Punitive Damages and the Supreme Court: A Tragedy in Five Acts

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The United States Supreme Court has had a stormy relationship with punitive damages over the last twenty years. The Court had largely ignored this issue before then—but as we will see, that is because punitive damages were not ''company-busters'' until relatively recently. Our Supreme Court is not a legislature, of course: its constitutional role is *not* to reform ill-advised state law (almost all punitive damage awards arise from state law), but rather only to strike down lower court decisions grounded in a rule or a process that violates the federal Constitution. Now that the punitive component of a single tort award can bankrupt a corporation, with of course repercussions on third parties (shareholders and employees), the constitutional implications of such awards are different than they used to be.

To understand and evaluate the Supreme Court's recent constitutional analyses of the punitives, it is necessary to understand how tort law fits in our legal system. That is where this brief essay will begin.

I. Tort Law and Private Ordering

Political-legal philosophers conventionally distinguish aspects of law that regulate *private ordering* from those that regulate *public ordering*.[2]

- *Private ordering* describes juridical regulation of interactions between citizens: property law, contracts, torts, and family law

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[1] An earlier version of this article appeared in *Engage*, the scholarly publication of the Federalist Society.

[2] See generally Michael I. Krauss, Tort Law and Private Ordering, 35 St. Louis U. L.J. 623 (1991).

essentially regulate this ordering. These areas of the law provide the rules we need to self-determine, in a way, to live our lives as free and responsible human beings.

- *Public ordering* describes the juridical regulation of interactions between a citizen and the state. Criminal law, administrative law, tax law, and welfare law are all part of public ordering, which provides us with the rules we need to know our rights and obligations vis-à-vis government.

Public ordering is the *only* kind of legal order in a totalitarian society, where citizens are not trusted to self-regulate their affairs. In a totalitarian society, even one governed by legal processes, there's no such thing as *property*, as we know it—rather, there are (provisional) grants from the state, returnable to the state *via* administrative law. Nor is there *contract* law between consenting adults, since private contracts would allow a form of self-governance without state authorization—incompatible with totalitarianism. Finally, totalitarian societies can have no true *tort* law—there's no such thing as a private wrong if only the state can be wronged. If one does something the state considers wrong, criminal law takes over. In a totalitarian society, therefore, administrative law and criminal law take the place of contract, property, and tort.

Tort law may be maligned by demagogic politicians, but it is an essential component of our freedom. Tort law is contract law's flip side—tort privately regulates *non-contractual* behavior among humans, obliging them to make good harm wrongfully caused to others. In a free society, criminal law is accompanied by myriad constitutional protections (such as the constitutional protection against self-incrimination, the double jeopardy rule, and the strong presumption of innocence) precisely because its threat to liberty is so different from that of tort law.

When property becomes a loan from the state, when all contracts are with the state, when tort law gives way to crimes, then private ordering will have been dissolved and only public ordering left standing. A monopoly of public ordering is incompatible with a society of free and responsible individuals.

II. Introduction to Tort Damages

A. Punitive Damages

In my view the moral foundation of tort law, seen as a component of private ordering, is *corrective justice*. When one citizen wrongs

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another, the wrongdoer must correct the (private) injustice he has caused. Tort law, under the doctrine of ''sovereign immunity,'' did not originally cover injustices caused by wrongful state behavior; rather, the right of revolution was originally the only remedy for state torts. Today that is no longer the case, and many state wrongs are subject to private tort recovery.

Without a wrong there is no corrective justice requirement. An efficient businessman who, through acceptable practices, out-competes his competitor owes that competitor nothing as a matter of corrective justice, even though the competitor has suffered possibly devastating losses. Causing a loss incurs no tort liability. *Wrongfully* causing a loss creates the corrective justice requirement of compensation.

Analogously, wrongful behavior *that causes no damages* creates no corrective justice requirement. Driving home while drunk may be criminal (public ordering requires no victims—the affront is to ''society'' or ''the state'') and is also quite negligent (wrongful), if it exposes others on the road to excessive danger. Nonetheless, if a drunk driver gets home without hitting anyone, he has no tort liability. He may well have committed a *crime*—a matter for public ordering, with all the protections provided when the might of the state is directed at an individual. But he owes compensation to no one because his conduct, though wrongful, did no private harm.

It is the *conjunction of wrongfulness and the harm caused thereby* that creates the tort obligation. Typically, that obligation consists of compensation, that is, righting the wrong and making good the loss—no more, no less.

Compensation, by definition, must be full to be integral. This means that compensation is not a function of the extent of wrongdoing. A tortfeasor who negligently burns down a $50,000 house is liable in tort to pay $50,000 to compensate for the loss of the house.[3] If the tortfeasor just as negligently burns down a $1 million house, he is liable in tort to pay $1 million to its owner. This is not because tort favors the rich, but because tort *equally respects* poor and rich. Each tort victim has the right to be returned to her former state—that far and no farther—when she is wrongfully harmed. Similarly, rich tortfeasors owe no more to their victims in compensation than

[3] In addition to the cost of temporary lodging, etc.

do poor tortfeasors.[4] *Public* ordering may distinguish between the rich and the poor in sentencing, but private law is blind to wealth—only one's rights ''count'' with regard to private ordering.

As has likely already been seen, punitive damages do not fit into this scheme of tort law because, by definition, punitive damages are overcompensatory.

Nevertheless, in one deceptive and in one symbolic form, something called punitive damages was present at tort law's inception. Both of these forms can be usefully summarized here:

B. The Deceptive Historic Role of Punitives

In medieval days criminal and tort trials were combined. After all, what we today call *intentional torts*, such as battery and trespass, typically constituted both a crime (a breach of the peace punishable by the state) and a tort (some kind of harm wrongfully caused to a citizen). Both were adjudicated in the same judicial proceeding. For instance, a battery may have caused $10 in injury, payable to the plaintiff. In the days before police forces, this plaintiff was also the only one who had a strong incentive to track down and arrest the batterer. This plaintiff could also pursue the equivalent of a criminal fine (the amounts were tiny by today's monetary standards). The plaintiff was in a sense a private attorney general, prosecuting the criminal case, so the fine went into his coffers.

Today we have paid attorneys general and prosecutors, and fines are collected in public ordering settings. Those fines are subject to cherished American constitutional protections, as I noted above:

- The Double Jeopardy prohibition against multiple fines for the same offense;
- The Fifth Amendment protection against self-incrimination;
- The Eighth Amendment protection against excessive fines.

A tort trial today offers none of those protections: compulsory ''discovery'' may lead to involuntary inculpation of a tortfeasor, one tort committed may lead to several successful lawsuits, etc.

[4] Of course, if the tortfeasor is so poor that he has insufficient assets to compensate (and insufficient insurance to make him solvent), then he cannot be adequately reached in tort. We used to have debtors' prisons to take care of this issue—making tortfeasors ''work off'' their indebtedness—but that solution is now seen as inhumane. Thus, destitute people cannot be reached in tort. Many people in prison are destitute, of course.

In its deceptive form, punitive damages are an anachronism with no place in tort today. Criminal law with all its apparatus has essentially swept aside the combined tort/criminal suits, and anyway the Constitution doesn't allow them. But there is still a symbolic role for punitives in common law tort.

C. A Symbolic Place for Punitives

Punitive damages were also granted as symbolic damages in common law cases, when there was deliberate wrongdoing and real but unknowable or *de minimis* harm. For example, if A slandered B, but B could not prove exactly how much business he had lost because of the slander, A might be condemned to pay B $1. If A deliberately and flagrantly trespassed on B's land, but didn't trample any of B's crops, B could still sue A for $1.

The damages in such cases were symbolic: they recognized that one party was in the right, had been intentionally wronged by the other party, and had been damaged in a non-obviously quantifiable way. Suits like these might be filed because victory was itself a vindication of one's rights, and also because a ''loser-pays rule'' (in effect outside America) means that the tortfeasor would have to pay both his and his victim's lawyer's costs.

Thus, classical punitives were either (when substantial) disguised criminal fines (before the state criminal apparatus was organized and constitutional protections were enacted), or symbolic sums meant to vindicate intentional but hard-to-quantify violations of a plaintiff's rights. Since constitutional protections exist today, all that should remain are the small symbolic ''vindication'' awards.

The growth of substantial modern punitive damages is, I submit, a product of confusion between private and public ordering. Happily, four states' (Louisiana, Nebraska, Washington, and Massachusetts) supreme courts have declared that their common law of tort does not permit these punitive damages.[5] A fifth state (New Hampshire) abolished modern punitives by statute.[6] Any state in the union could

[5]See, e.g., Int'l Harvester Credit Corp. v. Seale, 518 So.2d 1039, 1041 (La. 1988); Distinctive Printing & Packaging Co. v. Cox, 443 N.W.2d 566, 574 (Neb. 1989); Dailey v. North Coast Life Ins. Co., 919 P.2d 589, 590–91 (Wash. 1996); Fleshner v. Technical Communications Corp., 575 N.E.2d 1107, 1112 (Mass. 1991).

[6]N.H. Rev. Stat. Ann. § 507:16 (1997).

abolish substantial punitive damages if it chose to, without federal constitutional impediment.

III. The Supreme Court and Punitive Damages: A Play in Six Parts (So Far . . .)

States vary tremendously in their rules about punitive damages. As just stated, a handful have no punitives at all. Quite a few other states allow punitive damages for intentional torts and gross negligence, but with a global monetary cap.[7] Other states have partial limitations on punitives, some of which may be unconstitutional.[8] Finally, many states have no limitation on punitives at all.

Yet, in all states punitive damages were mostly symbolic until the 1980s. *Up to 1976, the highest punitive damages award in the entire country was $250,000, a sobering observation in light of recent multibillion-dollar punitive awards.*

Starting in the late 1980s, though, some punitive awards in amounts, heretofore unheard of, were handed down. Defendants naturally protested that their constitutional rights were abridged by these new, non-compensatory awards. After all, these awards were for amounts that did not correspond to any harm they had wrongfully caused; they could be repeated many times for the same wrongdoing, if different persons sued them; they resulted from the compelled production of ''self-incriminating'' evidence through discovery; they could be granted if the fact finder believed them warranted ''by a preponderance of the evidence,'' not ''beyond a reasonable doubt''; and there seemed to be no limit on the amount that could be assessed. Imagine a criminal law in which violations are punishable by a fine, the amount of which will be determined by the ruler, at his discretion, with no presumption of innocence and after a forced confession. Such a law might lead us to dump tea in the nearest harbor. Analogously, modern punitive damages developments were shocking and seemed contrary to the basic nature of private ordering.

No small wonder that constitutional appeals to our nation's highest court followed. Obviously, every time one of these challenges

[7] In the case of Virginia, for example, the cap on punitive awards is $350,000. Va. Code Ann. §§ 8.01–38.1 (2000).

[8] See, e.g., Reynolds v Porter, 760 P.2d 816 (Okla. 1988) (holding that a state statute eliminating punitive damages only in medical malpractice cases violates the state constitution).

happened, by definition the complaining party was usually a pretty bad guy—not an ''attractive client,'' as lawyers say . . .

Anyway, our Supreme Court play begins in 1989, with the case of *Browning-Ferris Industries*.[9]

A. Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc. *(Vermont 1989)*

Browning-Ferris International (BFI) operates a nationwide commercial waste-collection and disposal business. In 1973, BFI entered the Burlington, Vermont area trash-collection market, and in 1976, began to offer ''roll-off'' collection services, which had not previously been available heretofore in the area.[10] Until 1980, BFI was the sole provider of ''roll-off'' services in Burlington. That year respondent Joseph Kelley, who, since 1973, had been BFI's local district manager, went into business for himself, starting Kelco Disposal, Inc. Within a year Kelco had obtained nearly 40 percent of the Burlington roll-off market. During 1982 BFI reacted to this competition, first by offering to buy Kelco Disposal and then, when Kelly refused to sell his company, by cutting BFI's own prices by 40 percent or more on new business. The orders given to the Burlington BFI office by its regional vice president were clear: one memo read, ''Put [Kelco] out of business. . . .if it mean[s] giv[ing] the [service] away, give it away.''[11]

Of course in most American jurisdictions, in England, and in economic theory, price competition is not a tort. So-called ''predatory pricing'' cannot succeed in the long run, as a matter of economic theory, and it didn't work in Burlington, either. BFI kept losing market share as Kelco matched its prices, and BFI threw in the towel when Kelco increased its market share to 56 percent. BFI then left Vermont. Turning the knife in the wound, Kelco sued BFI for the tort of unfair competition. A Vermont jury awarded Kelco $51,000 in lost profits due to BFI's futile effort at predatory pricing.

[9] Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

[10] Roll-off service alludes to the bin used to store garbage before pickup. They are called ''roll-off'' bins because they are typically configured with small back wheels. The garbage truck uses a hoist and a tipping bed to roll the bin on and off the use site to and from the truck.

[11] *Id.* at 260–61 (emphasis added).

Normally this would merely be a legally questionable and economically silly decision, of which there are many. What distinguished it, however, was that Kelco's attorney urged the Vermont jury to return an award of punitive damages, asking the jurors to ''*deliver a message to Houston* [BFI's headquarters].''[12] The attorney pointed to BFI's world revenues of $1.3 billion, ''noting that this figure broke down to $25 million a week.''[13] BFI urged that punitive damages were not appropriate at all (of course, BFI believed *no* damages, even compensatory, were due). But the jury socked it to this Texas company that had already left the state—$6 million in punitive damages.[14]

BFI, shell-shocked, asked the trial judge to reverse the punitives award, and when this motion was denied appealed this award to the Vermont Supreme Court and ultimately to the United States Supreme Court. At each level BFI claimed that the award was an excessive fine for the degree of its wrongdoing (which it claimed was zero), and therefore was imposed in violation of BFI's Fourteenth Amendment rights. The Supreme Court, in an 8-1 decision, rejected BFI's claim. Because the $6 million went to Mr. Kelly and not to the State of Vermont, it was not a fine, the majority ruled, and since it was not a fine it could not be an *excessive* fine.

Since BFI had not made a timely Fourteenth Amendment claim, the Supreme Court expressly reserved ruling on any due process argument. In fact, Justices Brennan and Marshall hinted strongly that they thought this kind of punitives award *did* violate BFI's right to due process of law. But these justices would both soon leave the Court.

Justice O'Connor's dissent in this case detailed the history of fines, and showed how substantial punitive damages had, in fact, always been treated as fines.

Note, by the way, that current events put into question even the dubious majority decision. Subsequent to the BFI decision, several states modified their statutes to provide that a certain percentage

[12] *Id.* at 261.

[13] *Id.*

[14] Note the combination of individual, local plaintiff, local jurors, and *out-of-state* corporate defendant with few in-state employees. This turns out to be the common denominator of crazy punitive damages—let's bring some money in state, boys.

of punitive damages (up to 60 percent in some instances) must henceforth be payable to the state government, not to the plaintiffs. This is how Illinois recently received a $3 billion punitive award against Philip Morris in a recent class action tobacco decision from notorious Madison County—30 percent of the total award to the plaintiff is payable to the state under Illinois law. This makes the state an explicit accomplice in the increasing acceleration of punitive awards.

So, Act I ends with a crushing defeat for those who, like me, claimed that tort law prohibits large punitive awards, since they cross the line to become public ordering and are therefore excessive fines.

But the BFI case did hold out the hope that punitives might violate due process of law, because they are not accompanied by the procedural guarantees of public ordering.

This set the stage for Act II:

B. Pacific Mutual Life Ins. Co. v. Haslip *(Alabama 1991)*[15]

Lemmie Ruffin was an insurance agent. He represented many insurance companies, including Pacific Mutual Life.

As Pacific Mutual's agent, Ruffin sold ''major medical'' health insurance policies to a group of civic employees in Alabama. The employees paid monthly premiums to Ruffin, which he was to forward to the company. The employees kept up with their premiums and thought they had health coverage. In reality, Ruffin had stopped sending money to Pacific Mutual Life, and converted the funds to his own use. The insurance company, thinking the policies were in arrears, gave Ruffin warning letters to deliver to the women (to pay their overdue premiums or have their policies cancelled)—of course Ruffin never transmitted those letters. Finally, when one employee (Ms. Haslip) got very sick, she found she was not covered. Needless to say, she sued Pacific Mutual Insurance for its ''bad faith.''

An Alabama jury found bad faith and inadequate supervision of Ruffin by the (out-of-state) insurance company. The jury held that Pacific Mutual was liable to Haslip in the amount of $230,000 to cover her hospital bills—a perfectly just tort award, given that Ruffin was Pacific Mutual's agent. But Haslip was not yet done with Pacific

[15] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

Mutual—she asked for punitive damages. Alabama's punitive damages scheme gave a jury virtually complete discretion in this area. It provided no standard for deciding whether to impose punitives, and no method for calculating them. On the threshold question of whether to impose punitive damages, the trial court instructed the jury as follows: ''Imposition of punitive damages is *entirely discretionary* with the jury, that means you don't have to award it unless this jury *feels* that you should do so.''[16]

Thus instructed that there was no applicable *law* about the matter, the jury condemned Pacific Mutual to $1 million in punitives.[17] The company appealed all the way to the U.S. Supreme Court, on the grounds that it was deprived of due process by the standardless discretion invested in the local jury and by the huge amount of punitives. Clearly, by the way, the company had had no malice—it was just as defrauded by Ruffin as had been the plaintiff. It had no knowledge of the actions of Ruffin, who was not even its legal employee in any traditional sense.

Pacific Mutual lost its appeal, 7-1. Again only Justice O'Connor dissented. The due process claim that many had thought so promising after the BFI case foundered, as the justices who had espoused it had left the Court. The vague Alabama jury instruction was deemed precise enough to provide legal guidance to the jury.[18] The punitive award of four times compensatory damages was not so exorbitant as to violate due process standards, said the majority.[19] They did say it was ''close to the line,'' however.[20]

Defendants were reeling after this case. (Local) juries seemed to have unfettered discretion to whack (invariably out-of-state) corporations for minor transgressions, though it was felt that the Supreme Court would henceforth at least require some legal standard for the calculation of punitives.

Haslip was disappointing, but the darkest hour had not yet been reached. It would come, in 1993, and Act III.

[16] *Id.* at 6 n.1 (emphasis added).

[17] *Id.*

[18] See *id.* at 19–20.

[19] See *id.* at 23–24. The punitives were ''much in excess of the fine that could be imposed for insurance fraud'' under Alabama criminal law. *Id.* at 23.

[20] *Id.*

C. *TXO Production Corp. v. Alliance Resources Corp*. (West Virginia, 1993)[21]

TXO and Alliance were engaged in a complex series of negotiations so that TXO could get oil and gas rights to West Virginia land owned by Alliance. They were bickering back and forth on what royalty rate would be paid to Alliance. During these negotiations, a third party claimed that in fact it, not Alliance, owned the rights to the land, by virtue of an obscure deed. TXO then expressed concern that any title it might get to the oil and gas rights was vulnerable to this claim; because of this, it asked for a reduction in its royalty rate to cover against possible precariousness. After more complex and ambiguous declarations on both sides, TXO declared that a deal with Alliance had been reached. Alliance disagreed. TXO then sought, at the West Virginia circuit court, a declaratory judgment that it had in fact acquired from Alliance the resource rights over the land. Alliance defended against this claim, and countersued for what Alliance called ''slander of title'' (an old English tort that had never once been recognized in the state of West Virginia's entire history). In brief, Alliance asserted that TXO was falsely diminishing public belief in Alliance's property rights. At bottom, this countersuit was an episode in a ''hardball'' contractual dispute about royalty rates.

That is, until the West Virginia courts got through with it. The trial judge rejected TXO's principal claim that any deal had been reached. The judge let a jury decide whether Alliance's title had been slandered. The jury accepted Alliance's slander of title suit and condemned TXO to pay $19,000 to Alliance (essentially the amount of Alliance's lawyer's costs in defending against the declaratory suit by TXO). Alliance had no other losses.[22]

So far, this sounds unexceptional—the case was a close call in a hardball dispute, TXO lost, and the damages are the equivalent of a loser-pays rule that folks like me have advocated for a long time. I have not yet mentioned that Alliance was a local company, while TXO was a fully owned subsidiary of U.S. Steel. That explains,

[21] TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993).

[22] See *id.* at 451.

perhaps, why the jury also condemned TXO to *ten million dollars* in punitive damages, i.e., 526 times the compensatory award.[23]

TXO had great confidence in its appeal. In *Haslip* the punitives were ''only'' 4 times punitives and the Supreme Court had said this was ''close to the line.''[24] Moreover, West Virginia's instructions to the jury on punitives were so totally devoid of standards as to make a mockery of the Supreme Court's demand in *Haslip* for at least minimum guidance. [Here was the standard as stated by the West Virginia Supreme Court, when it heard the appeal: We are compelled by the United States Supreme Court to set punitive damages standards if our decision is to pass constitutional scrutiny, so we hereby distinguish between ''really mean'' defendants and the ''really stupid'' defendants.[25] For the really *stupid* defendant, punitives can be 10 times compensatories. For the really *mean* defendant, punitives can be 500 times compensatories. Since this defendant ''failed to conduct [itself] as a gentleman'', it was ''really mean'', and 526 times punitives is close enough to 500, so we uphold the trial court's award.[26]]

The Supreme Court affirmed the West Virginia Supreme Court's ruling, 6-3, saying that its standard passed constitutional scrutiny. Justices White and Souter joined Justice O'Connor in dissent this time. On the one hand, O'Connor was no longer alone on the court in thinking that there were *some* punitive damage awards that could not pass constitutional muster. On the other hand, this case looked like the mother of all punitive awards, and if six justices found *it* constitutional, one wondered what could possibly offend due process.

This was the darkest hour. It was three years before dawn broke in Act IV.

D. BMW of North America, Inc. v. Gore *(Alabama, 1996)*[27]

Mr. Gore purchased a new BMW from an authorized Alabama dealer. He loved his car until he took it in for service one day, when

[23] This seemed ''quite likely'' to Justice O'Connor as well. *Id.* at 489 (O'Connor, J., dissenting).

[24] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991).

[25] TXO, 509 U.S. at 452 n.15.

[26] See *id*. at 473 (O'Connor, J., dissenting).

[27] BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

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he was casually informed by a mechanic that a wing of his car had been repainted. It turned out the car had been scratched during maritime transport from Germany. BMW had, it turns out, a nationwide policy of repairing pre-delivery paint chips and scratches to new cars so long as the cost of repair did not exceed 3 percent of the car's suggested retail price. (If repairs cost over 3 percent of the value of the car, it was not sent to the dealer, but was removed from new vehicle inventory and given to the sales team to use as a demonstrator, then sold at auction.) This particular paint repair cost *way* under the 3% limit, and it was also legal under Alabama's consumer protection law, as it had always been understood.[28] So BMW had shipped the car to its Alabama dealer, who had sold it as a new car to Mr. Gore.

Learning all this, Gore brought suit for compensatory and punitive damages against BMW, alleging that his car had a lower resale value because of the repainted part; he considered himself a victim of the tort of fraud. Again, we have a local plaintiff suing an out-of-state defendant. The jury returned a verdict finding BMW liable for compensatory damages of $4,000, the alleged difference in resale value between a ''concours'' car and one that had a repainted part. The jury also assessed $4 million in punitive damages, on the grounds that BMW of North America had likely repainted 1,000 cars (at $4,000) over the years.[29] Alabama appellate courts reduced the punitive award to $2 million, which they decided was not ''grossly excessive'' under the *TXO* standard because that amount constituted 500 times compensatories[30].

Finally, a majority of the Supreme Court had had enough. By a 5-4 margin (Justices Breyer, Kennedy, O'Connor, Souter and Stevens constituting the majority), the Court held that a combination of the lack of any real wrongdoing by BMW, the lack of notice that any punitive award was possible or even that its marketing was illegal in Alabama, the consideration of non-Alabaman touch-ups which were surely not violations of Alabama law, and the huge discrepancy between compensatories and punitives all combined to make this

[28] *Id*. at 562–64. Specifically, the $601.37 cost of repainting was about 1.5 percent of the car's suggested retail price. *Id*. at 564.

[29] *Id.* at 564–65.

[30] See *id.* at 567.

award unconstitutional. The Court didn't give any firm boundaries as to what *would* be a maximum limit, but said *this case* was beyond that limit in these circumstances.

Three dissenters, Justices Thomas, Ginsburg, and Rehnquist, essentially held that the federal Constitution could not place any limits on states in determining punitive damages. I have, above, indicated why I find this reasoning faulty—it abstracts from the private-public divide that is intrinsic to our constitutional structure. Justice Scalia, for his part denied that the Due Process Clause of the Constitution could ever affect damages in federal or state court.

There were some procedural decisions following *BMW v. Gore*, but substantively the Supremes did not revisit the issue of punitive damages until 2000, when they decided Act V, perhaps the most interesting case of them all.

E. State Farm Insurance v. Campbell *(Utah, 2003)*[31]

In 1981, Curtis Campbell was driving his wife down a two-lane highway in Cache County, Utah. He decided to pass, in one fell swoop, *six* vehicles traveling ahead of him. Campbell did not have enough space to pass all six. For his part, Todd Ospital was driving a small car approaching from the opposite direction, at a speed somewhat in excess of the speed limit. Campbell was headed right toward Ospital. To avoid a head-on collision, Ospital swerved onto the shoulder, where he lost control of his automobile, which came back onto the road and collided with a vehicle driven by Robert G. Slusher. Ospital was killed and Slusher was permanently disabled. The Campbells escaped unscathed, in fact they never collided with anyone—they got back in their lane safe and sound just in the nick of time thanks to Ospital's sacrificial decision to leave the road.

In the ensuing tort suits against Campbell by Ospital's estate and by Slusher, Campbell insisted he could not be at fault since he never collided with anyone (!), and since Ospital was speeding. Campbell's insurance company, State Farm, incredibly declined offers by Slusher and Ospital's estate to settle their respective claims for the modest policy coverage limit of $50,000 (i.e., $25,000 per plaintiff). In deciding to take the case to trial, State Farm ignored the advice of one of its own investigators, assuring the Campbells that ''their assets were

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

safe, that they had no liability for the accident, that [State Farm] would represent their interests.''[32] To the contrary, a jury determined that Campbell was 100 percent at fault, and a judgment against him was returned for $185,849, way more than the amount of State Farm's coverage.[33]

At first, the insurance company refused to cover the $135,849 in excess liability, since Campbell had purchased only $50,000 of coverage. State Farm's lawyer told the Campbells, ''You may want to put 'for sale' signs on your property to get things moving.''[34] Nor was State Farm willing to post the required *supersedeas* bond to allow Campbell to appeal the judgment against him. Campbell thus hired his own lawyer to appeal the verdict. While this appeal was pending, in late 1984, Slusher and Ospital's estate contacted him. The three parties reached an interesting agreement whereby Slusher and Ospital's estate agreed not to execute their judgments against the Campbells' house. In exchange, the Campbells agreed to pursue a bad-faith tort suit against State Farm, in which they would be represented by Slusher's and Ospital's estates' attorneys. The Campbells also agreed that Slusher and Ospital's estate would have a right to play a part in all major decisions concerning the bad-faith suit: no settlement between Campbell and State Farm could be concluded, in other words, without Slusher's and the estate's approval. Last but not least, Slusher and Ospital's estate would receive 90 percent of any verdict Campbell obtained against State Farm.[35]

In 1989, the Utah Supreme Court denied Campbell's appeal. State Farm then decided to pay the entire $185 thousand to Slusher and to Ospital's estate. This meant that the Campbells had suffered no damage (other than their lawyer's fees, which State Farm also agreed to cover) from the insurance company's incompetence (or worse). The Campbells nonetheless filed (as they had promised the Slushers and Ospital's estate they would) a new tort suit against State Farm,

[32] *Id.* at 413.

[33] *Id.*

[34] *Id.*

[35] *Id* at 413–14. By the way, I am not a Utah expert, but sale of a tort claim is illegal in most states. This was a sale of 90% of a tort suit—former adversaries, all Utah residents, were now in league against the out-of-state corporation. Keep that in mind.

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alleging both fraud and ''intentional infliction of emotional distress.''[36] The trial court initially granted State Farm's motion to dismiss that suit for lack of damages (remember—no harm, no tort suit in private ordering), but that ruling was reversed on appeal. Now State Farm had to defend itself. In the first phase, the jury determined that State Farm's decision not to settle for $50,000 was unreasonable. The second phase of the trial would determine damages. Remember that there were *no* pecuniary damages (because State Farm had paid the excess award, though it was not contractually obliged to do so).[37] There *was* arguably emotional distress during the short period when the Campbells thought they were going to lose their home. Emotional distress, however, is not recoverable unless it was intentionally inflicted, and (as per my comment in a footnote above) no one can seriously claim that State Farm is a sadistic company bent on inflicting emotional distress on its clientele. State Farm argued during phase II of the trial that its decision to take the case to trial was an ''honest mistake,'' and that it certainly did not warrant punitive damages. The Campbells introduced evidence that State Farm's decision to take the case to trial was a result of a national ''scheme'' to meet corporate fiscal goals by capping payouts on claims, not just in Campbell's case, but across the country.[38] (It is pretty clear that State Farm was being parsimonious, to say the least, though I might wonder out loud who wants to pay the insurance premiums that would be required to insurance companies that *over*pay claims?)

Just before the fraud and ''intentional infliction'' trial, the Supreme Court decided *BMW of North America, Inc. v. Gore*, summarized above. Based on that decision, State Farm moved for the exclusion of evidence of all out-of-state conduct. The trial court denied State Farm's motion. The jury then found $2.6 *million* in emotional distress for the Campbells, who (to repeat) had not lost one cent and were therefore not eligible for distress damages under classic tort doctrine.

[36] *Id.* at 414. The intentional infliction allegation was that in advising the Campbells to sell their home, State Farm was deliberately torturing them. The absurdity of this claim is hopefully self-evident—few corporations make money by torturing their customers, though admittedly some may make money through fraud. The fraud allegation was that the Campbells had been misled to believe State Farm was looking out for their interests.

[37] *Id.*

[38] *Id.* at 415.

How did the jury arrive at this amount? We will never know for sure, but likely the jury knew that 90 percent of this amount, or $2.34 million was going to the Slusher and Ospital families pursuant to the agreement. Likely the jury wanted to give $260,000 in emotional distress damages to the Campbells. This would be totally illegal if done explicitly, because the Slusher and Ospital families had settled their suit and had no cause of action against State Farm. In addition, however, the jury awarded Campbell (i.e., the Slusher and Ospital parties, to the tune of 90 percent) $*145 million* in punitives, to punish State Farm for aggressive defense practices throughout the country. The trial court reduced the $2.6 million in compensatories to $1 million, and the punitives from $145 million to ''only'' $25 million, under the *TXO* ''really mean'' standard. The Utah Supreme Court then reinstated the original award in its entirety. State Farm appealed that reinstatement to the United States Supreme Court.[39]

This time the decision was 6-3. Chief Justice Rehnquist abandoned his previous position and joined the majority, leaving Justices Scalia, Thomas, and Ginsburg alone in dissent.

The majority this time tried to provide an indication that certain trial court activity would no longer be tolerated:

- Don't *ever* again use legal out-of-state behavior to calculate punitive damages. Out-of-state behavior can be invoked to establish a pattern of bad faith or maliciousness, but in that case, it has to be the same behavior as the behavior being impugned.[40]
- Don't *ever* give more than 9 times compensatories as punitive damages, the Court said, unless there is a ''particularly egregious act that has resulted in only a small amount of economic damages.''[41]
- Moreover, in cases like this one, where the compensatory damages adjudged by the jury are extremely generous, do not exceed around one time punitives.[42]

[39] *Id.* at 416.

[40] See *id.* at 421–33. Interestingly, this part of the Campbell ruling undoes much of the Gore case—BMW's legal painting of cars in other states, which the Court had excluded, would possibly be probative now.

[41] *Id.* at 425 (citation omitted). ''Single-digit multipliers are more likely to comport with due process . . . than awards with ratios in the range of 500 to 1, or, in this case, of 145 to 1.'' *Id.* (citation omitted).

[42] See *id.*

Joan Claybrook and Ralph Nader claimed that *Campbell* is a victory for them. Why? Part of this is spin, but I think Claybrook and Nader were happy that the Court has gone up from 4 times compensatories (''close to the line'' in *Haslip*) to 9 times compensatories. They were also glad that the Court felt it could not touch the compensatories themselves. Surely, there is no way on earth that the Campbells, who cavalierly tried to pass six vehicles at once and drove off into the sunset leaving two devastated families in their wake, had $1 million in pain and suffering inflicted on them because *State Farm* aggressively came to their defense. What is to stop the next jury that wants to sock it to an out-of-state corporation from finding $*50 million* in so-called compensatory pain and suffering, and zero punitives? Money is fungible, after all.

F. Philip Morris v. Williams *(Oregon 2002)*[43]

The plaintiff in *Williams* was the widow of a long-time smoker. This widow alleged that Philip Morris deceived her husband into not quitting smoking. According to the wife, the late Mr. Williams said that ''the tobacco companies don't even say they're cancer sticks, so I can smoke them.''[44] Although his wife apparently helpfully pointed to the myriad warning labels on cigarette packages and herself corroborated the government's stern warning told that cigarettes would kill her husband, Mr. Williams allegedly responded: ''This is what the Surgeon General says, it's not what [the] tobacco company says.''[45] According to his wife, Williams gave no credence to the surgeon general's warnings because he believed that the tobacco companies would simply not sell a harmful product. His widow testified at trial that, ''[H]e would say 'Well, honey, you see I told you . . . cigarettes are not going to kill you, because I just heard this so-and-so guy on TV, and he said that tobacco doesn't cause you [sic] cancer!'''[46]

Now, I cannot speak for you readers, but I know of no one on the planet Earth who talks like the decedent allegedly did, and I

[43] Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007).

[44] Joint Appendix at 153a, Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007) (No. 05-1256).

[45] Williams v. Philip Morris Inc., 48 P.3d 824, 835 n.15 (2002), vacated by 127 S. Ct 1057 (2007).

[46] Joint Appendix, *supra* note 44, at 138a.

know of no one who thinks that no seller could possibly fib about the dangers of the product he was selling. Of course, the jury can choose to believe whom it will, and to no one's surprise it chose to believe Ms. Williams, the local plaintiff. (Is the jury interested in buying a bridge in Brooklyn from me?) What possible motive could the plaintiff have to ''embellish,'' after all?

That said, tobacco companies' behavior over the years has certainly been reprehensible on many different levels. *Thank You for Smoking* is a nice caricature of Big Tobacco's awful behavior. But awful behavior does not tort damages merit! Tort damages are awarded following proof of wrongdoing, causation, and damages as I have indicated above. Causation was established when the jury believed the astounding rendition by Ms. Williams. As to damages, well, punitive damages are essentially awarded in cases of intentional tort. Here, I guess, fraud is the intentional tort du jour. Mr. Williams managed to be defrauded despite his wife's and the government's best efforts to set him straight. This jury awarded $79.5 million in punitive damages against Philip Morris, which appealed to the Supremes on the ground that the award violated the rules set forth in *State Farm v. Campbell*.[47]

A bare majority of the Court (Justices Alito, Breyer, Kennedy, Roberts, and Souter) agreed with the tobacco giant. The Oregon court had allowed evidence on harm caused to smokers across the country in the damages phase of the trial—a tactic presumably allowed by *State Farm v. Campbell* for the narrow question of whether punitives at all should be granted. Ah, reasoned the majority, the court didn't take enough care to ensure that the jury then prevented itself from considering those self-same facts (the number of national victims) in order to fix the amount of punitive damages.[48] The Court did not address the amount of the punitive damages, which Philip Morris had argued were grossly excessive. Instead, the Court focused on whether the jury improperly took into consideration the alleged harm that Philip Morris' conduct caused to smokers who were not parties to the litigation in order to calculate said punitives.

How are judges to instruct juries following *Williams*? Courts will now have to craft jury instructions allowing global misfeasance to

[47] Williams, 127 S. Ct. at 1061.

[48] *Id.* at 1063.

entitle a plaintiff to punitives, but forcing it out of the jury's mind when calculating punitives. This is impossible to enforce except by saying (as the Court explicitly refused to state) that the punitive award for this plaintiff was just too high. We can look forward to years of litigation and circuit splits trying to sort out what the Court hath wrought.

And so we come to the end of a very rocky and unsettled road. The Supremes have no coherent view of punitive damages. Justice Stevens in *Williams* seemed to admit as much, when he harkened for the good ol' days of Excessive Fines (recall that Oregon takes 60 percent of Williams' booty), rashly rejected as an argument in *Kelco*. This is a mess, a royal mess, and we're in for much more to come.

IV. Conclusion

I end where I began—by recalling the purpose of tort law, i.e., full compensation for wrongfully inflicted private losses.

As long as judges allow local juries to punish out-of-state corporate defendants to enrich individual local plaintiffs, tort law will be defiled. As long as that happens, in my opinion, the Supreme Court must continue to intervene on constitutional grounds. Whether it be by striking down punitive damages or by rejecting the standardless ''pain and suffering'' awards made more attractive in *Campbell*, the Court will have to uphold the fact that private ordering is the domain of civil litigation, while public ordering requires a slew of constitutional protections. The 1989 *BFI* decision denying that punitives are fines is what, in my opinion, has prevented the Court from going down this logical and principled path.