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INTRODUCTION

In its 2003 decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*,[1] the United States Supreme Court elaborated on three "guideposts" that it had previously announced for reviewing whether the amount of a punitive damages award is so excessive as to violate federal due process.[2] With respect to the first guidepost – the reprehensibility of the defendant's conduct – *Campbell* narrowed the ability of courts to consider conduct of the defendant beyond that which harmed the plaintiff.[3] With respect to the second guidepost – the disparity between the punitive award and the dollar amount representing harm to the plaintiff –

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1. 123 S. Ct. 1513 (2003).

2. *Id.* at 1521-26. In 1996, the Supreme Court announced three guideposts for reviewing whether a punitive damages award is so excessive as to violate due process: (1) the degree of reprehensibility of the defendant's conduct, (2) the ratio between compensatory damages and punitive damages, and (3) the difference between punitive damages and civil and criminal penalties for comparable misconduct. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574-85 (1996).

3. *See infra* Part I.

Campbell set forth numerical guidelines, although not "rigid benchmarks."[4] It stated that "few awards exceeding a single-digit ratio . . . to a significant degree, will satisfy due process," and that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety."[5] As for the third guidepost – comparing punitive damages to civil and criminal penalties for similar misconduct – *Campbell* downplayed the relevance of criminal sanctions in determining whether a punitive award is unconstitutionally excessive.[6]

Campbell involved claims against State Farm for fraud, intentional infliction of emotional distress, and bad faith refusal to settle within insurance policy limits. The state court jury had awarded $1 million in compensatory damages for emotional distress and $145 million in punitive damages.[7] Analyzing the case under the three guideposts, the Court concluded that the punitive award was unconstitutionally excessive and suggested that a punitive award approximately equivalent to the amount of compensatory damages might be justified.[8] The Supreme Court remanded the case to the state court for calculation of the punitive award in light of the principles articulated in *Campbell*.[9]

Six months after the *Campbell* decision, the United States Court of Appeals for the Seventh Circuit, in *Mathias v. Accor Economy Lodging*, upheld a punitive award in a case involving bedbug infestation of a Motel 6.[10] The two plaintiffs had been bitten by bedbugs while staying in the motel. Evidence at trial indicated that the motel management had long known of the infestation throughout the motel, but did not exterminate, and that management instructed desk clerks to call the creatures "ticks."[11] The jury awarded each plaintiff $5,000 in compensatory

4. *Campbell*, 123 S. Ct. at 1524.

5. *Id.* (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991); *Gore*, 517 U.S. at 581).

6. *Id.* at 1526.

7. *Id.* at 1519.

8. *Id.* at 1526 ("An application of the *Gore* guideposts to the facts of this case . . . likely would justify a punitive damages award at or near the amount of compensatory damages. . . . The proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts.").

9. *Id.*

10. 347 F.3d 672 (7th Cir. 2003).

11. *Id.* at 675.

damages and $186,000 in punitive damages.[12] A news article on the oral argument before the Seventh Circuit reported that Judge Richard Posner, who later authored the opinion for the court, was curious about the defendant's motivation to appeal:

> "Why are you appealing?" Posner asked. "I'm puzzled by this. It's a very small amount of money. You want your bedbug experience to be discussed at length in the Federal Reporter?"
>
> The bedbug experience was beside the point, [the defendant's lawyer] explained. It was the punitive damages that really had crawled under the corporation's skin—especially since the plaintiffs had received only a $10,000 compensatory award. An inquisitive Posner pressed on.
>
> "Are there a lot of bedbug cases?" he asked. "Are you worried about a flood of bedbug cases? Is this the first of thousands, or what?"[13]

The Seventh Circuit upheld the punitive award.[14] Notwithstanding the relatively low financial stakes, the "bedbug" case is important for Judge Posner's exposition of the purposes of punitive damages and for his reaction to *Campbell*.

In this essay, I address just a few of the many issues arising from *Campbell* and *Mathias*. In Part I, I discuss *Campbell*'s assertion that a punitive award may punish only conduct directed at the plaintiff. This assertion raises questions about the continuing vitality of the notions that recidivists may be punished more severely than one-time offenders and that a legitimate purpose of punitive damages is to deter unlawful conduct. I also examine how conduct directed at others than the plaintiffs came into play in *Mathias*. In Part II, I address various constitutional issues surrounding how a punitive award may punish. Specifically, I explore how *Campbell*, *Mathias*, and some other cases have gauged the disparity between the amount of punitive damages and the harm to the plaintiff. I also consider a separate issue regarding how to

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12. *Id.* at 674.

13. John Gibeaut, *Bugs Bite Guests, but Punitives Gnaw at Hotel: 7th Circuit Upholds Damages Over Bedbug Infestation*, 2 A.B.A. J. EREPORT 43, para. 4-6 (Oct. 31, 2003), *at* WL 43 ABAJEREP 3.

14. *Mathias*, 347 F.3d at 678.

punish – whether a low probability of detection or punishment of the defendant's unlawful conduct justifies a larger punitive award. *Campbell* decided that on the facts of that case, the low probability that the defendant would be punished for its many other instances of misconduct was irrelevant; *Mathias*, by contrast, asserted that the defendant's efforts to escape detection supported the punitive award in that case.

I. PUNISHABLE CONDUCT

Prior to *Campbell*, some courts allowed punitive awards to punish a broad course of conduct by defendants.[15] The Supreme Court in *Campbell* indicated that such a use of punitive damages violates due process. The Court stated that the "defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."[16] Part of the Court's motivation for this rule seems to be rooted in a concern about multiple punishment for the same conduct. That is, if a single award punishes both defendant conduct that harmed the plaintiff and defendant conduct that has harmed or may harm others, there is the possibility that a case brought by a subsequent plaintiff will result in a punitive award against the defendant for conduct already punished in the prior suit. *Campbell* warned that courts may not "adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis."[17] The Court noted, however, that evidence of similar acts by the defendant having "a nexus to the specific harm

15. *See, e.g.*, Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Cal. Ct. App. 1981). *Grimshaw*, a widely cited case involving the Ford Pinto, has been one of the leading cases on the use of punitive damages to punish a broad course of conduct by the defendant. At least one California appellate court has held that *Campbell* has undermined much of *Grimshaw*. *See* Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 801-03 (Cal. Ct. App. 2003).

16. State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1523 (2003). The Supreme Court also noted that a court may not award "punitive damages to punish and deter conduct that b[ears] no relation to the [plaintiff's] harm." *Id.*

17. *Id.* The Supreme Court also discussed out-of-state conduct in detail. First, an award may not punish conduct that was lawful where it occurred. *Id.* at 1522. Second, an award may not punish unlawful out-of-state conduct, because the state ordinarily has no legitimate interest in punishing a defendant for unlawful acts committed elsewhere. *Id.* at 1521-23.

suffered by the plaintiff" may be "probative when it demonstrates the deliberateness and culpability of the defendant's action."[18]

The reference in *Campbell* to "other parties' hypothetical claims" was included in the Supreme Court's discussion of the dissimilar conduct of State Farm that apparently had been punished by the state court.[19] However, given the Supreme Court's concern about multiple punishment for the same conduct, the Court's language arguably indicates that even conduct that is similar to that directed towards the plaintiff is not a permissible basis for a punitive award.[20]

While seemingly suggesting that an award may not punish conduct that was directed at someone other than the plaintiff, *Campbell* did reaffirm the notion – widely accepted in the criminal context – that repetitive misconduct may be punished more severely than first-time misconduct.[21] After acknowledging that recidivists may be punished more severely than first-time offenders, the Court cautioned that repeat misconduct in the civil context is relevant only when related to the conduct directed at the plaintiff.[22]

As an abstract matter, it is possible to distinguish between punishing the defendant more severely for repeat misconduct (which the Court suggests is permissible) and punishing the defendant for conduct other than that directed at the plaintiff (which the Court suggests is impermissible). The *status* of the defendant as a repeat wrongdoer is what justifies more severe punishment for the conduct directed at the plaintiff. By contrast, the *conduct* of the defendant directed at others may not be directly punished.

As a practical matter, it may be difficult to distinguish between enhanced punishment for recidivism and direct punishment

18. *Id.* at 1522.

19. *Id.* at 1516.

20. The Supreme Court suggested, however, that conduct directed at nonparties "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." *Id.* at 1522.

21. *Id.* at 1523 ("'[O]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance . . . .'" (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 577 (1996))).

22. *Id.*

of misconduct other than that directed towards the plaintiff. To prove the defendant's deliberateness and culpability, *Campbell* allows the introduction of evidence of defendant misconduct that is related to the misconduct directed at the plaintiff. After *Campbell*, however, the body making the decision about the amount of punitive damages (usually the jury) apparently is barred from using this evidence to punish the defendant's broad course of conduct. Judicial monitoring of the lawyers' arguments and careful phrasing of jury instructions are possible ways for reconciling the rule that similar conduct may be introduced with the rule that only conduct directed at the plaintiff may be punished.

In *Campbell*, the Supreme Court thought it evident from the trial record and the state court opinions that the punitive award did punish more than conduct directed at the plaintiff.[23] Compare this to *Mathias*, in which the Seventh Circuit stated that "it [was] probably not a coincidence" that the total award for each plaintiff equaled $1,000 per room in the hotel.[24] If the *Mathias* jury did select the amount by a sanction per room, then one might argue that the jury had punished the conduct of the defendant directed at others – i.e., guests who stayed in the other 190 rooms of the bedbug-infested hotel. If other guests brought their own bedbug complaints, and received punitive awards, then the defendant would be subjected to multiple punishment for the same conduct.

Judge Posner did not discuss whether the award impermissibly punished conduct directed at others. Rather, he emphasized that the selection of an amount of punitive damages is necessarily arbitrary.[25] He noted that "as there are no punitive-damages guidelines, corresponding to the federal and state sentencing guidelines, it is inevitable that the specific amount of punitive damages awarded whether by a judge or by a jury will be arbi-

23. *Id.* (stating that "we have no doubt" that the Utah Supreme Court had upheld the punitive award by allowing "the merits of other parties' hypothetical claims against the defendant" to be included). In support, the U.S. Supreme Court quoted the Utah Supreme Court: "Even if the harm to the Campbells can be appropriately characterized as minimal, the trial court's assessment of the situation is on target: 'The harm is minor to the individual but massive in the aggregate.'" *Id.* (citation omitted).

24. Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 678 (7th Cir. 2003) ("It is probably not a coincidence that $5,000 + $186,000 = $191,000/191=$1,000: i.e., $1,000 per room in the hotel.").

25. *Id.*

trary."[26] He added that "[t]he judicial function is to police a range, not a point."[27] In other words, the method apparently chosen by the *Mathias* jury to fix an amount of punitive damages was as legitimate as any other method that does not result in a "grossly excessive" punitive award. If the due process requirement, as indicated in *Campbell*, is that a punitive award not punish conduct directed at others, then regulating the evidence that is introduced at trial and crafting careful jury instructions – rather than scrutinizing the amount of the punitive award – would seem to be the most effective way to meet this requirement.

Another question that arises from *Campbell*'s instruction that a punitive award should not punish conduct directed at others is whether and how a punitive award is to achieve its traditional goal of deterring the defendant and others from committing similar acts.[28] If the punitive award is limited to punishing conduct directed at the plaintiff, then it is possible that the punitive award in the individual case will not serve as a deterrent. *Campbell*, although acknowledging that punitive damages may aim at deterrence,[29] does not discuss how a punitive award based solely on conduct directed at an individual plaintiff can achieve this goal if the defendant engaged in conduct harming many.[30] If the Court believes that deterrence remains a legitimate objective of punitive damages, then perhaps the deterrence must come through either

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26. *Id.*

27. *Id.*

28. *See, e.g.*, *Campbell*, 123 S. Ct. at 1519 ("[P]unitive damages serve a broader function [than compensatory damages]; they are aimed at deterrence and retribution."); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.").

29. *See supra* note 28.

30. Two post-*Campbell* cases in California illustrate the differing views of how the deterrence function has been affected by *Campbell*. *Compare* Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 805 & n.7 (Cal. Ct. App. 2003) (finding error in instruction that jury could consider "[t]he amount of punitive damages which will have a deterrent effect on the defendant in light of defendant's financial condition" because it did not restrict the jury to punishment and deterrence based solely on the harm to the plaintiffs), *with* Simon v. San Paolo U.S. Holding Co., 7 Cal. Rptr. 3d 367, 391 (Cal. Ct. App. 2003) (asserting that the amount of a punitive award should "further the California public policy of punishing the defendant and making an example, in order to discourage him and others from perpetrating fraud in the future").

class actions or the cumulative impact of individual punitive awards in individual suits.

II. HOW TO PUNISH

Once conduct is deemed punishable, the question then arises as to constitutional constraints on how to punish. *Campbell* and *Mathias* both discuss at some length the guidepost that there be a reasonable relationship between the amount of the punitive award and the harm to the plaintiff. The harm to the plaintiff commonly is represented by the award of compensatory damages, but it may also be represented by the actual harm suffered by the plaintiff beyond what is legally compensable, and it may be represented by the potential harm to the plaintiff threatened by the defendant's conduct. Separate from issues concerning the ratio analysis are questions about how a low probability of detection or punishment of the defendant's misconduct should influence the analysis of whether a punitive award is unconstitutionally excessive. In this part, I will address how *Campbell*, *Mathias*, and some other cases have approached the disparity between a punitive award and the harm to the plaintiff. I will then turn to the remarks in *Campbell* and *Mathias* about the relevance to the excessiveness inquiry of a low probability of detection or punishment.

A. *Disparity Between Punitive Award and Harm to Plaintiff*

The Supreme Court prior to *Campbell* had indicated that whether a punitive award is unconstitutionally excessive depends in part on the disparity between the punitive award and the compensatory award.[31] *Campbell* commented that on the facts of the case before it, "we have no doubt there is a presumption against an award that has a 145-to-1 ratio."[32] Prefacing this remark, the Court stated:

> We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a

31. *See Gore*, 517 U.S. at 580-83; TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 459-62 (1993); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991).

32. *Campbell*, 123 S. Ct. at 1524.

> single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process . . . . [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.[33]

In light of this language, some courts have vested the "single-digit multiplier" concept with great significance;[34] at least one court has suggested that a 4 to 1 ratio is the outermost limit permissible under *Campbell*.[35] The opinion in *Mathias*, by contrast, asserted: "The Supreme Court did not . . . lay down a 4-to-1 or single-digit ratio rule – it said merely that 'there is a presumption against an award that has a 145-to-1 ratio' – and it would be unreasonable to do so."[36]

Judge Posner upheld the punitive to compensatory ratio of 37.2 to 1 in *Mathias* in part because "[t]he defendant's behavior was outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional."[37] The notion that a small compensatory award might justify a ratio between punitive and compensatory damages greater than a single-digit multiplier has some support in the *Campbell* opinion. The Supreme Court in *Campbell* asserted that due process may permit "ratios greater than those we have previously upheld" when "'a particularly egregious act has resulted in

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33. *Id.* (citing *Haslip*, 499 U.S. at 23-24).

34. *See, e.g.*, Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1044 (9th Cir. 2003) (upholding a 7 to 1 ratio and stating, "We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case"); *Romo*, 6 Cal. Rptr. 3d at 812 (holding that a punitive damages award more than ten times the amount of compensatory damages was unconstitutionally excessive and stating that "a punitive damages award of triple the compensatory award to the individual plaintiffs would be constitutionally reasonable"); *Simon*, 7 Cal. Rptr. 3d at 393 ("The amount awarded here, $1,700,000, is only $80,000 more than a 1 to 4 ratio given the actual harm of $405,000, which we find insignificant for purposes of the due process analysis under *State Farm*.").

35. Diamond Woodworks, Inc. v. Argonaut Ins. Co., 135 Cal. Rptr. 2d 736, 760-61 (Cal. Ct. App. 2003) ("[W]ith regard to the ratio of punitive damages to compensatory damages, however, we have no doubt that anything exceeding four-to-one would not comport with due process under *Campbell*.").

36. Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 676 (7th Cir. 2003) (citation omitted).

37. *Id.* at 677.

only a small amount of economic damages'" or when "'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.'"[38] On the other hand, when compensatory damages are substantial, *Campbell* suggested that "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[39]

It is important to stress that in both *Campbell* and its prior decisions, the Supreme Court spoke not only of the ratio between punitive damages and compensatory damages, but also of the disparity between punitive damages and actual harm or potential harm to the plaintiff.[40] For example, in *TXO Production Corp. v. Alliance Resources Corp.*,[41] the Supreme Court stated that reviewing courts should inquire into "'whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred.'"[42] *TXO* upheld a $10 million punitive award, when compensatory damages were only $19,000; the Court suggested that the *potential* harm to the plaintiff if the defendant's tortious plan had succeeded was at least $1 million.[43] The Court then concluded that the ratio of not more than 10 to 1 did not "'jar one's constitutional sensibilities.'"[44] *Campbell* reaffirmed the notion that reviewing courts should compare the plaintiff's harm, or potential harm, to the punitive damages award.[45]

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38. *Campbell*, 123 S. Ct. at 1524 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996).

39. *Id.*

40. *See, e.g.*, *id.* at 1520 (stating that *Gore* instructs courts to consider "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award"); *Gore*, 517 U.S. at 575, 582-83; TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993) (holding that a ratio of ten times the potential harm to plaintiffs "was not so 'grossly excessive' as to violate due process," although it was 526 times greater than the actual damages awarded by the jury).

41. 509 U.S. 443 (1993).

42. *Id.* at 460 (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21 (1991)).

43. *Id.* at 462.

44. *Id.* ("While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme.").

45. *See Campbell*, 123 S. Ct. at 1524; *Gore*, 517 U.S. at 582 & n.35.

A court's focus on the "actual harm" to the plaintiff as opposed to the compensatory damages awarded may make a profound difference in how the ratio is analyzed. For example, in a post-*Campbell* decision, a California appellate court upheld a punitive damages award that was 340 times greater than the amount of compensatory damages awarded.[46] The court reasoned that the actual harm to the plaintiff was much greater than that reflected in the compensatory award – the plaintiff had been denied the "benefit of the bargain," a type of loss that under the facts of the case was *not* compensable under California law.[47] By calculating actual harm to include the loss of the benefit of the bargain, the court determined that the ratio between punitive damages and plaintiff harm was approximately 4 to 1.[48]

Another post-*Campbell* decision involving interesting issues about "actual harm" is a recent federal district court opinion in the Exxon Valdez oil spill litigation.[49] In reviewing a $5 billion punitive damages award, the federal district court judge based the actual harm to the thousands of plaintiffs not only on the aggregate of several compensatory awards, but also on amounts that Exxon had paid in pre-judgment payments and settlements.[50] The Ninth Circuit, however, had previously stated in the same litigation that "[t]he amount a defendant voluntarily pays before judgment should generally not be used as part of the [ratio analysis], because that would deter settlements prior to judgment."[51] In response, the trial judge asserted that this "general rule" did not apply to the litigation at hand because the jury had been specifically instructed that in determining the amount of punitive damages, it could consider in mitigation the voluntary payments that Exxon had made before the judgment.[52] The Exxon Valdez litigation thus raises the important question whether "actual harm" for

46. Simon v. San Paolo U.S. Holding Co., 7 Cal. Rptr. 3d 367, 383-93 (Cal. Ct. App. 2003).

47. *Id.* at 388.

48. *Id.* at 387-91 (noting in a real estate fraud case that compensatory damages, based on out-of-pocket expenses, were $5,000, but that harm to plaintiff was $400,000 more, based on its loss of the "benefit of the bargain," even though such a loss is not compensable under California law).

49. *In re* the Exxon Valdez, 2004 WL 170354 (D. Alaska 2004).

50. *Id.* at *22.

51. *In re* the Exxon Valdez, 270 F.3d 1215, 1244 (9th Cir. 2001).

52. *In re* the Exxon Valdez, 2004 WL 170354 at *23.

purposes of the ratio analysis should be discounted based on voluntary payments made by the defendant before judgment.

Comparison to "potential harm" might make an even bigger difference than comparison to "actual harm" in how a reviewing court will perceive the disparity between punitive damages and plaintiff harm. *TXO* is one example of this. Another example arises from a current case in which Alabama has asserted that Exxon intentionally underpaid natural gas royalties to the state.[53] In November 2003, the jury awarded Alabama $11.8 billion in punitive damages and $63.6 million in compensatory damages – a ratio of 180 to 1.[54] The trial judge subsequently ordered that the award of punitive damages be remitted to $3.5 billion, which is approximately 55 times the amount of compensatory damages.[55] In finding a punitive award of $3.5 billion consistent with state and federal constitutional constraints, the judge considered the relevant ratio to be that between punitive damages and the potential harm to the state if Exxon's wrongful conduct had not been discovered (a ratio that, depending on the estimate of potential harm used, was either approximately 9 to 1 or 4 to 1).[56]

In sum, while *Campbell* has language that seemingly tightened the permissible ratios between punitive damages and compensatory damages, it left open the possibility that higher ratios might be justified in certain circumstances. Several courts have read *Campbell* to impose a limit of a single-digit multiplier. Judge Posner's opinion in *Mathias* is an exception, with its emphasis on the slight amount of compensatory damages and the egregiousness of the defendant's behavior. Moreover, *Campbell* did not re-

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53. *See* Dee McAree, *Punitives War has New Battleground: Exxon Loses a Huge Verdict in Alabama*, 26 NAT'L L. J. 13 (Nov. 24, 2003) (discussing State of Alabama v. Exxon Corp., CV-99-2369 (Montgomery County Cir. Ct., Ala. 15th Cir.))

54. *Id.*

55. Alabama v. Exxon Corp., No. 99-2368 (Montgomery County Cir. Ct., Ala. 15th Cir. Mar. 29, 2004) (post-judgment order).

56. The trial judge noted that expert testimony indicated Exxon's anticipated gain from its wrongful conduct was $930 million, and that a more conservative estimate of the anticipated gain was $386 million. Based on the "conservative calculation" of $386 million, the trial court determined that "an award of $3.5 billion in punitive damages would necessarily preserve a single-digit ratio between punitive damages and anticipated gain." *Id.* With respect to the $930 million calculation, the court observed that a $3.5 billion punitive award would produce a 3.75 to 1 ratio. *Id.*

vise the notion that actual or potential harm to the plaintiffs (as opposed to merely the amount of compensatory damages awarded) could be considered by a reviewing court in determining whether a punitive award is grossly excessive. This has produced differing views in the lower courts as to how to fix a dollar amount on the plaintiff's harm for purposes of comparison to the punitive damages award.

B. *Low Probability of Detection or Punishment*

Prior to *Campbell*, the Supreme Court had stated that a higher ratio between punitive and compensatory damages might "be justified in cases in which the injury is hard to detect."[57] *Campbell* reaffirmed this statement in reviewing the $145 million punitive award against State Farm.[58] The Utah Supreme Court had upheld the award in part because "State Farm [would] only be punished in one out of every 50,000 cases as a matter of statistical probability."[59] The U.S. Supreme Court, however, asserted that the low probability that State Farm would be punished for other misconduct was not relevant when that misconduct was unconnected to the actual harm suffered by the plaintiffs.[60] This raises the question whether, after *Campbell*, wrongdoing that may be hard to detect or rarely punished can justify a higher punitive award than would otherwise be constitutionally permissible.

In *Mathias*, Judge Posner asserted that a low probability of detecting or punishing defendant misconduct may warrant increased punishment. He asserted that punitive damages should be "proportional to the wrongfulness of the defendant's action," subject to two qualifications: "when the probability of detection is very low . . . or the crime is potentially lucrative."[61] He added that "[i]f a tortfeasor is 'caught' only half the time he commits torts, then when he is caught he should be punished twice as heavily in order

57. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996).

58. State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1524 (2003) (quoting *Gore*, 517 U.S. at 582).

59. Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1153 (Utah 2001), *quoted in Campbell*, 123 S. Ct. at 1525.

60. *Id.* ("Here the argument that State Farm will be punished in only the rare case, coupled with reference to its assets . . . had little to do with the actual harm sustained by the Campbells.").

61. Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 676 (7th Cir. 2003).

to make up for the times he gets away."[62] Judge Posner observed that the hotel had attempted to "pass off the bedbugs as ticks, which some guests might ignorantly have thought less unhealthful," and that this effort at concealing the infestation might "have postponed the instituting of litigation to rectify the hotel's misconduct."[63] Moreover, he suggested that this effort to escape detection made it possible for the hotel to profit from its misconduct.[64] Accordingly, it was appropriate that the punitive award limited "the defendant's ability to profit from its fraud by escaping detection and (private) prosecution."[65]

Judge Posner did not address whether this "low probability of detection or punishment" view is consistent with *Campbell*. One possible way to reconcile the cases on this point is that the Supreme Court in *Campbell* assumed that the other instances of State Farm's misconduct did not have a sufficient nexus to the plaintiff's harm, while in *Mathias*, the defendant's conduct in concealing the infestation throughout the hotel was directly related to the harm suffered by the plaintiffs. To the extent that courts implement the view that a tortfeasor who is "caught" only a portion of the time it commits torts should be punished more severely, analysis of the disparity between punitive damages and plaintiff harm may be significantly affected.

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62. *Id.* at 677.

63. *Id.*

64. *Id.* Judge Posner also justified the amount of the punitive award on other grounds. He asserted that "[t]he defendant's behavior was outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional." *Id.* He likened the facts of the case to deliberately spitting in a person's face. In a tort suit for the spitting, he posited, punitive damages may be necessary:

> Compensatory damages would not do the trick in such a case, and this for three reasons: because they are difficult to determine in the case of acts that inflict largely dignitary harms; because in the spitting case they would be too slight to give the victim an incentive to sue; . . . and because to limit the plaintiff to compensatory damages would enable the defendant to commit the offensive act with impunity provided that he was willing to pay.

Id. at 676-77.

65. *Id.* at 677.

CONCLUSION

State Farm v. Campbell, the Supreme Court's most recent decision on the constitutional review of punitive damages, in many respects tightened due process limits on punitive awards. The Seventh Circuit decision in *Mathias* illustrates, however, the leeway that remains for reviewing courts to uphold punitive awards that exceed the numerical ratios discussed in *Campbell*. It will be interesting to observe whether, in the wake of the *Campbell* strictures, lower courts will give greater emphasis to a factor that was significant in *Mathias* – the low probability that the defendant's wrongdoing would be detected or punished. Moreover, one wonders whether the Supreme Court will revisit its doctrine that reviewing courts may consider actual or potential harm to the plaintiff (as opposed to merely the compensatory damages awarded) in determining whether a punitive award is excessive when compared to the plaintiff harm. The ongoing Exxon Valdez oil spill litigation in federal court and the *Alabama v. Exxon* case moving through the state court system are examples of how "actual harm" and "potential harm," respectively, have been used by reviewing courts to justify large punitive awards – in these two cases, multi-billion dollar awards. It remains to be seen whether the Supreme Court will consider either of these cases. What seems certain, however, is that *Campbell* will not be the Court's last word on the constitutional review of punitive damages.