."[39] The Court, however, faulted this argument because BMW's conduct was legal in many of the jurisdictions where it took place.[40] Furthermore, the Court frowned on punishing the defendant for non-material omissions which took place outside of the jurisdiction where the suit was initiated, wholly apart from whether or not the conduct was tortious.[41]

Similarly, with regard to the "comparable sanctions" guidepost, the Court again faulted Gore's "nationwide conduct" argument, noting that even if the Court were prepared to consider BMW's conduct in other jurisdictions in evaluating the punitive damages award, statutory penalties for similar malfeasance approached nothing near a multimillion dollar penalty.[42] The Court concluded with the admonishment that "[w]hile each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation."[43]

Similarly, and more openly, evidentiary issues played a major part in the reversal of a punitive damages award reviewed *de novo* in *State Farm*.[44] In striking down the award, which the Court found was

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36. *Id.* at 574.

37. *Id.*

38. *Id.* at 563-64.

39. *Id.* at 576.

40. *Id.* at 573.

41. *Id.* at 579-80, 585.

42. *Id.* at 584.

43. *Id.* at 585.

44. In the interim between *Gore* and *State Farm*, the Supreme Court held that appellate courts should engage in *de novo* review of punitive damages awards. In particular, the Court noted that the application of the *Gore* guideposts to the jury's award should be subjected to "exacting" *de novo* review. *See* Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 431 (2001). The Court reasoned that "[b]ecause the jury's award of punitive damages does not

probably based in part on dissimilar out-of-state conduct by the defendant insurer, the Court held that the "reprehensibility" prong of the *Gore* test was miscalculated due to the introduction of "perceived deficiencies of State Farm's operations throughout the country," much of which had little or no relation to the tort at issue in the case, and some of which was not proscribed by law where it occurred.[45] "Lawful out-of-state conduct," the Court admonished, "may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the state where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff."[46] Furthermore, the Court added, "Due Process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis."[47] Finally, under the "comparable sanctions" guidepost, the majority again agreed that this portion was not sufficient to justify the 145-to-one punitive-to-compensatory ratio, as the Supreme Court of Utah again brought in evidence of State Farm's out-of-state, unrelated conduct in determining if the punitive damages penalty squared with comparable civil and criminal penalties.[48]

Arguably, the inadmissible evidence admitted by the respective trial courts in *State Farm* and *Gore* constituted the main reason why these two landmark decisions came out differently than the *TXO* case. The Court in *Gore* was quick to point out under its discussion of the "reprehensibility" guidepost that willful fraud was the primary reason *TXO* was the outlier, but this argument seems disingenuous, considering the fact that *Gore* and *State Farm* also involved

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constitute a finding of 'fact,' appellate review of the district court's determination that an award is consistent with due process does not implicate the Seventh Amendment concerns raised by respondent." *Id.* at 437. The Court was particularly concerned with trial courts mishandling the third *BMW* guidepost, comparative civil fines and criminal penalties, stating that "the third *Gore* criterion, which calls for a broad legal comparison, seems more suited to the expertise of appellate courts. Considerations of institutional competence therefore fail to tip the balance in favor of deferential appellate review." *Id.* at 440.

45. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 420 (2003). The Court expressed displeasure that the trial court allowed evidence which was both extraterritorial and had nothing to do with fraud or automobile insurance claims. *Id.* at 422-24. In particular, the Court noted that the plaintiff was permitted to present evidence about the insurer's investigation into the personal lives of one of its employees, how they denied claims by insureds throughout the country, and in general how the insurer's policies had a tendency to corrupt its workers. *Id.* at 424.

46. *Id.* at 422.

47. *Id.* at 423.

48. *Id.* at 428.

allegations of willful fraud by the tortfeasor-defendants.[49] Furthermore, all three cases involved purely economic harm only, which the Supreme Court has stated provides for a lesser degree of reprehensibility than physical harm.[50] In addition, the ratio of punitive damages to compensatory damages was actually the highest in *TXO*, making the fact pattern impossible to distinguish on this ground as well.[51] Of course, one could argue that the most pertinent difference between *TXO* on one hand and *Gore* and *State Farm* on the other was that the ratio of potential punitive damages to actual damages made the ratio much lower in *TXO*, but this argument should also fail because, as the Supreme Court indicated in *Gore*, the "reprehensibility" prong must be given greater weight than the "ratio" guidepost.[52]

The significance of this argument is clear—if admitting the type of evidence the Supreme Court openly criticized in *Gore* and *State Farm* was the deciding factor (or at least *a* deciding factor) in holding that the Due Process Clause mandates overriding these punitive damages verdicts due to their excessiveness, then *Gore* and *State Farm* either persuasively suggest or presumptively require that rules of evidence be amended so that this type of evidence is excluded in the first place. This proposition is examined further in the following sections.

III. *GORE* AND *STATE FARM* HAVE SET A NEW CONSTITUTIONAL STANDARD THAT REQUIRES A NEW FEDERAL RULE OF EVIDENCE PERTAINING TO PUNITIVE DAMAGES CASES

"There is no specific rule that governs evidence about the amount of punitive damages," and, for the most part, evidentiary decisions are governed by general principles of federal evidence law and their state equivalents.[53] Currently, the admission of evidence

49. *See id.* at 415, BMW of No. Am., Inc. v. Gore, 517 U.S. 559, 579 (1996); GOLDBERG, *supra* note 15, at 982 (discussing the general applicability of the *Gore* guideposts). Note that since all three cases involved fraudulent misrepresentations or omissions, this also means that under the "comparable sanctions" guidepost of *Gore*, all three cases would have resulted in similar civil and criminal penalties, making *TXO* impossihle to distinguish on this ground as well.

50. *Gore*, 517 U.S. at 575-76.

51. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453 (1993) (526 to 1 ratio); *Gore*, 517 U.S. at 582 (500 to 1 ratio); *State Farm*, 538 U.S. at 425 (145 to 1 ratio).

52. *Gore*, 517 U.S. at 575.

53. David Crump, *Evidence, Economics, and Ethics: What Information Should Jurors Be Given to Determine the Amount of a Punitive-Damage Award?*, 57 MD. L. REV. 174, 215 (1998).

similar to that at issue in *Gore* and *State Farm* would be governed by Rules 401, 402, and 403 of the Federal Rules of Evidence and similar provisions of state evidence law.[54] Rule 401 is very lenient, declaring relevant any evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable" than if it was not admitted.[55] Rule 402 simply states that all relevant evidence is admissible, subject of course, to other federal law.[56] Rule 403, however, requires a somewhat more stringent inquiry, even though it is weighted in favor of admissibility.[57] Rule 403 requires trial judges to exclude relevant evidence when "its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues," the potential of misleading the jury, or waste of time.[58]

Thus, federal evidentiary rules and their state equivalents give the trial court an opportunity, in its discretion, to exclude the type of evidence at issue in *Gore* and *State Farm*, such as legal extraterritorial evidence and evidence of conduct with no "nexus to the specific harm suffered by the plaintiff,"[59] before they are ever presented at trial. It follows from these rules that the only reason these pieces of evidence were admitted was that the respective trial judges in *Gore* and *State Farm*, at least implicitly, made the evidentiary decision that these types of evidence withstood the 403 balancing test. The Supreme Court, especially in *State Farm*, concluded the opposite, indicating that legal out-of-state conduct which fails the "nexus" test is inadmissible for the purpose of determining the proper amount of punitive damages to assess.[60] Otherwise, a court would be in serious danger of unconstitutionally

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54. *See infra* notes 55-56, 58, and accompanying text. Note that this is assuming the evidence would not be barred by an independent rule of evidence, such as those barring evidence of prior bad acts or subsequent remedial measures when offered for certain reasons, evidence of past convictions, and hearsay problems, but this Note assumes that no such concerns come into play, as they did not in *Gore* or *State Farm*.

55. FED. R. EVID. 401. The comments to the rule even go as far as to declare that "[a]ny more stringent requirement is unworkable and unrealistic." *See id.* adv. comm. note.

56. FED. R. EVID. 402. The rule also states the converse; that all "[e]vidence which is not relevant is not admissible." *Id.*

57. Crump, *supra* note 53, at 216.

58. FED. R. EVID. 403 (emphasis added). For a judicial application of the rule, see Old Chief v. United States, 519 U.S. 172 (1997). Almost every state has an identical or similar evidentiary rule. For instance, the rule in Kansas is Kansas Code of Civil Procedure § 60-445, the rule in New Jersey is New Jersey Rule 4, and the rule in California is California Evidence Code § 352. *See* FED. R. EVID. 403 adv. comm. note.

59. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003).

60. *Id.*

punishing a defendant for action that was lawful where it occurred.[61] Such evidence, the Court concluded, prejudiced and misled the jury to the point where it "awarded punitive damages to punish and deter conduct that bore no relation to the [the plaintiffs'] harm."[62]

The Supreme Court's holding, without saying so explicitly, creates a powerful inference that the Federal Rules of Evidence must, or at least should, be amended, as the current regime fails to provide adequate protection against the introduction of certain types of evidence deemed inadmissible by the Court in *State Farm*. Based on the language used in the case, the new rule must state that the type of evidence admitted at trial in *Gore* and *State Farm*, such as legal extraterritorial conduct and conduct unrelated to the tort at issue, always has a tendency to prejudice or mislead the jury in a way that substantially outweighs any probative value the evidence may have. This is in essence what the Supreme Court declared in *State Farm* when it used the Due Process Clause of the Fourteenth Amendment to overrule the Utah Supreme Court's decision, making it clear that punitive damages awards based on unrelated conduct admitted into evidence "under the guise of the reprehensibility analysis"[63] can amount to an arbitrary punishment imposed on a tortfeasor.[64]

In terms of procedure, there would be no barrier to instituting a rule which trumped the 403 analysis. Note that the Federal Rules of Evidence specifically declares several other types of evidence inadmissible before a trial judge can get to the residual 403 balancing test. For instance, Rule 802 requires that hearsay evidence not admissible by an exception to the hearsay rules be deemed inadmissible, which, of course, operates even if the evidence is highly probative.[65] The Advisory Committee's Note to Rule 403 admits as

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61. *Id.* at 422-23. In theory, one could make the case that the Supreme Court was simply saying that the conduct at issue was not relevant, and thus that the trial courts were only misapplying Rule 401 (or its state equivalent). But this argument is tenuous, at best, because clearly there is some evidence that has "any tendency" to make a fact at issue more or less probable, see FED. R. EVID. 401, which fails the "nexus" requirement of *State Farm*, 538 U.S. 422. Note that the Court left open whether evidence of illegal, out-of-state conduct may be admitted at all, but, did admonish that "[n]or, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." *Id.* at 421. Note also that this was only a part (although, I would argue, the biggest part) of the court's rationale. The court also stressed concern over "hypothetical" claims and spoke in rather vague terms of the idea that making a defendant pay a plaintiff for alleged wrongs done to an unknown and/or not present third party is problematic. *Id.* at 422-23.

62. *Id.* at 422.

63. *Id.* at 423.

64. *Id.* at 416-17.

65. FED. R. EVID. 802.

much, stating that "case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance."[66]

While adding a rule of evidence that would be applied before the Rule 403 inquiry would pose no problem procedurally, there are potential substantive counterarguments to the proposition that *Gore* and *State Farm* require an amendment to the Federal Rules of Evidence. First, there is the argument that these two cases simply provide appellate courts certain points to consider when performing due process analysis on punitive damages cases against corporate defendants. Proponents of this viewpoint would argue that the whole rationale behind *Cooper Industries*, which was decided post-*Gore*, was to provide appellate courts with more of an opportunity to probe extraterritoriality cases such as *Gore*, not to require new standards for trial judges.[67]

Another argument would focus on the fact that the *State Farm* standard may trump implicit evidentiary decisions in the narrow sense that constitutional provisions always trump mere evidentiary rules. Yet this argument would claim that, because the holdings in *Gore* and *State Farm* are narrowly tailored and focus on the "excessiveness" and "arbitrariness" of the amount of the award rather than the evidence potentially used by the jury to reach that amount, the Court was not using Due Process to suggest changes to the Federal Rules of Evidence.[68] The proper response to this point would be that within this argument lay its shortcomings. It seems certain that if the admission of legal, unrelated extraterritorial conduct is so offensive as to violate Due Process (or to even come close to doing so) by playing a substantial part in a punitive damages award by violating a defendant's right to substantive Due Process, then it would clearly violate the lesser Federal Rule of Evidence.[69] Furthermore, there is no dearth of language in *Gore* and *State Farm* about the evidentiary errors by the trial court; clearly, there is substantial evidence that the Supreme Court intended to influence evidentiary

66. FED. R. EVID. 403 adv. comm. note.

67. Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 424 (2001). For a more in depth discussion of *Cooper*, see *supra* note 44.

68. There is some merit in this argument, as the standard in *State Farm* does focus on arbitrariness and excessiveness and the Court noted that it was "reluctant to identify concrete constitutional limits" to its holding, particularly with respect to the second "ratio" guidepost in *Gore*. *State Farm*, 538 U.S. at 416, 424.

69. And such unfair evidence did play a substantial part in both *Gore* and *State Farm*. The plaintiffs claimed that this evidence went to the reprehensibility of the defendants' conduct in both cases, and the Supreme Court has clearly stated that reprehensibility is the most important factor in the punitive damages analysis. *Id.* at 419; BMW of No. Am. v. Gore, 517 U.S. 559, 574 n. 21 (1996).

rulings in punitive damages cases. For instance, at one point in *State Farm*, the majority expressed displeasure that the plaintiff's attorney allowed the trial judge to become "convinced . . . that there was no limitation on the scope of evidence that could be considered" under Supreme Court precedent.[70] In criticizing this interpretation of *Gore* and using the admission of extraterritorial evidence in part to strike down the punitive damages award in *State Farm*,[71] the Court clearly signaled that a change in the Federal Rules of Evidence could (and probably, should) be required.

IV. EVEN IF *GORE* AND *STATE FARM* DO NOT REQUIRE A NEW RULE OF EVIDENCE, STATE AND FEDERAL EVIDENTIARY RULES SHOULD BE AMENDED ANYWAY, AS A MATTER OF SOUND POLICY

A. Practical Arguments for Change

Even if *Gore* and *State Farm* do not mandate a change to the Federal Rules of Evidence, as a practical matter states and the federal government should amend their rules to reflect the outcome of these two cases. Within the past few decades, punitive damages awards have risen in both frequency and amount.[72] Today, numerous academics have postulated that in many cases, punitive damages claims have gone from being merely a secondary, "'subordinate,' or 'derivative' claim to being *the* claim."[73] And, with so many millions of dollars at stake, some scholars have complained that the current state of the rules leaves too much discretion to trial judges, who abuse this discretion by giving too much information to the jury along with a dearth of meaningful standards with which to weigh this information.[74] This phenomenon, coupled with erratic appellate court review, makes it likely that the apparent danger of arbitrary

70. *Id.* at 421.

71. *Id.* at 421-22.

72. *See, e.g.*, Murphy, *supra* note 1, at 996 ("[J]uries have granted four multi-billion dollar punitive damages awards over the last few years and eight over the last sixteen years.").

73. Mark A. Klugheit, *"Where the Rubber Meets the Road": Theoretical Justification vs. Practical Outcomes in Punitive Damages Litigation*, 52 SYR. L. REV. 803, 807-08 (2002).

74. Crump, *supra* note 53, at 230-31. Crump notes that this is especially true with respect to claims against large corporate defendants. *Id.* at 215-33. *But see* Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 N.D. L. REV. 1497, 1512-19 (discussing the work of scholars such as Theodore Eisenberg, Michael Rustag, and Thomas Koenig, who see no evidence of a systemic problem).

deprivation of property will continue absent more direction to the states regarding punitive damages awards.[75]

Another practical problem, arguably even more serious, is that both trial and appellate judges continually misapply the *Gore* and *State Farm* standards to the detriment of defendants in punitive damages cases. Perhaps the most notorious instance was when the trial judge in the *State Farm* case stated on the record that he read *Gore* to advocate that judges should admit even *more* evidence than before in punitive damages cases.[76] A brief search on LEXIS or Westlaw reveals dozens of cases, even in the last several years, where courts have misapplied the *Gore* factors, the *State Farm* test, or both. For instance, in 2001, an intermediate appellate court in Illinois upheld all but $130 million of a $1.18 billion award against an insurance company in *Avery v. State Farm Mutual Automobile Insurance Co.*[77] Although the Supreme Court would not decide *State Farm* for another two years, this Illinois state court apparently ignored the mandate of the first and third guideposts of *Gore*, allowing testimony that the insurer encouraged the nationwide use of non-original equipment manufacturer (non-OEM) parts, a practice considered deceptive in Illinois, but permitted, and in some cases possibly even encouraged, in other states.[78] The court also allowed the plaintiffs to show a videotape of a corrosion test of a non-OEM fender, despite the insurer's objection that there was no evidence to show that this fender had been installed on any policyholder's car during the entire class period in question.[79]

In addition, in *Romo v. Ford Motor Co*, a California Court of Appeal upheld a $290 million punitive damages award, with compensatory damages amounting to only $5 million, despite the fact that some evidence was presented that the defense argued was both

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75. *See generally* Cordell A. Hull, Feature Article, *Extraterritoriality and Punitive Damages: Is There a Workable System?*, 70 DEF. COUNS. J. 439 (2003) (analyzing U.S. jurisprudence on punitive damages and recommending that the Supreme Court take the first available opportunity to clarify the appropriate standard for extraterritoriality considerations).

76. The case quotes the trial judge as saying "[a]s I read [Gore], I was struck with the fact that a clear message in the case . . . seems to be that courts in punitive damages cases should receive more evidence, not less. And that the court seems to be inviting an even broader area of evidence than the current rulings of the court would indicate." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003).

77. 746 N.E.2d 1242, 1262 (Ill. App. Ct. 2001) (*Avery I*).

78. *Id.* at 1254; *see also* Hull, *supra* note 75, at 441. The Illinois Supreme Court has since granted an appeal, 786 N.E.2d 180 (Ill. 2002) (*Avery II*), but this evidence probably should have been declared inadmissible in the first place in light of *Gore*'s prohibition of extraterritorial evidence, particularly that which is not even illegal in other states.

79. *Avery I*, 746 N.E.2d at 1262 (unpublished portion under Illinois Supreme Court Rule 23, see 166 Ill. 2d R. 23 (2005)).

based on out-of-state conduct[80] and involved "pieces of supposed knowledge of many different people on many different topics through many different decades."[81] Although this decision was later vacated and remanded in light of *State Farm*, the evidence at issue should at least have been evaluated, if not held inadmissible, in light of the *Gore* case. Ironically, the Ninth Circuit, which includes the state of California, concluded in a different case the same year that a punitive damages award which may have been based in large part on evidence of the conduct of Ford (the same defendant as in *Romo*) in other states with regard to the manufacture of one of its trucks, must be reversed and reconsidered in light of the territorial restraints established by *Gore*.[82]

Even after *State Farm*, though, courts continue to misinterpret, misapply, or ignore the Supreme Court's guidance on the prejudicial effect of extraterritorial and unrelated conduct.[83] On remand, the Fifth Circuit California Appellate Court in *Romo* did reduce the award, but focused on the "ratio" guidepost of *Gore* instead of the

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80. Hull, *supra* note 75, at 441.

81. Romo v. Ford Motor Co., 122 Cal.Rptr.2d 139, 158 (Cal. App. Ct. 2002) (internal quotation omitted), *overruled in part by* People v. Ault, 95 P.3d 523 (2004) (*Romo I*).

82. White v. Ford Motor Co., 312 F.3d 998, 1020 (9th Cir. 2002), *amended by* 335 F.3d 833 (9th. Cir. 2002).

83. Although beyond the scope of this Note, there is evidence that many lower courts have failed to apply other aspects of the Supreme Court's *Gore* analysis faithfully as well. *See, e.g.*, Clark v. Chrysler Corp., 310 F.3d 461, 482 (6th Cir. 2002) (stating, under the third guidepost, that "automobile manufacturers are generally on notice that their reckless conduct resulting in death could trigger a substantial punitive damages award"); American Pioneer Life Ins. Co. v. Williamson, 704 So. 2d 1361, 1366 (Ala. 1997) (seemingly adding an additional guidepost that "any punitive damages award should remove any profit realized . . . as a result of [the appellant's] misconduct"); Union Sec. Life Ins. v. Crocker, 709 So. 2d 1118, 1122 (Ala. 1997) (allowing a 123:1 punitive-to-compensatory-damages ratio and ignoring the statutory penalty in the Alabama Deceptive Trade Practices Act because it was too low to be relevant); Life Ins. Co. of Georgia v. Johnson, 701 So. 2d 524, 531 (Ala. 1997) (ignoring the comparable statutory penalties because they were too low to be relevant); Brantner Farms, Inc. v. Garner, No. C6-01-1572, 2002 WL 1163559, at *7 (Minn. Ct. App. June 4, 2002) (disregarding a comparable sanction of $1000 because it was not sufficient to deter behavior in the future); Paracelsus Health Care Corp. v. Willard, 754 So. 2d 437, 445 (Miss. 1999) (upholding a 150:1 punitive to compensatory damages ratio on the grounds that there were no other sanctions that could be imposed under the facts of the case); Wightman v. Consol. Rail Corp., 715 N.E.2d 546, 555 (Ohio 1999) (stating that a relevant civil penalty for comparison would be the potential award which could be handed down in another civil lawsuit); Williams v. Aetna Fin. Co., 700 N.E.2d 859, 871 (Ohio 1998) (stating that "when one of the guideposts is particularly relevant, a lesser reliance on the other guideposts may be justified"). The preceding line of cases suggests that, even absent the evidentiary concerns articulated in this note, the *Gore* and *State Farm* holdings should be codified; if for nothing else, codification would instruct lower courts as to how properly to apply all three guideposts in order to apply the meaningful, searching *de novo* review of punitive damages awards envisioned by the Supreme Court in Cooper Industries v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001).

evidentiary principles underlying the decision in *State Farm*.[84] This analysis seemed somewhat disingenuous, especially considering the language used in the opinion[85], as well as the fact that *Gore* preceded this case, which demonstrates that there was no reason why this guidepost could not have been more faithfully applied on the first appeal.[86] In addition, in *Simon v. San Paolo U.S. Holding Company*, a real estate case alleging fraud and breach of contract, a California appellate court amazingly applied *State Farm* to uphold a jury verdict of $5,000 in compensatory damages and $1.7 million in punitive damages.[87] Besides quite surprisingly upholding this 340-to-1 punitive to compensatory damages ratio, the court also affirmed the verdict despite a *State Farm*-like objection by the defense that the trial court admitted arguably unrelated evidence regarding certain deeds and liens recorded after the property was sold to a third party, as well as "testimony relating to compensatory damages that were not awarded in the first trial."[88]

Finally, in *Markham v. National States Insurance Co.*, an action by the beneficiary of an insured alleging breach of the covenant of good faith and fair dealing, the Tenth Circuit oddly rejected a *State Farm*-based objection to the presentation of extraterritorial evidence of insurance policy rescissions over the past five years.[89] In a somewhat baffling and cursory section of the opinion, the Court held that the admission of the evidence of out-of-state rescissions was proper, distinguishing *State Farm*. The Court held *State Farm* was distinguishable because a) the *State Farm* trial was bifurcated; b) in this case, the conduct dated back five years, instead of twenty years; and c) this case was unlike *State Farm* in that in *State Farm*, all of the evidence of past nationwide practices was presented by an expert witness.[90] There was absolutely no discussion of how the out-of-state evidence at issue bore a sufficient nexus to the harm complained of by

84. Romo v. Ford Motor Co., 6 Cal.Rptr.3d 793, 799, 810-13 (Cal. App. Ct. 2003) (*Romo II*).

85. The *Romo II* court stated that "considered in light of products liability actions against large corporate defendants for which single-digit multipliers may simply be a cost of doing business . . . the court's conclusion is far from 'obvious.'" *Id.* at 803.

86. *Gore* was decided in 1996. BMW of No. Am., Inc. v. Gore, 517 U.S. 559, 559 (1996). The first appeal to *Romo* was decided in 2002. *Romo I*, 122 Cal. Rptr. 2d at 139.

87. 7 Cal.Rptr.3d 367, 387-93 (Cal. App. Ct. 2003). California was able to consider as persuasive authority the Court's opinion in *State Farm* presumably because of the similarity of that state's evidentiary rules to the Federal Rules of Evidence.

88. *Id.* at 381.

89. Nos. 03-6275 & 03-6304, 2004 U.S. App. LEXIS 25805, *14, *18-19 (10th Cir. Dec. 14, 2004). The attorney for the defense objected based on Federal Rules of Evidence 401, 402, and 403. *Id.*

90. *Id.* at *18-19.

the plaintiff. Cases like *Romo*, *Simon*, and *Markham* clearly demonstrate why a new rule of evidence is sorely needed.

There is also an economic argument that cuts in favor of amending state and federal rules of evidence to better implement the *Gore* and *State Farm* concerns. As multimillion and multibillion dollar punitive damages awards become more commonplace, as they have over the past decade and a half,[91] more and more plaintiffs will begin to seek such damages because of the large payoffs they potentially contain. This phenomenon will have several adverse consequences. Again, as scholar Mark A. Klugheit has noted, this will change lawyers' trial strategies, as punitive damages will be transformed from a "derivative," or secondary, claim to *the* claim at issue in the case, potentially leading to longer and more costly litigation.[92] Next, the possibility of high punitive damage awards could raise transaction costs to the point where many defendants are pressured into settling potentially meritless claims.[93]

Lastly, and somewhat more speculatively, is the idea that Supreme Court review of punitive damages awards probably will not be available with the frequency and tenacity witnessed in the past decade, as the Supreme Court will instead look to influence other areas of tort law. One scenario which may bring about this change is an alteration in the political makeup of the Court. Although for different reasons, Justices Ginsburg, Scalia, and Thomas all dissented from the opinion in *State Farm*, and future appointees may come to agree with Justice Ginsburg that "this Court has no warrant to reform state law governing awards of punitive damages."[94] Alternatively, the Court may simply tire of such "passive aggressive" behavior on the part of state appellate courts who disingenuously apply *State Farm* because they are "chafing under the imposition of federal standards to the exclusion of well-settled [state] rules."[95] Quite simply, the sheer volume of large punitive damages awards cases could mean that many of these awards will be allowed to escape Supreme Court review and stand in the future, in the absence of a statutory rule.[96]

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91. Murphy, *supra* note 1, at 996.

92. Klugheit, *supra* note 73, at 807-08.

93. *See* Dan Schechter, *Two Post-*Campbell *Punitive Damage Decisions Apply Liberal Punitive Damage Ratios*, COMMERCIAL FINANCE NEWSLETTER, Dec. 8, 2003, at 101 (discussing *Romo* and *Simon*).

94. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 438 (2003) (Ginsburg, J., dissenting).

95. Schechter, *supra* note 93, at 101.

96. *Id.*

Related to this argument, the potential for abuse in plaintiff-friendly areas (with rules of evidence patterned on the Federal Rules) such as Mississippi, West Virginia, Creek County, Oklahoma, and Madison County, Illinois make amending the rules of evidence a practical necessity to guide trial courts in using wisely the discretion provided to them by evidence law, particularly in class action lawsuits.[97] In areas such as these, where large punitive damages awards are already more likely to be awarded, meaningful direction on evidentiary rulings is sorely needed, both at the trial court level and at the intermediate appellate court level.[98] This is because compared to higher levels of appellate review, appeals are heard in a more timely manner, judicial review is less expensive, and legal errors can be corrected sooner rather than later in the trial and intermediate appellate courts. Further complicating the problem of waiting for appellate courts to correct large punitive damages verdicts is the fact that the cost of appellate review is causing some states to eliminate procedures such as remittitur, thereby handcuffing appellate courts to an even greater degree.[99] Without statutory direction, punitive damages are likely to continue to rise and appellate review may not be able to handle the ensuing flood of appeals arising from punitive damages cases.

B. Policy Arguments for Change

Many judges and tort scholars view the legal battle for monetary and evidentiary limits in punitive damages cases as a microcosm for a larger battle regarding the fundamental functions of tort law as a whole. For instance, the California appellate court that decided *Romo* on remand focused much of its discussion on competing theories of tort law, rather than on the *Gore* and *State Farm* framework.[100] Of course, nearly everyone recognizes that the purpose

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97. *See* American Tort Reform Association, *Judicial Hellholes 2004*, *available at* http://www.atra.org/reports/hellholes/report.pdf, (including these jurisdictions as "judicial hellholes" or as getting an "honorable mention" for being a "judicial hellhole"). Although the new Class Action Fairness Act may work to effectively prohibit some of the forum-shopping concerns articulated by defendants in large class action cases, *see* Pub. L. No. 109-2, 119 Stat. 4 (2005), I argue that such evidentiary consistency is still needed in these jurisdictions for the small class actions lawsuits that can avoid the Act, if nothing else.

98. For a discussion of some of the "wild" interpretations of *Gore* that have taken place at the state intermediate appellate level, see *supra* note 83.

99. For instance, the State of Missouri eliminated the process of remittitur in 1985, Firestone v. Crown Center Redevelopment Corp., 693 S.W.2d 99, 110 (Mo. 1985), but it was eventually reinstated by the legislature in 2004. *See* MO. REV. STAT. § 537.068 (2004).

100. *See* Romo v. Ford Motor Co., 6 Cal.Rptr.3d 793, 793 (Cal. Ct. App. 2003) (discussing the purposes of punitive damages and the manner in which courts should determine punitive

of imposing punitive damages is to punish and to deter reprehensible conduct,[101] but concrete differences begin to appear when commentators inquire about the correct measure of punitive damages—and the correct procedure for imposing them—within one of these overriding theories of tort law.

Professor John Goldberg has identified six of the major competing theories of tort law, which he has labeled "the traditional account," "compensation-deterrence theory," "enterprise liability theory," "economic deterrence theory," "social justice theory," and a collection of opinions he considers "individual justice theories."[102] The traditional account, Goldberg recounts, understood actions in tort as personal to the victim, or in other words, conceived tort law "as a law of personal redress rather than as a law of public regulation or punishment."[103] Compensation-deterrence theory, by contrast—at least by the emerging twentieth century—views tort law as an important component of the administrative state, in which tort rulings represent societal statements regarding the social desirability or undesirability of a form of conduct.[104] The focus of enterprise liability theorists, however, is the extremely poor manner in which tort law provides relief for tort victims who seek redress in the tort system.[105] The primary reforms articulated by these theorists, then, are procedures which enable the judiciary to more efficiently act as a relief agency for accident victims.[106]

Next, economic deterrence theorists posit the overriding goal of "tort law is to promote overall social welfare by [efficiently] deterring accidents in the future."[107] Thus, the objective of this body of law is to minimize the sum of three considerations: the costs of accident prevention, the costs resulting from accidents, and the costs of administering the tort system.[108] In other words, tort law promotes

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damage awards in order to carry out these purposes most effectively); Ford Motor Co. v. Romo, 538 U.S. 1028, 1028 (2003). This is somewhat ironic since *Romo* was vacated and remanded in light of the court's holding in *State Farm*.

101. *See, e.g.*, BMW of No. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) ("Punitive damages may properly he imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence."); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001) (stating that punitive damages are aimed at deterrence and retribution).

102. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 516 (2003).

103. *Id.* at 517.

104. *Id.* at 524.

105. *Id.* at 537.

106. *Id.*

107. *Id.* at 544.

108. *Id.* at 545.

the most social welfare when the threat of liability causes actors to take all and no more than "those precautions that cost less than the harms likely to occur if those precautions are not taken."[109] Standing in stark contrast to this, social justice theorists state the goal of tort law is to serve as a mechanism for "rectifying imbalances in political power" by empowering diffuse individuals to "sue corporations for misconduct outside of the legislative and regulatory process," where they are protected by interest-group politics.[110] Finally, the individual justice theories consist of libertarian theory, which seeks to reconnect tort with laissez-faire concepts; reciprocity theory, which, as its name suggests focuses on a "justice-based conception of tort law"; and corrective justice theory, which states that the goal of tort law should be to "restore the injured plaintiff to the status quo ante."[111]

Within each of these theories there exists a particular theoretical approach to the imposition of punitive damages on tort defendants. Economic deterrence theory, for example, which focuses on the socially optimal level of deterrence, clearly would, in most cases, seek to impose a smaller punitive damages penalty on a corporate defendant than would social justice theorists, particularly when the tortfeasor committed the tort unintentionally.[112] Institutional reforms, then, in theories supporting lower punitive damages awards, would clearly focus at the evidentiary level of increasing the burden on plaintiffs seeking punitive damages in order to reach a more optimal level of payouts.[113]

Many state appellate courts, however, seem to subscribe to the compensation-deterrence theory in punitive damages cases. For instance, in *Romo* on remand, the California appellate court made no secret of its broader, more compensation-deterrence-like view of tort law, and its dislike of the traditional account of tort law:

> The idea of awarding punitive damages based purely on a conception of torts as private wrongs lost favor in the era of products liability litigation. . . . [O]utrageous or malicious wrongdoing was no longer simply an affront to the dignity of a single victim. Instead, the affront was . . . viewed as one to society as a whole. In this view . . . punitive damages awards needed to be based on the overall scope of the wrong in order to punish

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109. *Id.* at 545. *See generally* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987) (presenting economic models of alternative liability rules and discussing the tort law guidelines necessary to promote economic efficiency).

110. Goldberg, *supra* note 102, at 560.

111. *Id.* at 563-70.

112. LANDES & POSNER, *supra* note 109, at 160-65. Although some may argue there is some evidence of outlier cases, *see, e.g.*, Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 677-78 (7th Cir. 2003) (in which the Seventh Circuit, in an opinion by Judge Posner, upheld a punitive award with a 35:1 ratio), many of these cases, including *Mathias* itself, involve evidence of intentional wrongdoing by the defendant and also feature alleged wrongs which are very hard to detect.

113. *See, e.g.*, Goldberg, *supra* note 102, at 553-60.

> and deter the mass torts [citation omitted]. As the issue became . . . more a question of preventing outrageous large-scale wrongdoing, it was thought that, in order to be effective, punitive damages had to render the overall conduct unprofitable or prohibitively costly . . . [W]e applied the broad standards for punitive damages established by California case law in our original opinion in this case. To be sure, such standards were subject to limitations or "guideposts" established in [*Gore*]. But, as evidenced in our original opinion, we applied these guideposts in light of the broad purposes and broad measure of punitive damages, in which courts undertook to *actually* deter a practice or course of conduct by depriving the wrongdoer of profit from the course of conduct or making such conduct so expensive it put the wrongdoer at a competitive disadvantage. [citation omitted] "Punishment and deterrence" in this view is far along a scale that might be viewed as increasing from mere admonition toward direct incapacitation.[114]

As the court noted, this "broad" view of punitive damages tort law conflicts with some of the language in *State Farm*, in which the Court appeared to indicate its wish to redirect punitive damages litigation, and the evidentiary limitations therein, more toward the "traditional account" side of the tort theory spectrum.[115] As *State Farm* admonished, "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."[116]

With this in mind, it is clear that an important policy rationale for amending the rules of evidence to enforce the *State Farm* evidentiary limitations is to prevent some of the courts that endorse the broader conceptions of tort law from allowing juries to impose punitive damages on corporate defendants because they perceive themselves as having an administrative or regulatory-like "duty" to do so.[117] One critique of these broader theories is that the individual defendant is often not the primary payer of the tort judgment.[118] Arrangements such as liability insurance, experience-rating, and other indemnification contracts cover some or all of the damages

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114. Romo v. Ford Motor Co., 6 Cal.Rptr.3d 793, 800-01 (Cal. Ct. App. 2003).

115. *Id.* at 801:

> *State Farm*, in our view, impliedly disapproved this broad view of the goal and measure of punitive damages. Instead, as a matter of due process under the federal Constitution, the court adopted the more limited, historically based view of punitive damages [citation omitted]. In doing so, the court in *State Farm* went beyond the "guideposts" established in *Gore* and articulated a constitutional due process limitation on both the goal and the measure of punitive damages. Further, the result is a punitive damages analysis that focuses primarily on what defendant did to the present plaintiff, rather than the defendant's wealth or general incorrigibility.

116. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422-23 (2003).

117. *See* Goldberg, *supra* note 102, at 524, 537 (noting the historical trend of tort law towards cases being based on "judges' conceptions" of social norms and discussing enterprise liability theory).

118. *Id.* at 531.

imposed, which makes the proposition that tort law is an ideal vehicle for deterring anti-social conduct a shaky one.[119] More importantly, the Supreme Court indicated that imposing such a regime on an individual defendant is an unfair and sometimes unconstitutional burden.[120] The only fair application of punitive damages can be when the damages award seeks to punish and deter conduct that has a "nexus" to the harm suffered by the plaintiff.[121] As the law only asks juries to take into account relevant evidence, not unduly prejudicial, specific to the parties involved in the litigation, it is important that evidentiary rules pertaining to punitive damages cases reflect a more traditional account of the purpose of tort law.

In addition, it should be noted that the Federal Rules of Evidence in many cases embrace the concept, embedded in *State Farm*, that evidence law should take a cautious approach to evidence that seeks to make a defendant appear more culpable based on prior bad acts committed against a separate and distinct entity. This cautious approach holds true even if those acts were unlawful. In addition to Rule 403, which excludes such evidence if overly prejudicial or repetitive,[122] Rule 404(b) also limits the introduction of "other crimes, wrongs, or acts" presented to show "action in conformity therewith" on a particular occasion.[123] The rationale behind this rule is similar to the rationale articulated by the Supreme Court in *Gore* and *State Farm*. As the Advisory Committee's Note states, such evidence "tends to distract the trier of fact from the main question of what actually happened on the particular occasion" and "subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."[124]

Finally, a few words must be said to counter the obvious argument against amending the Federal Rules of Evidence, which asks why such an amendment is needed when the Supreme Court has already spoken on the issue. The most important response to this counterargument is that lower courts are not following the guidance of the Supreme Court or Rule 403. This Note identifies many instances of lower courts misapplying, either due to a misunderstanding of the

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119. *Id.* at 531, 532.

120. *State Farm*, 538 U.S. at 425. By "unconstitutional," this Note is referring to an arbitrary deprivation of property under Due Process. *Id.*

121. *Id.* at 422-24.

122. FED. R. EVID. 403.

123. FED. R. EVID. 404(b). One can argue that one of the purposes behind the Hearsay Rule, in some instances, is also to avoid this type of propensity reasoning.

124. FED. R. EVID. 404(b) adv. comm. note.

case law, due to a lack of statutory guidance, or due to a desire to protest, the framework of *Gore* and *State Farm*.[125] Amendments to the federal evidence rules—which will hopefully lead to amendments to the state rules which are patterned after them—will provide courts with more guidance, and perhaps heavier penalties, if they continue their "passive-aggressive" disregard for *Gore* and *State Farm*.[126] Furthermore, appellate review of pre-trial evidentiary rulings is inefficient, costly, and should not always be needed or expected.[127] Finally, Rule 403 and its state equivalents give too much discretion to the trial court in punitive damages situations to admit prejudicial evidence with little relevance to the tort at issue. In many situations, the initial ruling on the 403 balancing test by the trial judge is deferred to,[128] and without more statutory guidance, appellate courts may only continue to give cursory review to such evidentiary determinations.

Of course, a valid counterargument to this point is that the Supreme Court's evidentiary pronouncements in *Gore* and *State Farm* are less than crystal clear, and that lower courts are simply doing their best to act in accordance with a balancing test with very little guidance toward specific factual and evidentiary situations. Though this argument should not be given short shrift, I would argue that the Court, at the very least, sought in *Gore* and *State Farm* to exclude evidence *exactly* like that deemed inadmissible in those two cases—namely, extraterritorial evidence with no relation to the tort at issue, evidence of conduct in other states which is not even illegal, and other types of evidence that clearly has no "nexus" to the specific harm complained of, such as evidence of "bad practices" in other sections of a defendant's business.[129] Although a rule that attempts to enforce just this (arguably unclear) language would still lead to "gray areas" in the law, it perhaps would induce lower courts to exclude some of the "borderline" evidence discussed in this Note, which in turn would produce a more efficient judiciary—by reducing the chance of verdicts being overturned on appeal—and help to perpetuate a system that is

125. For a further discussion of this phenomenon, see *supra* note 83.

126. *See* Schechter, *supra* note 93, at 101.

127. For a further discussion of this point, see *supra* Section III.A.

128. *See, e.g.*, Freeman v. Package Mach. Co., 865 F.2d 1331, 1340 (1st Cir. 1988) ("[O]nly rarely – and in exceptionally compelling circumstances – will we, from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighing of prohative value and unfair effect."); United States v. Currier, 836 F.2d 11, 18 (1st Cir. 1987).

129. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421-24 (2003).

more cautious about the imposition of such large punitive damages awards.[130]

V. CONTENTS AND APPLICATION OF THE NEW RULE

In the majority opinion in *State Farm*, Justice Kennedy quipped that "[u]nder the principles outlined in [*Gore*], this case is neither close nor difficult."[131] While this statement may or may not have been true (the three separate dissents almost surely would disagree), the problems that the lower courts have had in applying *Gore* and *State Farm*[132] bring to mind the oft-quoted warning that "easy cases make bad law."[133] Thus, the aim of the new Federal Rule of Evidence, as well as any state rule fashioned for similar reasons, should be to give more guidance to lower courts regarding which items of evidence, due to their low probative value, potential to unfairly influence the jury, or lack of "nexus" to the specific harms at issue in the trial, should never see the inside of the courtroom.[134] The result of such a rule should be more uniformity in the application of *Gore* and *State Farm* by the lower courts, increased efficiency, and greater fairness to defendants in punitive damages cases. With this in mind, the following section focuses on some aspects of the new rule which are necessary to achieve these goals.

A. Suggested Contents of the New Rule

While the exact wording of the new Federal Rule of Evidence is beyond the scope of this Note, there are certain essential provisions

130. For an example of a case which supports this view by recognizing the evidentiary principles articulated in *State Farm* and applying them correctly, see Woodward v. Corr. Med. Services. of Ill,, Inc., 368 F.3d 917, 930-31 (7th Cir. 2004). In *Woodward*, the Seventh Circuit rejected a *State Farm*-based objection to the admission of "pattern and practice" evidence by a defendant private health services contractor, finding that the evidence was admissible because it was, unlike *State Farm*, limited to evidence of misconduct by the *same* defendant, at the *same* correctional facility, to similarly-situated persons as the plaintiff (in this case, suicidal or mentally-ill prisoners). *Id.*

131. *State Farm*, 538 U.S. at 418.

132. For a discussion of some of the most glaring misapplications of *Gore* and *State Farm*, see *supra* Part IV.

133. *See, e.g.*, Burnham v. Super. Ct. of Cal., County of Marin, 495 U.S. 604, 640 (1990) (Stevens, J., concurring in the judgment); O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 804 (1980) (Blackmun, J., concurring in the judgment).

134. *See* FED. R. EVID. 403 (providing the rule for excluding evidence where its "probative value is substantially outweighed" by pragmatic considerations, e.g. "unfair prejudice"; *State Farm*, 538 U.S. at 421-22 (discussing the probative value of extraterritorial conduct).

that the rule should contain in order to encompass the holdings of *Gore* and *State Farm* and provide further guidance to lower courts in making important and controversial evidentiary decisions. At a minimum, it is imperative that the new rule contain the following core concepts.

1. The Rule should only apply where punitive damages are "in play."

With regard to the scope of the new rule, it is clear it should be applied only in cases where punitive damages are sought by the plaintiff. This first makes intuitive sense because the evidentiary holdings in *Gore* and *State Farm* focused primarily on punitive damages cases and how the inflammatory evidence presented at the two respective trials could have skewed the jury's idea of "reprehensible conduct."[135] Secondly, because compensatory damages are easier for a jury to quantify,[136] the margin of error is decidedly smaller, and hence Rule 403's balancing test provides an adequate proxy in itself for trial courts to filter out such unwarranted evidence.[137]

2. The Rule should make clear that it is triggered when evidence is proffered to demonstrate extraterritorial conduct, conduct which was legal where it occurred, and conduct which fails the "nexus" requirement of *State Farm*.

In delineating what situations trigger the rule, the drafters should rely heavily on the evidence criticized by the Court in *Gore* and *State Farm*.[138] Specifically, the rule should be triggered when a claim

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135. BMW of No. Am., Inc. v. Gore, 517 U.S. 575-78 (1996); *State Farm*, 538 U.S. at 413-23.

136. *See, e.g.*, C.J. Martin, Dardinger v. Anthem Blue Cross and Blue Shield: *Judicial Redistribution of Punitive Damage Awards*, 40 SAN DIEGO L. REV. 1649, 1668 n.123 (2003) (noting that punitive damages, unlike compensatory damages, are "unpredictable and unlimited").

137. For instance, evidence about the general reprehensibility of the defendant's conduct offered by a plaintiff in a tort case in which no punitive damages were sought would rightly be deemed inadmissible under Rule 403 because its potential to mislead or confuse the jury would outweigh its probative value. *See* FED. R. EVID. 403 (stating that relevant evidence may be excluded if its probative value is substantially outweighed by risk of unfair prejudice, confusion of the issues, or undue delay). This is because such evidence could only come in to judge the "outrageousness" of the defendant's conduct in order to determine if punitive damages are warranted, and thus could only mislead the jury in a case in which punitive damages are not sought. Hence, there would be no need for the new rule, based solely on punitive damages cases, to be applied.

138. Changing the impact of the Federal Rules of Evidence to conform to recent Supreme Court interpretations of the Constitution is far from a novel concept. *See, e.g.*, FED. R. EVID. 702 adv. comm. note. (noting the changes to the rule based on the Supreme Court's decisions in

for punitive damages is based on extraterritorial evidence, or similarly, evidence of conduct which is legal in the jurisdiction where it occurred.[139] Also, regardless of whether the conduct took place in the relevant jurisdiction, the rule should also be triggered when it appears that the defendant's actions lack a sufficient "nexus" to the harm suffered by the plaintiff.[140] In defining with greater specificity the "nexus" requirement, the comments to the rule should point out that, as stated in *State Farm*, the evidence must bear relation to the plaintiff's harm to escape the application of the rule.[141] For instance, evidence presented with the sole purpose of demonstrating that the defendant is an "unsavory individual," or is generally unfair in dealing with its employees or customers, will trigger the application of the rule.[142] Similarly, evidence of general corporate policies which resulted in little or no harm to the specific plaintiff, but could be seen as bad for society in general, would likewise be weighed by the new rule.[143] Clearly, the rule should also state the converse of the above—evidence that bears a strong relation to the harm alleged by the plaintiff and demonstrates the defendant's unlawful conduct within the relevant jurisdiction, would not trigger the rule.[144]

3. The Rule should impose a more stringent balancing test that displaces the test currently required by Rule 403 of the Federal Rules of Evidence.

The most important part of the new rule would be the portion defining its application. When triggered, the rule should require trial judges to perform a balancing test to determine whether the evidence in question should be admitted. Obviously, the rule should require judges to perform this test only after the judge determines that the proffered evidence meets the minimum standard of relevancy under

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Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993) and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)).

139. The Supreme Court in *Gore* criticized the use of both of these types of evidence under both the "Reprehensibility" and "Sanctions for Comparable Misconduct" prongs. *Gore*, 517 U.S. at 572, 579-80, 583-86.

140. *State Farm*, 538 U.S. at 422.

141. *Id.*

142. *Id.* at 423.

143. *See id.* (criticizing the trial court for admitting evidence which was characterized as demonstrating harm "minor to the individual but massive in the aggregate").

144. This Note does not suggest that the wealth of the defendant should be a trigger for the new rule, although the drafters may want to consider the personal wealth of the defendant as having a greater potential to mislead or prejudice the jury. For a discussion of how evidence of the defendant's wealth may unduly influence the jury, see Robbennolt, *supra* note 4, at 123-24, and Hull, *supra* note 75, at 445-47.

Rule 401.[145] More meaningfully, though, the rule should mandate that its balancing test should be undertaken by the trial court *in place of* the usual Rule 403 inquiry. Of the utmost importance, the new rule should remove the presumption in favor of inclusion which accompanies the ordinary Rule 403 analysis.[146] In other words, while the new balancing test should resemble the ordinary 403 test in requiring the judge to weigh the evidence's probative value against its potential to confuse, mislead, or unduly prejudice the jury,[147] the evidence should not be admitted unless its probative value outweighs the negative effects it may have. Furthermore, in addition to considering the evidence's potential to delay the proceedings or to confuse, mislead, or unduly prejudice the jury,[148] the trial court should also be required to consider the potential that inclusion would result in the jury punishing the defendant for "being an unsavory individual or business" instead of for its wanton conduct with respect to the specific plaintiff.[149]

The underlying policy behind these changes is clear. The comments to the new rule should indicate that this particular procedure should be employed in the new rule because of the peculiar and far-reaching dangers inherent in punitive damages cases. Such dangers include the fact that punitive damages are unpredictable, harder for juries to forecast, and provide greater potential for staggeringly large verdicts because of the lack of any sort of cap on the amount that juries can award.[150] Thus, inflammatory evidence can have a much bigger impact on the amount of the award than it could in cases where only compensatory damages are sought.

In providing further guidance in the application of the new balancing test, the comments to the rule should incorporate several important principles from *Gore* and *State Farm* which would give more relevant items of evidence a greater chance of overcoming the heightened burden in the new rule. First, both *Gore* and *State Farm* recognized that evidence of recidivism can be more probative than evidence of one-time malevolent conduct.[151] With this in mind, the

145. *See* FED. R. EVID. 401, 402 (admitting evidence that has the tendency to make the existence of a material fact more or less probable, unless otherwise excluded by the Rules).

146. Rule 403 allows the evidence to be admitted unless its probative value is "substantially outweighed" by its potential to mislead or confuse the jury, or to cause undue prejudice, delay, or waste of time. FED. R. EVID. 403.

147. *Id.*

148. *Id.*

149. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003).

150. *See generally* Martin, *supra* note 136 (explaining the dual nature of punitive damages, and defending the judiciary's right to award punitive damages to third party beneficiaries).

151. BMW of No. Am., Inc. v. Gore, 517 U.S. 559, 577 (1996); *State Farm*, 538 U.S. at 423.

comments to the rule should indicate that trial judges are free to treat evidence of recidivism as having greater probative value than ordinary evidence, provided that the pattern and practice of such conduct has a sufficient nexus to the harm complained of by the plaintiff.[152] The inquiry would thus mirror a Rule 404(b) inquiry into evidence regarding other crimes, wrongs, or acts by the defendant to show proof of intent, preparation, plan, or absence of mistake.[153] Evidence of recidivism, therefore, would have a good chance of admission under the new rule if it tended to show the defendant engaged in repeated, similar types of malevolence towards the plaintiff or people like the plaintiff. If the evidence were offered, however, simply to show two or more unrelated bad acts by the same defendant, just to demonstrate that he or she is "evil" and hence probably acted in an evil manner toward the plaintiff, the evidence would likely be deemed inadmissible, just as if Rule 404(b) were applied.[154]

In addition, the comments to the rule should also note that the probative value of a piece of evidence may also increase based on the underlying claim for punitive damages. The *Gore* case indicated as much, creating a functional hierarchy where violent torts were more reprehensible than non-violent torts, and where non-violent torts involving "affirmative acts of misconduct," such as "trickery and deceit," were more reprehensible than mere negligence.[155] Thus, the rule may want to counsel trial courts that where an application of the rule is particularly close, whether the stricter burden of the new rule should be imposed could depend on the underlying claim of the plaintiff. Evidence offered in tort cases involving battery, wrongful death, false imprisonment, and intentional infliction of emotional distress[156] should be considered more probative than evidence simply tending to show an economic injury resulting from a reckless or negligent disregard for the law.

Lastly, in terms of the limitations of the new rule, the drafters should be sure to state that the rule is not intended to displace or

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152. *State Farm*, 538 U.S. at 423. *State Farm* frames the inquiry in terms of reprehensibility—evidence of recidivism is more reprehensible than an individual instance of conduct, and hence may be punished more severely. *Id.* According to the Supreme Court, the pattern and practice inquiry should look to whether the past conduct replicates the current tort, and whether the "existence and frequency of similar past conduct" suggests a pattern of malevolence. *Id.* (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991)).

153. FED. R. EVID. 404(b).

154. FED. R. EVID. 404(b) adv. comm. note.

155. *Gore*, 517 U.S. at 575-76.

156. This is particularly true with regard to cases involving wrongful death by intentional act and in jurisdictions where intentional infliction of emotional distress claims can only be brought if they result in a physical injury.

override any other rule of evidence.[157] The only time where the new rule would trump an existing rule is when its balancing test would replace the Rule 403 inquiry in punitive damages cases where one of the rule's triggers has been met.[158] Therefore, the new rule would remain consistent with Supreme Court precedent holding that evidence which would be admissible under one rule but is deemed inadmissible under another rule may still be admitted by the trial court.[159] The effect of this provision would be that the new rule would not subvert the drafters' intent, embodied in the existing rules, that a relevant item of evidence be deemed admissible. The only exception to this statement would be the instance where a trial court would seek to admit evidence contrary to the spirit of *Gore* and *State Farm* cases, and then only if punitive damages were sought and the evidence would not be admissible under any other rule.

B. Application of the New Rule

The advantages of the proposed rule can clearly be realized when the rule is applied to a few specific factual scenarios. First, consider this hypothetical. Say Paula Plaintiff sues her employer, Donald Defendant in tort, for battery and sexual harassment under

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157. The suggested language of such a provision would be "This rule shall not be construed to limit the admission or consideration of evidence under any other rule except Rule 403." For similar language, see FED. R. EVID. 413(c), 414(c), and 415(c).

158. Of course, an alternative proposal would be for the new rule's balancing test to simply be performed before the Rule 403 inquiry, but the rule would still allow a trial judge the discretion to perform the ordinary 403 test afterwards. Practically, though, this proposal is somewhat less desirable because of the dearth of instances where a proffered item of evidence would overcome the new rule's test and then be deemed inadmissible by Rule 403. One of very few examples would be this: say Peter Plaintiff sues Don Defendant for the tort of battery in the mythical state of "Defendantland," where the state constitution affords extra protections to tort defendants in cases where the tort has a criminal counterpart. Say that one of the additional protections is that Defendant may exercise a right not to testify. Assume also that Defendantland has adopted the Federal Rules of Evidence in its entirety into the state code. In this case, Plaintiff's proffered evidence that Defendant had previously been convicted for assaulting Plaintiff's father and his brother under similar circumstances would arguably overcome the new rule's test—it is specific evidence indicating similar acts of violent malevolence in the past. If Defendant wished to stipulate to the fact of his conviction in a strategic move to prevent Plaintiff from presenting the specific details of the prior conviction, however, the proffered evidence of past conduct would arguably be deemed inadmissible under the less stringent 403 test. *See* Old Chief v. United States, 519 U.S. 172, 190 (1997) (holding that the prosecution's general interest in presenting its version of the facts carries very little weight when the point at issue is a defendant's uncontested legal status). Thus, in areas where tort defendants are afforded extraordinary testimonial protections, drafters may want to leave Rule 403 in effect residually after the application of the new rule.

159. United States v. Abel, 469 U.S. 45, 56 (holding that "there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case.").

Title VII of the United States Code,[160] seeking compensatory and punitive damages. Plaintiff claims that Defendant repeatedly subjected her to unwanted sexual contact at work while she was in his employ. Plaintiff also wants to present evidence that Defendant has two prior criminal convictions for fondling female employees, against their consent, for the purposes of his sexual gratification during working hours. This scenario would arguably not even trigger the new rule, if the conduct was sufficiently similar or it fell within a jurisdictional exception for sex-based offenses. Even if it did, however, because the previous instances occurred out-of-state or the previous claims were not sufficiently similar to the plaintiff's allegation, the balancing test mandated by the new rule would, appropriately, allow the trial court to admit this evidence.

First, the trial judge would correctly note that the probative value of this evidence is high, indicating recidivism and a pattern and practice of battering subordinate women. Furthermore, the judge would heed the comments to the rule that indicate that violent torts are more likely to overcome the rule than economic ones. Next, the nexus of these instances to the harm suffered by the plaintiff should easily overcome the prejudicial value of the evidence. Finally, even if the judge wavered under the new rule because of the danger that a jury may award excessive punitive damages based solely on the fact that the defendant was a "bad person," the provision that the new rule cannot be used to limit the application of any other rule would force the trial court to admit the evidence under Rule 415.[161] Thus, the new rule would not sweep too broadly in requiring courts to declare inadmissible previously relevant and admissible evidence of related malevolent conduct.

More examples of the benefits of the new rule can be realized by applying the new rule to prior cases. First, consider *Avery*.[162] In *Avery*, as discussed above, the trial court erred in at least two respects. First, the court allowed a plaintiff's witness to testify that the defendant insurer encouraged the use of non-OEM (original equipment manufacturer) parts nationwide, despite the fact that such practice was permitted, if not encouraged, in several states outside of

160. *See* 42 U.S.C. § 2000e-2. The Court has recognized that sexual harassment and hostile work environment claims are both actionable under Title VII, even though neither of these terms appear in the statute. Burlington Indus. v. Ellerth, 524 U.S. 742, 751-52 (1998).

161. *See* FED. R. EVID. 415(a) (providing that in civil cases based on sexual assault, evidence of a party's commission of another offense of sexual assault is admissible as provided in Rules 413 and 414).

162. Avery v. State Farm Mutual Auto. Ins. Co, 746 N.E.2d 1242 (Ill. App. Ct. 2001) (*Avery I*).

Illinois, the home jurisdiction.[163] Secondly, the court allowed the plaintiff to show a videotape of a corrosion test of a non-OEM fender, despite the fact that there was no evidence to show any policy holder in the class period ever had such a fender installed.[164]

Under the new rule, both of these errors would be corrected. With respect to the evidence of the insurer's encouraged use of non-OEM parts in other jurisdictions, this would trigger the new rule in two separate ways—the evidence seeks to punish based on extraterritorial conduct, and the evidence demonstrates conduct which was not illegal where it occurred. An application of the rule would then remove the presumption in favor of admission in ordinary circumstances,[165] and force the trial court to note the danger of this evidence misleading the jury, as well as the danger that it will result in the defendant being punished simply because it has behaved (arguably) unscrupulously in an unrelated context. Thus, the evidence of the use of non-OEM parts outside of the home jurisdiction would fail the new rule's test, and would be deemed inadmissible.

The court would reach the same result with respect to the corrosion test. Since it could not be proved that a member of the class within the jurisdiction actually used such a non-OEM fender, evidence of such conduct would trigger both the "not illegal where it occurred" and "nexus" prongs of the new rule. The probative value would be deemed low because the evidence does nothing to prove fraud within the class, and the danger of misleading and prejudicing the jury would be deemed high by the trial judge under the rule, due to its potential to make the defendant appear "unscrupulous" in general, and not culpable with respect to the specific allegation of fraud. The trial court would have no alternative but to declare the evidence inadmissible.

Another case which would come out differently under the new rule is *Jimenez v. DaimlerChrysler Corp.*[166] In *Jimenez*, the trial court rightly admitted expert testimony suggesting that the car manufacturer had negligently designed a liftgate with a "headless striker" latch, causing the liftgate to fly open upon impact.[167] The expert did not testify, however, that other improvements to the overall

163. *Id.* The use of non-OEM parts was deemed illegal in Illinois but not in other states. *See also* Hull, *supra* note 75, at 441 (noting that the jury award in *Avery* was directed at a practice that was prohibited in Illinois, but legal in other states).

164. *Avery I*, 746 N.E.2d at 1262 (unpublished portion under Illinois Supreme Court Rule 23, see 166 Ill. 2d R. 23 (2005)).

165. *See* FED. R. EVID. 403 (stating that relevant evidence may be excluded if its probative value is substantially outweighed by risk of unfair prejudice, confusion of the issues, or undue delay).

166. 269 F.3d 439 (4th Cir. 2001).

167. *Id.* at 456.

strength of the latch would have prevented the liftgate from opening. Despite this, the trial judge allowed the plaintiff to present evidence of other accidents allegedly caused by the latch's overall weakness, and not the specific fact that the latch did not have a head.[168]

Under the new rule, the evidence of other accidents would not have been admitted. The fact that the accidents were based on a design decision not proven to be negligent by the plaintiff in this case would trigger the rule by appearing to be outside of the "nexus" requirement of the rule. Accordingly, the presumption of admissibility in place under Rule 403 would disappear,[169] and the trial judge would note that the evidence's probative value is low compared to its potential to mislead or confuse the jury. Specifically, the new rule would suggest that there is a heightened danger in this particular case of the jury rendering a high punitive damages award on the assumption that the car manufacturer unscrupulously designs weak latches in general, and not because the headless latch design was particularly reckless and wanton and caused the plaintiff's injury. Furthermore, if it were a close decision, the trial court could note the rule's instructions that torts based on mere negligence are more likely to fall within the prohibition than torts involving affirmative misconduct.

Lastly, the decision in *John Deere Co. v. May* provides a particularly useful factual scenario for applying the new rule.[170] In that case, the plaintiff's estate instituted a products liability and wrongful death suit against a bulldozer manufacturer, claiming that the "dozer" was negligently designed to shift into gear despite being locked in neutral.[171] The plaintiff wanted to admit as evidence a videotape of such an occurrence, as well as evidence of a different products liability suit involving a self-shifting dozer.[172] The defendant objected, noting that the videotape and the prior lawsuit involved a different model dozer, with different adjustments, and dissimilar amounts of wear and tear on the transmissions.[173] The trial court admitted the evidence after applying the balancing test mandated by Texas's equivalent of Rule 403.[174]

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168. *Id.* The Fourth Circuit found this evidentiary determination to be in error, yet inexplicably found the error to be harmless. *Id.*

169. FED. R. EVID. 403.

170. 773 S.W.2d 369 (Tex. App. 1989).

171. *Id.* at 371.

172. *Id.* at 371-72.

173. *Id.* at 372.

174. *Id.* The trial court, later in the trial, did give the jury a weak limiting instruction with respect to the prior case, but not with respect to the videotape. *Id.* at 374-75. The Court of Appeals of Texas, Waco Division, affirmed the decision of the trial court. *Id.* at 372. Although

Under the new rule, this factual scenario may or may not have come out differently, but at least it would have been given more than the cursory examination given by the trial and appellate courts in this case. First, the fact that the proffered evidence involved different dozers with different levels of wear would probably have created enough of a "nexus" problem to trigger the rule and its stricter balancing test. When applied, the trial court would have to note the substantial probative value of the evidence—namely, the repeated instances of self-shifting in similar models under similar circumstances.[175]

The potential to prejudice the jury and to disadvantage this defendant in particular, however, would also be very high. Initially, there is the danger that the jury would infer that the defendant was grossly negligent based on malfunctions of different, older models. Furthermore, there is the specific danger that substantial punitive damages would be awarded based only on the prior acts or on the supposition that all of this defendant's products are "bad" because models with more wear had failed in the past. The new rule counsels that the trial court should then look to the underlying claim in such close cases. Here, the underlying claim alleged both affirmative misconduct—a knowing failure to warn with conscious indifference to the result—and simple negligence—with regard to the products liability claim.[176] In the end, the evidentiary determination would probably come down to how well the plaintiff alleged the affirmative misconduct portions of his claim. If the plaintiff could compile ample evidence that the manufacturer knew of the defect, and it could be inferred that there was a reasonable probability that defect was not model-specific, than the evidence should probably go to the jury.[177] If this were just a subsidiary claim with little evidence to suggest its

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outside the scope of this Note, it is interesting to note that that court also misread state products liability precedent in affirming the decision. John Deere claimed that the evidence should not have been admitted because the plaintiffs failed to prove that the other incidents had occurred under "reasonably similar" circumstances. *Id.* The court rejected the argument that the incidents did not occur under reasonably similar circumstances. *Id.* In butchering the standard for reasonably similar circumstances, the court stated "Deere's . . . argument, that the dozers had to be reasonably similar before there could be a reasonable similarity of circumstances, is rejected because that would have required proof of identical circumstances. Identical circumstances are not required." *Id.*

175. *Id.* at 371-72.

176. *Id.* at 371-73. The products claim was based in part on a conscious decision not to alter the dozer further despite knowledge of existing problems. *Id.*

177. *State Farm* noted that evidence of lawful, extraterritorial conduct may be considered more probative when it demonstrates the "deliberateness and culpability of the defendant's action in the state where it is tortious," and it has the sufficient "nexus" to the plaintiff's alleged harm. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003).

validity, however, then the policy of avoiding inflammatory evidence with a high potential to prejudice the jury, particularly in regard to large corporate defendants, should control.

This last hypothetical raises one final but extremely important point about the purpose and limitation of the new rule that this Note proposes. A balancing test can never fully cabin the discretion of a trial judge, and this Note does not propose that this would be a good idea.[178] It is clear, however, that trial courts are continuing to take advantage of the existing balancing test and admitting evidence that is misleading the jury, resulting in skewed punitive damages awards. To the effect that this new rule leaves some discretion in the trial judge to make evidentiary determinations under a balancing test, it does so in a significantly restricted manner. Hence, it is an unqualified improvement on the existing punitive damages regime.

VI. CONCLUSION

As *Gore*, *State Farm*, and their aftermath prove, there is no simple answer when it comes to balancing the competing ideals of punishing and deterring harmful conduct and minimizing the risk of "arbitrary deprivations of property" under the Due Process Clause.[179] Add to this the larger problem that these conflicting goals butt heads inside the greater context of a tort system that is struggling for a new identity,[180] and it becomes almost impossible to forge a consensus.

One point, however, remains clear. Punitive damages verdicts have reached an unhealthy level in this country. While many commentators have focused on different solutions, this Note embraces the practical and efficient notion that reform should start at the trial level, whether or not the decisions in *Gore* and *State Farm* require it. By preventing fact finders, by way of statute, from even considering the type of barely relevant and highly misleading evidence criticized by the Supreme Court, the American legal system can take an important step toward striking the delicate balance so desperately needed in punitive damages cases today. With this in mind, the best way of influencing trial judges is by amending the Federal Rules of Evidence, and substantially similar state provisions, to indicate why

178. As the advisory comments to Rule 404(b) state, there can be no mechanical solution to tough evidentiary questions. FED. R. EVID. 404(b) adv. comm. note.

179. Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994).

180. *See generally* Goldberg, *supra* note 102 (analyzing the various idealized theories of tort law).

and how the evidence at issue in *Gore* and *State Farm* should be excluded. Not only will this solution restore uniformity and efficiency to the punitive damages regime, but it will constitute an important step back toward a system which, consistent with Due Process, only seeks to punish a defendant and reward a plaintiff on the basis of their individual interaction with each other, and not the sum of their dealings with society as a whole.

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How *Mead* Has Muddled Judicial Review of Agency Action

Lisa Schultz Bressman *58 Vand. L. Rev. 1443 (2005)*

In United States v. Mead Corp., *the Supreme Court held that an agency is entitled to* Chevron *deference for interpretations of ambiguous statutory provisions only if Congress delegates, and the agency exercises, authority to issue such interpretations with "the force of law." The Court did not define "force of law," and thus did not determine what type of agency procedures fit within* Mead. *Four years have passed since the Court decided* Mead, *and despite numerous court of appeals decisions, we still do not know when an agency is entitled to* Chevron *deference for interpretations issued through procedures less formal than notice-and-comment rulemaking or formal adjudication. Lower courts agree that, after* Mead, *agencies must issue interpretations in formats that reflect some indicia of lawmaking authority. But they lose focus thereafter. First, lower courts employ different analytical frameworks to determine the relevant indicia of lawmaking authority, making* Chevron *deference turn more on the decisional preference of a particular court than on the procedural choice of a particular agency. Second, lower courts cite uncertainty about* Mead *as a reason to avoid extending* Chevron *deference exclusively or at all, and take easier routes that may restrict agency interpretive flexibility. Finally, lower courts read* Mead *to address a question more general than intended – namely, whether agencies possess delegated authority to issue interpretations governing the scope of their own authority, even through notice-and-comment rulemaking. In the process, they ignore what little guidance* Mead *provides on the significance of notice-and-comment rulemaking for* Chevron *eligibility. If justified in so doing, they nonetheless turn the decision somewhat on its head, reading it as relevant to determining when an explicit delegation of interpretive authority is necessary rather than when an implicit one is present. As Justice Scalia predicted in his dissent, the consequences of* Mead *have not been good.*

After surveying the chaos in the lower courts, this Article calls for a new approach to Chevron *analysis that accommodates procedural innovation within defined bounds. Thus, the Article finds little help in Justice Breyer's recent effort in* National Cable & Telecommunications Ass'n v. Brand X Internet Services *to clarify* Mead. *And it neither advocates Justice Scalia's solution of abandoning the focus on procedural formality nor endorses the Court's current position, which recognizes the significance of procedural formality but permits Congress or agencies unbounded room to create procedures that are more efficient than the relatively formal ones we have come to accept for administrative lawmaking. The Article could defend a formalistic approach that restricts* Mead *to notice-and-comment rulemaking or formal adjudication. But it ultimately argues for a more nuanced approach that allows Congress to design and agencies to invoke informal procedures without sacrificing* Chevron *eligibility so long as those procedures generate interpretations that are transparent, rational, and binding. It further contends that this approach is consistent with the best reading of* Mead *and its erstwhile partner,* Barnhart v. Walton.