[J-59A-2022 and J-59B-2022]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, JJ.

THE BERT COMPANY D/B/A NORTHWEST INSURANCE SERVICES	:	No. 13 WAP 2022
	:	Appeal from the Order of the Superior Court entered May 5, 2021 at No. 817 WDA 2019, affirming the Judgment of the Court of Common Pleas of Warren/Forest County entered June 3, 2019 at No. AD 260 of 2017
v.	:	
MATTHEW TURK, WILLIAM COLLINS, JAMIE HEYNES, DAVID MCDONNELL, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK, AND FNB CORPORATION	:	ARGUED: October 25, 2022
APPEAL OF: MATTHEW TURK, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK, AND FNB CORPORATION	:	
THE BERT COMPANY D/B/A NORTHWEST INSURANCE SERVICES	:	No. 14 WAP 2022
	:	Appeal from the Order of the Superior Court entered May 5, 2021 at No. 975 WDA 2019, dismissing as moot the cross-appeal from the Judgment of the Court of Common Pleas of Warren/Forest County entered June 3, 2019 at No. AD 260 of 2017
v.	:	
MATTHEW TURK, WILLIAM COLLINS, JAMIE HEYNES, DAVID MCDONNELL, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK AND FNB CORPORATION	:	ARGUED: October 25, 2022
MATTHEW TURK	:	
v.	:	

THE BERT COMPANY, NORTHWEST BANK, AND NORTHWEST BANCSHARES, INC.	:
	:
	:
APPEAL OF: MATTHEW TURK, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK, AND FNB CORPORATION	:

OPINION

JUSTICE DONOHUE **DECIDED: JULY 19, 2023**

In this appeal by permission, we consider the application of jurisprudence of the United State Supreme Court[1] addressing the constitutionality of an award of punitive damages[2] by a civil jury in this Commonwealth.[3] We specifically address the ratio calculation first discussed in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and developed in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Our grant of allowance of appeal narrowly encompasses the appropriate ratio calculation measuring the relationship between the amount of punitive damages awarded

[1] *Pacific Mutual Life Insurance v. Haslip*, 499 U.S. 1 (1991), *TXO Product Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

[2] "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty" that may be imposed. *Gore*, 517 U.S. at 574. Accordingly, "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 538 U.S. at 416. *Accord Haslip*, 499 U.S. 1; *TXO*, 509 U.S. 443.

[3] This is the first time we consider any aspect of a challenge to excessiveness of a punitive damages award since the High Court's decision in *Haslip*.

against multiple defendants who are joint tortfeasors and the compensatory damages awarded. The ratio is one of the considerations in assessing whether an award of punitive damages is unconstitutionally excessive.

The Superior Court calculated the punitive to compensatory damages ratio using a per-defendant approach, as calculated by the trial court, which resulted in ratios ranging from 1.81 to 1 to 6 to 1, rather than a per-judgment approach, which resulted in a ratio of 11.2 to 1. For the reasons discussed, we generally endorse the per-defendant approach as consistent with federal constitutional principles that require consideration of a defendant's due process rights. Further, we conclude that under the facts and circumstances of this case, it was appropriate to consider the potential harm that was likely to occur from the concerted conduct of the defendants in determining whether the measure of punishment was both reasonable and proportionate. Thus, we affirm the order of the Superior Court.

BACKGROUND

The Bert Company, dba Northwest Insurance Services ("Northwest"), is an insurance brokerage firm with clientele in northwestern Pennsylvania and western New York. In 2017, Northwest realized gross earnings of $9.4 million. Beginning in 2005, Matthew Turk ("Turk") was employed as an insurance broker with Northwest. In 2009, he became head of the property and casualty division, and then worked as senior vice president of that division from January 2013 until his departure in May 2017. First National Insurance Agency, LLC ("FNIA") is an insurance brokerage firm. FNB Corporation is the parent company of First National Bank ("FNB") and FNIA (collectively and with FNIA "First National").

In 2016, FNIA had only a minor market share in northwestern Pennsylvania. To grow its business in that region, First National developed a plan to takeover Northwest, initially by convincing key Northwest employees to leave Northwest for FNIA and to bring their clients with them. These employees were under non-solicitation agreements with Northwest. First National initiated this plan,[4] which it referred to as a "lift out," beginning in the fall of 2016 by covertly meeting with Turk. The ultimate goal, however, was not only the acquisition of certain key employees and their books of business but the takeover of Northwest at a fire sale price.[5]

Through the fall and winter of 2016, Turk repeatedly met with First National about the plan with the hope that First National could gut Northwest by hiring the bulk of its highest producers, acquiring their clients, and ultimately forcing that company to sell its remaining book of clients to First National. This course of conduct included Turk providing First National with sensitive pieces of Northwest's data, such as his book of business and a list of profitable employees that Turk believed would be willing to leave Northwest to work for First National. Turk's interactions with First National included various correspondence with two Senior Vice Presidents of FNB regarding the plan to raid Northwest.

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[4] First National "affectionately referred" to the plan as "Project Green Goblin." Trial Court Opinion on Post-Trial Motions for Relief, 4/29/2019, at 12 (citing Plaintiff's Trial Exhibit 174).

[5] Our factual summary is based in part on the reporting of the Superior Court which, pursuant to its standard of review of the denial of post-trial motions, views the evidence and all reasonable inferences therefrom in the light most favorable to the verdict winner. *Bailets v. Pa. Turnpike Comm'n*, 181 A.3d 324, 332 (Pa. 2018). For a detailed account of the evidentiary background in this case, see *The Bert Co. v. Turk*, 257 A.3d 93 (Pa. Super. 2021). Based on our de novo review, the facts reported by the Superior Court are supported by the record unless otherwise indicated.

During this time, Turk and William Collins, a Northwest employee who Turk put in contact with First National, forwarded their non-solicitation/non-disclosure agreements to First National for review.[6] Thereafter, Turk asked Northwest for a new agreement to reduce his restrictive period from three years to one year. Unaware of the takeover plan, Northwest provided a new agreement to Turk, which he signed on February 16, 2017 ("NSND Agreement").[7]

Correspondence and multiple meetings occurred among various representatives of First National and Northwest employees regarding the takeover of Northwest; all the while Turk attempted to undermine Northwest's operations. For example, in May 2017, Northwest held a staff retreat where Turk was charged with overseeing a session regarding a new software program. Rather than covering that topic, Turk "furthered [First National's] plan to create discontent among [Northwest's] employees by opening the floor for grievances." *The Bert Co. v. Turk*, 257 A.3d 93, 106 (Pa. Super. 2021). Two days after the retreat, Turk and Jamie Heynes ("Heynes"), another Northwest employee covertly participating in the plan, met with Linda Wallin ("Wallin"), an account manager at another agency who was planning to join Northwest where she would have reported to Turk. They informed Wallin that they were leaving Northwest for FNIA and encouraged

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[6] According to expert testimony at trial, the *pro forma* analysis prepared by FNB showed the value of the lift out of Turk and Collins by FNIA to be $5.3 million. N.T., 12/17/2018, at 231–32.

[7] Relevant to this appeal, the NSND Agreement disallowed Turk from recruiting Northwest employees for twelve months after the termination of his relationship with Northwest. NSND Agreement, 2/16/2017, ¶ 8(a). It further rendered Turk responsible for Northwest's reasonable attorney's fees and costs in the event that Northwest needed to initiate a court action to enforce the agreement. *Id.* ¶ 8(d)(ii). Post-trial, the trial court awarded Northwest $361,093.74 in attorneys fees and costs. The award was affirmed by the Superior Court and is not implicated in this appeal.

her to join FNIA instead of Northwest. The efforts of Turk and Heynes were successful. Although Turk was directly responsible for Wallin's employment by FNIA, Wallin was instructed to advise him in writing of her decision to join FNIA in order to conceal Turk's involvement in her decision to forego employment with Northwest.

Toward the middle of May 2017, the plan began to come to fruition as several Northwest employees resigned and accepted offers from First National. Pursuant to the plan, Turk remained at Northwest to convince the company to sell its remaining business to First National. Northwest refused, choosing instead to fire Turk and initiate legal action.

Northwest initially sued several of its ex-employees, including Turk and William Collins, alleging breach of their NSND Agreements. The trial court issued an injunction barring the ex-employees from soliciting or servicing Northwest customers and from soliciting other Northwest employees to leave the company. Northwest then filed an amended complaint, adding First National as defendants and seeking compensatory and punitive damages. In addition, Northwest asserted: (1) breach of contract and fiduciary duties and theft of trade secrets against its ex-employees; (2) unfair competition against First National; and (3) misappropriation of trade secrets, tortious interference with contract, and civil conspiracy against Turk and First National.

The case proceeded to a jury trial on December 10, 2018, resulting in verdicts on December 21, 2018 against Turk, FNIA, FNB, and FNB Corporation (collectively the "Defendants"). The jury found Turk liable for breach of contract, breach of fiduciary duty,

and civil conspiracy; it found First National liable for civil conspiracy and unfair competition. The jury awarded Northwest compensatory damages[8] as follows:

Turk	Breach of Contract, $164,943[9] Breach of Fiduciary Duty, $90,000
Turk, FNB Corp., FNB, FNIA	Civil Conspiracy, $164,943
FNB Corp., FNB, FNIA	Unfair Competition, $250,000

The trial court instructed the jury that Northwest would receive only the largest award of any compensatory damages and that Northwest could not recover on each theory separately. Trial Court Opinion on Post-Trial Motions for Relief ("PTM Opinion"), 4/29/2019, at 14 (citing N.T., 12/20/2018, at 180).[10] The verdict slip also reflected this instruction.[11] The largest compensatory damages award for which Turk and First National

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[8] According to the trial court, the amount of compensatory damages awarded by the jury "[was] not only reasonable, but mirror[ed] very closely the testimony of the expert witnesses." Trial Court Opinion on Post-Trial Motions for Relief, 4/29/2019, at 19.

[9] This was "the exact amount of Defendant Turk's salary." Trial Court Opinion on Post-Trial Motions for Relief, 4/29/2019, at 19.

[10] This instruction was based on the agreement of all parties and was the result of a mutual request by counsel to the trial court. N.T., 12/19/2018, at 283; N.T., 12/21/2018, at 16.

[11] Under each claim on the agreed-upon verdict slip, the jury was instructed to first determine which, if any, of the Defendants were liable to Northwest. If liability was found, the jury was instructed to determine the amount of damages suffered by Northwest caused by the Defendants cumulatively as a result of the liability under the claim. In other words, the compensatory damages award was entered as a lump sum and not allocated among the liable Defendants. As to each award of damages, the following instruction appeared:

> Note to jurors: While you may choose to award Northwest Insurance Services damages on this claim and any others, Northwest Insurance Services will only be permitted to recover once for the same injury. Therefore, if you choose to award Northwest Insurance Services damages on this claim

(continued…)

were jointly and severally liable was $164,943 (civil conspiracy). The largest compensatory damages award for which First National was jointly and severally liable was $250,000 (unfair competition).[12] The jury also awarded a total of $2.8 million in punitive damages, imposed per-defendant as follows:

Turk	Breach of Contract & Fiduciary Duty, Civil Conspiracy	$ 300,000
FNB Corp.	Civil Conspiracy and Unfair Competition	$ 500,000
FNB	Civil Conspiracy and Unfair Competition	$ 500,000
FNIA	Civil Conspiracy and Unfair Competition	$1,500,000

Northwest and the Defendants filed post-trial motions, challenging, inter alia, the compensatory and punitive damages awards. The trial court denied the post-trial motions,[13] but it granted Northwest's request to assess Turk with attorney's fees pursuant

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> and any others, it will collect the largest sum awarded on any particular claim (but not any other lesser or equal sums awarded), together with whatever amount of punitive damages you award below, if any.

Verdict Slip, 12/21/2018, at 2, 3, 5, 7, 8, and 10. Except for the claims for breach of contract and misappropriation of trade secrets, in addition to the foregoing instructions, the jury was instructed to answer whether any of the Defendants were liable for punitive damages and, if so, with respect to any such defendant, in what amount. In other words, the jury was instructed to award a specific amount of punitive damages individually against each of the Defendants it found liable for punitive damages.

[12] This finding is relevant in determining the ratio of punitive to compensatory damages for the claim of constitutional excessiveness. Northwest's recovery against Turk was capped at $164,943, and its recovery against First National was capped at $250,000. How that award is ultimately allocated for payment among the Defendants is not relevant to our analysis.

[13] According to the trial court, "[t]he gloating emails between the First National Defendants prove[] that there was malicious intent with their plan to lift-out key employees. …[T]he fact that First National Defendants are still trying to claim that their only motivation for recruiting the Individual Defendants was for their particular skills and gifted abilities is incredulous [sic]." PTM Opinion, 4/29/2019, at 16–17.

to his NSND Agreement. After the entry of judgment against the Defendants, all parties appealed to the Superior Court.

A majority of a three-judge panel of the Superior Court affirmed the judgment in a published opinion. *The Bert Co. v. Turk*, 257 A.3d 93 (Pa. Super. 2021). The Defendants raised seven issues, the one relevant to the instant appeal being a challenge to the constitutionality of the jury's award of punitive damages to Northwest. The Defendants argued that the Due Process Clause of the Fourteenth Amendment to the United States Constitution[14] prohibits, as grossly excessive, the punitive damages assessed against them on the grounds that the aggregate ratio of punitive to compensatory damages in this case was 11.2 to 1, resulting in an award of punitive damages that was unconstitutionally excessive. In advancing this as the appropriate ratio, the Defendants argued that the federal constitution required the trial court to cumulate all the punitive damages that the jury imposed and use that total as the numerator in its ratio calculation. *Id.* at 119.

In reviewing this claim, the Superior Court observed that the trial court had rejected the Defendants' math, explaining that the trial court computed the ratio using the amount of the punitive damages assessed against each of the Defendants compared to the compensatory damage imposed on that defendant. This resulted in ratios of 1.8 to 1 for Turk; 2 to 1 for FNB; 2 to 1 for FNB Corporation; and 6 to 1 for FNIA. *The Bert Co.*, 257 A.3d at 118–19 (citing PTM Opinion, 4/29/2019, at 25). Using this per-defendant approach, the trial court concluded that the ratios would be constitutionally sound under

[14] The Due Process Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1 (1868).

State Farm and further, under the facts and circumstances of this case, "the punitive damages are not so outrageous as to shock the trial court's conscience." *The Bert Co.*, 257 A.3d at 119 (citing Trial Court PTM Opinion, 4/29/2019, at 25).[15]

The Superior Court explained that punitive damages serve the important state interest of deterring and punishing egregious behavior. *The Bert Co.*, 257 A.3d at 119. As to the "historical context of punitive damages generally" and federal constitutional case law pertaining to punitive damages awards, the court observed that, in *Pacific Mutual Life Insurance v. Haslip*, 499 U.S. 1 (1991),[16] the Supreme Court of the United States determined that the Fourteenth Amendment limits punitive damages based on "general concerns of reasonableness"; however, the High Court did not "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *The Bert Co.*, 257 A.3d at 120–21 (quoting *Haslip*, 499 U.S. at 18-19). Indeed, the Superior Court noted that the High Court affirmed punitive damages that exceeded the compensatory award by 526 times in *TXO Product Corp. v. Alliance*

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[15] In its opinion addressing Defendants' post-trial motions, while endorsing the single-digit ratios based on the per-defendant approach, the trial court suggested—without discussion—that the global ratio of 11.2 to 1 "could obviously be considered an award 'exceeding a single-digit ratio…to a ***significant degree***.'" PTM Opinion, 4/29/2019, at 24 (emphasis in original). Subsequently, in its Pennsylvania Rule of Appellate Procedure 1925(a) opinion, the trial court stated: "While the individual ratios clearly fall within the single-digit ratio explained in *State Farm*, the global ratio only slightly exceeds this standard." Trial Court Opinion, 8/6/2019, at 4. By way of explanation for its change of position, the trial court stated that because "there is no explicit ratio that a punitive damages award may not surpass and the punitive damages in this case are not so outrageous as to shock the [c]ourt's conscience, the jury's award stands." *Id.*

[16] *Haslip* involved a jury award of $200,000 in compensatory damages and $840,000 in punitive damages after an insurance agent misappropriated premiums while acting within the scope of his apparent authority as an agent of the plaintiff's insurer.

Resources Corp., 509 U.S. 443 (1993).[17] Also refusing to draw a mathematical bright line between constitutionally acceptable and unacceptable amounts of punitive damages, the *TXO* plurality stated that a factfinder may impose punitive damages that have a "reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred." *The Bert Co.*, 257 A.3d at 121 (quoting *TXO*, 509 U.S. at 460).

The Superior Court next addressed *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), wherein the High Court vacated a punitive damages award.[18] In so doing, the Court provided three "guideposts" for determining whether a punitive damages award is grossly excessive: "(1) the degree of reprehensibility of defendant's conduct; (2) the relationship of the punitive verdict to the harm or potential harm suffered by the victim; and (3) any sanctions for comparable misconduct in statutory or decisional law." *The Bert Co.*, 257 A.3d at 121 (citing *Gore*, 517 U.S. at 574, 583, & 585). The Superior Court observed that the *Gore* rationale was refined in *State Farm*, 538 U.S. 408 (2003).[19]

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[17] *TXO* involved a jury award of $19,000 in actual damages and $10 million in punitive damages after TXO acted in bad faith to advance a claim against the holder of good title to oil and gas development rights in order to renegotiate royalty arrangements with the holder.

[18] *Gore* involved a jury award of $4,000 in compensatory damages and $2,000,000 in punitive damages after an American distributor of a foreign automobile manufacturer failed to disclose that a purchaser's automobile had been repainted after being damaged prior to delivery.

[19] *State Farm* involved a jury award of $2.6 million in compensatory damages (almost entirely for emotional distress) and $145 million in punitive damages after State Farm failed to settle an underlying automobile insurance claim within policy limits. *State Farm*, 538 U.S. at 415. In *State Farm*, the Supreme Court targeted the reprehensibility guidepost, clarifying that only the defendant's conduct that harmed the plaintiff is relevant to that indicium of excessiveness and not the conduct of the defendant in other jurisdictions. *Id.* at 419–20.

Specifically, *State Farm* "expounded on the first guidepost (degree of reprehensibility) and instructed courts to consider five factors" in examining this criterion, namely, whether

> (1) the harm caused was physical as opposed to economic;
>
> (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;
>
> (3) the target of the conduct was vulnerable;
>
> (4) the conduct involved repeated actions or was an isolated incident; and
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> (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident.

The Bert Co., 257 A.3d at 121-22 (citing *State Farm*, 538 U.S. at 419-20).

Regarding the second *Gore* guidepost (the relationship of the punitive verdict to the harm or potential harm suffered by the victim), the Superior Court explained that *State Farm* reiterated there is no bright-line ratio for determining whether an award of punitive damages meets constitutional muster. However, it opined that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *The Bert Co.*, 257 A.3d at 122 (quoting *State Farm*, 538 U.S. at 425). In concluding its summary of the High Court's precedent in this area, the Superior Court expressed that, "[l]ike any substantive-due-process inquiry then, the issue is whether the jury's award of punitive damages is reasonable under the facts." *Id.*

The Superior Court then turned its attention to determining how to calculate the punitive to compensatory damages ratio when multiple defendants are involved in a verdict. In so doing, the Superior Court initially rejected the Defendants' suggestion that the alleged 11.2 to 1 punitive to compensatory damages ratio is grossly excessive as a matter of law. In support of this conclusion, the court reiterated that the High Court has repeatedly declined to draw a bright-line ratio that punitive damages cannot exceed.

Next, the Superior Court discussed at length whether the trial court correctly calculated the punitive to compensatory damages ratio in this case, which obviously involved multiple defendants, a scenario never addressed by the United States Supreme Court. According to the Superior Court, the issue of how to calculate the damages ratio among multiple defendants also presented an issue of first impression in Pennsylvania. *The Bert Co.*, 257 A.3d at 124. After surveying precedent from various state and federal courts, the Superior Court ultimately found persuasive the combined reasoning of the United States Court of Appeals for the Ninth Circuit in *Planned Parenthood of Columbia/Willamette Inc. v. American Coalition of Life Activists*, 422 F.3d 949 (9th Cir. 2005), and the Supreme Court of Texas in *Horizon Health Corp. v. Acadia Healthcare Co., Inc.*, 520 S.W.3d 848 (Tex. 2017).

The Superior Court recounted that, in *Planned Parenthood*, the Ninth Circuit adopted the formula proposed by Northwest and employed by the trial court in this case, i.e., the Ninth Circuit's "math compared each plaintiff's individual compensatory damages and punitive damages awards as to each defendant." *The Bert Co.*, 257 A.3d at 125 (internal quotation marks and citation omitted). The Superior Court explained that the "Ninth Circuit found this defendant-by-defendant approach 'more accurately reflects the true relationship between the harm for which a particular defendant is responsible, and the punitive damages assessed against that defendant.'" *Id.* (quoting *Planned Parenthood*, 422 F.3d at 961).

The Superior Court noted that the Texas Supreme Court reached the same result in *Horizon Health*. In so doing, the Texas Supreme Court stated that the "proper basis for assessing the constitutional excessiveness of an exemplary-damages award[20] is per-

[20] "Exemplary damages" is another, ancient term for the damages a jury awards that "exceed the amount necessary to compensate the plaintiff for his actual pecuniary loss. The additional sum was … justified as serving various purposes: punishment, deterrence, (continued…)

defendant rather than per-judgment." *The Bert Co.*, 257 A.3d at 128 (quoting *Horizon Health*, 520 S.W.3d at 877). The Texas Supreme Court further expressed that this "approach is also consistent with the underlying purpose and focus of exemplary damages—to punish the wrongdoer rather than to compensate the claimant." *Horizon Health*, 520 S.W.3d at 877.

After adopting the per-defendant ratio, the Superior Court stated that the ratio guidepost, i.e., the second *Gore* guidepost, "is not **strictly** a compensatory-to-punitive-damages question." *The Bert Co.*, 257 A.3d at 128 (emphasis in original). Rather, the court opined, "that guidepost can also consider the '**potential** harm' a plaintiff could have suffered due to the defendant's misconduct." *Id.* (citing *Gore*, 517 U.S. at 575) (emphasis in original). According to the Superior Court, "*Gore* indicates that, in addition to the amount of harm inflicted, the Due Process Clause allows juries to impose punitive damages based on the **potential** damage that defendants wantonly risked or intentionally sought to inflict on a plaintiff." *Id.* (emphasis in original). The court reasoned that "[f]actoring potential harm into the calculus is well-suited where defendants demonstrate knowledge that an act or omission is unlawful, yet deliberately break the law. This is particularly so where, as here, the tort is perpetrated with a desire to injure the plaintiff." *Id*. at 129.

The Superior Court then reviewed the evidence of record which the court concluded clearly demonstrated that the Defendants intended to do as much economic damage as possible to Northwest, "to the point of forcing [Northwest] into sacrificing its entire staff and book of business to the First National Family." *The Bert Co.*, 257 A.3d at

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assessing the degree of reprehensibility of the defendant's conduct, and recording the jury's sense of moral outrage as an expression of societal norms." *See* Andrew W. Marrero*, Punitive Damages: Why the Monster Thrives*, 105 Geo. L.J. 767, 777 (2017) (citing *Wilkes v. Wood*, 98 Eng. Rep. 489 (1763), and *Huckle v. Money*, 95 Eng. Rep. 768 (1763)).

129. Indeed, the court noted, immediately after the Defendants set their plan into motion, numerous clients left Northwest for FNIA, forcing Northwest to obtain an injunction against its former employees and FNIA. According to the Superior Court, if Northwest would not have obtained this injunction, then the actual damages to Northwest would have been far worse than the jury found. Thus, in the Superior Court's view, the potential harm that the Defendants wished to inflict on Northwest substantially exceeded the award of $250,000 in compensatory damages. In fact, the court concluded, the Defendants intended to inflict upon Northwest potential harm equal to the value of the company. The Superior Court found that, under *Gore*, the jury had the right to punish the Defendants' "attempt to steal a corporation" with an estimated worth of at least $9.4 million. *The Bert Co.*, 257 A.3d at 132. The court asserted that the harm the Defendants inflicted upon Northwest, $250,000, and the remaining value of the company, $9,150,000, "combine for a punitive-damage [ratio] denominator of $9,400,000." *Id.*

The Superior Court reiterated that the jury imposed punitive damages of $300,000 against Turk, $1.5 million against FNIA, $500,000 against First National Bank, and $500,000 against FNB Corporation; thus, these defendant-specific awards of punitive damages "pale in comparison to the staggering, **potential** harm that they all wanted to inflict on [Northwest]." *The Bert Co.*, 257 A.3d at 132 (emphasis in original). The court then stated that "the punitive-damages-to-potential-harm ratios, per-defendant, are significantly less than even a one-to-one ratio. They are as follows: a one-to-31.333 ratio for Mr. Turk, a one-to-6.266 ratio for FNIA, and a one-to-18.8 ratio for First National Bank and F.N.B. Corp." *Id.* Ultimately concluding that the Defendants' constitutional claim was "frivolous," the court opined, "Given the total disregard for the rule of law that [the Defendants] displayed, the punitive damages that the jury awarded are **light years away** from the outer limits of the Due Process Clause." *Id.* (emphasis in original).

Senior Judge Colins authored a concurring and dissenting opinion. *The Bert Co.*, 257 A.3d at 133-42 (Colins, S.J., concurring and dissenting). As to the constitutional claim regarding the punitive damages award, Judge Colins explained that, because he concluded that FNB and FNB Corporation were entitled to JNOV on the claims rendered against them "and that only the $300,000 punitive damage award against Turk and $1.5 million punitive damage award against FNIA should remain, the ratio of the total legally valid punitive damages awards, $1.8 million, to the $250,000 in compensatory damages is 7.2 to 1, significantly less than 10 times the compensatory award." *Id.* at 141. Consequently, Judge Colins found it unnecessary to consider the constitutional "validity of a $2.8 million punitive damages award in this case or to address the majority's analysis of whether the punitive damages awards may be separately analyzed for each defendant without considering their cumulative effect[.]" *Id.*

Judge Colins rejected, however, the Defendants' contention that, because the compensatory damages award was substantial, any ratio of punitive to compensatory damages above 2 to 1 is unconstitutionally excessive as a matter of law.[21] In so doing, Judge Colins observed that, in *State Farm*, the High Court ultimately held that "because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages." *The Bert Co.*, 257 A.3d at 141 (Colins, J., concurring and dissenting) (quoting

[21] The 2 to 1 ratio argued by the Defendants was based on two Superior Court cases affirming the award of punitive damages that were two times the amount of the compensatory damages awards in those cases. *See Reading Radio, Inc. v. Fink*, 833 A.2d 199 (Pa. Super. 2003) (upholding punitive to compensatory damages ratio of slightly more than 2 to 1), and *B.G. Balmer & Co. v. Frank Crystal & Co.*, 148 A.3d 454 (Pa. Super. 2016) (upholding punitive to compensatory damages ratio of 1.88 to 1). The majority rejected reliance on these cases because, inter alia, no ratio calculation analysis was performed in either case. *The Bert Co.*, 237 A.3d at 123.

State Farm, 538 U.S. at 425) (internal quotation marks omitted). Judge Colins then highlighted that, while Northwest suffered only $250,000 in compensatory damages, "the amount of business that FNIA and Turk sought to make Northwest lose was at least $1.3 million."[22] *Id.* at 141 (citing N.T. Trial, 12/11/2018, at 51). Without including the awards against FNB and FNB Corporation, Judge Colins suggested, the "amount of the total punitive award, $1.8 million, while high in comparison to Northwest's actual loss, is not extraordinary in comparison to the harm and gain that FNIA and Turk sought from their conduct." *Id.* In Judge Colins' view, "[g]iven these facts, a 7.2 to 1 ratio of punitive damages to compensatory damages is not unconstitutional under the decisions of the United States Supreme Court or our courts." *Id*. at 141-42 (citing *Empire Trucking Co. v. Reading Anthracite Coal Co.*, 71 A.3d 923, 938-39 & n.3 (Pa. Super. 2013) (holding, without substantive analysis or citation to federal guidepost precedent, that $1.5 million punitive damages award was not unconstitutionally disproportionate to $271,000 compensatory damages award in business tort case where ratio was 5.6 to 1)).[23]

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[22] This amount is the sum of Turk's $900,000 book of business and William Collins' $400,000 book of business. N.T., 12/11/2018, at 51.

[23] We note that the Superior Court has addressed other claims of excessive punitive damages awards in cases that involved one defendant. *See, e.g.*, *Hollock v. Erie Ins. Exchange*, 842 A.2d 409 (Pa. Super. 2004) (affirming 10 to 1 ratio in bad faith case based on egregiousness of insurer's conduct, defendant's wealth, and *State Farm*'s exception to single-digit ratio where low compensatory damages are awarded); *Grossi v. Travelers Personal Ins. Co.*, 79 A.3d 1141 (Pa. Super. 2013) (affirming 4 to 1 ratio in bad faith case based on reprehensibility of insurer's conduct, *State Farm*'s exception to single-digit ratio where low compensatory damages are awarded, and comparison to higher ratio affirmed in *Hollock*). *Cf. B.G. Balmer*, 148 A.3d 454 (affirming in two sentences singular punitive damages award of $4.5 million and compensatory damages award of $2.4 million, which yielded ratio of 1.88 to 1, in business tort case based on outrageousness of individual and corporate defendants' conduct and *State Farm* language favoring single-digit ratios).

See also Reading Radio, 833 A.2d 199 (affirming punitive damages awards of $5,000 against individual defendant and $800,000 against corporate defendants and single compensatory damages award of $300,000, which yielded ratios of .016 to 1 and 2.67 to 1, in business tort case based on outrageousness of defendants' conduct and *State Farm* (continued…)

The Defendants filed a petition for allowance of appeal, which we granted on the following questions:

> 1. Whether in cases involving joint and several liability−where compensatory damages are awarded, cumulatively, against all defendants and not on an individualized basis−the constitutionally permissible ratio of punitive-to-compensatory damages is calculated on a per-judgment basis and not a per-defendant basis?
>
> 2. Whether, in reviewing the constitutionality of a punitive damages award, a court cannot consider the speculative potential harm that the plaintiff could have suffered and introduce it as a *post hoc* justification for the award, especially when the plaintiff did not present evidence of potential harm to the jury?
>
> 3. Whether, in cases where the compensatory damages award is substantial, a punitive-to-compensatory damages ratio exceeding 9:1 is presumptively unconstitutional under U.S. Supreme Court precedent?

The Bert Co. v. Turk, 275 A.3d 958 (Pa. 2022) (reordered).

DISCUSSION

I. Scope and Standard of Review

A challenge to the constitutionality of a punitive damages award triggers de novo review. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436 (2001). An appellate court should, however, adhere to the trial court's findings of fact unless they are clearly erroneous. *Id.* at 440 n.14 (citing *United States v. Bajakajian*, 524 U.S. 321, 336–37 n.10 (1998)). The issues accepted for review involve deciding the appropriate calculation of the ratio of punitive to compensatory damages pursuant to the second *Gore* factor where the defendants are jointly and severally liable under Pennsylvania law, and

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language favoring single-digit ratios). *Reading Radio* involved multiple defendants, a single compensatory damages award, and separate punitive verdicts. The court employed the per-defendant approach used by the lower court in the case at hand.

the circumstances under which potential harm to a plaintiff can be considered. The issues present questions of law, and our scope of review is plenary. *Dooner v. DiDonato*, 971 A.2d 1187, 1193 (Pa. 2009).

II. Legal Background

The focal point of this appeal is the relationship between compensatory and punitive damages. Compensatory and punitive damages are typically awarded at the same time by the same decisionmaker, but they serve distinct purposes. *Leatherman*, 532 U.S. at 432. The distinguishing feature of compensatory or actual damages is that they serve "to compensate for a proven injury or loss." *Damages*, Black's Law Dictionary (10th ed. 2014). Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Leatherman*, 532 U.S. at 432 (2001); *State Farm*, 538 U.S. at 416. To that end, compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). Given their purpose, "compensatory damages are measured by the harm the defendant has caused the plaintiff." *Philip Morris USA v. Williams*, 549 U.S. 346, 358 (2007).

"Punitive damages have long been a part of traditional state tort law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). The common-law method for assessing punitive damages has been recognized in every state and federal court for over two hundred years—since before enactment of the Fourteenth Amendment in 1868. *Day v. Woodworth*, 54 U.S. 363 (1852); *Haslip*, 499 U.S. at 17. Punitive damages "are aimed at

deterrence and retribution." *Leatherman*, 532 U.S. at 432. They have been described as "quasi-criminal," *Haslip*, 499 U.S. at 19, and could be described as "private fines" intended to punish the defendant and to deter future wrongdoing. *Leatherman*, 532 U.S. at 432. "A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation." *Id.*; *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) ("[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."); *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting) ("[P]unitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible.").[24] According to the traditional common-law approach,[25] "the amount of the punitive award is initially determined by a jury instructed to consider

[24] According to the United States Supreme Court, one should presume "a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419 (citing *Gore*, 517 U.S. at 576–77).

[25] At the time of this writing, twenty-three states have modified the common law approach by enacting statutes that limit the permissible size of punitive damages awards: Arizona, Alaska, Colorado, Idaho, Indiana, Louisiana, Kansas, Maine, Massachusetts, Mississippi, Montana, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Ohio, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. *See*, *e.g.*, Oh. Rev. Code § 2315.1(D)(1)(a) ("In a tort action…[t]he court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of compensatory damages awarded to the plaintiff from that defendant[.]"); W. Va. Code §55-7-29(c) ("The amount of punitive damages that may be awarded in a civil action may not exceed the greater of four times the amount of compensatory damages or $500,000, whichever is greater."). *See also Gore*, 517 U.S. at 1618–20 (Ginsburg, J., dissenting) (surveying state legislative activity regarding punitive damages); *Leatherman*, 532 U.S. at 433 n.6 (identifying four additional states that had added punitive damages caps since *Gore* decision).

the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable." *Id.* at 14.

The common law approach to punitive damages, including its unpredictability and appellate review based on an undefined concept of excessiveness, was the subject of constitutional challenge in the High Court on numerous occasions beginning in, at least, the 1970s.[26] As stated in *Haslip*:

> [T]he constitutional status of punitive damages, therefore, is not an issue new to this Court or unanticipated by it. Challenges have been raised before; for stated reasons, they have been rejected or deferred. … But the Fourteenth Amendment due process challenge is here once again.

Haslip, 499 U.S. at 12.

Given the embedded root in state tort law of the common-law approach, the High Court declined to say that the method "is so inherently unfair as to deny due process and be *per se* unconstitutional." *Haslip*, 499 U.S. at 17. The High Court went on to note, however, that "[i]t would be just as inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional." *Id.* at 18. In *Haslip*, the High Court determined that substantive due process principles serve as protections in punitive damages awards, invoking the "fair notice" principle embedded in

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[26] *See, e.g.*, *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270–271 (1981) ("The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial..."); *Electrical Workers v. Foust*, 442 U.S. 42, 50–51 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused"); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82–84 (1971) (Marshall, J., joined by Stewart, J., dissenting).

the Due Process Clause and proffering concepts of "reasonableness" and "adequate guidance from the [trial] court." *Id.* at 18. Although noting that in some circumstances a punitive damages award of more than four times the amount of compensatory damages might be near the limit of constitutional impropriety, the High Court refused to draw a "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.*

Consistent with the Supreme Court's unwillingness in *Haslip* to impose a bright line or concrete limit on how to determine if an award of punitive damages meets constitutional muster, federal constitutional law in this area remained elastic. In *TXO Production Corp.*, 509 U.S. at 460, the High Court held that punitive damages must have a "reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually occurred." In *Gore*, 517 U.S. at 560, the Court invoked statutory multiples of compensatory damages as instructive, and again declined to impose a bright-line rule. It also articulated three "guideposts" for determining if an award of punitive damages is grossly excessive: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.* at 575.

More recently, in *State Farm* the Supreme Court further developed *Gore*'s second guidepost by adding more structure. In discussing the relationship between a punitive damages award and the harm or potential harm suffered by the victim, the Supreme Court articulated a non-binding single-digit ratio test.

> We decline again to impose a bright-line ratio which a punitive damage award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. We cited that 4–to–1 ratio again in *Gore*. The [*Gore*] Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution.

State Farm, 538 U.S. at 425 (citing *Haslip*, 499 U.S. at 23–24, and *Gore*, 517 U.S. at 581 & n.33). The *State Farm* Court identified two exceptions to its suggested preference for a single-digit ratio: cases in which "a particularly egregious act has resulted in only a small amount of economic damages," and cases in which "the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine." *State Farm*, 538 U.S. at 425.

In Pennsylvania, the purpose of compensatory damages is also "to make the plaintiff whole." *Feingold v. Se. Pa. Transp. Auth.*, 517 A.2d 1270, 1276 (Pa. 1989). For decades, the alleged excessiveness of a compensatory verdict was measured by a "criterion of shockability." *Howarth v. Segal*, 232 F.Supp. 617, 620 (E.D. Pa. 1964) (citing *Flank v. Walker*, 157 A.2d 163, 165 (Pa. 1960)). As for punitive damages, their purpose in Pennsylvania, consistent with the norm, is "to punish the wrongdoers and to deter future conduct." *Feingold*, 517 A.2d at 1276. Pennsylvania continues to follow the common law approach except in the medical malpractice arena. *See* 40 P.S. § 1303.505 ("Except in

cases alleging intentional misconduct, punitive damages against an individual physician shall not exceed 200% of the compensatory damages awarded."). Thus, in this Commonwealth, a factfinder in a civil action for damages arising out of a non-medical tort claim enjoys discretion in the fixing of punitive damages. The factfinder may impose punitive damages for "torts that are committed willfully, maliciously, or so carelessly as to indicate wanton disregard of the rights of the party injured." *Thompson v. Swank*, 176 A. 211, 211 (Pa. 1934). "Punitive damages are not awarded as additional compensation but are purely penal in nature." *G.J.D. by G.J.D. v. Johnson*, 713 A.2d 1127, 1129 (Pa. 1998).

In the era predating the United States Supreme Court's fashioning of measurement tools for punitive damages, like the use of "guideposts" and ratios, the law in Pennsylvania was well settled that a jury verdict would be interfered with on the grounds of excessiveness only in cases where an award shocked the conscience of the court,[27] in which case the reviewing court could grant a remittitur or remand for a new trial. *See, e.g., Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800 (Pa. 1989) ("[A]t some point the amount of punitive damages may be so disproportionate when compared to the character of the act, the nature and extent of the harm and the wealth of the defendant, that it will shock the court's sense of justice. In those rare instances, the court is given discretion to remit the damages to a more reasonable amount."); *DiSalle v. P.G. Pub. Co.*, 544 A.2d 1345 (Pa. Super. 1988) (addressing request for new trial based on excessiveness of

[27] This concept of a punitive damages award's ability to shock has not been entirely eschewed by the High Court. *See TXO*, 509 U.S. at 481 (O'Connor, J., dissenting) (describing the punitive award as "a dramatically irregular, if not shocking, verdict by any measure"). Following the federalization of the standards for reviewing for excessiveness, the High Court has referred to shocking "constitutional sensibilities." *Haslip*, 499 U.S. at 18; *TXO*, 509 U.S. at 462; *Gore*, 517 U.S. at 581 n.34.

punitive damages), *abrogated on other grounds*, *Bd. of Supervisors of Willistown Twp. v. Main Line Gardens, Inc.*, 155 A.3d 39 (Pa. 2017)); *see also* 1 Summ. Pa. Jur. 2d Torts § 9:103 (2d ed.) (discussing excessiveness of punitive damages). Additionally, Pennsylvania embraced the guidance of Section 908 of the Restatement (Second) of Torts. *Chambers v. Montgomery*, 192 A.2d 355 (Pa. 1963); *Feld v. Merriam*, 485 A.2d 742 (Pa. 1984). That section provides:

> Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

Restatement (Second) of Torts § 908(2).[28]

Pennsylvania continues to follow the common law in the punitive damages arena. The United States Supreme Court's jurisprudence overlays its operation to prevent constitutionally excessive awards. While the High Court has developed various

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[28] Observing that Section 908(2) did not include a requirement that "an award of punitive damages be proportional to compensatory damages," this Court maintained that it was the jury's function to determine whether and in what amount punitive damages should be awarded without a proportionality restriction. *Kirkbride*, 555 A.2d at 803. Consistent with this, the Suggested Standard Civil Jury Instructions informed juries that the "amount you assess as punitive damages need not bear any relationship to the amount you choose to award as compensatory damages." Former Pa.S.S.Civ.J.I. § 14.02 (Punitive Damages-Amount of Award). After *Haslip* and its progeny, this was a misstatement of the law.

Former S.S.Civ.J.I. § 14.02 was renumbered in 2005 to § 8.2 and edited to exclude the provision that an award of punitive damages "need not bear any relationship to the amount" awarded as compensatory damages. Inexplicably—in that the Defendants requested the current version of the instruction in their proposed jury instruction number 52—the trial court used the former version, to which the Defendants objected. N.T., 12/19/2018, at 277; N.T., 12/20/2018, at 198. On appeal, the Defendants challenged the ratio of compensatory to punitive damages but did not otherwise challenge the jury instruction.

guideposts and factors to consider in challenges to punitive verdicts based on excessiveness, its instructions are clear on two points: there is no bright line ratio that a punitive damages award cannot exceed; and the guideposts and factors do no operate mechanically because the facts and circumstances of each case are determinative in assessing the constitutionality of a punitive damages award.

III. Whether the ratio for punitive to compensatory damages awarded in a multi-defendant case should be calculated on a per-judgment or per-defendant basis

The ratio calculation in this case involves two factors: a single compensatory damages award entered against multiple defendants who are jointly and severally liable for the award[29] and distinct punitive damages awards against each of the Defendants. In multiple defendant cases, the ratio of punitive to compensatory damages has been calculated by other courts in one of two ways, i.e., on a per-defendant or a per-judgment basis. The per-defendant approach divides the punitive damages assessed against a defendant by the compensatory damages assessed against that defendant, and the per-judgment approach divides the total of punitive damages assessed against the defendants by the total of compensatory damages assessed against the defendants. *Compare Planned Parenthood*, 422 F.3d 949 (applying per-defendant ratio calculation), *Horizon Health*, 520 S.W.3d 848 (same), and *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985 (6th Cir. 2007) (same) *with Advocat*, *Inc. v. Sauer*, 111 S.W.3d 346, 363 (Ark.

[29] Joint and several liability is premised upon causation and the indivisibility of the harm caused. *Carrozza v. Greenbaum*, 916 A.2d 553, 556 & n.21 (Pa. 2007). A joint or concurrent tortfeasor whose tortious conduct was the legal cause of a plaintiff's injury bears liability for the full amount of damages (without any apportionment or diminution for the other cause or causes that cannot be apportioned) if his tortious conduct, along with the tortious conduct of other tortfeasors, caused an indivisible harm. *Harsh v. Petroll*, 887 A.2d 209, 211 & nn. 4, 5, 6 (Pa. 2005).

2003) (dividing total of punitive awards against all companies by full amount of compensatory damages award), *Bardis v. Oates*, 119 Cal. App.4th 1, 21 n.8 (2004) (same), and *Cooley v. Lincoln Elec. Co.*, 776 F.Supp.2d 511, 551–53 (N.D. Ohio 2011) (same). The Defendants argue for application of the per-judgment approach;[30] Northwest argues for the per-defendant approach[31] as applied by the trial court and the Superior Court in this case.

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[30] The following entities filed amicus briefs in support of the Defendants ("Defense Amici"): Product Liability Advisory Council, Washington Legal Foundation, The Chamber of Commerce of the USA, and Philadelphia Association of Defense Counsel. In addition, the following parties jointly filed an amicus brief in support of the Defendants: Coalition for Civil Justice Reform, American Property Casualty Insurance Association, Pennsylvania Chamber of Business and Industry, Pennsylvania Manufacturers Association, Insurance Federation of Pennsylvania, LeadingAge PA. Defense Amici's arguments substantially overlap with each other and the Defendants' arguments.

[31] The American Association for Justice and The Pennsylvania Association for Justice jointly filed an amicus brief in support of Northwest ("Justice Amici"). They argue that the Defendants are placing entirely too much emphasis on a ratio to determine the constitutional question of whether an award of punitive damages is grossly excessive. In support, Justice Amici contend, among other reasons, that: (1) ratios provide limited information that cannot establish a valid presumption that a punitive damages award is unconstitutional; (2) such a presumption would elevate a mathematical formula to a degree that the United States Supreme Court has repeatedly rejected—marking a constitutional line by a simple mathematical equation; and (3) a bright-line rule regarding a ratio that creates a presumption of unconstitutionality fails to take into account the egregiousness of a defendant's misconduct, which clearly is the primary factor that drives a consideration of whether a punitive damages award is reasonable.

Justice Amici also argue that this case in a poor vehicle to decide whether a constitutional ratio in multi-defendant cases should be on a per-defendant or per-judgment basis. They suggest that, because only significantly disproportionate punitive-to-compensatory awards should be considered unconstitutional and because the ratio in this case is not significantly disproportionate even under the Defendants' theory, this Court should not reach that issue.

A. Arguments of the Parties

According to the Defendants, the Superior Court erroneously held that the ratio calculation in multi-defendant cases is computed on a per-defendant basis, rather than by aggregating all of the punitive damages as the numerator in one ratio calculation, i.e., computed on a per-judgment basis. In support of that position, the Defendants first assert that courts and commentators have expressed the need to calculate punitive damages on a per-judgment basis when joint tortfeasors are in the same corporate family. The Defendants' Brief at 37, 38 (citing *Advocat,* 111 S.W.3d at 363, and *The ratio guidepost in the lower courts*, 5 Bus. & Com. Litig. Fed. Cts. § 48:54 ("[W]hen multiple defendants are members of the same corporate family and the compensatory award is joint and several, it is more appropriate to calculate a single ratio using the full compensatory award as the denominator and the total punitive awards as the numerator, as opposed to comparing each separate punitive award to the total awards of compensatory damages.")).[32] Here, the Defendants contend, the Superior Court erred in rejecting the per-judgment calculation approach, even though, "according to the majority, the jury viewed [First National] as one singular entity, thus eliminating any factual predicate for an

[32] We note that the Defendants' argument is based on the premise that Turk is part of the corporate family otherwise populated by First National. This treatment of Turk by First National highlights the mechanical nature of their position on this issue and also increases the per-judgment ratio. It is not possible to view Turk as part of a theoretical First National corporate family under the facts of this case because all the conduct attributable to Turk took place while he was an employee of Northwest.

The Defendants' computation of the ratio combines the punitive damages awards of all four Defendants ($2.8 million), divides it by $250,000, resulting in a single ratio of 11.2 to 1. Applying the Defendants' methodology requires the computation of two ratios: one for First National, i.e., the three corporate defendants, as a single entity, and one for Turk. Applying this formula results in a 10 to 1 ratio for First National and a 1.8 to 1 ratio for Turk.

assessment of compensatory damages on a per-defendant basis." The Defendants' Brief at 37 (citing *The Bert Co.*, 257 A.3d at 102-33 (collectively referring to FNIA, First National Bank, FNB Corporation, and/or Turk as the "First National Family" or "Family" more than sixty-five times)).

The Defendants further assert that the Superior Court's approach to calculating punitive damages fails to account for how compensatory damages are awarded in multi-defendant cases. They argue that punitive damages, like compensatory damages, should be awarded depending upon the type of tortfeasor at issue: "In cases involving consecutive or successive tortfeasors, the jury assesses compensatory damages on a per-defendant basis. In contrast, in cases involving joint or concurrent tortfeasors, the jury assesses compensatory damages, cumulatively, against all defendants, because joint and several liability applies." The Defendants' Brief at 39. Based upon this premise, the Defendants submit that calculating the punitive to compensatory damages ratio on a per-defendant basis in a case involving joint or concurrent tortfeasors is "to perpetuate a fiction," i.e., "to count the same compensatory damages award multiple times…despite the fact that it is logically impossible that each defendant will pay the full amount of a compensatory damages award in a joint and several liability scenario." *Id.* (citation omitted).

The Defendants reason that the per-defendant calculation of punitive damages approach is not appropriate among joint tortfeasors for several additional reasons. First, because the jury assesses compensatory damages as a whole and punitive damages individually, the punitive to compensatory damages comparison is not an apples-to-

apples comparison.[33] Second, "because compensatory damages often contain a punitive element," calculating the constitutionally permissible damages ratio in joint tortfeasor cases requires a rule that protects tortfeasors from being deprived of their constitutional right to be free from the arbitrary deprivation of property. The Defendants' Brief at 41. Third, because "the per-defendant approach inevitably leads to a smaller ratio of punitives-to-compensatories and, in turn, decreases the probability that the ratio for a single tortfeasor will ever exceed 9:1," it becomes almost impossible for tortfeasors to challenge a punitive damages award based on excessiveness. *Id.* at 42. Fourth, the Superior Court's reliance on *Planned Parenthood*[34] and *Horizon Health* in support of the per-defendant approach is "misplaced," because both of those cases failed to account for the problem of counting the total amount of compensatory damages multiple times, i.e., per each defendant. The Defendants' Brief at 43.

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[33] In support, the Defendants cite to *Bardis v. Oates*, 119 Cal. App.4th 1 (2004). The Defendants' Brief at 40. However, their analysis of that case is incomplete and, therefore, unpersuasive. In *Bardis*, the jury found the multiple defendants jointly and severally liable for a single compensatory damages award and liable for individual punitive awards. The Defendants fail to explain that the court combined the individual punitive awards because there was no reason on the record to maintain strict culpability lines between the individual defendant and the corporate defendant where the individual was the manager and principal owner of the company. *Bardis*, 119 Cal. App.4th at 22 n.8. *Bardis* is not instructive because that is not the type of relationship that exists between the Defendants, as found by the jury and confirmed by the Superior Court's review of the record. *The Bert Co.*, 257 A.3d at 102–08.

[34] The Defendants suggest that the Ninth Circuit merely assumed that the compensatory damages awarded in *Planned Parenthood* were joint and several. The Defendants' Brief at 43. On the contrary, the Ninth Circuit accepted that characterization, observing that "the district court held (and the parties do not dispute) that the [compensatory damages] awards are joint and several" and expressing that it had "no quarrel with the district court's interpretation of the import of the verdicts[.]" *Planned Parenthood*, 422 F.3d at 960, n.5.

In their final challenge to the Superior Court's per-defendant approach (which presumes a remitter), the Defendants submit that a per-judgment approach allows for an award that differentiates among defendants based on their varying degrees of reprehensibility. To this point, the Defendants explain, "Once the total punitive damages award is remitted to a constitutionally acceptable figure, that sum can be allocated to each defendant *pro rata*, based on the relative size of the punitive awards made by the jury—which is what the intermediate appellate court did in *Horizon Health*[,] 520 S.W.3d at 859, 872." *Id.* at 44; Reply Brief at 14. The Defendants argue that a remittitur is required as a result of the 11.2 to 1 ratio and then conclude that "[t]he logical approach here is to use a balanced equation, in which the **total** punitive damages are the numerator and the **total** compensatory damages are the denominator, i.e., total punitive/joint-and-several compensatory." *Id.* at 45 (emphasis in original).

Northwest challenges the Defendants' position that a due process analysis of a punitive damages award mandates a ratio that compares Northwest's actual harm on a per-judgment basis, i.e., a ratio that compares the compensatory damages award to the aggregate of the individual amounts the jury assessed against each of the Defendants in punitive damages (here, $2.8 million). Northwest asserts that the Defendants fail to offer any principles of law to support their contention. More specifically, Northwest asserts that the Superior Court's individualized, per-defendant ratio calculation "is beyond reproach" because a punitive damages award implicates personal rights, specifically, a person's right to fair notice of the potential penalties for tortious conduct. Northwest's Brief at 30. Northwest explains that many courts have employed this method, including the *Planned*

Parenthood Court. *See id.* at 31–33 (discussing cases that utilized the per-defendant basis for the compensatory-to-punitive ratio).

According to Northwest, calculating the ratios individually by using the punitive award assessed against each defendant as the numerator and the total compensatory award for each jointly and severally defendant as the denominator is the correct formulation for multiple reasons: (1) the per-defendant "approach serves to best assess 'the reasonable relationship' between punitive damages and harm"; (2) it "advances the task of determining whether due process rights have been upheld"; and (3) it respects the jury's verdict because "the jury found differing degrees of egregious behavior for punitive damages, while finding joint and several liability for compensatory harm." Northwest's Brief at 31 (citing *Planned Parenthood*, 422 F.3d at 960–62, and *Ingham v. Johnson & Johnson*, 608 S.W.3d 663 (Mo. Ct. App. 2020)). Thus, Northwest continues, "a plaintiff's actual harm is represented by the amount a plaintiff is awarded in compensatory damages for the injury the defendant caused[.]" *Id.* at 34 (citing *State Farm*, 538 U.S. at 424–25). So, in calculating a ratio for each of the Defendants, it was proper to include the individual punitive damages awards as the numerator and the joint and several $250,000 compensatory damages award as the denominator for each First National entity and, as to Turk, it was proper to include the individual $300,000 punitive damages award as the numerator and the compensatory damages award of $164,943 as the denominator.

Next, Northwest points to the uncontroverted fact that it sustained "a single, indivisible injury" as a result of the Defendants' misconduct; that is, the actual economic harm to Northwest could not be divided into separate, distinct parts. Northwest's Brief at 36. Northwest asserts that the per-defendant approach adheres to that principle. In short,

each tortfeasor bears liability for the full amount of damages where his conduct, and that of other tortfeasors, caused an indivisible harm, and he is not relieved of his responsibility for the entire indivisible harm that he proximately caused, even if other tortfeasors also caused the same harm.[35] Northwest explains that there is only one amount that represents the actual harm that each of the Defendants caused Northwest. *Id.* at 40. By using the amount of compensatory damages awarded by the jury as the denominator in the ratio calculation for each of the Defendants, the trial court did not "double-count" the amount of actual harm. Rather, the court compared "the amount awarded in punitive damages against each [of the Defendants] to the actual damages that each [of the Defendants] caused" Northwest, which "was proper and constitutional." *Id.* at 36.

Northwest also finds unavailing the Defendants' single-corporate-entity argument, echoing the trial court's observations that First National "insisted on their separate corporate existence and repeatedly made every effort to separate themselves, one from the other," and that the jury was instructed to "decide whether punitive damages are to be assessed against each Defendant by that Defendant's conduct alone[,]" which the jury did. Northwest's Brief at 38 (citing Trial Court Opinion, 4/29/2019, at 3; N.T., 12/20/2018, at 172); Special Verdict Sheet, 12/21/2018, at 10. Finally, Northwest contests the Defendants' reliance on the observation in *State Farm* that, in many cases, compensatory damages include a component that is duplicated in a punitive damages award.

[35] In response to the Defendants' argument that none of them will actually pay the total amount of compensatory damages, Northwest is correct in asserting that the amount a plaintiff "is awarded in compensatory damages for its actual harm" is separate and distinct from "the amount [a tortfeasor] may collect from another joint tortfeasor in contribution[.]" Northwest Brief at 37. *Accord Puller v. Puller*, 110 A.2d 175, 177 (Pa. 1955) ("Contribution is not a recovery for the tort [committed against the plaintiff] but the enforcement of an equitable duty [among joint tortfeasors] to share liability for the wrong done.").

Specifically, Northwest asserts that United States Supreme Court "made no such statement. Rather, the Court observed that in the case before it, there was likely a duplicative component in the punitive damages award because plaintiffs were awarded $1 million dollars [sic] in compensatory damages for emotional distress." *Id.* at 40 (citing *State Farm*, 538 U.S. at 426). In contrast, Northwest contends, this case does not include an award of compensatory damages with a potentially punitive component.[36]

B. Analysis

The Superior Court found the reasoning expressed in *Planned Parenthood*, 422 F.3d 949, and *Horizon Health*, 520 S.W.2d 848, persuasive: "computation of damages ratios in multi-defendant cases are on a per-defendant basis, rather than by aggregating all of the compensatory and punitive damages on a per-judgment basis." *The Bert Co.*, 257 A.3d at 128. In *Planned Parenthood*, the jury awarded individualized compensatory damages to six plaintiffs that were identical as to each of fourteen defendants, for a total, **joint and several** compensatory award of $526,336.14.[37] *Planned Parenthood*, 422 F.3d at 952, 960. After grouping the defendants into different tiers for purposes of exemplary damages, "the jury awarded each plaintiff punitive damages in a discrete amount from each defendant," for a total punitive damages award of $108.5 million. *Id.* at 960. In assessing the ratio calculation, the Ninth Circuit Court of Appeals reminded that due process "prohibits the imposition of grossly excessive or arbitrary punishments on a

[36] We agree. Neither the claims asserted in this case nor the record provide any indication that the award of compensatory damages included a punitive element.

[37] According to the Ninth Circuit, the trial court deduced that the compensatory awards were joint and several from the jury's award of the amount of harm suffered by each plaintiff against each defendant and the lack of argument by the plaintiffs that they were each entitled to fourteen times this amount. *Planned Parenthood*, 442 F.3d at 960 n.5.

[particular] tortfeasor." *Id.* at 953 (quoting *State Farm*, 538 U.S. at 416). Therefore, it concluded:

> it makes sense to compare each plaintiff's individual compensatory damages and punitive damages awards as to each defendant because this approach simplifies the task of assessing constitutional reasonableness. If it appears that the envelope is pushed too far, the reviewing court can figure out who is to receive what amount of money from whom, and remit on a per plaintiff, per defendant basis.

Id. at 962.[38]

In *Horizon Health*, the jury awarded $55,049.24 in actual damages to a single plaintiff, Horizon Health, finding the five individual defendants[39] caused the loss in varying degrees. *Horizon Health*, 520 S.W.3d at 871–72. The jury awarded a total of $1,750,000 in exemplary damages against the individual defendants, but the intermediate appellate court suggested a remittitur to $220,196.96, using a per-defendant approach; the suggested remittitur would result in a ratio of 4 to 1 as to each defendant. In reviewing the intermediate court's ratio calculation, the Texas Supreme Court voiced the same

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[38] Having applied a per-defendant calculation to the individual compensatory and punitive damages awards, the Ninth Circuit concluded that the resulting ratios did not pass constitutional muster. The court observed that, with few exceptions, the ratios "were well in excess of single digits," most of the compensatory awards were substantial, but not all of the plaintiffs' damages were quantifiable, and one defendant's conduct was "particularly reprehensible." *Planned Parenthood*, 422 F.3d at 963. Given these circumstances, the court concluded that a 9 to 1 ratio "would reasonably serve the interests of punishment and deterrence." *Id.* Accordingly, it remitted the punitive awards "to a sum for each plaintiff that is nine times that plaintiff's compensatory recovery," allocating "that amount of punitive damages among defendants in the same proportion as the jury did in its verdicts." *Id.* at 963–64.

[39] The Texas Supreme Court reversed the trial court's joint-and-several exemplary damages award against the two corporate defendants. It directed entry of a take-nothing judgment as to these corporate defendants' liability for exemplary damages. *Horizon Health*, 520 S.W.3d at 883.

relationship principle: the constitutional concern at issue—the arbitrary deprivation of property through excessive punitive damages without due process—is assessed on an individual basis. *Horizon Health*, 520 S.W.3d at 877.

Planned Parenthood and *Horizon Health* involve joint and several compensatory damages awards that are distinguishable from the compensatory damages award in this case. In those sister court cases, the juries entered individual amounts of compensatory damages against each defendant. While the defendants were jointly and severally liable to the plaintiffs for the cumulative compensatory damages award, the ratios were calculated using the individual compensatory damages awards as the denominator, not the cumulative joint and several amount of compensatory damages. Those cases represent straightforward per-defendant ratio calculations. In contrast, pursuant to the agreement of the parties in this case, the jury entered a joint and several compensatory damages award without allocating responsibility for that amount among the Defendants or assigning a specific amount of compensatory damages against each of the Defendants (which would later be cumulated for entering judgment against each of the jointly and severally liable Defendants).

A more analogous situation is reported in the Missouri intermediate appellate court's decision in *Ingham*, 608 S.W.3d 663. There, twenty-two consumers filed an action against a cosmetics manufacturer and its parent company, asserting claims for strict liability and negligence based on evidence that the consumers developed ovarian cancer due to their use of talcum powder. The jury awarded $550 million in actual damages ($25 million multiplied by twenty-two Plaintiffs) jointly and severally against the defendants. "The jury recommended, and the trial court awarded, $990 million in punitive damages

against JJCI [the manufacturer] and $3.15 billion against J&J [the parent company], yielding ratios of 1.8:1 for JJCI and 5.72:1 for J&J." *Id.* at 721–22. The ratios were calculated by dividing "each individual punitive damages award by the entire actual damages award where defendants were jointly and severally liable for all actual damages." *Id.* at 722 n.27. After reducing the total amount of actual damages because the trial court lacked personal jurisdiction over certain consumers, the appeals court reduced the punitive damages awards against the two defendants proportionally to "reflect the ratio of punitive to actual damages assessed originally by the trial court." *Id.* at 722 (citation omitted). According to the appeals court, this method gave effect to the original judgment of the jury and avoided excessive damage awards. *Id.* The *Ingham* Court did not express its rationale for using the per-defendant approach in the context of a single compensatory damages award, apparently relying on the joint and several liability of the defendants for its choice.[40]

[40] In *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014), the Missouri Supreme Court used the per-defendant approach under the same circumstances presented in *Ingham*. *Id.* at 147. The Missouri Supreme Court likewise did not express its rationale for using this calculation. The per-defendant approach has also been applied in two other jurisdictions where a single compensatory damages award was entered against jointly and severally liable defendants. *Merrick v. Paul Revere Life Ins. Co.*, 594 F.Supp.2d 1168, 1190–91 (D. Nev. 2008) (relying on Nevada law to calculate ratio separately for each defendant by dividing punitive damages award by total of trial judgment where defendants "were jointly and severally liable without apportionment for the underlying harm their conduct caused"), and *Atlantic Human Resource Advisors, LLC v. Espersen*, 76 V.I. 583, 636 (V.I. 2022) (holding that court should evaluate ratio by comparing punitive damages awarded against each of three jointly and severally defendants who did not act with same level of reprehensibility to total compensatory damages award; citing *Planned Parenthood* and *Horizon Health* for the proposition that the *Gore* "factors must be evaluated separately as to each punitive damage award against each separate defendant, rather than considering all damages awarded against all defendants collectively").

In contrast, based on a jury verdict analogous to the one in this case, the federal District Court for the Northern District of Ohio utilized a per-judgment approach. *Cooley v. Lincoln Electric Co.*, 776 F.Supp.2d 511 (N.D. Ohio 2011). The jury returned a verdict finding four defendants liable to the plaintiff and awarded $1.25 million in compensatory damages. The jury allocated 37% of the fault to the plaintiff and, as a result, the total compensatory damages award was reduced to $787,500. The jury awarded punitive damages against each of the defendants in separate amounts. The total amount of the punitive damages awards was $5 million. Relevant to our discussion, the defendants challenged the punitive damages award as excessive, and the parties disputed the method of calculating the *Gore* ratio.

As to the appropriate calculation, the defendants argued that the ratio for each defendant should be calculated for each defendant individually and the denominator in the individual calculations should be the reduced compensatory damages award ($787,500) divided by four (to reflect an equal division among the four defendants) rendering a denominator of $196,875. Using this method resulted in ratios of 8.9 to 1, 8.9 to 1, 3.8 to 1, 3.8 to 1.

In contrast, the plaintiffs argued that the ratios should not be calculated individually and should be measured using the total compensatory damages unreduced by plaintiff's comparative fault ($5 million) as the denominator and the total punitive damages award as the numerator. This calculation, $5 million divided by $1.25 million, resulted in a ratio of 4 to 1.[41]

[41] As is apparent, in *Cooley* the plaintiff advocated for a per-judgment approach, and the defendants argued for a modified per-defendant approach for the calculation of the ratio. The parties in this appeal took the opposite positions.

The *Cooley* Court devised a third calculation, reflecting the per-judgment approach: total punitive damages divided by the total compensatory damages reduced by the percentage of the plaintiff's comparative fault ($5 million divided by $787,500), resulting in an "overall ratio" of 6.3 to 1. *Cooley*, 776 F.Supp.2d at 552. While it ultimately adopted this ratio as the "maximum *Gore* ratio" for its ensuing analysis,[42] the *Cooley* Court noted that "while the second guidepost requires more of an analysis than simply a mathematical calculation of the ratio, it is worth observing that all of the [ratios considered], using all of these different approaches, are single-digit." *Id.*

The *Cooley* Court rejected using the per-defendant approach advanced by the defendants (which resulted in the highest ratios) because dividing the compensatory damages award equally among the defendants for purposes of the calculation was "misleading." *Cooley*, 776 F.Supp.2d at 552. At trial, it was determined that, "due to the secret joint-defense agreement, the jury would not be instructed to allocate compensatory damages separately." *Id.* at 552 n.203. Consequently, it was not possible for the district court to accurately calculate the ratio for each defendant individually. *Id.* at 552.

For purposes of our consideration, it is important to emphasize that the *Cooley* Court did not chose the per-judgment approach to calculate the ratio because it best reflected the purpose of the second *Gore* factor. There was no consideration of whether the per-judgment approach under the circumstances reflected the impact on each defendant's due process rights. Nor were the defendants related in a "corporate family"

[42] In contrast to the appeal before us where we limited our review to determine the appropriate mathematical calculation of the ratio, the *Cooley* defendants presented a challenge on all four *Gore* factors and developed case specific arguments based on the evidence relative to the constitutional bounds of the ratio. The *Cooley* Court ultimately affirmed the punitive damages award. *Cooley*, 776 F.Supp.2d at 555.

sense. It appears that the *Cooley* Court believed it had no choice but to develop its own methodology to account for the joint-defense agreement.

As in the case before us, by agreement of the parties,[43] there was no allocation of compensatory damages as a result of the manner in which the jury was instructed. Thus, as in *Cooley*, we have no basis to determine what amount of the $250,000 compensatory damages award correlates with the conduct of any specific defendant.

Neither the plaintiff nor the defendants in *Cooley* advocated for the per-defendant approach invoked by Northwest, i.e., doing a ratio calculation for each of the Defendants using the total compensatory damages award as the denominator and the individual punitive damages award against each of the Defendants as the numerator. Based on our survey of other jurisdictions addressing this scenario, Missouri and the Virgin Islands have used this calculation to determine the *Gore* ratio.[44] It also appears that our Superior Court has used this approach. *See* supra note 23 (discussing *Reading Radio*, 833 A.2d 199). In addition, as seen in *Horizon Health* and *Planned Parenthood*, Texas and the Ninth Circuit have endorsed the per-defendant approach to calculating the ratio, albeit where

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[43] There is nothing in the record before us to indicate that there was a joint-defense agreement. We only know that the Defendants agreed with Northwest that there would be a lump sum compensatory damages award based on the highest amount awarded on any one cause of action.

The *Cooley* Court seemed to be of the view that the joint-defense agreement on the allocation of payment of damages precluded an instruction to the jury to allocate the compensatory damages among the defendants. We are not clear why an agreement among defendants on how damages would be allocated for payment among them has any impact on a jury making an allocation of damages based on the evidence. Notwithstanding such a determination, the defendants are free to agree among themselves how the compensatory damages award will be paid.

[44] *See* supra note 40.

the jury allocated damages among the jointly and severally liable defendants, and the allocated amount of compensatory damages was used as the denominator. Moreover, as we view the decisions applying the per-judgment approach, it becomes apparent that the courts are in reality applying a per-defendant approach. This is because in these cases multiple corporate defendants are treated as one defendant because the defendants were, or acted as, a single entity, and the punitive damages awards are cumulated to determine the numerator.[45]

We emphasize, as evidenced by the High Court's rulings, an analysis of the constitutionality of a punitive damages award must account for its impact on a defendant's right to due process. *State Farm*, 538 U.S. at 416–17 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receives fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."). The per-defendant ratio assesses the individualized

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[45] Courts using the per-judgment approach aggregated the individual punitive damages awards and compared them to the total compensatory awards because the separate defendants were or acted as a singular entity. Viewing the application from this perspective, the methodology is actually a measurement on a per-defendant basis because multiple defendants are collapsed into one in the ratio. *See, e.g.*, *Advocat*, *Inc. v. Sauer*, 111 S.W.3d 346, 363 (Ark. 2003) (dividing total remitted punitive damages of $21 million against three companies that operated nursing home as one business by full amount of remitted compensatory damages, $5 million); *Bardis v. Oates*, 119 Cal. App.4th 1, 21 n.8 (2004) (dividing total punitive damages of $7 million against individual and corporate defendants, where individual was manager and principle owner of corporation, by joint and several compensatory damages of $165,527.63). *Cf. Cooley*, 776 F.Supp.2d at 552, discussed supra at pp. 37–40.

Contrary to the Defendants' argument, this case was not tried as a single-corporate-entity case. Trial Court Opinion, 4/29/2019, at 3; N.T., 12/20/2018, at 172; Special Verdict Sheet, 12/21/2018, at 10. Northwest was required to prove wrongdoing by each defendant. The jury was charged in that manner and determined liability and punitive damages in that manner as instructed on the verdict sheet.

impact intended by the punitive damages awards, whereas the per-judgment approach distorts the analysis by obscuring the due process rights of the individual defendants. A composite analysis undoes the jury's determination of an individual's reprehensibility and need for deterrence as reflected in the punitive verdict. Indeed, given the purpose of punitive damages, the jury could not have been instructed to award a composite punitive verdict.

Punitive damages awards must be tailored to each defendant. Unlike responsibility for causing the harm, which as to jointly and severally liable defendants is indivisible for purposes of liability, reprehensibility is a determination that must be individualized as to each defendant. In this case, the jury deliberated and assessed the reprehensibility of the conduct of each of the Defendants and determined the punitive damages verdict necessary to punish and deter each of the Defendants. *See The Bert Co.*, 257 A.3d at 124 ("Here, the jury found each defendant's misconduct morally reprehensible but to varying degrees."). The per-defendant approach reflects this reality.

In the trial of this case, the principles of joint and several liability were recognized in the parties' agreement to instruct the jury to award a single compensatory damages award as to all the Defendants. Pursuant to Pennsylvania statute: "A defendant's liability in [an intentional tort action] shall be joint and several, and the court shall enter a joint and several judgment in favor of the plaintiff and against the defendant for the total dollar amount awarded as damages[.]" 42 Pa.C.S. § 7102(a.1)(3)(ii). Joint and several liability is premised upon causation and the indivisibility of harm caused to the plaintiff. *Carrozza v. Greenbaum*, 916 A.2d 553, 566 n.21 (Pa. 2007). A joint or concurrent tortfeasor is not relieved of responsibility for the entirety of indivisible harm even though some other

tortfeasor's misconduct also caused that same harm. *Powell v. Drumheller*, 653 A.2d 619, 622 (Pa. 1995).

The purpose of joint and several liability is to enhance the collectability of the plaintiff's verdict. The plaintiff can recover the full amount of an award against any jointly and severally liable defendant, avoiding the barrier to compensation created by defendants without the financial resources to satisfy the judgment. *See AAA Mid-Atlantic Ins. Co. v. Ryan*, 84 A.3d 626, 631 (Pa. 2014) ("[Joint and several liability] allows an injured party to recover an entire judgment from any one responsible tortfeasor.").

The fact that defendants are jointly and severally liable as a matter of law does not mean that a jury cannot allocate responsibility for the harm among those defendants. If separate compensatory damages awards had been entered against the Defendants in this case, the amounts would have been cumulated for purposes of Northwest entering judgment against each of them. The fact that this did not occur here was because the parties chose not to have the jury allocate the responsibility for the harm to Northwest.[46]

As a result, utilizing the per-defendant approach to calculate the *Gore* ratio does not perfectly reflect a comparison of the Defendants' responsibility for the harm to the reprehensibility of the Defendants' conduct. It is certainly possible that the jury believed that the takeover scheme could not have been accomplished without Turk working from the inside of Northwest and that he bore a greater responsibility for the compensatory

[46] The Fair Share Act makes clear that a jointly and severally liable defendant can seek contribution from other jointly and severally liable defendants who caused the same harm. *See* 42 Pa.C.S. § 7102(a.1)(4) ("Where a defendant has been held jointly and severally liable under this subsection and discharges by payment more than that defendant's proportionate share of the total liability, that defendant is entitled to recover contribution from defendants who have paid less than their proportionate share."). This same allocation of responsibility for the harm can be determined by the jury in the principal case.

loss; or, it could have concluded that FNIA, with its knowledge of the insurance industry and strategic planning capabilities, was responsible for an elevated amount of responsibility for the compensatory damages; or FNB, with its financial clout, was disproportionately responsible for Northwest's harm; or the Defendants were equally responsible for the loss. We will never know the jury's opinion as a result of the parties' agreement on the jury charge and verdict slip culminating in a single compensatory damages award. However, this information gap, inevitable because of this trial strategy, is not a basis to abandon the per-defendant approach to calculating the *Gore* ratio.

Cumulating the punitive verdicts as required under the per-judgment approach obliterates the jury's assessment of each defendant's reprehensibility, and we cannot conceive a reason for doing so where the Defendants are not a single corporate entity. Here, the single compensatory damages award reflects the parties' decision to have the jury consider the harm as indivisible. Consequently, under the circumstances, the per-defendant calculation of the *Gore* ratio—dividing the individualized punitive damages awards by the total compensatory damages award—is appropriate. This was the methodology used by the trial court and the Superior Court.

We reject the Defendants' contention that the utilization of this approach "perpetuates a fiction" by utilizing the compensatory damages award multiple times in a case involving jointly and severally liability defendants. Instead, this approach effectuates the parties' agreement to have the compensatory damages award reflect the General Assembly's directive that such tortfeasors are in fact individually liable to the victim of an intentional tort for the full amount of damages. As a result, the verdict returned by the jury reflected an indivisible harm. Tampering with this determination is not within our

purview. Similarly, the individualized punitive damages awards reflect the jury's verdict on the degree of reprehensibility of each of the Defendants. This is the correct foundation for the due process analysis. We will not override these determinations. Under these circumstances, it is the per-judgment approach advanced by the Defendants that would create a fiction.

Utilizing the per-defendant approach, the trial court correctly calculated the ratio of punitive damages to compensatory damages contemplated under the second *Gore* factor as follows:

Turk	1.8 to 1
First National Bank	2 to 1
FNB Corp.	2 to 1
FNIA	6 to 1

Trial Court Opinion, 8/6/2019, at 4. The trial court concluded that, while the individual calculations fall within the single-digit ratio explained in *State Farm*, the "global ratio" (per-judgment ratio of 11.2 to 1) only slightly exceeds it. *Id.* Recognizing that there is no explicit ratio that a punitive damages award may not surpass, and that the award must be based on the facts and circumstances of the Defendants' conduct and harm to Northwest, the trial court validated the jury award, finding that it did not shock the court's conscience. *Id.* While the trial court's ultimate conclusion is expressed in pre-*Haslip* terminology, its opinion as a whole reflects a thorough consideration of the evidence of record, the requisite reprehensibility, and a recognition of the due process implications of the relationship between the compensatory and punitive damages awards. Although the trial court did not decide that the per-defendant ratio calculation was preferable to the per-

judgment calculation, the Superior Court expressly so decided and approved the trial court's methodology. *The Bert Co.*, 257 A.3d at 128. We affirm the decision of the Superior Court to the extent that it affirmed the trial court's methodology.

Determination of the ratio of punitive to compensatory damages is not the end of the examination of the relationship between the plaintiff's harm as reflected in the compensatory damages award and the reprehensibility of the defendant's conduct. "[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered." *State Farm*, 538 U.S. at 426. We emphasize that the second *Gore* factor does not operate mechanically. Without regard to the totality of the circumstances, the Defendants view the calculation of the ratio as the endgame. Either it is too high or too low, and the constitutional question is answered. This is wrong.[47]

[47] While the adequacy of the evidentiary support for any of the punitive damages awards is not before us, we note that the ratio for FNIA at 6 to 1 is three times higher than the ratios associated with the other defendants. The jury was correctly instructed that in making an award of punitive damages it should take into account not only punishment but deterrence. N.T., 12/20/2018, at 170. Given that FNIA President Martin Munchok testified that, if he had it to do all over, he would engage in the same conduct detailed by the evidence, N.T., 12/14/2018, at 229, a punitive award containing a large deterrence factor is not surprising. In addition, it is clear from the record as a whole that FNIA gave birth to the scheme that was subsequently embraced and advanced by the other Defendants.

As to the remaining ratios of 2 to 1 or less, we note that Defendants posit that such ratios are acceptable because they are consistent with prior punitive damages awards in Pennsylvania. The Defendants' Brief at 58 (citing *Reading Radio* and *B.G. Balmer*).

IV. Whether a court may consider the harm that the plaintiff could have suffered and use it as a post hoc justification for an award of punitive damages

The Defendants contend that the Superior Court erroneously injected potential harm into the case sua sponte as a post hoc justification for the jury's punitive damages awards. Northwest considers the court's discussion to be relevant and supported by the record.

A. Arguments of the Parties

According to the Defendants, at trial Northwest made only passing reference to the concept of potential harm to Northwest if the lift out and ultimate hostile takeover were successful. Furthermore, it never offered a developed argument to the Superior Court that the court should consider such harm in evaluating the constitutionality of the $2.8 million punitive damages award. Thus, the Defendants reason, whatever role potential harm has under the *Gore* guideposts, it cannot be used as an after-the-fact justification to save an otherwise unconstitutional punitive damages award. Yet, the Defendants assert, the Superior Court utilized the potential harm to Northwest for this exact purpose. The Defendants support this argument by selectively referring to the record, which, they claim, demonstrates that a Northwest executive wrote to Northwest's remaining customers that the company had the resources to service and retain them all.

The Defendants also believe that Northwest offers this Court a flawed argument on potential harm, insisting that Northwest fails to point to anything in the record that would suggest either party introduced the issue of potential harm in the lower courts, let alone that the jury considered potential harm in crafting its punitive damages award. In addition, the Defendants challenge Northwest's suggestion that "potential harm" encompasses everything that could have happened in a case. On this point, the

Defendants highlight the United States Supreme Court's explanation that "the proper inquiry is 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." The Defendants' Brief at 16-17 (quoting *Gore*, 517 U.S. at 581).

The Defendants further submit that the Superior Court's potential harm analysis conflicts with Supreme Court precedent. Specifically, the Defendants argue that the *Gore* Court did not hold that potential harm is a valid consideration when reviewing the constitutionality of a punitive damages award in all cases. Rather, the Defendants assert, the Supreme Court merely stated that "there is no suggestion that Dr. Gore or any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy." The Defendants' Brief at 47 (quoting *Gore*, 517 U.S. at 582). Assuming arguendo that potential harm is a valid consideration under the circumstances of this case, the Defendants maintain that the Superior Court ignored the fact that Northwest eliminated any hypothetical "potential harm" by obtaining a preliminary injunction in the early stages of litigation, thereby rendering potential harm an inapplicable consideration.

Contrary to the Defendants' argument that potential harm should not be considered in these circumstances, Northwest highlights cases, such as *Gore* and *State Farm*, wherein the Supreme Court clearly spelled out that courts can assess the potential harm from tortious conduct when contemplating the constitutionality of punitive damages awards. According to Northwest, because no defendant "has to pay" compensatory damages for potential harm, the amount of harm that a defendant could have caused "only has a relationship to the degree of wrong," i.e., to the assessment of punitive

damages for purposes of punishment and deterrence. Northwest's Brief at 37. Thus, Northwest opines, the Superior Court properly considered the potential harm that Northwest could have suffered in this case. Moreover, Northwest asserts, the potential harm it could have suffered makes the ratio of damages awarded especially reasonable.

Concerning the Defendants' contention that the Superior Court improperly injected potential harm into this case sua sponte, Northwest posits that the court merely applied the law that Northwest presented to the court, i.e., *Gore* and *State Farm*. Northwest's Brief at 46–47 (citing the Defendants' First Superior Court Brief at 49–50). In fact, Northwest maintains, in relying on *Gore* and *State Farm*, the Defendants put at issue the question of potential harm, because those cases refer to such harm as part of the equation. Northwest further notes that, with regard to its arguments in the Superior Court as an appellee, it had no issue preservation responsibilities; therefore, the Defendants' attempted waiver argument fails. *Id.* at 47 n.16.

Next, Northwest refutes the Defendants' argument that the Superior Court created a new rule that potential harm should be considered in cases such as this one. Northwest contends that the Superior Court did not craft a new rule regarding potential harm; it merely applied this well-settled law. Concerning the Defendants' contention that potential harm was not a factor in this case because Northwest obtained a preliminary injunction enjoining First National from further gutting Northwest, Northwest argues that the Defendants cannot invoke its resistance to the takeover and business resilience to exculpate itself. Its ability to thwart the Defendants' scheme does not mean the "potential harm ratios cannot be calculated under *Gore* guidepost two and, in this case, the evidence was more than sufficient to establish the value of the potential harm [Northwest] would

have likely sustained, if [the Defendants'] scheme had succeeded." Northwest's Brief at 49-50; *see id.* at 46 n.15 ("According to expert testimony at trial, the *pro forma* analyses that FNB prepared prior to the raid regarding the financial benefits of only acquiring Turk and Collins and their books of business showed a value of $5.3 million. (R.R. 302a–303a). Calculating potential harm ratios using this figure representing a partial success of the entire scheme also yields ratios that are less than 1 to 1.").

B. Analysis

In assessing the constitutionality of a punitive damages award, the United States Supreme Court first took account of the potential harm that might result from a defendant's tortious conduct in *Haslip*. The High Court endorsed the Alabama Supreme Court's standard of "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." *Haslip*, 499 U.S. at 21. The *TXO* plurality noted the High Court's previous endorsement of the potential harm standard:

> Thus, both State Supreme Courts and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.

TXO, 509 U.S. at 460.

Then in *Gore*, the Supreme Court granted certiorari to clarify "the character of the standard that will identify unconstitutionally excessive awards of punitive damages." *Gore*, 517 U.S. at 568 (citation omitted). As part of that standard, the High Court associated potential harm with its second guidepost: "the disparity between the harm or

potential harm suffered [by the plaintiff] … and [the] punitive damages award[.]" *Gore*, 517 U.S. at 575 (emphasis supplied). According to the *Gore* Court, potential harm refers to "the harm likely to result from a defendant's conduct as well as the harm that actually has occurred," or, stated otherwise, "the harm to the victim that would have ensued if the tortious plan had succeeded." *Id.* at 568 (quoting *TXO*, 509 U.S. at 460) (emphasis omitted). *See also Weinstein v. Prudential Property and Cas. Ins. Co.*, 233 P.3d 1221, 1256 (Idaho 2010) ("[P]otential harm refers to harm that may occur or could have occurred from the defendant's past wrongful conduct, not harm that could result from future similar wrongful conduct by the defendant or others if they are not deterred from engaging in that conduct.").

Although in *Leatherman* the Supreme Court was focused mainly on the correct standard of review in assessing the constitutionality of a punitive damages award, it again commented on potential harm as part of the second *Gore* factor, discussing potential harm in relation to a realistic evaluation of the record evidence. *See Leatherman*, 532 U.S. at 442 ("Even if that estimate [of potential harm] were correct, however, it would be unrealistic to assume that all of Cooper's sales of the ToolZall would have been attributable to its misconduct in using a photograph of a modified PST in its initial advertising materials."). The *TXO* plurality explained that the potential harm that is properly included in the due process analysis is "harm that is likely to occur from the defendant's conduct." *TXO*, 509 U.S. at 460.

In this case, the Superior Court never discussed the constitutionality of the single-digit ratios resulting from the per-defendant ratio calculation using the compensatory damages as the denominator in the equation. Instead, the Superior Court viewed the

evidence based on the totality of the takeover scheme and proceeded to consider the potential harm to Northwest in the calculation. *See The Bert Co.*, 257 A.3d at 128 ("Additionally, and critically in this case, the ratio guidepost is not ***strictly*** a compensatory-to-punitive damages question. Instead, that guidepost can also consider "***potential***" harm a plaintiff could have suffered due to the defendant's misconduct. *Gore*, 517 U.S. at 575[.]") (emphasis in original). After discussing the scope and intent of the scheme to takeover Northwest, the Superior Court identified what it believed to be the monetary amount of the potential harm intended by the Defendants ($9.4 million), then used that number as the denominator and concluded that the ensuing calculations resulted in ratios of less than 1 to 1, which were impervious to constitutional attack.

We have determined that the second *Gore* guidepost requiring an analysis of the relationship between the punitive damages award to the harm suffered by Northwest—as measured by the mathematical ratio of the punitive damages awards to the compensatory damages award—does not bump up against the single-digit ratio earmarked for concern in *State Farm*. However, as discussed, the calculation of the ratio is not the end of the analysis. The Defendants' argument in this Court against the Superior Court's consideration of the potential but unrealized harm to Northwest starts with the premise that the ratio must be calculated on a per-judgment basis. Applying that calculation results in an 11.2 to 1 ratio. Again, in a mechanical fashion, the Defendants posit that this ratio is presumptively unconstitutional, and the Superior Court's only reason for considering potential harm was to rationalize an otherwise presumptively unconstitutional punitive verdict. Even though the Defendants' argument is couched in an attack on a ratio calculation that we have rejected, whether potential harm has a place

in a jury's award of punitive damages remains relevant to the application of the second *Gore* factor.

First, the Defendants' contention that the Superior Court's "sua sponte" consideration of potential harm in its analysis of the second *Gore* factor was error demonstrates a misunderstanding of the de novo review required when a specific challenge is made to the unconstitutional excessiveness of a punitive damages award as required by *Leatherman*, 532 U.S. at 431. In the Superior Court, the Defendants challenged the punitive damages awards in light of the second *Gore* guidepost: the relationship of the punitive damages award to the harm or potential harm suffered by the victim. Its consideration of evidence of potential harm as part of its de novo review of the relationship between the punitive and compensatory damages awards was sound.

Second, contrary to the Defendants' assertion, evidence of record supports the calculation of potential harm intended by the Defendants. As detailed by the Superior Court and supplemented by our review of the record, the Defendants' scheme to gut Northwest of its personnel, capture the business of those employees, and force a fire sale of the remaining business was thwarted by Northwest through resistance and prompt legal action. The jury's compensatory damages award did not and could not capture the harm that was the goal of the Defendants' conduct and that was likely to result from their conduct. *TXO*, 509 U.S. at 460. At a minimum, the expert testimony established through the pro forma analysis prepared by FNIA to evaluate the acquisition of Turk and Collins and their books of business showed a value of $5.3 million over a five-year period. N.T., 12/17/2018, at 231–32. As described, this was just one aspect of the planned takeover. The Superior Court relied on the 2017 revenue of Northwest as verified by the testimony

of Mr. Bert at $9.4 million[48] to establish the amount of the potential harm intended by the Defendants if the scheme was successful. We are skeptical of the reliance on this raw point-in-time economic figure to reflect the amount of potential harm that "was likely to occur" from the Defendants' conduct. It is not only unrealistic but incorrect to assume that this figure, devoid of any consideration of the costs of doing business, represents the amount of potential harm. However, the jury was apprised of the harm likely to occur if only the first step of the plan was successful, i.e., "lifting out" Turk and Collins. We are satisfied that the jury was presented with sufficient evidence to consider the potential harm that was likely to occur from the Defendants' conduct.

Finally, the jury was instructed that in considering the award of punitive damages it could consider "any or all of the follow[ing] factors. … Two, the nature and extent of the harm to Plaintiff the Defendant caused or intended to cause." N.T., 12/20/2018, at 171. The trial court derived this language from well-established Pennsylvania law. The element of an award of punitive damages for averted harm has long been recognized in Pennsylvania. *Feld v. Merriam*, 485 A.2d 742 (Pa. 1984) (adopting Restatement (Second) of Torts § 908(2), which provides that jury can consider nature and extent of harm defendant caused or intended to cause); *Kirkbride*, 555 A.2d at 803 (citing *Feld* and Section 908(2) instruction on punitive damages); *SHV Coal, Inc. v. Continental Grain Co.*, 587 A.2d 702 (Pa. 1991) (same). The charge given by the trial court accurately reflects the concept of potential harm as articulated by the High Court and consistently applied in this Commonwealth. This case involved the commission of intentional torts, and the charge appropriately conveyed to the jury that it could award punitive damages for both

[48] N.T., 12/20/2018, at 206, 211.

the harm caused by the Defendants and the harm that they intended to inflict on Northwest if the scheme had been successful. The magnitude of the harm intended is a strong indicator of the maliciousness of the Defendants' conduct, and it is relevant in considering whether the *Gore* ratio is constitutionally acceptable.

Under the facts and circumstances of this case, the Superior Court did not err in considering potential harm in its de novo review of the relationship between the compensatory and punitive damages awards in this case. Although we reject its point of analysis for the amount of potential harm, using the described pro forma analysis as the potential harm likely to occur if the Defendants' scheme was not thwarted was a relevant factor to consider in analyzing the relationship between the punitive and compensatory damages awards.

However, we are not convinced that the appropriate treatment of the amount of potential harm is to mechanically add it to the amount of compensatory damages and then recompute the ratio under the second *Gore* factor. The magnitude of the potential harm that was intended by the Defendants in this case sheds light on the proportionality of the punitive to compensatory damages. The jury decided, appropriately based on the evidence, that punishment and deterrence were warranted because the goal of the entire scheme was to destroy a competitor without regard to the existing non-solicitation agreements and by way of months-long planning, surreptitious meetings, disruption of employment arrangements with newly hired employees, and timing the transfer of personnel to FNIA so that the key Northwest employee (who helped mastermind the scheme) was last to leave so that he could broker the fire sale of the remaining business of Northwest. We do not go so far as to say that the amount of the potential harm that

was likely to occur if the scheme had not been thwarted created a less than 1 to 1 ratio of punitive to compensatory damages. However, in light of the evidence that conservatively establishes a goal of $5.4 million of thwarted harm to Northwest, the ratios of punitive to compensatory damages ranging from 1.8 to 1 to 6 to 1 likely understate the actual proportion. Certainly, in a case where the ratio exceeds, to a significant degree, a single-digit ratio, consideration of the potential harm to the plaintiff that was likely to occur from a defendant's conduct is important and may be outcome determinative in judicial scrutiny of the award for purposes of the second *Gore* factor.

V. Whether, in cases where the compensatory damages award is substantial, a punitive-to-compensatory damages ratio exceeding 9:1 is presumptively unconstitutional under U.S. Supreme Court precedent?

As discussed, the issues upon which we granted allowance of appeal were narrowly tailored to address the appropriate calculation of the ratio of punitive to compensatory damages required by *Gore*. *See* supra at p. 18. Having concluded that the appropriate methodology is the per-defendant approach, none of the resulting ratios applicable to the individual Defendants' punitive damages awards exceeds the single-digit ratio earmarked by the High Court in *State Farm* as potentially constitutionally suspect. *State Farm*, 538 U.S. at 425. The Defendants' argument regarding a ratio in excess of a single digit (i.e., the global ratio of 11.2 to 1) is moot in that it is based on a calculation of the ratio using the per-judgment approach. Although we have rejected the Defendants' preferred methodology, we find it prudent to address certain aspects of the Defendants' contentions because they interface with the general framework of the *Gore* ratio analysis.

A. Arguments of the Parties

In arguing that the punitive to compensatory damages ratio in this case presumptively violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution, the Defendants start from the premise that a per-judgment ratio of 11.2 to 1 is presumptively unconstitutional. The Defendants' Brief at 31 (citing *State Farm*, 538 U.S. at 425 ("[I]n practice, few awards exceeding a single-digit ratio between punitive damages and compensatory damages, to a significant degree, will satisfy due process.")). The Defendants consider the Pennsylvania appellate court precedent cited by the Superior Court, *Hollock v. Erie Insurance Exchange*, 842 A.2d 409 (Pa. Super. 2004), and *Grossi v. Travelers Personal Insurance Co.*, 79 A.3d 1141 (Pa. Super. 2013), to be exceptions to the single-digit cut-off of 9 to 1. They reason that, in those statutory bad faith actions, compensatory damages are limited to fees, expenses, and interest. As a result, an award of compensatory damages in such cases is relatively low, which, pursuant to federal precedent, may justify a higher ratio of punitive damages. In this case, however, the Defendants insist that the substantial award of $250,000 in compensatory damages does not justify the double-digit ratio of punitive to compensatory damages and that, instead, the amount of punitive damages should be at most equal to the compensatory damages award, i.e., 1 to 1.

In response, Northwest challenges the Defendants' characterization of the $250,000 award of compensatory damages as "substantial," highlighting that courts have characterized damages that far exceed that amount as "limited," "little," or "not substantial." Northwest's Brief at 42 (citing cases to establish that $250,000 is not substantial for purposes of assessing ratio). Northwest also rejects Defendants' assertion

that courts have held there is a presumptive constitutional ratio cutoff of 9 to 1. In support, Northwest highlights that the Supreme Court has consistently maintained that "there are no rigid benchmarks that a punitive damages award may not surpass." Northwest's Brief at 20-21 (quoting *State Farm*, 538 U.S. at 425). Indeed, Northwest urges, the Court "has stated flatly that the ratios discussed in *State Farm* 'are not binding.'" *Id.* at 41 (quoting *State Farm*, 538 U.S. at 425). Northwest argues there is no presumption that a double-digit ratio results in an unconstitutionally excessive award of punitive damages.

B. Analysis

Although the *State Farm* Court opined that, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," it did not define "substantial" for purposes of evaluating compensatory damages. *State Farm*, 538 U.S. at 425. The question is, what is a "substantial" award.

The term "substantial" is not self-explanatory, and its meaning is not self-evident.[49] Does substantial have meaning only in relation to something else or is it merely the

[49] As demonstrated by the parties' advocacy in this matter, for every case cited for the proposition that $250,000 in compensatory damages is a substantial award, a case can be cited for the proposition that $250,000 in compensatory damages is not a substantial award. For the proposition that a $250,000 award is substantial, the Defendants cite, inter alia, *Williams*, 947 F.3d at 755 (describing $250,000 as "not a small amount of money," where lost wages were in the $75,000 range), and *Schwigel v. Kohlmann*, 647 N.W.2d 362 (WI App. 2002) (overturning "substantial" compensatory award of $250,000 due to improper jury instructions on law of damages). On the other hand, for the proposition that a $250,000 award is not substantial, Northwest cites *Bullock v. Philip Morris USA, Inc.*, 131 Cal. Rptr.3d 382 (Cal. Ct. App. 2011) (describing $850,000 as "a small amount of economic damages"), and *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521 (Tenn. Ct. App. 2008) (holding that $2.5 million compensatory damages award was not subject to *State Farm* ratio of 1 to 1 for substantial awards). This situation is not (continued…)

subjective conclusion about the size of the award, i.e., it is a big number?[50] For example, in *State Farm*, the Supreme Court concluded that a $1 million compensatory damages award was substantial and complete compensation for a year and a half of emotional distress. *State Farm*, 538 U.S. at 426. Certainly, what eighteen months of emotional distress is worth to the victim suffering it is subjective, not objective. While the *State Farm* Court struck down the punitive verdict that rendered a 145 to 1 ratio for multiple reasons,

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surprising because compensatory damages are fact-intensive; each case is decided on the evidence of harm presented to the jury.

We observe that the Defendants additional citation to *King v. GEICO Indemnity Co.*, 712 Fed. App'x 649 (9th Cir. 2017), as a "substantial" award case is misplaced. Therein, the court did not use the term "substantial" at all, let alone to describe the compensatory damages awarded. In calculating the ratio pursuant to the second *Gore* guidepost, the *King* Court simply calculated the ratio using the $266,070.61 compensatory damages award—without qualification—to assess whether the punitive damages award violated due process. *Id.* at 650–51.

[50] Commentators have recognized that some courts sideline the inquiry given the difficulty of determining if a compensatory award is substantial:

> If the Supreme Court intends 1:1 to represent a significant restraint on punitive damages in cases involving 'substantial' compensatory damages, that message is not being well received [as most courts] do not expressly consider the 'substantial' rationale at all.
>
> * * *
>
> Determining when compensatory awards are sufficiently substantial to limit the punitive damages to a 1: 1 ratio obviously depends heavily on how the reviewing court interprets the amount of the compensatory damages in relation to the facts of the case, particularly the degree of reprehensibility involved, and arguably interjects a disturbing degree of subjectivity into the review process.

Laura J. Hines & N. William Hines, Constitutional Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma, 66 Hastings L.J. at 1302.

its predicate finding that the compensatory award was substantial deserves separate attention to demonstrate that the meaning of substantial is open to a variety of definitions and opinions on which reasonable minds might differ.

In a commercial tort or breach of contract action, for example, some courts have opined that the substantiality of a compensatory damages award has meaning in relation to the amount of damages demanded, which the plaintiff presents to the jury as a sum certain. *See*, *e.g.*, *Williams v. First Advantage LNS Screening Solutions Inc.*, 947 F.3d 735, 755 (11th Cir. 2020) (holding $250,000 award of compensatory damages was substantial where lost wages resulting from negligence of consumer reporting agency totaled $78,272). Other courts have used the degree of reprehensibility of the defendant's conduct to assess whether the compensatory damages award was substantial. *See Bullock v. Phillip Morris USA, Inc.*, 131 Cal. Rptr. 3d 382, 406 (Ct. App. 2011) (upholding $13.8 million punitive damages award where compensatory damages award was $850,000 "because of the extremely reprehensible degree of defendant's misconduct"), and *Flax v. DaimlerChrysler Corp.*, 272 S.W. 3d 521, 539 (Tenn. Ct. App. 2008) (upholding $13 million punitive damages award where compensatory damages award was $2.5 million because "a 1:1 ratio would [not] adequately punish or deter defendant's reckless conduct"). As we previously discussed, the amount of potential harm that was likely to result from a defendant's conduct compared to the actual damages awarded is a relevant factor in determining whether a compensatory damages award is substantial.

Given the multitude of factors that might influence a determination of whether a compensatory damages award is or is not substantial, the Defendants' contention that the dollar amount of an award alone suggests the answer is misplaced. Like the other

inquiries inherent in the second *Gore* factor, the determination of substantiality of an award is based on the totality of the circumstances.

Again straining for mathematical certainty, the Defendants' argue that a ratio of punitive to compensatory damages higher than 9 to 1 is presumptively unconstitutional. United States Supreme Court precedent does not lend itself to such a doctrinaire assertion. The overall concern of the United States Supreme Court in limiting the discretion-based common-law approach to the assessment of punitive damages was to curtail punitive awards that "run wild" and offend "judicial sensibilities," *Haslip*, 499 U.S. at 18, or that amount to an arbitrary deprivation of property in violation of due process, *TXO*, 509 U.S. at 453–54.[51] The High Court "rejected the notion that the constitutional line [of excessiveness] is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award." *Gore*, 517 U.S. at 582. In fact, the Court has remarked that "[i]n most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis." *Id.* at 583.

Even taking into account the High Court's observation that a 4 to 1 ratio "might be close to the line of constitutional impropriety," *State Farm*, 538 U.S. at 425, we cannot escape the Court's steadfast refusal to create a bright line for delineating excessive

[51] The only presumption related to punitive damages grounded in federal jurisprudence is that, if "fair procedures were followed, a judgment that is the product of that process is entitled to a strong presumption of validity." *TXO*, 509 U.S. at 457. The Defendants have not complained that fair procedures were not followed in this case; therefore, the jury's punitive verdict is entitled to a strong presumption of validity.

punitive awards. The fact is that—by definition—a guidepost is an "indication, sign,"[52] and is meant to direct courts toward a line of reasonableness, not dictate where the line is.[53] There is no bright line because being close to the line is not synonymous with crossing it, let alone crossing it to the point of offending constitutional principles. According to the Supreme Court, the ratio of punitive damages to compensatory damages is "instructive," not binding, and the limits of a constitutionally acceptable ratio are defined by the facts of a particular case. *Gore*, 517 A.2d at 583; *see also State Farm*, 538 U.S. at 425 ("The precise award in any case … must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.").

While the *State Farm* Court also observed that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," *State Farm*, 538 U.S. at 425, again the High Court did not explain what it meant by "a significant degree." Nor did it say that if a ratio exceeds single digits beyond that nebulous degree, it is unconstitutional. Rather, we view the observation to mean at most that such a ratio requires a closer examination of the justification for the punitive damages award. Borrowing a phrase from another context, a court should "raise a suspicious judicial eyebrow" at a punitive damages award that does not bear a reasonable relationship to the harm. *TXO*, 509 U.S. at 481 (O'Connor, J., dissenting). At

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[52] "Guidepost." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/guidepost. Accessed 15 Feb. 2023.

[53] Justice O'Connor recognized that, "although it might be convenient to establish a multipart test and impose it upon the States, the principles of federalism counsel against such a course. The States should be permitted to 'experiment with different methods' of ferreting out impermissible awards 'and to adjust these methods over time.'" *TXO*, 509 U.S. at 483 (O'Connor, J., dissenting).

bottom, a punitive damages award that exceeds a single-digit ratio to a "significant degree" may trigger judicial suspicion, not a presumption of unconstitutionality.[54]

Conclusion

In this appeal involving a challenge based on the alleged unconstitutional excessiveness of punitive damages awards against multiple defendants, we granted discretionary review to consider the appropriate ratio calculation that is part of the due process analysis contemplated by the second guidepost articulated in *Gore* and further refined in *State Farm*: the relationship of the punitive verdict to the harm or potential harm suffered by the victim. *Gore*, 517 U.S. at 575; *State Farm*, 538 U.S. at 425. We adopt the per-defendant approach to calculate the ratio, where the punitive damages award is the numerator and the compensatory damages award is the denominator. This methodology reflects the impact of the punitive verdict on each of the Defendants as required under the Due Process Clause.

Based on the agreement of the parties in this case, a jury entered a single compensatory damages award against the Defendants who were jointly and severally liable to the plaintiff, Northwest. The jury entered separate punitive damages awards against each of the Defendants in varying amounts. Although the jury was not instructed to allocate responsibility among the Defendants for the harm caused to Northwest, we conclude that the per-defendant methodology is appropriate. The calculation for each of the Defendants includes the total compensatory damages award as the denominator and

[54] In *Gore*, the Supreme Court described a ratio of 500 to 1 as "breathtaking" and one that "must surely 'raise a suspicious judicial eyebrow,'" but not as presumptively unconstitutional. *Gore*, 517 U.S. at 483 (quoting *TXO*, 509 U.S. at 481 (O'Connor, J., dissenting)).

the individual punitive damages awards as the numerator. This methodology for calculating the ratio in this case reflects the instruction to the jury that the harm to Northwest was indivisible and stays true to both the purpose of assessing the Defendants' individual due process rights and joint and several liability principles incorporated by the parties into the verdict.

In addition, the second *Gore* guidepost anticipates consideration of the potential harm likely to occur from the Defendants' conduct. Where, as here, the record includes evidence of the potential harm intended by the Defendants and the jury was instructed that such harm could be considered in its award of punitive damages, the Superior Court did not err in considering the amount of potential harm as part of its consideration of the relationship between the punitive damages awards and the compensatory damages award. While the value of the potential harm is not directly added to the compensatory damages award to create a new denominator in the ratio, it is a relevant factor to consider in evaluating whether a punitive damages award is excessive.

In the absence of any other basis to review the constitutionality of the punitive damages awards based on the scope of our allowance of appeal, we affirm the order of the Superior Court.

Chief Justice Todd and Justices Dougherty and Wecht join the opinion.

Justice Dougherty files a concurring opinion.

Justice Wecht files a concurring opinion.

Justice Mundy files a concurring opinion.

Justice Brobson files a concurring opinion.

[J-59A-2022 and J-59B-2022] [MO: Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

THE BERT COMPANY D/B/A NORTHWEST INSURANCE SERVICES	:	No. 13 WAP 2022
v.	:	Appeal from the Order of the Superior Court entered May 5, 2021 at No. 817 WDA 2019, affirming the Judgment of the Court of Common Pleas of Warren/Forest County entered June 3, 2019 at No. AD 260 of 2017
MATTHEW TURK, WILLIAMS COLLINS, JAMIE HEYNES, DAVID MCDONNELL, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK, AND FNB CORPORATION	:	ARGUED: October 25, 2022
APPEAL OF: MATTHEW TURK, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK, AND FNB CORPORATION	:	

THE BERT COMPANY D/B/A NORTHWEST INSURANCE SERVICES	:	No. 14 WAP 2022
v.	:	Appeal from the Order of the Superior Court entered May 5, 2021 at No. 975 WDA 2019, dismissing as moot the cross-appeal from the Judgment of the Court of Common Pleas of Warren/Forest County entered June 3, 2019 at No. AD 260 of 2017
MATTHEW TURK, WILLIAM COLLINS, JAIME HEYNES, DAVID MCDONNEL, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK AND FNB CORPORATION	:	ARGUED: October 25, 2022
MATTHEW TURK	:	
v.	:	

THE BERT COMPANY, NORTHWEST BANK, AND NORTHWEST BANCSHARES, INC.	:
APPEAL OF: MATTHEW TURK, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK, AND FNB CORPORATION	:

CONCURRING OPINION

JUSTICE DOUGHERTY **DECIDED: JULY 19, 2023**

I join the majority's well-reasoned opinion in full. I write separately only to emphasize that courts may ordinarily consider a defendant's wealth when evaluating whether a punitive damages award is excessive. *See* Restatement (Second) of Torts §908(2) (1979) ("In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and **the wealth of the defendant."**) (emphasis added); *and Feld v. Merriam,* 485 A.2d 742, 747 (Pa. 1984) (adopting §908(2)). *See also* Majority Opinion at 25. A defendant's wealth is "relevant, since the purposes of exemplary damages are to punish for a past event and to prevent future offenses, and the degree of punishment or deterrence resulting from a judgment is to some extent in proportion to the means of the guilty person." Restatement (Second) of Torts §908(2) cmt. e.

In my view, it is simple common sense that "if a wealthy person commits a rather heinous act, nominal punitive damages will not deter either that person or any other similarly situated person from committing a similar act. . . . If the resulting punishment is relatively small when compared to the potential reward of his actions, it might then be feasible for a tortfeasor to attempt the same outrageous conduct a second time." *Kirkbride v. Libson Contractors, Inc.,* 555 A.2d 800, 802-03 (Pa. 1989). Stated differently,

if a wealthy defendant can absorb a punitive damages award without suffering financial discomfort, the deterrent purpose of the award is undermined. After all, how can punitive damages possibly deter future wrongdoing if a massive award represents a mere fraction of the defendant's actual worth? A company which generates millions of dollars every year can comfortably pay hundreds of thousands of dollars assessed against it – even if the same figure would be unreasonably high when levied against the average person. Because such damages are intended to inflict financial "pain" as punishment, and thus deter similar future conduct, the wealthier the defendant, the larger the monetary loss required to have that deterrent effect.

It is true the "wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 427 (2003). Although evidence of great wealth may "provide[] an open-ended basis for inflating awards . . . [t]hat does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct." *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 591 (1996) (Breyer, J., concurring). The jury's award in the present case reflected the reprehensibility of the defendants' conduct in engaging in a brazen conspiracy "to steal a corporation," and consideration of their wealth in assessing the award's excessiveness is proper.

[J-59A-2022 and J-59B-2022] [MO: Donohue, J.]
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THE BERT COMPANY, NORTHWEST BANK, AND NORTHWEST BANCSHARES, INC.

APPEAL OF: MATTHEW TURK, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK, AND FNB CORPORATION

CONCURRING OPINION

JUSTICE WECHT **DECIDED: JULY 19, 2023**

I join the Majority's excellent and thorough opinion in full. While I have significant doubts about much of the jurisprudence that controls the present inquiry and that assigns punitive damage awards a federal "constitutional status,"[1] the Majority has correctly and faithfully applied the standards (such as they are) set forth by the Supreme Court of the United States.[2]

I write separately because the current state of Supreme Court precedent forces courts to engage in analytical exercises that lack sufficient clarity. Future litigants would be wise to seek more useful guidance from the Court and perhaps a complete unshackling of punitive damage awards from the artificial constraints placed upon them by that Court's bewildering substantive due process jurisprudence.

The imposition and limitation of punitive damage awards traditionally were considered matters of state law concern, in deference to our common law heritage and

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1 *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 12 (1991).

2 Hereinafter, unless otherwise specified, uses of "the Supreme Court" or "the Court" refer to the Supreme Court of the United States, rather than this Supreme Court or the highest courts of the other states.

to American principles of federalism.[3] Nonetheless, and in derogation of this tradition, in recent decades the Supreme Court has declared that the Due Process Clause of the Fourteenth Amendment to the United States Constitution[4] places "procedural and substantive constitutional limitations on these awards" and "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."[5] The analysis that courts are now required to conduct in order to detect the federal constitutional borderline—a line often and erroneously distilled as a 10:1 ratio rule[6] comparing punitive to compensatory damages—is riddled with caveats, qualifiers, and porous "guideposts" which render that analysis nearly incapable of principled application to concrete cases. Moreover, the Supreme Court's jurisprudence has exposed in sharp relief the flaws and fault lines embedded in the underlying doctrine that itself brought punitive damages into the realm of federal constitutional adjudication: the judicially-manufactured doctrine of "substantive due process."

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[3] *See, e.g.*, U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[4] U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."). The Fourteenth Amendment's Due Process Clause is distinct from the similar provision of the Fifth Amendment, a component of the original Bill of Rights applicable to the federal government. U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ."). In this opinion, references to the Due Process Clause refer to the Fourteenth Amendment, unless otherwise specified. The case before us concerns only federal conceptions of due process and does not implicate any provision of the Pennsylvania Constitution.

[5] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

[6] This "rule," moniker, or shortcut traces to the Supreme Court's surmise in *State Farm* that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 425.

Inasmuch as the substantive due process doctrine currently exists in a state of flux,[7] it is worthwhile to discuss that doctrine generally, to examine its theoretical alternatives, and to consider specifically how well the federal constitutional invalidation of a state punitive damage award, based merely upon its size, fits within the current paradigm. Can "excessive" punitive damages, awarded by a jury after an undisputedly fair trial in state court, deprive a civil defendant of property without federal due process of law?

I.

The United States Constitution protects unenumerated rights. The infirmity of the Supreme Court's precedent that governs the disposition of today's case, however, reinforces widely held doubts that the Due Process Clause—in its "substantive" guises—was ever the proper constitutional anchor for the identification of these rights. Two provisions of the United States Constitution stand out as far likelier guarantees of Americans' unenumerated rights: the Ninth Amendment[8] and the Privileges or Immunities Clause of the Fourteenth Amendment.[9] Both of these fundamental mandates provide straightforward and textual paths to the recognition and protection of unenumerated

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[7] *See Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)); *id.* at 2301 (Thomas, J., concurring) (calling for the reconsideration of all substantive due process precedents).

[8] U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

[9] U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."). The Privileges or Immunities Clause of the Fourteenth Amendment is distinguishable from the Privileges *and* Immunities Clause of Article IV of the Constitution, which refers to the privileges and immunities of state rather than national citizenship. *See* U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

rights. Oddly and maddeningly, both provisions have languished in obscurity within the pages of the Supreme Court's jurisprudence, while the Court has opted instead to venture further and further down the oxymoronic path of "substantive due process."[10]

If protection from "excessive" punitive damage awards in state courts is properly a matter of federal constitutional concern (and that is a very big "if"), the Supreme Court should provide an intellectually rigorous and disciplined justification for this protection as an unenumerated right grounded either in the Privileges or Immunities Clause or in the Ninth Amendment. Substantive due process is an inappropriate tool for federal oversight of state court punitive damage awards.

A. Due Process of Law

The Fourteenth Amendment's Due Process Clause is expressed in simple terms: no state shall "deprive any person of life, liberty, or property, without due process of law." The natural reading of this provision (indeed, the only textual one) suggests that the protected rights, *i.e.*, life, liberty, and property, *may indeed be deprived* so long as the state provides the requisite "due process of law." This is an expressly procedural protection. It is a guarantee that the government must follow a fair *process* before the deprivation of any of the important rights identified.[11] This species of due process has come to be known by a facially redundant moniker: "procedural due process." It is from this core guarantee that we derive, for instance, the familiar requirements of notice and a

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[10] *See* Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 110 (1999) (hereinafter, "Tribe") (describing the fundamental rights jurisprudence of the twentieth century as "characterized by misguided efforts to ground such rights in the concept of due process").

[11] Fundamental though these rights are, the government may deprive individuals of their lives (*e.g.*, the death penalty), their liberties (*e.g.*, the right to raise their children or even the right to vote), and their property (*e.g.*, a taking), so long as they are given fair process and the government does not violate some other constitutional command.

meaningful opportunity to be heard,[12] and the intuitive principle that legal controversies must be decided by a neutral adjudicator.[13] The demand for, and entitlement to, procedural fairness is a robust protection against arbitrary government action, and it stands as a pillar of our rule of law.[14] Whatever the extent and dimensions of the process that may be due under the circumstances of a particular case, it is this constitutional promise that provides the baseline assurance that Americans' rights will be safeguarded by fundamentally fair procedures.

Over time, this concern with procedural fairness evolved, developing into a view that certain governmental actions are intolerable regardless of the process employed.[15] The precise moment at which "substantive due process" crystallized as a distinct doctrine

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[12] *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'") (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1863)); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

[13] *See Tumey v. State of Ohio*, 273 U.S. 510, 523 (1927) ("[I]t certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.").

[14] "The history of American freedom is, in no small measure, the history of procedure." *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).

[15] *See generally* JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 33-72 (Univ. Press of Kansas 2003) (tracing the origin of substantive due process considerations to classically cited examples of procedural inequity mentioned in decisions such as *Calder v. Bull*, 3 U.S. 386, 388 (1798), such as a man serving as judge in his own case, or a hypothetical law that would take the property of 'A' and give it to 'B'); *id.* at 67 ("Although the A-to-B paradigm had once seemed only another example of procedural irregularity, it had in time acquired another meaning, substantive rather than procedural. In some cases property simply could not be taken, no matter by whom, no matter for what.").

is a matter of some debate.[16] There is little dispute, however, that, by the time of *Mugler v. Kansas*[17] in 1887, the Supreme Court had embraced the notion that "due process of law" includes substantive limitations upon the sort of laws that may be enforced, independent of considerations of the laws' procedural fairness.[18]

Any discussion of "substantive due process" must clear the initial hurdle of its paradoxical framing. The linguistic tension on the face of the doctrine has always been obvious. As constitutional scholar John Hart Ely famously commented, the phrase is inherently contradictory, "sort of like 'green pastel redness.'"[19] Judge Richard Posner has referred to the doctrine as a "ubiquitous oxymoron."[20] Justice Antonin Scalia used the

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16 Critics of the doctrine often contend that the first "substantive due process" decision was the infamous *Dred Scott v. Sandford*, 60 U.S. 393 (1857). *See Casey*, 505 U.S. at 998 (1992) (Scalia, J., concurring in part) ("Both *Dred Scott* and one line of the cases resisting the New Deal rested upon the concept of 'substantive due process' that the Court praises and employs today. Indeed, *Dred Scott* was 'very possibly the first application of substantive due process in the Supreme Court, the original precedent for *Lochner v. New York* and *Roe v. Wade*.'") (quoting D. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 271 (1985)). Although the core of the doctrine developed through the latter half of the nineteenth century, the first recorded instance of a United States Supreme Court Justice using the phrase "substantive due process" in an opinion was in 1948. *See Republic Nat. Gas Co. v. Oklahoma*, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting) ("The basic question here is really one of substantive due process.").

17 123 U.S. 623 (1887).

18 *See Casey*, 505 U.S. at 846 ("Although a literal reading of the [Due Process] Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since *Mugler v. Kansas*, 123 U.S. at 660-61, the Clause has been understood to contain a substantive component as well, one 'barring certain government actions regardless of the fairness of the procedures used to implement them.'") (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)) (citation modified).

19 JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (Harvard Univ. Press, 1980) ("[T]here is simply no avoiding the fact that the word that follows 'due' is 'process.' . . . Familiarity breeds inattention, and we apparently need periodic reminding that 'substantive due process' is a contradiction in terms—sort of like 'green pastel redness.'")

20 *Ellis v. Hamilton*, 669 F.2d 510, 512 (7th Cir. 1982).

same word.[21] And Professor Akhil Amar has written that, because "the very phrase 'substantive due process' teeters on self-contradiction, it does not give us a sound starting point, or a directional push to proper legal analysis."[22] Inasmuch as my more pedestrian imagination has always found the phrase perplexing, I take comfort in the knowledge that such giants of jurisprudence as these share my befuddlement.

Although questions of "substance" and "procedure" may at least arguably overlap at the margins,[23] my understanding is that "due process of law" is, and traditionally was understood as, predominantly a guarantee of procedural fairness. As its substantive iterations have burgeoned into an immense body of precedent, the Due Process Clause has been forced to bear ever greater weight through the Supreme Court's uncritical application of the doctrine to vastly different areas of law. It is astounding that, for instance, protection from a certain (or, as it happens, an uncertain) threshold of punitive damages is guaranteed by the same constitutional provision that, throughout its history, has been held to mandate that judges be neutral, to prohibit legislation regulating the weight of loaves of bread, and to secure the fundamental rights to marry or to rear one's children. My primary difficulty with the doctrine is not the various approaches that the Court has taken to understanding unenumerated rights themselves, but rather the fact that it has never made sense to discover these rights within the ambit of due process when there are other plainly more intelligible constitutional sources.

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[21] *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring in the judgment) ("If I thought that 'substantive due process' were a constitutional right rather than an oxymoron . . . .").

[22] Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 (2001) (hereinafter, "Amar").

[23] *See, e.g.*, *infra* nn.46-48 and accompanying text (discussing "arbitrary" and "vague" laws).

Of course, not all of the Supreme Court's substantive due process cases are created equal. The substantive strand of due process jurisprudence rose to prominence in the notorious "*Lochner* era,"[24] as the Court began to strike down laws intended to spur economic or social reform, ostensibly based upon those laws' perceived intrusion upon substantive rights like the "freedom of contract."[25] Although these efforts met resistance at the time from Justices such as Oliver Wendell Holmes, Jr., and Louis Brandeis,[26] for several decades the Court embarked on a project of judicial regulation of ordinary economic activity. It struck down a law that set maximum hours for working in bakeries.[27] It invalidated a statute that outlawed so-called "yellow dog" contracts which restricted labor union membership.[28] It rejected legislation that required minimum wages for women.[29] It overturned a measure that regulated the weight of loaves of bread.[30] Though the Court cast these decisions as protecting some substantive constitutional interest of employers and industrial producers, they came to be seen for what they were—

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[24] *See Lochner v. New York*, 198 U.S. 45 (1905) (overruled by *Ferguson v. Skrupa*, 372 U.S. 726 (1963)).

[25] *See Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

[26] *See Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924) (Brandeis, J., dissenting) (opining that Court's invalidation of a law regulating the weight of loaves of bread was "an exercise of the powers of a super-Legislature—not the performance of the constitutional function of judicial review"); *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) ("[A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*.").

[27] *Lochner*, 198 U.S. 45.

[28] *Coppage v. Kansas*, 236 U.S. 1 (1915) (overruled by *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941)).

[29] *Adkins v. Children's Hosp. of the Dist. of Columbia*, 261 U.S. 525 (1923) (overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)).

[30] *Jay Burns Baking Co.*, 264 U.S. at 510-17 (abrogation recognized by *Ferguson*, 372 U.S. at 729).

deployment of the Due Process Clause to "strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy."[31] By the mid-1930s (and confronted with the ongoing reforms of the New Deal), the Court began its historic course-correction, returning to a constitutional attitude more deferential to the political branches of government, under which the judiciary declines to invalidate laws based upon a subjective assessment of their "wisdom, need, or appropriateness."[32, 33]

But some of *Lochner*'s vestiges remain with us. While it purports to eschew the *Lochner* era's legacy, the Supreme Court has in subtle ways reverted to old habits. As I explain below in Part II, the *Lochner* era cast a long shadow over what was to come.

Not all of the due process jurisprudence that flowed from the *Lochner* era shared its most reviled attributes, and much of that jurisprudence has survived. Beyond the seemingly mercurial overriding of legislative judgments on ordinary economic matters, the Court also began to recognize certain personally held rights that it deemed fundamental, even though they are not enumerated in the Constitution. Having

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31 *Ferguson*, 372 U.S. at 729.

32 *Olsen v. Nebraska ex rel. W. Reference & Bond Ass'n*, 313 U.S. 236, 246 (1941) ("We are not concerned, however, with the wisdom, need, or appropriateness of the legislation."); *see also Ferguson*, 372 U.S. at 730 ("The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.").

33 Oddly, notwithstanding the Supreme Court's long-ago-abandonment of *Lochner*, this Court has persisted in *Lochner*-izing under its own vague notions of federal and/or state due process. *See Ladd v. Real Est. Comm'n*, 230 A.3d 1096, 1116-20 (Pa. 2020) (Wecht, J., dissenting); *Shoul v. Commonwealth, Dep't of Transportation, Bureau of Driver Licensing*, 173 A.3d 669, 688-94 (Pa. 2017) (Wecht, J., concurring).

essentially foresworn the Privileges or Immunities Clause,[34] and having persisted in neglecting the Ninth Amendment, the Supreme Court turned instead to the Due Process Clause. In *Meyer v. Nebraska*[35] and *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*,[36] for instance, the Supreme Court struck down laws prohibiting, respectively, teaching foreign languages in schools and sending children to private religious schools. These laws offended, as the Court saw it, the due process interest of "the liberty of parents and guardians to direct the upbringing and education of children under their control."[37] It is notable, as discussed below, that, at the time of these decisions, the guarantees of the Bill of Rights had not yet been deemed fully applicable to the states, and it is conceivable that the Court in early "fundamental rights" cases looked to the Fourteenth Amendment's Due Process Clause as an alternative to, for instance, the First Amendment, which at the time provided no protection against the actions of state governments.[38] Indeed, the very use of the Fourteenth Amendment's Due Process Clause as the vehicle for "incorporation" of the Bill of Rights against the states represents a significant strand of substantive due process jurisprudence that ran

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34 *See Slaughter-House Cases*, 83 U.S. 36 (1872).

35 262 U.S. 390 (1923).

36 268 U.S. 510 (1925).

37 *Id.* at 534-35.

38 *See* Erwin Chemerinsky*, Substantive Due Process*, 15 TOURO L. REV. 1501, 1505-06 (1999) (positing that *Meyer* and *Pierce* relied upon substantive due process because First Amendment protections were not yet incorporated against state governments). Of course, as discussed below, this does not explain the Court's failure to notice the Clause adjacent to the Due Process Clause—the Privileges or Immunities Clause.

parallel to the *Lochner* era, and it continues to undergird much of American constitutional law to this day.[39]

The Supreme Court's retreat from *Lochner* was not a wholesale repudiation of all judicial review of the substantive content of laws. In *West Coast Hotel Co. v. Parrish*, the Court disavowed the erratic and unprincipled approach to economic due process that characterized the *Lochner* era,[40] but it left some room for judicial consideration of a law's substance. The Court explained: "Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."[41] The Supreme Court developed this principle into what would become the familiar "rational basis" standard of review.[42] In *United States v. Carolene Products Co.*, the Court explained that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally

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[39] *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (holding that the Second Amendment to the United States Constitution is applicable to the states via the Due Process Clause of the Fourteenth Amendment); *id.* at 754-67 (discussing the history of incorporation under the Due Process Clause); *id.* at 861 (Stevens, J., dissenting) ("This is a substantive due process case."). As discussed below in Part I(C), the Privileges or Immunities Clause was (and is) better suited to this incorporation task.

[40] *West Coast Hotel Co.*, 300 U.S. at 391 ("In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people.").

[41] *Id.*

[42] *See, e.g.*, *Nebbia v. People of New York*, 291 U.S. 502, 525 (1934); *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (assessing whether prohibition of physician-assisted suicide, deemed not to be a fundamental right, is "rationally related to legitimate government interests").

assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[43] Thus, even though the era had passed in which the Court would employ the Due Process Clause as a cudgel to strike down disfavored laws, that Clause continued to serve as a protection against "arbitrary" or "irrational" laws.[44]

The Due Process Clause similarly has been held to provide protection against "vague" laws. In this strand of due process jurisprudence, which likewise gathered momentum during the *Lochner* era,[45] the Court has held that laws may violate due process "by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."[46] The requirement of "fair notice"—a concept so

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[43] *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). It is immediately following this "rational basis" statement that the *Carolene Products* Court placed its famous Footnote Four, which forecast the development and application of what would become strict scrutiny—a "more searching judicial inquiry"—to laws that restrict fundamental rights or reflect prejudice against "discrete and insular minorities." *Id.* at 152 n.4.

[44] *See* Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 844 (2003) ("Governmental conduct that does not trench [*sic*] on any fundamental right is also subject to invalidation as a matter of substantive due process . . . . The ordinary formulation is that such governmental action must be 'rationally related to a legitimate governmental purpose,' or that it may not be 'arbitrary' or 'irrational,' or 'arbitrary and irrational,' or 'fundamentally unfair or unjust,' or 'purposeless.'") (footnotes omitted) (citing, *inter alia*, *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 84 (1978); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 650 (1974)).

[45] *See Johnson v. United States*, 576 U.S. 591, 618 (2015) (Thomas, J., concurring) (identifying the first decision in which the Supreme Court invalidated a law on vagueness grounds as *International Harvester Co. of America v. Kentucky*, 234 U.S. 216 (1914), in the heart of the *Lochner* era).

[46] *Johnson*, 576 U.S. at 595 (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)).

important in the law of *procedural* due process—in this context serves the need to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[47]

The prohibitions of "arbitrary" and "vague" laws are due process concepts that work their way into the precedents that govern punitive damages, as discussed below in Part II. These considerations are in some sense substantive, inasmuch as they are concerned with the content of laws and the objects that those laws seek to attain. But these branches of due process jurisprudence are less conceptually challenging than some due process strains because they do not purport to define substantive rights. Because "[l]iberty implies the absence of arbitrary restraint,"[48] there is room within the doctrine for minimal inquiry into a law's means and ends, if only to satisfy the "baseline requirement of 'rationality.'"[49] Moreover, at least in some circumstances, these protections may have a conceivable connection to procedural concerns. Many laws that are "arbitrary" or "irrational" may be seen in some sense as failures of procedure, perhaps because they offer no process to prevent unjustified deprivations or no process to weigh the reasons for the government's actions.[50] And, as noted above, the void-for-vagueness doctrine's concern for "fair notice"

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47 *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

48 *West Coast Hotel Co.*, 300 U.S. at 392.

49 John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 928 (1973).

50 Indeed, the Court has described "arbitrariness" in such terms. *See Daniels*, 474 U.S. at 331 (the history of due process "reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, was intended to secure the individual from the *arbitrary* exercise of the powers of government. By requiring the government to follow *appropriate procedures* when its agents decide to 'deprive any person of life, liberty, or property,' the Due Process Clause promotes fairness in such decisions.") (emphasis added; internal citations and quotation marks omitted).

of prohibited conduct is a principle directly tethered to procedural due process.[51] These species of protections further differ from other "substantive" due process rights in precisely *what* they protect. To say that a law is "arbitrary," "irrational," or "vague," is not to say that its subject is problematic or otherwise off-limits. The problem lies in the way the law exists as drafted.

In the realm of unenumerated fundamental rights—the last stop on our brief tour of due process—how the law is written is of less consequence, and questions of procedure are eclipsed by substantive focus upon the importance of the right itself.[52] Since the latter part of the twentieth century, the Supreme Court has recognized several of these deeply personal rights. The rights at issue lie at the heart of personal autonomy, private decision-making, and human dignity, and are deemed fundamental to individual liberty, although not specifically listed in the Constitution. The conceptual anchor that the Court chose to use for these unenumerated rights was a strand of constitutional theory that either sounded directly in due process[53] or was derived from an implied right of privacy, which, in time, came to be understood as a component of the "liberty" protected by the Due Process Clause.[54] Subsequent decisions in this realm grew to recognize

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51 *See supra* n.12; *Mullane*, 339 U.S. at 314.

52 Where a law concerns a restriction on rights deemed to be "fundamental," the Supreme Court generally applies strict scrutiny, rather than the above-referenced rational basis test. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 302 (1993) (substantive due process "forbids the government to infringe certain 'fundamental' liberty interests . . . no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.") (citing, *inter alia*, *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992); *United States v. Salerno*, 481 U.S. 739, 746 (1987)).

53 *See supra* n.38; *Meyer*, 262 U.S. 390; *Pierce*, 268 U.S. 510.

54 The Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), which recognized a right of married persons to use contraceptives, expressly avoided substantive due process, seeking to sidestep the legacy of *Lochner*. *See id.* at 481-82 ("Overtones of some arguments suggest that *Lochner v. New York* should be our guide. (continued…)

numerous rights that the government was seen as having limited authority to restrict, such as the right to marry,[55] the right to use contraceptives,[56] the right to consensual sexual

But we decline that invitation . . . .") (citation omitted). *Griswold* instead found the right to "privacy" within the "penumbras" of various provisions of the Bill of Rights, including the First, Third, Fourth, Fifth, and Ninth Amendments. *See id.* at 484 ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."). Over time, however, the right to privacy came to be understood as a liberty interest protected by substantive due process. *See, e.g.*, *Carey v. Population Services, Intern.*, 431 U.S. 678, 684 (1977) ("Although '(t)he Constitution does not explicitly mention any right of privacy,' the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy.'") (quoting *Roe v. Wade*, 410 U.S. 113, 152 (1973)).

[55] *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating law prohibiting interracial marriage) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Turner v. Safley*, 482 U.S. 78 (1987) (invalidating law denying prison inmates the right to marry); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (invalidating law denying same-sex couples the right to marry).

[56] *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (invalidating law prohibiting the distribution of contraception) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); *Carey*, 431 U.S. 678 (invalidating law prohibiting distribution of contraceptives to minors); *Griswold*, 381 U.S. 479 (1965) (invalidating law prohibiting use of contraceptives as applied to married persons).

activity,[57] the right to raise one's children as one wishes,[58] the right to refuse medical care,[59] and the right to decide whether to terminate a pregnancy.[60]

My difficulty with the Court's due process precedent has nothing to do with the recognition of these fundamental rights. In general, I find these cases persuasive in establishing that such interests fall into the category of "none of the government's damn business," and are sufficiently fundamental to the "realm of personal liberty" to warrant constitutional protection.[61] The problem is the stubborn insistence on cramming these

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[57] *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (invalidating law prohibiting same-sex sexual activity) ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

[58] *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (invalidating law allowing any person to petition for visitation rights with children) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Pierce*, 268 U.S. 510 (invalidating law prohibiting private parochial schooling); *Meyer*, 262 U.S. 390 (invalidating law prohibiting the teaching of foreign languages in schools).

[59] *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 281 (1990) (recognizing a right to refuse life-sustaining medical care) ("The choice between life and death is a deeply personal decision of obvious and overwhelming finality. . . . It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment."); *Washington v. Harper*, 494 U.S. 210 (1990) (recognizing a prison inmate's interest in refusing administration of antipsychotic drugs, but finding the state's interest satisfactory to justify the compelled administration).

[60] *Roe*, 410 U.S. at 153 (invalidating law prohibiting abortion) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); *Casey*, 505 U.S. 833 (reaffirming the "essential holding" of *Roe*). *Roe* and *Casey* were both overruled by *Dobbs*, 142 S.Ct. 2228.

[61] "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey*, 505 U.S. at 847 (overruled by *Dobbs*, 142 S.Ct. 2228).

natural rights into the ramshackle dwelling of "substantive due process." None of the Supreme Court's precedents meaningfully reconciled the "substance" and the "process," or even acknowledged that "substantive due process" reflects a contradiction in terms and a clash of conflicting principles. I am unable to comprehend how the quintessentially procedural right to "due process of law" manages to house all of the "substantive" guarantees attributed to it, alongside its intuitive "procedural" protections, coupled with a protection from arbitrary, irrational, or vague laws, all while separately serving as the Court's chosen vehicle for the Fourteenth Amendment's incorporation of (most of)[62] the Bill of Rights against the States. More to the point here, as I discuss below in Part II, because the Court's current explication of the federal constitutional oversight of punitive damages blends attributes of these various categories of due process, I struggle to make sense of it within the broader framework. The problem may be that the breadth of this jurisprudence has stretched the Due Process Clause well beyond what its text can plausibly support.

That said, the Supreme Court's attitude toward the requirements of "due process of law" clearly is not immutable. I suspect that due process has continued to wear its substantive hat for this long primarily out of fidelity to precedent and regard for public reliance upon that precedent. But the hat is threadbare. *Stare decisis* notwithstanding, the Court has never shied away from periodic alterations to the doctrine, from reconceptions of the nature of unenumerated rights,[63] to the seismic shift represented by

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[62] Several provisions of the Bill of Rights have not been incorporated against the states: the Third Amendment, the Seventh Amendment, the Fifth Amendment's right to indictment by grand jury, and the Sixth Amendment's right to a jury selected from the state and district in which the crime occurred. *See* U.S. CONST. amend. III, V, VI, VII.

[63] *See, e.g.*, *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (stating that "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution," but rather consists of "a rational continuum which, broadly speaking, (continued…)

the demise of the *Lochner* era, to *Dobbs*.[64] None of the Supreme Court's pronouncements were (or are) received at Mount Sinai on stone tablets. The Supreme Court recently has demonstrated its willingness to reconsider longstanding precedent in the realm of substantive due process. As the Court says, "*stare decisis* is not a straitjacket."[65]

For the sake of the future of American civil rights, the time has come for advocates to develop and advance arguments—even in the alternative—that substantive, yet unenumerated, protections emanate not from the Due Process Clause, but rather from what was always their proper home in the Ninth Amendment, the Privileges or Immunities Clause, or both.

B. The Ninth Amendment

The most obvious constitutional source for the recognition of unenumerated rights is the provision that expressly refers to their existence. Its language is straightforward. Immediately following the specific enumeration of particular rights in the first eight Amendments to the Constitution, the Ninth provides:

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includes a freedom from all substantial arbitrary impositions and purposeless restraints"). Justice Harlan's dissent in *Poe* was favorably cited in *Griswold*, 381 U.S. at 484, and *Casey* relied heavily upon it. *Casey*, 505 U.S. at 848-89. The Court rejected Justice Harlan's broader framing in favor of a greater focus upon historical analysis in *Glucksberg*, holding that substantive due process "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Glucksberg*, 521 U.S. at 720-21 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); *see also Dobbs*, 142 S.Ct. at 2242 (quoting *Glucksberg*, 521 U.S. at 721).

64 *Dobbs*, 142 S.Ct. 2228 (overruling *Roe* and *Casey*).

65 *Id.* at 2280.

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.[66]

Thumbing through the pages of the United States Reporter, however, one could be forgiven for failing to notice that the Ninth Amendment even exists. Effectively ignored by the Supreme Court for generations, the Ninth Amendment has long served more as fodder for scholars than as any meaningful mandate.

Although the meaning of this provision has engendered debate,[67] the reason for its existence is well-documented. At the nation's founding, the "Anti-Federalists" advocated for the inclusion of a Bill of Rights within the Constitution, along the lines of the Declarations of Rights found in numerous state constitutions, such as Pennsylvania's. Opponents of this idea, the "Federalists," feared that no document could comprehensively list all fundamental rights,[68] and that enumerating some might imply that the federal

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66 U.S. CONST. amend. IX.

67 *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 3, 11-21 (2006) (hereinafter, "Barnett") (discussing different approaches to the Ninth Amendment that have emerged among scholars, all of which purport to carry the banner of "originalism"). Assembling the historical evidence, Professor Barnett concludes that the Ninth Amendment guarantees protection of "individual, natural, preexisting rights" that were not enumerated, and that its purpose was to "ensure that all individual natural rights had the same stature and force after some of them were enumerated as they had before." *Id.* at 13, 2. "In other words, it means what it says." *Id.* at 80. I share Professor Barnett's view.

68 James Wilson, a delegate to both the Constitutional Convention and the Pennsylvania ratifying convention, gave a speech at the time in which he stated:

> All the political writers, from Grotius and Puffendorf down to Vattel, have treated on this subject; but in no one of those books, nor in the aggregate of them all, can you find a complete enumeration of rights appertaining to the people as men and as citizens. . . . Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing.

Barnett, *supra* n.67, at 27 (quoting The Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution (Dec. 4, 1781), in 2 THE (continued…)

government possessed the power to infringe others not so enumerated.[69] After all, the belief in the existence of fundamental rights as a matter of natural law independent of any governing charter was a fixture of the American polity from its founding moment, celebrated by the Declaration of Independence's stirring recognition of the "self-evident" truth that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights."

James Madison—the principal drafter of the Constitution—proposed a solution to the stalemate. The Ninth Amendment unambiguously rejects the notion that the Bill of Rights represents the beginning and the end of fundamental rights. It simply makes clear that the first eight Amendments are not an exclusive list. They were just the rights, in Madison's words, that were "singled out."[70]

DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 415, 454 (Jonathan Elliot ed., 2d ed. 1907)).

[69] THE FEDERALIST No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?").

[70] In his statement to Congress introducing the proposed amendments that would become the Bill of Rights, James Madison explained:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that may be guarded against.

1 Annals of Cong. 456 (Statement of James Madison), Library of Congress, A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774–1875, *available at* https://memory.loc.gov/cgi-
(continued…)

Since its ratification, the Ninth Amendment has played effectively no role in constitutional adjudication. This state of affairs is to the liking of some. Judge Robert Bork, during the United States Senate hearings on his nomination to the Supreme Court, famously described the Ninth Amendment as an "ink blot," and suggested that it is inappropriate for a court to consider what lies underneath.[71] But given the words of that Amendment, its purpose, and its original meaning, unenumerated rights must exist. The Constitution says that they do. The founding generation took the step of amending the Constitution expressly to make clear that those rights exist.

The closest that the Ninth Amendment ever came to a moment in the judicial spotlight was not in a majority opinion, but rather in Justice Arthur Goldberg's concurrence in *Griswold*.[72] Whereas the Court's majority chose to discover the right to marital privacy in "penumbras, formed by emanations" of various provisions of the Bill of Rights,[73] Justice Goldberg would have grounded that right on the Ninth Amendment. Believing the right of marital privacy to be indisputably fundamental, Justice Goldberg opined that failing to recognize it merely because it is not enumerated in the Bill of Rights would be to "ignore the Ninth Amendment and to give it no effect whatsoever."[74] Justice Goldberg did not

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bin/ampage?collId=llac&fileName=001/llac001.db&recNum=229 (last visited June 1, 2023).

71 "I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says 'Congress shall make no' and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot . . . ." Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 249 (1989) (statement of Robert H. Bork) (quoted in Barnett, *supra* n.67, at 10).

72 *Griswold*, 381 U.S. at 486-99 (Goldberg, J., concurring). Chief Justice Earl Warren and Justice William Brennan joined Justice Goldberg's concurrence in *Griswold*.

73 *Id.* at 484.

74 *Id.* at 491.

see the invocation of the Ninth Amendment as an impermissible "broadening" of the powers of the judiciary; "rather it serves to support what this Court has been doing in protecting fundamental rights."[75]

Justice Goldberg's approach is consistent with the words and the history of the Ninth Amendment. And it is there, rather than the Due Process Clause, that courts could tether unenumerated rights. Of course, as the original Bill of Rights did not apply to the states, it is arguable whether rights recognized under the Ninth Amendment would apply to the states automatically, or whether they would need to be incorporated via the Fourteenth Amendment. The latter is a job well suited to the Privileges or Immunities Clause.

C. **The Privileges or Immunities Clause**

Whereas the Ninth Amendment jurisprudence is a virtual *tabula rasa*, the Privileges or Immunities Clause precedent is more closely akin to a sawed-off tree branch.

Just as the original Constitution arose from the ashes of the War of Independence, the Fourteenth Amendment followed from the clash of arms—and ideas—that tore the nation apart in the Civil War. Slavery itself was incompatible with civil liberty, but even after its abolition, widespread violations of fundamental rights persisted throughout the southern states, as those states deprived both former slaves and their political allies of myriad freedoms that, if infringed by the federal government, would violate the guarantees of the Bill of Rights. The states, however, were free to take these unjust actions, because the Bill of Rights did not protect individuals from their own states.[76]

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75 *Id.* at 493.

76 See *Barron v. City of Baltimore*, 32 U.S. 243, 247-48 (1833).

The Fourteenth Amendment was revolutionary in this regard. Its second sentence has served as the fountainhead of a great deal of modern jurisprudence, for it contains the Due Process Clause discussed throughout this opinion, as well as the Equal Protection Clause. But those provisions are preceded by another clause—one that was intended to do a great deal of the Fourteenth Amendment's work:

> *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States*; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[77]

On its face, the Privileges or Immunities Clause appears to be rather significant, especially coupled with the understanding that "privileges" and "immunities" were merely synonyms for "rights."[78] However, shortly after the Fourteenth Amendment's ratification, in the *Slaughter-House Cases*,[79] the Supreme Court rendered the Clause an essentially dead letter. The Court opined that the widely held view of the Fourteenth Amendment as conferring federal protection of fundamental rights against state infringement was simply too radical a notion to have been intended, as it would change "the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."[80] The Court drew a sharp line between the rights of federal

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77 U.S. CONST. amend. XIV, § 1 (emphasis added). For a recent, comprehensive historical analysis of these provisions, including the Privileges or Immunities Clause, *see* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT (The Belknap Press of Harvard Univ. Press 2021).

78 *See McDonald*, 561 U.S. at 813 (Thomas, J., concurring in part) ("At the time of Reconstruction, the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.' The two words, standing alone or paired together, were used interchangeably with the words 'rights,' 'liberties,' and 'freedoms,' and had been since the time of Blackstone.").

79 83 U.S. 36 (1872).

80 *Id.* at 78.

citizenship protected by the Privileges or Immunities Clause and those of *state* citizenship, which the Court viewed as much broader. The referenced federal rights were only those "which owe their existence to the Federal government, its National character, its Constitution, or its laws."[81] As the *McDonald* Court opined nearly a century and a half later, this meant that "other fundamental rights—rights that predated the creation of the Federal Government and that 'the State governments were created to establish and secure'—were not protected by the Clause."[82]

In dissent, Justice Field predicted that the *Slaughter-House* Court had rendered the Fourteenth Amendment "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."[83] His prophecy would come to fruition a few years later. In *United States v. Cruikshank*, the Court snuffed out whatever remained of the Privileges or Immunities Clause, building upon *Slaughter-House* to conclude that the First and Second Amendments did not restrict the states because they protected natural rights that *pre-dated* the Constitution, and thus were not "in any manner dependent upon that instrument" for their existence.[84] Following

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81 *Id.* at 79.

82 *McDonald*, 561 U.S. at 754 (quoting *Slaughter-House*, 83 U.S. at 76). Although the *Slaughter-House* Court suggested that the Privileges or Immunities Clause may protect some enumerated constitutional rights such as the "right to peaceably assemble" and the "privilege of the writ of *habeas corpus*," its focus upon less weighty items—such as access to "seaports," "navigable waters," and "subtreasuries," and the protection of the federal government "when on the high seas"—indicated that the provision's breadth was much narrower than a contemporary observer likely expected. *Slaughter-House*, 83 U.S. at 79.

83 *Slaughter-House*, 83 U.S. at 96 (Field, J., dissenting).

84 92 U.S. 542, 553 (1876). Although never expressly overruled, the rationale of *Cruikshank* was incompatible with later "incorporation" decisions, specifically *De Jonge v. Oregon*, 299 U.S. 353 (1937), which held that the First Amendment's right to peaceable assembly is applicable to the states. *Cruikshank* was later rendered wholly obsolete by *McDonald*'s incorporation of the Second Amendment. *McDonald*, 561 U.S. at 791.

Slaughter-House and *Cruikshank*, the Privileges or Immunities Clause was moribund, and the nation was left in essentially the same situation as before the Fourteenth Amendment, with the guarantees of the Bill of Rights inapplicable to the states.

Slaughter-House and its progeny commonly are regarded as grievous errors and gross misapplications of the Fourteenth Amendment. Professor Amar has written of *Slaughter-House*: "Virtually no serious modern scholar—left, right, and center—thinks that this is a plausible reading of the Amendment."[85] Notwithstanding this broad consensus, the Court has never corrected its error. Instead, as noted above, the Court gradually applied the protections of the Bill of Rights—and other fundamental rights—to the states through the Due Process Clause. The Court even rejected an express and thoroughly developed request to correct the *Slaughter-House* error as recently as *McDonald* in 2010, instead adhering to established precedent to declare the Second Amendment applicable to the states via the Due Process Clause.

In recent decades, Justice Clarence Thomas has developed a compelling historical argument for a broader reading of the Privileges or Immunities Clause, noting that *Slaughter-House* "sapped the Clause of any meaning," and opining that the case was a cause of much "disarray" in Fourteenth Amendment jurisprudence.[86] Concurring in *McDonald*, Justice Thomas conducted a detailed analysis of the historical background and original meaning of the Privileges or Immunities Clause, concluding that the

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[85] Amar, *supra* n.22, at 631 n.178. The extent of this scholarly consensus is illustrated by the *amicus curiae* brief submitted to the Court in *McDonald* by renowned constitutional law professors Richard L. Aynes, Jack M. Balkin, Randy E. Barnett, Steven G. Calabresi, Michael Kent Curtis, Michael A. Lawrence, William Van Alstyne, and Adam Winkler. *See* Brief of Constitutional Law Professors as *Amici Curiae* in Support of Petitioners (hereinafter, "Professors' Brief"), at 33 n.16, *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010) (No. 08-1521) (as it concerns the error of *Slaughter-House*, the "consensus of preeminent constitutional scholars and authoritative historians of otherwise disparate viewpoints is truly remarkable").

[86] *Saenz v. Roe*, 526 U.S. 489, 527 (1999) (Thomas, J., dissenting).

"evidence overwhelmingly demonstrates that the privileges and immunities of such citizens included individual rights enumerated in the Constitution," and that "the Clause establishes a minimum baseline of federal rights."[87]

The history is indeed compelling, and the *McDonald* majority made no effort to refute it. Indeed, a historical understanding of the Privileges or Immunities Clause further supports the view that the Clause also protects *unenumerated* rights. Although Justice Thomas himself is critical of the Court's fundamental rights jurisprudence and has suggested that he does not favor the same approach to privileges or immunities,[88] he has never disputed that the Privileges or Immunities Clause was intended to protect rights beyond those expressly listed in the Constitution.[89]

Scholarly debate about the intended scope of the Privileges or Immunities Clause focuses upon myriad events of the era, but perhaps no source has been so thoroughly mined as the series of congressional debates over the Fourteenth Amendment. These

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[87] *McDonald*, 561 U.S. at 823, 850 (Thomas, J., concurring in part); *see id.* at 813-50 (discussing the history and meaning of the Privileges or Immunities Clause).

[88] *See Saenz*, 526 U.S. at 528 (Thomas, J., dissenting) ("We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence. The majority's failure to consider these important questions raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the 'predilections of those who happen at the time to be Members of this Court.'") (quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977)).

[89] *See McDonald*, 561 U.S. at 854 (Thomas, J., concurring in part) ("Because this case does not involve an unenumerated right, it is not necessary to resolve the question whether the Clause protects such rights."); *id.* at 854-55 (assuming the Privileges or Immunities Clause protects unenumerated rights, the "mere fact that the Clause does not expressly list the rights it protects does not render it incapable of principled judicial application . . . . To be sure, interpreting the Privileges or Immunities Clause may produce hard questions. But they will have the advantage of being questions the Constitution asks us to answer."); *Dobbs*, 142 S.Ct. at 2302 (Thomas, J., concurring) (stating that the "myriad rights that our substantive due process cases have generated" could be analyzed under the Privileges or Immunities Clause).

debates were extensively covered in the press at the time—particularly statements made by U.S. Representative John Bingham, the Amendment's principal author, and U.S. Senator Jacob Howard, its floor sponsor in the upper chamber.[90] The congressional record is not dispositive in itself, and scholars have found support for different views within it. But concerning unenumerated rights, it is important to note the degree to which debate referenced and incorporated the 1823 decision of *Corfield v. Coryell*,[91] in which Justice Bushrod Washington, riding circuit on the federal bench here in Pennsylvania, expounded upon the Privileges *and* Immunities Clause of Article IV of the Constitution, which concerns the rights of state citizenship.[92] In a passage repeatedly cited during congressional debates, Justice Washington in *Corfield* stated:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.[93]

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90 *See McDonald*, 561 U.S. at 828-35 (Thomas, J., concurring in part); Professors' Brief, *supra* n.85, at 14-21.

91 6 F. Cas. 546 (C.C.E.D. Pa. 1823); *see McDonald*, 561 U.S. at 819-20; 832-35 (Thomas, J., concurring) (discussing *Corfield* and references to it in congressional debates); Professors' Brief, *supra* n.85, at 10-11, 15-16 (same).

92 *See* U.S. CONST. art. IV, § 2; *supra* n.9

93 *Corfield*, 6 F. Cas. 546, 551-52 (emphasis added).

Justice Washington described the privileges and immunities of state citizenship capaciously, invoking unenumerated rights in language echoing the Declaration of Independence.

In the Senate debates over the Fourteenth Amendment, Senator Howard described the Privileges *or* Immunities Clause of the Fourteenth Amendment as protecting two categories of rights: the "the personal rights guarantied [*sic*] and secured by the first eight amendments of the Constitution," and "the privileges and immunities spoken of" in *Corfield*.[94] Of those latter rights, Senator Howard echoed Justice Washington's expansive language, stating that the privileges and immunities referenced "are not and cannot be fully defined in their entire extent and precise nature."[95] Senator Howard's speech was widely disseminated in newspapers of the day, and presumably influenced ordinary people's understanding of the proposed amendment.[96]

In Justice Washington's and Senator Howard's language, one finds the same idea that gave rise to the Ninth Amendment—that the Constitution encompasses protection of fundamental rights beyond those specified; it would be impossible to list them all. Although I set forth here only the small fraction of the extensive historical record that I find most compelling in the context of unenumerated rights, and although the import of much of the history is debated, it is from this and similar evidence that many scholars conclude that the Privileges or Immunities Clause is not only the "textual basis for protection of the

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94 Cong. Globe, 39th Cong., 1st Sess. 2765; *see McDonald*, 561 U.S. at 832 (Thomas, J., concurring in part).

95 Cong. Globe, 39th Cong., 1st Sess. 2765; *see* Professors' Brief, *supra* n.85, at 16.

96 *McDonald*, 561 U.S. at 832-33 (Thomas, J., concurring in part).

liberties in the Bill of Rights," but also serves as "the natural textual home for . . . unenumerated fundamental rights."[97]

Should the Supreme Court ever be willing to correct its historic *Slaughter-House* error, the Privileges or Immunities Clause warrants resuscitation. Whether on its own or in conjunction with the Ninth Amendment,[98] that Clause provides a more historically sound and practically superior basis for recognizing unenumerated rights—and protecting them against state infringement—than the Due Process Clause.

D. Unenumerated Rights Adjudication

The Supreme Court's use of the Due Process Clause as the fount of unenumerated rights jurisprudence has left both the Ninth Amendment and the Privileges or Immunities Clause adrift in the constitutional wilderness, in disregard of a command dating back to *Marbury v. Madison*: "It cannot be presumed that any clause in the constitution is intended to be without effect."[99] Undoubtedly, reorientation of unenumerated rights to a more textually sound foundation in these provisions would not solve all problems. Disputes would remain over the proper standard to apply, and over what particular rights should be recognized. A more cogent constitutional analysis would not magically align everyone's legal, moral, and political convictions. But it would remove

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97 Professors' Brief, *supra* n.85, at 9 (quoting Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House*: A Critique of the Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 449 (1990)).

98 *See* Adam Lamparello, *Fundamental Unenumerated Rights Under the Ninth Amendment and the Privileges or Immunities Clause*, 49 AKRON L. REV. 179, 191 (2016) ("The Ninth Amendment's language means what it says: fundamental rights exist independently of the Constitution's text, and citizens are entitled to full enjoyment of those rights. These fundamental rights *are* the Fourteenth Amendment's Privileges or Immunities.") (emphasis in original).

99 *Marbury v. Madison*, 5 U.S. 137, 174 (1803).

the most obvious and recurring objections to employment of the doctrine of "substantive due process," which rests upon perpetually shaky ground.[100]

The Constitution always has embraced the idea that fundamental rights exist beyond those specifically enumerated in the text. Any refusal to acknowledge such fundamental rights would be inconsistent with the Constitution's letter and meaning, both at the time of the adoption of the Ninth Amendment in 1791, and at the time of the ratification of the Fourteenth Amendment in 1868. Although I do not here presume to identify the definitive standard for identifying such rights, the sorts of analyses that the Supreme Court long has conducted to assess the "fundamental" status of a right appear well-suited to such an inquiry. There is no reason that such rights cannot be recognized on the more stable grounds of the Ninth Amendment and the Privileges or Immunities Clause, rather than under the dubious "substantive due process" rubric.

II.

Protection from any particular amount of punitive damages has never been recognized as a fundamental right. With the foregoing understanding of the underlying law, I turn to the Supreme Court's decisions that bring us here today. The Majority does an excellent job of summarizing the principles of law that now govern punitive damages, which emanate principally from *Pacific Mutual Life Insurance Company v. Haslip*,[101] *TXO*

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[100] *See* Tribe, *supra* n.10, at 193-94 ("Indeed, perennial dissatisfaction with the whole concept of substantive due process, both linguistically and historically, in themselves support the use of the Privileges or Immunities Clause as a less troublesome vehicle both for selective incorporation and for the elaboration of whatever unenumerated rights merit protection against the states.") (footnotes omitted); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 135 (2000) ("Substantive due process is a weak and flawed doctrine, and the Ninth Amendment mechanism discussed above—which avoids at least some of the weaknesses and flaws of substantive due process—would significantly improve our personal autonomy jurisprudence.").

[101] 499 U.S. 1 (1991).

Production Corp. v. Alliance Resources Corp.,[102] *BMW of North America, Inc. v. Gore*,[103] and *State Farm Mutual Automobile Insurance Company v. Campbell*.[104] I commend the Majority for its effort—because an effort it is—to apply this welter of precedent on its own terms, as we are bound to do in this matter of federal constitutional law. But it is the Supreme Court's handiwork that has led me to this lengthy discussion, and there are features of that Court's punitive damages decisions that illustrate why I find that work untenable. The more time that I spend with *Haslip* and *TXO*, *Gore* and *State Farm*, the more problematic that I find their rationales, and the more it seems that the best course would be to pull the whole line of cases, root and branch, from the exhausted soil of substantive due process.[105]

Broadly, there are two overarching problems with these decisions, one doctrinal and one practical. Each area of analysis induces headaches.

A.

It is important that we be clear about what we are discussing, even if the precedent that we analyze is not. The fact that I am skeptical of a due process right to a particular threshold on the *amount* of punitive damages does not mean that I believe due process plays no role in the matter. Certainly, as in any trial or legal proceeding, there are procedural interests requiring procedural protections as such. Deprivations of due process may lurk here just as they do elsewhere in the law. But generally, I would suggest

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102 509 U.S. 443 (1993).

103 517 U.S. 559 (1996).

104 538 U.S. 408 (2003).

105 To be sure, the Supreme Court has no reason whatsoever to notice, much less heed, my thoughts on the matter, and I am well aware that the Supreme Court has both the first and the last word on the question.

that a civil defendant's federal due process rights are protected by, for instance, adherence to state law procedures, a fair trial, and a properly instructed jury.[106]

Judicial tinkering with the amount of a jury's award, an award bestowed upon an injured party after full consideration of the facts and following an undisputedly fair trial, is something different—something substantive. Although such a power to reduce jury verdicts is a venerable feature of the common law and has long inhered in state court judges in Pennsylvania and elsewhere,[107] the federal "constitutionalization" of this power is an intrusion that looks little like the application of "due process of law." Or perhaps more accurately, it looks like an application of the Due Process Clause from the *Lochner* era.

State law is the proper frame of reference, as it was before the Court's 1991 decision in *Haslip*. Prior to that decision, limitation of punitive damage awards was solely a matter of state statutory and common law. Rumblings about allegedly exorbitant punitive damage awards always have had the ability to generate outrage, and by the 1980s and 1990s, objections to the sheer size of some awards had reached the United States Supreme Court, which overtly noted its "concern about punitive damages that 'run wild.'"[108] In 1989, the Court rejected an effort to interpret the Eighth Amendment's Excessive Fines Clause[109] as a limitation on punitive damage awards (where one might

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106 *See Haslip*, 499 U.S. at 40 (Kennedy, J., concurring) ("Elements of whim and caprice do not predominate when the jury reaches a consensus based upon arguments of counsel, the presentation of evidence, and instructions from the trial judge, subject to review by the trial and appellate courts.").

107 *See* Maj. Op. at 24-25 (discussing the pre-*Haslip* law of Pennsylvania).

108 *Haslip*, 499 U.S. at 18.

109 U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

expect such a limitation to reside, if anywhere), but the Court left open the notion that the Due Process Clause might do the work, and even invited such a challenge.[110]

The Court answered that call in *Haslip*. Many of the Court's explanations for the deceptively significant step that it was taking in fact sound like reasons *not* to take it. The Court first recognized that punitive damages "have long been a part of traditional state tort law,"[111] and that the Court had long approved of the states' traditional common-law approach to such damages' imposition and limitation.[112] The Court quoted numerous precedents that approved of the common-law approach, and it exalted the discretion of juries to award damages. The Court even noted that, "[s]o far as we have been able to determine, every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process."[113] Continuing to raise questions as to why, therefore, it had any business in this matter, the Court went so far as to highlight that "the common-law method for assessing punitive damages was well established before the Fourteenth Amendment was

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110 *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276-77 (1989); *see id.* at 280 (Brennan, J., concurring) ("I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties."); *id.* at 282-83 (O'Connor, J., concurring in part) ("Awards of punitive damages are skyrocketing . . . . [N]othing in the Court's opinion forecloses a due process challenge to awards of punitive damages or the method by which they are imposed.").

111 *Haslip*, 499 U.S. at 15 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984)).

112 Under the traditional common-law approach, the Court explained, "the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct," and the "jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable." *Id.*

113 *Id.* at 17.

enacted. Nothing in that Amendment's text or history indicates an intention on the part of its drafters to overturn the prevailing method."[114]

Notwithstanding its candid acknowledgment that the Due Process Clause of the Fourteenth Amendment in no way suggests any limitation upon the state common law of punitive damages, the Court elected to manufacture such a limitation. But it had remarkably little to say about it. It gave one rhetorical justification, noting that just because the practice of imposing punitive damages is deeply rooted in state law does not mean that it can *never* be unconstitutional. But, as for those of us who might be skeptical of the use of the Due Process Clause to place a substantive limit on the *amount* of punitive damage awards, we are simply told that we must "concede": "One must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that *jar one's constitutional sensibilities*."[115]

In what would become a mantra in future cases, the Court left deliberately fuzzy the line at which one's "sensibilities" should be offended: "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."[116] Instead, the Court stated that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus."[117] With those principles established, the Court turned to the punitive damage award before it, which it stressed was more than four times the amount of the compensatory damages awarded (a later-significant 4:1 ratio), and exceeded the criminal fines that could have been

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114 *Id.* at 17-18.

115 *Id.* at 18 (emphasis added).

116 *Id.*

117 *Id.*

imposed under state law for similar conduct (though surely not the potential imprisonment). Although this may have been "close to the line," the award was permissible because it "did not lack objective criteria," and thus did not "cross the line into the area of constitutional impropriety."[118] In upholding the award in this manner, the Court obscured the significance of what had just happened.

The consequence of the *Haslip* Court's reasoning was not lost on Justice Scalia. In his *Haslip* concurrence, Justice Scalia laid out the case that punitive damage awards are not a federal constitutional concern. He gave a thorough history of both punitive damages and the principles of due process, demonstrating that "it has been the traditional practice of American courts to leave punitive damages (where the evidence satisfies the legal requirements for imposing them) to the discretion of the jury," and that, "when the Fourteenth Amendment was adopted, punitive damages were undoubtedly an established part of the American common law of torts."[119] Justice Scalia contended that this observation was effectively dispositive of questions of due process relating to punitive damages, and that he would "end the suspense and categorically affirm their validity."[120]

Justice Kennedy, at the time, likewise rejected an expansive reading of due process requirements into the state law of punitive damages, commenting that the jury's assessment of punitive damages "has such long and principled recognition as a central part of our system that no further evidence of its essential fairness or rationality ought to be deemed necessary."[121] But Justice Kennedy left open the possibility that the size of some awards may raise due process concerns, inasmuch as "the extreme amount of an

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118 *Id.* at 23-24.

119 *Id.* at 24-26 (Scalia, J., concurring).

120 *Id.* at 39-40.

121 *Id.* at 40 (Kennedy, J., concurring)

award compared to the actual damage inflicted can be some evidence of bias or prejudice" on the part of the jury.[122] He referenced the potential need for change at the state level, because federal judges—so we thought—"do not have the authority, as do judges in some of the States, to alter the rules of the common law respecting the proper standard for awarding punitive damages and the respective roles of the jury and the court in making that determination."[123]

To Justice O'Connor, punitive damages were a "weapon" with "devastating potential for harm."[124] Justice O'Connor lauded the application of the Due Process Clause, but unlike the *Haslip* majority, she would have invalidated the punitive damage award at bar. Beyond championing the Court's novel use of due process in this area, perhaps Justice O'Connor's greatest contribution to the precedents to come would be her invocation of the void-for-vagueness concept in this context, a thread of due process doctrine, discussed above, which insists that laws—criminal laws, ordinarily—fairly place people on notice of prohibited conduct.[125] In support of this novel application of the doctrine, Justice O'Connor stated that the "void-for-vagueness doctrine applies not only to laws that proscribe conduct, but also to laws that vest standardless discretion in the jury to fix a penalty."[126] And after discussing the procedures that attended the Alabama jury's verdict, which she found deeply inadequate, Justice O'Connor declared that the

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122 *Id.* at 41.

123 *Id.* at 42.

124 *Id.* at 42 (O'Connor, J., dissenting).

125 *See supra* nn.46-47 and accompanying text.

126 *Haslip*, 499 U.S. at 44 (O'Connor, J, dissenting) (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)).

"vagueness question is not even close."[127] Separately, she would have concluded that the award violated procedural due process as well.[128]

Haslip is the original error that begat the ones that followed. With little to explain why due process was implicated, or how it could be violated, the Court had nonetheless drawn a line. Where that line lay could not be known. The constitutional principle appeared to be a matter of avoiding "extremes" that "jar one's constitutional sensibilities," a phrase reminiscent of the "shocking the conscience" language that has appeared in some *substantive* due process cases,[129] and which resembled the state common-law standards that the Court now determined it could improve upon.[130] Beyond that, a due process inquiry into a punitive damage award, *Haslip* says, should focus upon "general concerns of reasonableness"—a *substantive* consideration—and "adequate guidance from the court when the case is tried to a jury"—a matter of *procedure*.

In the cases that followed, the Court would blend due process concepts indiscriminately, combining bits of one doctrine with pieces of others. In *TXO*, a plurality of the Court stated, "[a]ssuming that fair *procedures* were followed, a judgment that is a product of that process is entitled to a strong presumption of validity."[131] Here, the Court

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127 *Id.* at 46.

128 *Id.* at 53-60.

129 *See, e.g.*, *Rochin v. California*, 342 U.S. 165, 172 (1952); *United States v. Salerno*, 481 U.S. 739, 746 (1987) ("So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience' . . . .") (citing *Rochin*).

130 *See, e.g.*, *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800, 803-04 (Pa. 1989) (articulating the pre-*Haslip* law of Pennsylvania) ("[A]t some point the amount of punitive damages may be so disproportionate when compared to the character of the act, the nature and extent of the harm and the wealth of the defendant, that it will shock the court's sense of justice. In those rare instances, the court is given discretion to remit the damages to a more reasonable amount.") (emphasis added).

131 *TXO*, 509 U.S. at 457 (plurality) (emphasis added).

showed deference to the *amount* of an award based upon procedural due process considerations. But the *TXO* plurality was more interested than the *Haslip* Court in explicating the origin of the Court's claimed authority to control the amount of a jury verdict, and what it found were a number of early twentieth century substantive due process decisions that invalidated penalties which were deemed "arbitrary and oppressive," or "grossly excessive."[132] Consideration of an award's "excessiveness" is certainly a question of *substance*.

Shaking off the criticism of the respondents, who "unabashedly denigrate[d] those cases as *Lochner*-era precedents," the *TXO* plurality countered that Justices who dissented in *Lochner* joined the cited decisions, and that the respondents did not dispute that the Fourteenth Amendment "imposes a substantive limit on the amount of a punitive damages award."[133] Proceeding as if that settled the matter, the Court ever after would use the terms "grossly excessive" and "arbitrary" to describe the nature of the punitive damage awards that the Due Process Clause ostensibly precludes.[134] The Court also has collapsed these descriptions, noting in *State Farm* that, "[t]o the extent an award is *grossly excessive*, it furthers no legitimate purpose and constitutes an *arbitrary* deprivation of property."[135] Whether "arbitrariness" was intended as a substantive

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[132] *Id*. at 454 (citing, *inter alia*, *Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73, 78 (1907); *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 491 (1915); *Waters–Pierce Oil Co. v. Texas (No. 1)*, 212 U.S. 86, 111 (1909)).

[133] *TXO*, 509 U.S. at 455 (plurality) (internal quotation marks omitted).

[134] *Gore*, 517 U.S. at 562 ("The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor.") (citing *TXO*, 509 U.S. at 454, "(and cases cited)"). "And cases cited" does a great deal of work in *Gore*'s citation. *See also State Farm*, 538 U.S. at 416 ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.") (citing, *inter alia*, *Gore*).

[135] *State Farm*, 538 U.S. at 417 (citing *Haslip*, 499 U.S. at 42 (O'Connor, J., dissenting)) (emphasis added).

consideration or a procedural one, here it merged with the Court's primary emphasis upon the substantive consideration of "excessiveness."

Gore, the first of these decisions to actually take the step of invalidating a punitive damages award as a violation of due process, omitted any reference to a presumption of validity based upon "fair procedures," and that consideration did not reappear in *State Farm*. *Gore* likewise was the first to expressly constitutionalize an inquiry referenced in *Haslip* and *TXO*, which would take center stage in *State Farm*—assessing the amount of punitive damages as a "ratio" compared to compensatory damages. In the Court's words, punitive damages must bear a "reasonable relationship" to compensatory damages.[136]

But *Gore* also added an entirely new flavor of due process to the mix: "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[137] Here the Court introduced another *procedural* concept—"fair notice." Further, although not stated explicitly, this new addition to the punitive damages lexicon was a near word-for-word incorporation of common formulations of the void-for-vagueness doctrine, an entirely distinct strand of due process jurisprudence.[138] While this recalled Justice O'Connor's proposal in her *Haslip* dissent, she had focused not upon giving "fair notice" to a civil litigant of proscribed conduct, but rather upon "laws that vest standardless discretion in the jury to fix a penalty."[139] *Gore*'s invocation of the void-for-vagueness doctrine focused not upon cabining the jurors, but

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136 *Gore*, 517 U.S. at 581.

137 *Id.* at 574.

138 *Compare id.* (requiring that "a person receive fair notice . . . of the conduct that will subject him to punishment"), *with Johnson*, 576 U.S. at 595 (void-for-vagueness doctrine requires that law "give ordinary people fair notice of the conduct it punishes").

139 *Haslip*, 499 U.S. at 44 (O'Connor, J., dissenting).

upon providing warning to the tortfeasor. Adding to the confusion, *Gore* cited several cases for the "fair notice" proposition, most of which concerned *ex post facto* violations and retroactive application of laws.[140]

By the time of *State Farm*, the Court largely had stopped bothering to cite any decisions prior to *Haslip*. It was "well established," the Court declared, "that there are procedural and substantive constitutional limitations on these awards."[141] This was certainly true, but where the procedure ends and the substance begins is less than clear. From the very beginning of this line of cases, the Court's primary concern was a substantive objection to awards of "excessive" size, and the cases it originally cited for its view of due process undoubtedly are *Lochner*-era substantive due process decisions. But procedural language recurs nearly as prominently, as the Court stressed "fair notice," "fair procedures," and providing juries with "adequate guidance from the court." Drop hints of protection from "arbitrary" laws, and, while those are working their way in, toss in some "reasonable relationship" and "legitimate purpose" language, and then sprinkle in a dash of void-for-vagueness doctrine. An "eye of newt, and toe of frog, wool of bat, and tongue of dog," and the due process witches' brew is complete.[142]

Given the array of due process principles cobbled and mashed up together, this area of the law bears little resemblance to any of the recognizable, and currently recognized, strands of due process jurisprudence. What emerges is an approach that performs a nominal gesture toward "due process of law" while providing little analysis or detail, and in practice ends up focusing more upon what a majority of Supreme Court

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140 *Gore*, 517 U.S. at 574 n.22.

141 *State Farm*, 538 U.S. at 416; *but see id.* at 431 (Ginsburg, J., dissenting) ("If our activity in this domain is now 'well established,' it takes place on ground not long held.") (citation omitted).

142 WILLIAM SHAKESPEARE, MACBETH act 4, sc. 1, l. 14-15.

Justices at the moment might "hunch" to be "too much."[143] Unable as I am to situate the Court's reasoning within the law of due process, its enterprise looks more like an older sort of case. Perhaps unsurprisingly given its precedential origins, the new law of punitive damages bears a resemblance to the "doctrine that prevailed in *Lochner* . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely."[144] Here, it is the wisdom of juries, long the repository of the moral conscience of the people, that lies exposed to questioning by a disapproving Court.

The Justices in the minority in these decisions, representing the full spectrum of judicial philosophies, recognized this problem alongside other significant deficiencies in the Court's approach. Justice Kennedy, who hesitated to endorse the Court's reasoning in *Haslip*, but who would later join *Gore* and write for the Court in *State Farm*, noted in his *TXO* concurrence that the Court's approach to the "excessiveness" inquiry "comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution."[145] Justice Ginsburg referred to the Court's invalidation of the punitive damage award in *State Farm* as a "substitution of its judgment" for that of the state's "competent decisionmakers."[146] Justice Scalia critiqued the Court's "new rule of constitutional law" as "constrained by no

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143 As Judge Ruggero Aldisert wrote, quoting another federal appellate judge, "decisions may emerge from any of four separate processes: 'first, the cogitative, of and by reflection and logomachy; second, aleatory, of and by the dice; third, intuitive, of and by feeling or "hunching"; and fourth, asinine, of and by an ass.'" RUGGERO J. ALDISERT, THE JUDICIAL PROCESS: TEXT, MATERIALS AND CASES 524 (2d ed. 1996) (quoting J.C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L. Q. 274, 275-76 (1929)). (Note: The Cornell Law Quarterly was renamed the Cornell Law Review in 1967.)

144 *Ferguson*, 372 U.S. at 730; *supra* n.32.

145 *TXO*, 509 U.S. at 466-67 (Kennedy, J., concurring).

146 *State Farm*, 538 U.S. at 422 (Ginsburg, J., dissenting).

principle other than the Justices' subjective assessment of the 'reasonableness' of the award in relation to the conduct for which it was assessed."[147] The Court was unable to slip its *Lochner*-izing past Justice Scalia, who decried the Court's reliance upon "*Lochner*-era cases"[148] which had "invented the notion that an unfairly severe civil sanction amounts to a violation of constitutional liberties" and that "simply fabricated the 'substantive due process' right at issue."[149]

These Justices, particularly Justice Scalia and Justice Ginsburg, further and persuasively articulated their dismay concerning the Court's intrusion upon state law. From *Haslip* onward, Justice Scalia repeatedly objected that, notwithstanding certain Justices' fretting over the size of punitive damage awards, "the Constitution does not make that concern any of our business," and that "the Court's activities in this are an unjustified incursion into the province of state governments."[150] "The Constitution provides no warrant for federalizing yet another aspect of our Nation's legal culture (no matter how much in need of correction it may be)."[151] Justice Ginsburg believed that, by taking these steps, the Court "unnecessarily and unwisely venture[d] into territory traditionally within the States' domain,"[152] and that the "Court has no warrant to reform state law governing awards of punitive damages."[153]

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147 *Gore*, 517 U.S. at 599 (Scalia, J., dissenting).

148 *TXO*, 509 U.S. at 470 (Scalia, J., concurring).

149 *Gore*, 517 U.S. at 600-01 (Scalia, J., dissenting).

150 *Id.* at 598; *see also TXO*, 509 U.S. at 472 (Scalia, J., concurring) ("As I said in *Haslip*, the Constitution gives federal courts no business in this area, except to assure that due process (*i.e.*, traditional procedure) has been observed.").

151 *Gore*, 517 U.S. at 599 (Scalia, J., dissenting).

152 *Id.* at 607 (Ginsburg, J., dissenting).

153 *State Farm*, 538 U.S. at 438 (Ginsburg, J., dissenting).

I agree with the Court's minority in these cases. As a matter of due process doctrine, *Haslip* and its progeny are unsupportable. As a matter of federalism, these decisions represent a needless disruption of the balance between federal constitutional law and state statutory and common law.

B.

Setting aside the doctrinal inadequacies of *Haslip* (and progeny), and taking the Court's reasoning on its own terms, the application of the standard that the Court has left for us still leaves much to be desired. As Justice Scalia commented in *Gore*, acidly but not inaccurately: "One might understand the Court's eagerness to enter this field, rather than leave it with the state legislatures, if it had something useful to say."[154] But as the Court attempted to make its analysis more concrete and judicially manageable, the folly of the endeavor became ever more apparent, indeed, unavoidable.

Although a fixture of the Court's decisions has been a refusal to draw any bright lines as to what is "too much," it has attempted to give its amorphous standards some shape. First were the three *Gore* "guideposts," itself a flexible word. As more concisely summarized in *State Farm*, these "guideposts" are: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[155] Although these "guideposts" were likewise criticized as insufficiently definite,[156] they at least reflected some attempt to articulate a standard

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154 *Gore*, 517 U.S. at 602 (Scalia, J., dissenting).

155 *State Farm*, 538 U.S. at 418 (citing *Gore*, 517 U.S. at 575).

156 *Gore*, 517 U.S. at 605 (Scalia, J., dissenting) ("The legal significance of these 'guideposts' is nowhere explored, but their necessary effect is to establish federal (continued…)

reminiscent of other multifactorial inquires or balancing tests, rather than merely invoking the Court's "constitutional sensibilities" and "general concerns of reasonableness" or the like.[157]

Then came *State Farm*. Still seeking to refine the applicable test, the *State Farm* Court ended up choosing perhaps the worst of all options—a murky concoction of ratios and multipliers that insists it is not a bright line, yet commonly is read as one. *State Farm* first sought to put some meat on the bones of the first *Gore* "guidepost"—the degree of reprehensibility—which it described as the "most important indicium of the reasonableness of a punitive damages award."[158] The Court distilled some considerations of "reprehensibility" considered in *Gore*,[159] and added that the "existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect."[160]

But if reprehensibility is the most important factor, it was upstaged by arithmetic. Ask some lawyers you know what the constitutional limit on punitive damages is, and you will likely hear tell of a "10:1 ratio rule" comparing the amount of punitive damages to the compensatory damages awarded. This impression is prevalent notwithstanding the Supreme Court's repeated insistence that it "need not," and indeed "cannot" draw "a

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standards governing the hitherto exclusively state law of damages . . . . In truth, the 'guideposts' mark a road to nowhere; they provide no real guidance at all.").

157 *Haslip*, 499 U.S. at 18.

158 *State Farm*, 538 U.S. at 419 (quoting *Gore*, 517 U.S. at 575).

159 These "reprehensibility" considerations are whether: "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id.* (citing *Gore*, 517 U.S. at 576-77.

160 *Id.*

mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."[161] *State Farm* reiterated this, as is tradition, noting that the Court has been "reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award."[162] The Court "decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed."[163]

But the Court came close, drawing not a "bright line," but perhaps a dim one. "Our jurisprudence and the principles it has now established," the Court stated, demonstrate that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[164] As this sentence has become perhaps the most important in the new constitutional law of punitive damages, it is worth a close look.

At this juncture, it is important to remember what we are talking about. The Court here engages in a mathematical exercise to assess the size of the punitive damages award by producing a "ratio," asking how many times larger the punitive award is than the compensatory award. Too high of a ratio, the Court states, and the award may be "excessive," and thus unconstitutional as a deprivation of "due process."

A "single-digit" ratio between punitive and compensatory damages is the Court's preference—call it 9:1, or maybe 9.999:1. Why "single-digit ratios" were selected as the line is unstated. "*Few*" awards exceeding such a ratio will satisfy due process, which necessarily implies that *some* such awards are permissible. Further, the ratio is

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161 *Haslip*, 499 U.S. at 18; *see also TXO*, 509 U.S. at 458 (quoting *Haslip*); *Gore*, 517 U.S. at 582-83 (same).

162 *State Farm*, 538 U.S. at 424.

163 *Id.* at 425.

164 *Id.*

problematic when it exceeds single digits "*to a significant degree*," which necessarily implies that *some* upward deviation is permissible. 11:1? How about 25:1? The Court does not say. *State Farm* does say that *Haslip* considered 4:1 to be "close to the line of constitutional impropriety," and the Court cited that passage again in *Gore*.[165] 4:1 is close to the line, but 9:1 is the line, and awards should not exceed that line "to a significant degree," but a "few" that do are nonetheless permissible.

But "because there are no rigid benchmarks that a punitive damages award may not surpass," the Court says, these ratios may slide up and down depending upon the circumstances.[166] "Ratios greater than those we have previously upheld[167] may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'"[168] On the other hand: "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[169]

This passage is remarkable, for several reasons. First, the Court provided no guidance as to what a "small amount" of economic damages means. Presumably, it is the opposite of "substantial." "Substantial" is a term that appears to be rather important to the analysis, but the Court gives us no hint of what a "substantial" compensatory damage award is. Is it a pure dollar amount? $10,000? $100,000? Or is an award "substantial" in relation to what the plaintiff seeks, or the amount awarded in similar

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165 *State Farm*, 538 U.S. at 425.

166 *Id.*

167 The Court upheld a ratio of *526:1* in *TXO*. *See TXO*, 509 U.S. at 459 ("In support of its submission that this award is 'grossly excessive,' TXO places its primary emphasis on the fact that it is over 526 times as large as the actual damages award.").

168 *State Farm*, 538 U.S. at 425 (quoting *Gore*, 517 U.S. at 582).

169 *Id.*

cases? In this regard, it is important to remember that we are speaking of compensatory damages, which *compensate* the plaintiff for a loss. A plaintiff might say that his compensatory damage award was "substantial" because his *loss* was substantial. What bearing should that have upon his ability to recover punitive damages if the tortious conduct was reprehensible and the consequences grave?[170]

According to the *State Farm* Court, it has a significant bearing. If a compensatory damage award is "substantial," then punitive damages must fall within a "lesser ratio, *perhaps only equal to compensatory damages*."[171] That ratio, of course, would be 1:1. This is a remarkably restrictive suggestion. But it also calls into question everything the Court just said. Again, the general rule—the not-bright-line—was the "single-digit ratio," pronounced mere sentences earlier. Now, when an award is "substantial," the permissible line can shrink to as low as 1:1. But what of the entire range between 1:1 and 9:1? Are those single-digit ratios, which were purportedly within the generally comfortable constitutional range that the Court had just identified, only permissible when a compensatory award is *not* substantial? But if an award is not "substantial," and thus reflects a "small amount" of compensatory damages, the Court also stated that the ratio may be "greater than those we have previously upheld," so presumably well *above* the ordinary range of single-digit ratios. The general rule that the *State Farm* Court tried to articulate was, within a paragraph, rendered incomprehensible by the Court's standardless caveats and qualifications. To call this a standard is unduly charitable.

I find much greater persuasive power in what Justice Kennedy wrote prior to the *State Farm* mishmash: "The Constitution identifies no particular multiple of compensatory

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170 Indeed, the suggestion that large compensatory awards necessitate restricted punitive awards endorses a "volume discount" on tortious harm: The more compensable harm caused, the lower the comparable scale of permissible punishment.

171 *Id.* (emphasis added).

damages as an acceptable limit for punitive awards; it does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions."[172] "Due process of law" does not reduce to a question of numerators and denominators. The specific contours of state policy limiting the amount of punitive damage awards are, and should be, matters of state statutory and common law, including the trial judge's historic power of remittitur. As Justice Ginsburg wrote: "In a legislative scheme or a state high court's design to cap punitive damages, the handiwork in setting single-digit and 1-to-1 benchmarks could hardly be questioned; in a judicial decree imposed on the States by this Court under the banner of substantive due process, the numerical controls today's decision installs seem to me boldly out of order."[173]

It is here that I perceive the sort of "freewheeling judicial policymaking"[174] that less resembles a constitutional analysis than an effort to rewrite state common law, *Erie*[175] be damned. But the Due Process Clause is not, to borrow a phrase from the Court, a "font of tort law to be superimposed upon whatever systems may already be administered by the States."[176] The "Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."[177]

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172 *TXO*, 509 U.S. at 467 (Kennedy, J., concurring).

173 *State Farm*, 538 U.S. at 438 (Ginsburg, J., dissenting).

174 *Dobbs*, 142 S.Ct. at 2248.

175 *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.").

176 *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998) (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

177 *Daniels*, 474 U.S. at 332.

In its attempt to set general constitutional rules, the Court has in essence empowered itself to make policy choices governing state tort law, and not even necessarily good ones, inasmuch as they arguably undermine countervailing policy concerns serving the undisputedly valid interests in "punishing unlawful conduct and deterring its repetition."[178] *State Farm*, for instance, disapproved of using the defendant's wealth as a consideration in setting punitive damages.[179] This overlooks the rational economic proposition that the particularly wealthy are unlikely to be deterred by anything less than the possibility of a particularly large verdict. And to the extent that the Court even attempted to draw something close to a "bright line" beyond which punitive damage awards may not cross, this endeavor invites a straightforward calculation: if a business can predict with reasonable confidence the amount of harm a tortious course of action may cause, multiply that number by the magic ratio, and determine that it stands to profit nonetheless, then the punitive damages fail to serve their function of deterrence. A bit of unpredictability, and the prospect of an outraged jury, can go a long way in achieving deterrence. Of course, states nonetheless may wish to cap punitive damages at some threshold as a matter of state law, as many have done, but this provides no warrant or authority for the Supreme Court to draw such lines through the federal Due Process Clause.

But of course, the Court has not actually set any bright line, and it is we, in state courts, who are called upon to determine precisely the line that "due process" will tolerate in concrete cases—precisely the line that the Supreme Court declined to draw. The arguments presented in today's case suggesting "presumptive unconstitutionality"

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178 *Gore*, 517 U.S. at 568.

179 *See State Farm*, 538 U.S. at 427 ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").

beyond fixed limits demonstrate the folly of this endeavor, as they draw upon tantalizing language in *State Farm* suggestive of some such limit, but one so qualified and hedged as to be utterly unhelpful. Instead, this task of nailing Jell-O to a wall falls to us, as we parse imprecise and self-contradictory language in a quest to discern a particular dollar amount that the Justices of the Supreme Court might choose to find acceptable. The federal "constitutionalization" of punitive damages is not only a commandeering of state common law; it also impresses state court judges into federal service in an illusory and quixotic mission, the quintessential fool's errand.

III.

Can a punitive damage award, merely because of its size rather than any defect of procedure, deprive a civil defendant of due process of law? My understanding of the law of the due process, even its "substantive" formulations, leads me to conclude that the answer is "no."

Protection from the civil consequences of one's actions, following a fair trial, is not a "fundamental right." Imposition of a punitive damage award is not "arbitrary" or "irrational," but rather serves indisputably important interests in punishing reprehensible conduct and deterring similar such conduct in the future. The award is not the product of "vagueness" if the jury is properly instructed, if adequate state law procedures are followed, and if state law places all persons on notice that egregious torts may result in civil liability that includes punitive damages.

In my view, the *size* of a punitive damages award, by itself, is simply not a concern of the federal Due Process Clause.[180] If the Supreme Court believes that protection from some specific threshold of punitive damages is an unenumerated right guaranteed by the

[180] As noted, the award's size can be a *state* concern, under longstanding principles of common law. *See supra* n.130 (referencing the familiar "shock the court's sense of justice" standard).

United States Constitution, then it should abandon the erroneous precedent of *Haslip* and its progeny and ascertain, by whatever standard it deems appropriate, whether such a right emanates from the Ninth Amendment or the Privileges or Immunities Clause. Otherwise, it should leave state courts and legislatures to go about their business. That is the essence of federalism.

Bound as I am by the Supreme Court's pronouncements on this matter of federal constitutional law, I join the Majority Opinion.

[J-59A-2022 and J-59B-2022] [MO: Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

THE BERT COMPANY D/B/A NORTHWEST INSURANCE SERVICES	:	No. 13 WAP 2022
v.	:	Appeal from the Order of the Superior Court entered May 5, 2021 at No. 817 WDA 2019, affirming the Judgment of the Court of Common Pleas of Warren/Forest County entered June 3, 2019 at No. AD 260 of 2017.
MATTHEW TURK, WILLIAM COLLINS, JAMIE HEYNES, DAVID MCDONNELL, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK, AND FNB CORPORATION	:	ARGUED: October 25, 2022
APPEAL OF: MATTHEW TURK, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK, AND FNB CORPORATION	:	
THE BERT COMPANY D/B/A NORTHWEST INSURANCE SERVICES	:	No. 14 WAP 2022
v.	:	Appeal from the Order of the Superior Court entered May 5, 2021 at No. 975 WDA 2019, dismissing as moot the cross-appeal from the Judgment of the Court of Common Pleas of Warren/Forest County entered June 3, 2019 at No. AD 260 of 2017.
MATTHEW TURK, WILLIAM COLLINS, JAMIE HEYNES, DAVID MCDONNELL, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK AND FNB CORPORATION	:	ARGUED: October 25, 2022
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THE BERT COMPANY, NORTHWEST BANK, AND NORTHWEST BANCSHARES, INC.	:
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CONCURRING OPINION

JUSTICE MUNDY **DECIDED: JULY 19, 2023**

The Majority holds that the constitutional permissible ratio of punitive to compensatory damages in cases with multiple joint and several liable tortfeasors – where compensatory damages are awarded in a lump sum against all defendants while punitive damages are awarded on an individual basis – should be calculated on a per defendant basis. I agree that this is an acceptable basis to calculate the punitive to compensatory damages ratio in the case currently before the Court.[1] As the Supreme Court has consistently refused to create strict mechanical tests in determining the constitutionality of punitive damages awards, however, I would hold open the possibility that other approaches to calculating the ratio would also be constitutionally permissible.

In *BMW of North America, Inc. v. Gore*, 57 U.S. 559 (1996), the High Court set out three guideposts courts must follow in considering the constitutionality of a punitive damages award. The second guidepost being the ratio between the punitive damages and compensatory damages awarded. *Gore*, 57 U.S. at 580. The purpose in considering this ratio is that there must be a "reasonable relationship" between punitive and compensatory damages. *Id.* The Court also recognized that it has "consistently rejected

[1] I also agree with the Majority that potential harm caused by a tortfeasor's actions is a permissible consideration in comparing the relationship between a punitive damages award and a compensatory damages award.

the notion that the constitutional line is marked by a simple mathematical formula[,]" *id.* at 582, and again refused to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id*. at 583 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

Then in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the Court refined the *Gore* guideposts. In discussing the second *Gore* guidepost, the Court again acknowledged it has been "reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." *State Farm*, 538 U.S. at 424. The Court again declined to "impose a bright-line ratio which a punitive damages award cannot exceed." *Id.* In the absence of such a bright-line ratio, courts must assure that a punitive damages award is reasonable and proportionate to the amount of harm sustained by the plaintiff and to the compensatory damages recovered. *Id.* at 426.

The Supreme Court's continued reluctance to set a rigid benchmark for a permissible punitive-to-compensatory damages ratio allows courts to consider the facts and circumstances of a specific case in considering the constitutionality of a particular punitive damages award. This flexibility should extend to the method by which the ratio itself is calculated. In multiple defendant cases courts have calculated the ratio in one of two ways. The first is the per-defendant approach, which divides the punitive damages assessed against an individual defendant by the compensatory damages awarded against that defendant. *See*, *e.g.*, *Planned Parenthood of Columbia/Williamette Inc., v. Am. Coal. of Life Activists*, 422 F.3d 949 (9th Cir. 2005); *Horizon Health Corp. v. Acadia Healthcare Co., Inc.*, 520 S.W.3d 848 (Tex. 2017). The second is the per-judgment approach, which divides the punitive damages assessed against all defendants by the compensatory damages assessed against all defendants. *See*, *e.g.*, *Advocat, Inc. v.*

Sauer, 111 S.W.3d 346 (Ark. 2003); *Cooley v. Lincoln Elec. Co.*, 776 F.Supp.2d 511 (N.D. Ohio 2011).

Instantly, the Majority adopts the per-defendant approach. It reasons that the per-defendant approach "assesses the individualized impact intended by the punitive damages awards, whereas the per-judgment approach distorts the analysis by obscuring the due process rights of the individual defendants." Maj. Op. at 42. The Majority continues that the per-judgment approach "undoes the jury's determination of an individual's reprehensibility and need for deterrence as reflected in the punitive award." *Id.* This reasoning may be applicable when courts are calculating the ratio solely using a plaintiff's actual damages. However, as the Majority correctly finds, courts are permitted to consider not only a plaintiff's actual damages but also the potential harm caused by a defendant's conduct. *See State Farm*, 538 U.S. at 424 ("[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, **or potential harm,** to the plaintiff and the punitive damages award." (emphasis added)).

Unlike compensatory damages, the jury does not make a finding of the amount of potential harm caused by the defendants' tortious conduct let alone allocate that potential harm amongst the several defendants. In such circumstances, employing the per-judgment approach and using the combined total of the compensatory damages and potential harm as the denominator and the total amount of punitive damages awarded by the jury as the numerator may be more appropriate because it would give fuller consideration to the reprehensibility of the defendants' conduct. It would also be impossible for the court to accurately appropriate the amount of potential harm attributable to each individual defendant without a specific finding by the jury, making it practically impossible to employ the per-defendant approach when considering potential harm.

The Majority finds that "[c]umulating the punitive verdicts as required under the per-judgment approach obliterates the jury's assessment of each defendant's reprehensibility, and we cannot conceive a reason for doing so where the Defendants are not a single corporate entity." Maj. Op. at 44. As seen from the complications potential harm can have in the employment of the per-defendant approach, there are instances where the per-judgment approach would be more appropriate, and the Court should not be so quick to dismiss the possibility that other instances may arise that are not currently before it. For those reasons, and in light of the fact the Supreme Court has continuously refused to create mechanical rules in considering the constitutionality of the punitive-to-compensatory damages ratio, I would leave open the possibility that approaches other than the per-defendant approach could be permissible.

[J-59A-2022 and J-59B-2022] [MO: Donohue, J.]
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CONCURRING OPINION

JUSTICE BROBSON **DECIDED: JULY 19, 2023**

I concur in the result of the Majority because I believe the facts of this case demonstrate that the per-defendant approach to assessing the ratio discussed in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), is permissible. I disagree, however, with the Majority's suggestion that the Defendants (FNIA, FNB Corp., FNB, and Turk) may have avoided the per-defendant approach as applied here by having the jury "allocate responsibility for the harm [among the Defendants]." Majority Op. at 43-44. The Majority posits that the Defendants' "trial strategy" to agree with Northwest that the jury charge and verdict slip would instruct the jury to enter a single compensatory damages award now prevents this Court from ascertaining a more accurate "comparison of the Defendants' responsibility for the harm to the reprehensibility of the Defendants' conduct." *Id*. at 7 n.10, 36, 43-44. For several reasons, I disagree with this position.

First, there may be valid reasons for declining to request that a jury allocate harm among multiple defendants, particularly where all defendants are contesting liability. For example, trial counsel may be wary of suggesting to a jury that his client is less liable than another party while simultaneously claiming that his client has no liability at all. Allocating

harm may also confuse the jury, and, as explained in more detail below, there may be circumstances where harm is indivisible.

Second, as the parties represent in their briefs, they "agreed" to enter a single, lump-sum award because joint and several liability applied and the injury to Northwest was *indivisible*. (*See* Defendants' Br. at 11-12 ("While the jury awarded separate compensatory damage amounts for each count, per agreement, only the highest compensatory damage number is recoverable since joint and several liability applied.")); (Northwest Br. at 33-34 ("The jury note reflected that it was uncontroverted that [Northwest] sustained a single, indivisible injury . . . [that] was incapable of being divided into separate and distinct parts.").) The trial court similarly noted that Northwest could not recover multiple times for the same injury under the law and that the joint and several nature of the injury required that the jury enter a single compensatory damages award. (*See* Reproduced Record at 496a-97a (instructing jury that "each Defendant that is liable on these causes of action is jointly and severally liable for the damages, which means that [Northwest] can attempt to recover the amount . . . awarded against any of the liable Defendants. If you award damages on multiple causes of action, [Northwest] will only be able to recover the amount of the highest damage award.").) Thus, the parties and the trial court were clearly operating under the belief that the law permitted only a single, lump-sum compensatory damages award. The Majority correctly recognizes that a jury can allocate a joint and several compensatory award among multiple defendants, but, based on the representations of the parties and the trial court and in review of the claims and injury to Northwest, it is not clear to me that this case involved an injury that is divisible.

Consequently, in my view, this Court is faced with: (1) an indivisible compensatory award; (2) individualized punitive damages awards based on the reprehensibility of each

of the Defendants' conduct; (3) joint and several liability among the Defendants; and (4) the inability to group the Defendants together and treat them as a single actor. Under these circumstances, I agree with the outcome reached by the Majority that calculating the *Gore* ratio by utilizing the $250,000 compensatory damages award for the First National Defendants and the $164,943[1] compensatory damages award for Turk as the denominator and utilizing each Defendants' individual punitive damages award in the numerator—*i.e.*, the per-defendant approach—is permissible. Further, this factual scenario makes clear that this is not a circumstance where trial strategy could have impacted the constitutionality of the punitive damages awards.

Assuming *arguendo* that the actual harm to Northwest could be allocated among the Defendants, a remand to the trial court for such an allocation and a review of the constitutionality of the punitive damages awards would be appropriate given that this involves an issue of first impression. As such, the parties and their counsel clearly had no knowledge that failing to allocate the compensatory damages award could potentially lead to an unfavorable punitive-to-compensatory ratio. In other words, I would not fault the parties for failing to take measures of which they were unaware in order to preserve a means of demonstrating that the individual punitive damages awards at issue are excessive. *Cf. Newman Dev. Grp. of Pottstown, LLC v. Genuardi's Family Markets, Inc.*, 52 A.3d 1233, 1247-48 (Pa. 2012) (suggesting that "the heavy consequence of waiver" should only be applied where a rule is both "clear" and consistent with "the reasonable expectations of practicing attorneys"). This is particularly so where this matter involves an exceptionally malleable area of law.

Going forward, should a compensatory damages award lend itself to allocation at trial in a situation where punitive damages may also be awarded, it may be beneficial for

[1] The highest amount that Turk was jointly and severally liable for was $164,943.

the trial court and the parties to determine at the outset whether such compensatory damages should be allocated by the fact-finder—be it a jury or a trial judge—or whether the matter should be bifurcated. If the matter is bifurcated, the fact-finder could allocate compensatory damages and assess punitive damages independent from questions of liability, thereby dispelling any jury confusion or problems arising from trial strategy mentioned above. If a party fails to take such action, it may find itself in a situation where the only available method of assessing the constitutionality of a punitive damages award is, like the present case, the per-defendant method where a joint and several, lump-sum compensatory award serves as a recurring denominator.

Finally, Justice Mundy notes in a concurring opinion that there may be circumstances not presently before the Court where the per-judgment approach is more appropriate than the per-defendant approach applied here. Justice Mundy notably highlights that the United States Supreme Court has "continuously refused to create mechanical rules in considering the constitutionality of the punitive-to-compensatory damages ratio." Concurring Op. at 5 (Mundy, J.). I agree. Given the complexity of this area of the law, I would likewise leave open the possibility that the per-judgment approach or some hybrid method could serve as the best means under different circumstances for assessing the constitutionality of a punitive award.

For the above reasons, I concur in the result.