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Civil and Criminal Recidivists: Extraterritoriality in Tort and Crime

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CIVIL AND CRIMINAL RECIDIVISTS: EXTRATERRITORIALITY IN TORT AND CRIME

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I. INTRODUCTION

For much of modern American legal history, a line has divided the civil and criminal justice systems, demarcating private and public law. In recent years, however, this line has become less distinct as a result of the aggressive expansion of the criminal law into domains previously regulated by civil law[1] and the rapid proliferation of quasi-criminal civil sanctions.[2] The blurred boundaries, in turn, have raised constitutional concern, especially with regard to perceived erosions in procedural protections afforded individuals caught in this legal netherworld.[3] Taken together, these developments have been said to reflect "the trend towards the civilization of the criminal law and the criminalization of the civil law."[4]

More longstanding in existence, but no less indicative of a civil-criminal convergence, are punitive damage awards,[5] imposed on

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1. *See, e.g.*, John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997); Richard A. Nagareda, *Outrageous Fortune and the Criminalization of Mass Torts*, 96 MICH. L. REV. 1121 (1998).

2. *See* Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 103 (1995) (noting that "[t]here has been a remarkable increase during the last decade in the imposition of overlapping civil, administrative, and criminal sanctions for the same misconduct, as well as a steady rise in the severity of those sanctions"(footnote omitted)); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1798 (1992) (noting that "[p]unitive civil sanctions are replacing a significant part of the criminal law in critical areas").

3. *See, e.g.*, Carol S. Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997).

4. Thomas Koenig & Michael Rustad, *"Crimtorts" as Corporate Just Deserts*, 31 U. MICH. J.L. REFORM 289, 297 (1998); *see also* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325 (1991) (noting that "[t]oday, the distinction between criminal and civil law seems to be collapsing across a broad front"); Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. (forthcoming 2005) (noting that "[t]he boundaries of the criminal justice system are eroding").

5. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) (observing that "[t]he idea of punishment, or of discouraging other offenses, usually does not enter into tort law"; it is only in the "anomalous" realm of punitive damages that "the ideas underlying the criminal law have invaded the field of torts").

individuals and entities for aggravated tortious misconduct.[6] According to the U.S. Supreme Court, punitive damages are "an expression of moral condemnation"[7] awarded "to further the aims of the criminal law: 'to punish reprehensible conduct and to deter its future occurrence.'"[8] Moreover, like criminal sanctions, punitive damages have come to be viewed as a means to address "public wrongs,"[9] as evidenced in the emergence of "split recovery" statutes whereby a set portion of the punitive damages award is allocated to the government treasury.[10] With punitive awards being allocated to the public fisc, the distinction between punitive damages and criminal fines appears to have been eroded altogether.[11]

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6. *See id.* § 2, at 9-10:

> Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton.

(footnotes omitted).

7. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001).

8. Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 297 (1989) (O'Connor, J., concurring) (citation omitted); *see also* State Farm Mut. Auto Ins. v. Campbell, 538 U.S. 408, 417 (2003) (noting that punitives "serve the same purposes as criminal penalties"); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) (stating that punitives are "imposed for purposes of retribution and deterrence"). Although "punishment" and "retribution" are often used interchangeably, the latter term more specifically reflects the intended purpose: to sanction misconduct, in proportion to the offender's culpability. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 414-20 (1978); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS ON THE PHILOSOPHY OF LAW 231, 233-34 (1968).

9. *See, e.g.*, Kirkland v. Midland Mortgage Co., 243 F.3d 1277, 1280 (11th Cir. 2001) (punitives serve "the collective good by deterring a public wrong and punishing egregious wrongdoing"); Chrysler Corp. v. Wolmer, 499 So. 2d 823, 825 (Fla. 1986) (punitives are imposed to redress a "public wrong"); Buzzard v. Farmers Ins. Co., Inc., 824 P.2d 1105, 1115 (Okla. 1991) (punitives "are awarded to punish the wrongdoer for the wrong committed upon society"); *see also* Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 749, 817 (2002) (observing that "[w]ithin the panoply of tort damages, the punitive damages remedy is unique: only a thin doctrinal thread ties it to individual plaintiffs"); Theodore B. Olson & Theodore J. Boutrous, Jr., *Constitutional Restraints on the Doctrine of Punitive Damages*, 17 PEPP. L. REV. 907, 918 (1990) (noting that a punitive damages award is imposed "for purposes of retribution and deterrence by a system which simultaneously compensates the victim for his injury, and punishes the defendant for the wrong done to society by his conduct").

10. Today, eight states have such laws. *See* Victor A. Schwartz et al., *I'll Take That: Legal and Public Policy Problems Raised by Statutes that Require Punitive Damages Awards to Be Shared with the State*, 68 MO. L. REV. 525, 534-38 (2003). In addition, the Ohio Supreme Court recently assumed responsibility to assess whether some portion of a punitive award should be directed to "a place that will achieve a societal good." *See* Dardinger v. Anthem Blue Cross & Blue Shield, 781 N.E.2d 121, 146 (Ohio 2002). According to the court, "[a]t the punitive-damages level, it is the societal element that is most important. The plaintiff remains a party, but the de facto party is our society, and the jury is deciding whether and to what extent we as a society should punish the defendant." *Id.* at 145.

11. *See* RESTATEMENT (SECOND) OF TORTS § 908 cmt. A (1977) (distinguishing punitive damages and criminal fines on the basis that with the former the injured individual receives damages, not the state).

Viewed in their totality, the aforementioned developments provide compelling evidence of a reversion to a time when tort and crime were united,[12] and public and private law defied ready distinction.[13] This Essay, however, examines an area of the law that highlights the continued existence of a distinct civil-criminal divide: the differing consideration given extraterritorial misconduct in the assessment of punitive damage awards and criminal sentences. Although both sanctions are justified on retribution and deterrence grounds,[14] and governed by the tenet that repeated wrongdoing justifies increased culpability,[15] they have come to regard extraterritorial wrongdoing quite differently. The sentences of criminal offenders are enhanced without regard for whether their prior offenses occurred outside the forum state.[16] Meanwhile, as made clear in the Supreme Court's recent 6–3 decision in *State Farm Mutual Auto Insurance v. Campbell*,[17] extraterritorial wrongdoing is permitted to play a very limited role, if any, in the formulation of punitive damage awards imposed on tortfeasors.

After first exploring the inconsistent treatment given extraterritorial misconduct in the sanctioning of tort and crime, this Essay examines the purported justifications for the contrast. Chief among these is the notion that states have no cognizable interest in tortfeasors' wrongdoing outside their borders and that to permit consideration of such wrongdoing would violate principles of federalism and comity. Such a view, however, is at marked odds with the reality that sentencing courts routinely take account of extraterritorial criminal misconduct, which by unavoidable implication involves application of other states' laws. Likewise, judicial concern that civil defendants will lack notice and perhaps face

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12. *See* OLIVER W. HOLMES, THE COMMON LAW 44 (1881) ("[T]he general principles of criminal and civil liability are the same."); JAMES FITZJAMES STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 2 (1863) ("Nearly every crime is not only a crime, but is also an individual wrong or tort."); David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59 (1996) (noting shared historic commonalities).

13. *See* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982) (noting that "only in the nineteenth century was the public/private distinction brought to the center of the stage in American legal and political theory"); *see also* Angela P. Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 ALA. L. REV. 1079 (1989).

14. *See supra* notes 7-8 and accompanying text. This is not to say that retribution and deterrence are the only goals of the respective sanctions, rather that they are the principal ones. *See* Kansas v. Hendricks, 521 U.S. 346, 361-62 (1997) (noting other criminal law goals such as incapacitation but describing retribution and deterrence as the "two primary objectives"); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3, 12 (1982) (identifying seven possible goals of punitive damages but specifying retribution and deterrence as the primary goals); *see also* LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 1.4(B) (4th ed. 2000) (noting that in all but three states punitive damages are awarded for purposes of retribution and deterrence).

15. *See infra* notes 45, 81 and accompanying text.

16. *See infra* notes 83-88 and accompanying text.

17. 538 U.S. 408 (2003).

"multiple punishments" if extraterritorial misconduct is considered in setting punitive damage awards, stands in sharp contrast to criminal recidivist laws, which afford jurisdictions broad discretion to enhance sentences based on extraterritorial misconduct and have been immune to double jeopardy challenges.

Finally, but no less important, the embrace of such distinct views on extraterritoriality highlights the existence of fundamentally different understandings of tort and crime culpability. In *State Farm*, the Court conceived of tort culpability in narrow geographic terms, with punitive damages being treated much more as a private remedy tied to the particular harm suffered by the individual in-state tort victim. By contrast, in *Ewing v. California*,[18] decided a month before *State Farm*, the Court rejected an Eighth Amendment challenge to California's draconian "three strikes" recidivist law, emphasizing that criminal culpability is to be assessed in terms of an offender's entire recidivism history, which commonly entails extraterritorial wrongdoing.

In short, like reports of Mark Twain's death, the purported demise of the civil-criminal distinction has been exaggerated.[19] It remains alive and well in the sanctioning of civil and criminal recidivists.

II. RECIDIVISM IN TORT AND CRIME

A. Punitive Damage Awards

Punitive damage awards trace their Anglo-American origins back to mid-eighteenth century England.[20] Juries then had "it in their power to give damages for more than the injury received . . . as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."[21] In 1851, the U.S. Supreme Court recognized the availability of punitive damages as "a well-established principle of the common law."[22] Today, the

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18. 538 U.S. 11 (2003).

19. JOHN BARTLETT, FAMILIAR QUOTATIONS 528 (16th ed. 1992) (recounting that late in his life Twain is said to have dispatched a telegram to reporters proclaiming that the "report of my death was an exaggeration").

20. *See* Ellis, *supra* note 14, at 12-15 (citing and discussing Wilkes v. Wood, 98 Eng. Rep. 489 (Ct. Com. Pl. 1763); Huckle v. Money, 95 Eng. Rep. 768 (Ct. Com. Pl. 1763)). Prior thereto, mention of punitive damage awards appeared in the Code of Hammurabi, Roman law, and the Bible. *See* Howard A. Denemark, *Seeking Greater Fairness When Awarding Multiple Plaintiffs Punitive Damages for a Single Act by a Defendant*, 63 OHIO ST. L.J. 931, 934 (2002).

21. *Wilkes*, 98 Eng. Rep. at 498-99.

22. Day v. Woodworth, 54 U.S. (13 How.) 362, 371 (1851).

overwhelming majority of U.S. jurisdictions permit punitive awards[23] based upon defendants' willful, malicious, aggravated misconduct, or the reckless disregard for the rights and safety of others.[24]

Until recently, punitive awards remained relatively uncontroversial, despite occasional judicial condemnation.[25] However, prompted by reports of an "explosion" in excessive judgments,[26] and the empirical reality of increasing numbers of mass tort claims winning significant punitive awards,[27] the issue drew the attention of the Supreme Court. The first intimations of major concern came in the late 1980s, when the Court declined to address the constitutional merits of several punitive awards, despite worries expressed by individual justices.[28] Eventually, in the early 1990s, the Court imposed procedural due process controls on punitive awards[29] and made clear that substantive due process, embodying "general concerns of reasonableness" and proportionality, is implicated in the judicial review of punitive awards.[30]

Only in 1996, with *BMW of North America v. Gore*,[31] did the Court fully engage in proportionality review of a punitive damages award. By a 5–4 vote, the Court held that an award violated due process because it was so excessive that the defendant lacked fair notice of its possible

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23. RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE, ch. 8 (2003).

24. SCHLUETER & REDDEN, *supra* note 14, § 4(c)(1).

25. *See, e.g.*, Fay v. Parker, 53 N.H. 342, 382 (1872) (referring to punitive damages as "a monstrous heresy" and "an unsightly and unhealthy excrescence, deforming the symmetry of the body of the law.").

26. *See* Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform By Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1034-35 (1999) (chronicling major awards). An equally vehement chorus of commentators has questioned the actual extent of outlandish punitive awards, attributing a political motive to reformers. *See, e.g.*, Theodore Eisenberg, *Damage Awards in Perspective: Behind the Headline-Grabbing Awards in Exxon Valdez and Engle*, 36 WAKE FOREST L. REV. 1129 (2001); Marc Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 WIS. L. REV. 1.

27. John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 141 (1986) (noting that before 1967, "the typical punitive damages claim arose from an isolated incident involving only two parties").

28. *See* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 281-82 (1989) (Brennan, J., concurring) (expressing concern that "punitive damages are imposed by juries guided by little more than an admonition to do what they think is best"); *id.* at 282 (O'Connor, J., concurring in part and dissenting in part) (expressing concern over "skyrocketing" punitive awards); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 87-88 (1988) (O'Connor, J., concurring in part and concurring in the judgment) (stating that jurors' discretion to award punitives raises "serious" procedural due process concern).

29. *See* Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (vacating award because Oregon law prohibited courts from reducing or vacating jury awards); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (supporting use of jury instructions and post-trial and appellate review).

30. *Haslip*, 499 U.S. at 18; *see also* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 458 (1993) (stating that "reasonableness" is central to substantive due process review and that an award violates due process when it is "grossly excessive").

31. 517 U.S. 559 (1996).

imposition.[32] Gore challenged BMW's nationwide policy of not advising customers of paint damage sustained on its newly delivered cars, and recovered $4,000 in compensatory and $4 million in punitive damages. The punitive damage award was based on the finding that BMW's behavior satisfied Alabama's statutory prerequisite of "gross, oppressive or malicious" fraud.[33] In computing the award, the jury considered evidence that BMW had sold 983 refinished cars nationwide, including 14 in Alabama, and that the actual market value of each car had been diminished by $4,000.[34] On appeal, the Alabama Supreme Court cut the punitive award in half because the jury had improperly multiplied Gore's compensatory damages by the number of sales in other jurisdictions.[35]

In reviewing the award, the *Gore* Court acknowledged at the outset that punitive damages can "be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[36] However, any such award must be "reasonably necessary to vindicate" the "scope" of these interests, which the majority emphasized was limited by Alabama's geographic boundaries.[37] Principles of "state sovereignty and comity" prevented one state from imposing its policy prerogative, backed by economic sanctions, on other states where such behavior was perhaps lawful.[38] Alabama lacked the power "to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions."[39]

The *Gore* Court supported its conclusion by citing to its precedent regarding criminal recidivist laws: "Habitual offender statutes permit the sentencing court to enhance a defendant's punishment for a crime in light of prior convictions, including convictions in foreign jurisdictions . . . But we have never held that a sentencing court could properly *punish* lawful conduct."[40] The Court added, however, that while evidence of out-of-state conduct may not be used as a "multiplier" in computing a punitive award, "such evidence may be relevant to the determination of

32. *Id.* at 574-75.
33. *Id.* at 565.
34. *Id.* at 564.
35. *Id.* at 567 (citing BMW of N. Am., Inc. v. Gore, 646 So. 2d 619 (Ala. 1994)).
36. *Id.* at 568.
37. *Id.* at 568, 572-73.
38. *Id.* at 571-72.
39. *Id.* at 573.
40. *Id.* at 573 n.19.

the degree of reprehensibility of the defendant's conduct."[41] Moreover, the Court expressly reserved judgment on the question of whether it is proper for a jury to consider out-of-state *unlawful* conduct.[42]

With the evidentiary landscape thus limited, the Court proceeded to assess whether the reduced $2 million award remained "grossly excessive," identifying three "guideposts" to inform its excessiveness analysis: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the award to the harm inflicted upon the plaintiff; and (3) the difference between the award and the civil or criminal sanctions that could be imposed for similar conduct.[43] The Court characterized the reprehensibility guidepost as "[p]erhaps the most important indicium" of reasonableness, noting that both the nature of the underlying misconduct and whether it has been repeated weigh in the analysis.[44] Again, in support the Court referenced its treatment of criminal recidivist laws:

> Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.[45]

However, because BMW's nondisclosure policy did not so clearly contravene the disclosure laws of other states as to put it on notice of its wrongfulness, it could not be deemed a recidivist, thereby mitigating the reprehensibility of its behavior.[46] This, together with the Court's finding that the harm inflicted was "purely economic in nature" and did not stem from an "indifference to or reckless disregard for the health or safety of others,"[47] warranted the conclusion that the $2 million award violated BMW's due process rights.

The Court proceeded to find that the punitive award was unwarranted under the second and third guideposts as well. Emphasizing that no "simple mathematical formula" is available to determine a reasonable ratio, the Court nonetheless expressed concern over the

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41. *Id.* at 574 n.21.

42. *Id.* at 573 n.20.

43. *Id.* at 574-85.

44. *Id.* at 575-76.

45. *Id.* at 576-77 (citation omitted).

46. *Id.* at 578. The Court rejected Gore's assertion that BMW was a recidivist because the company changed its repaint policy once it "had been adjudged unlawful." *Id.* at 579.

47. *Id.* at 576.

"breathtaking 500 to 1" ratio of the punitive award.[48] The comparison of civil or criminal sanctions for comparable misconduct inspired equal concern. Fines in Alabama and elsewhere for deceptive trade practices paled in comparison to the $2 million punitive award.[49] Accordingly, the Court remanded, leaving it to the Alabama Supreme Court to determine whether a new trial was in order or only a determination "of the award necessary to vindicate the economic interests of Alabama consumers."[50]

Gore, the Court's first decision overturning a punitive damages award on substantive due process grounds, triggered considerable controversy.[51] Lower courts reached mixed results on the question expressly reserved in *Gore*—whether *unlawful* extraterritorial conduct could be considered in the vindication of the state's "legitimate interests" of punishing and deterring civil wrongdoers.[52] The question was complicated by language in *Gore* ostensibly allowing consideration of out-of-state behavior in the assessment of "the degree of reprehensibility of the defendant's conduct," yet precluding its use as a "multiplier" for award amounts.[53] The gossamer distinction understandably fueled additional confusion.[54]

The Court's 2003 decision in *State Farm v. Campbell*[55] promised to clarify the punitive damages jurisprudential landscape. At issue in *State Farm* was a $145 million punitive award, based on $1 million in compensatory damages, resulting from State Farm's bad faith refusal to settle an earlier tort action against its insured, the Campbells. At trial, the Utah court admitted extensive testimony regarding misconduct by State Farm in its nationwide operations, "much" of which was lawful in the jurisdictions where it occurred.[56] Applying the *Gore* guideposts, a

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48. *Id.* at 583.

49. *Id.* at 584.

50. *Id.* at 586.

51. *See, e.g.*, Bruce J. McKee, *The Implications of* BMW v. Gore *for Future Punitive Damages Litigation: Observations from a Participant*, 48 ALA. L. REV. 175 (1996); Glen R. Whitehead, Casenote, BMW of North America v. Gore: *Is the Supreme Court Initiating Judicial Tort Reform?*, 16 QUINNIPIAC L. REV. 533 (1997).

52. *See, e.g.*, White v. Ford Motor Co., 312 F.3d 998, 1017 (9th Cir. 2002) (precluding consideration); Smith v. Ingersoll-Rand, 214 F.3d 1235, 1253 (10th Cir. 2000) (allowing consideration); Hampton v. Dillard Dep't Stores, 18 F. Supp. 2d 1256, 1276 (D. Kan. 1998) (precluding consideration); Romo v. Ford Motor Co., 122 Cal. Rptr. 2d 139 (Ct. App. 2002) (allowing consideration), *cert. granted, vacated by* 538 U.S. 1028 (2003).

53. *Gore*, 517 U.S. at 574 n.21.

54. *See* McKee, *supra* note 51, at 219-20 (noting varied interpretations by courts); *see also* Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275, 313 (1999) (referring to distinction as a "fine one").

55. 538 U.S. 408 (2003).

56. *Id.* at 422.

6–3 majority invalidated the award, finding the case "neither close nor difficult."[57]

Focusing first on reprehensibility, the Court cautioned that punitive damages "should only be awarded if the defendant's culpability . . . is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."[58] While it acknowledged that State Farm's behavior toward the Campbells "merits no praise," the Court deemed the punitive award excessive based on the jury's heavy reliance on State Farm's conduct outside Utah.[59] As established in *Gore*, "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred."[60] The Court hastened to add that "[n]or, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction."[61]

The Court reiterated that out-of-state conduct might be "probative" of reprehensibility,[62] but conditioned that it must be "similar" to and have a "nexus" with the in-state conduct targeted by the punitive award.[63] "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."[64] Again, the Court invoked a parallel to its treatment of criminal recidivists, but this time with an important qualification: "Although '[o]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance,' *in the context of civil actions* courts must ensure the conduct in question *replicates the prior transgressions*."[65] Because much of the out-of-state conduct relied upon by the Utah jury was lawful and there was "scant" or no evidence of repeated unlawful conduct elsewhere similar to that injuring the Campbells, the award was unconstitutionally excessive.[66]

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57. *Id.* at 418.
58. *Id.* at 419.
59. *Id.*
60. *Id.* at 421 (citing BMW of N. Am. v. Gore, 517 U.S. 559, 572 (1996)).
61. *Id.*
62. *Id.* at 422.
63. *Id.* at 422-23.
64. *Id.*
65. *Id.* at 423 (quoting *Gore*, 517 U.S. at 577) (emphasis added).
66. *Id.* The majority elaborated on its reprehensibility finding:

> The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period. In this case, because the Campbells have shown no conduct by State Farm similar

The Court also found the award improper under the second and third *Gore* guideposts. With respect to the ratio between punitive and compensatory damages awarded, the majority confirmed its reluctance to prescribe any certain formula to gauge excessiveness, but emphasized that "few awards" in excess of a single-digit ratio will satisfy due process.[67] Accordingly, the 145:1 ratio was presumably excessive, a presumption afforded added weight because the "harm arose from a transaction in the economic realm."[68] The third guidepost likewise suggested an excessive award: the most relevant civil sanction under Utah law was a $10,000 fine for fraud, which was dwarfed by the $145 million punitive award.[69]

B. Criminal Recidivist Laws

In the criminal law realm, recidivism is conceived as "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence."[70] When first employed in the sixteenth and seventeenth centuries, criminal recidivist laws only enhanced the punishment of offenders who repeatedly committed particular crimes.[71] Given that death was often imposed on even first-time offenders, however, such laws were infrequently applied.[72] In the U.S., with the increasing mitigation of punishments in the late eighteenth century, recidivist laws eventually came to affect a broader range of criminal offenders. Starting in the 1790s, legislatures enacted the first generalized "habitual felon" and "repeat offender" laws,[73] and after crime wave panics in the 1920s and 1930s, most states enacted recidivist laws of general application.[74]

> to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.

Id. at 424. *But see id.* at 437 (Ginsburg, J., dissenting) (asserting that the extraterritorial misconduct, while varied in nature, "reflect[ed] an overarching underpayment scheme").

67. *Id.* at 425.

68. *Id.* at 426.

69. *Id.* at 428.

70. Almendarez-Torres v. United States, 523 U.S. 224, 243 (1998).

71. *See* George K. Brown, *The Treatment of the Recidivist in the United States*, 23 CAN. B. REV. 640, 640-41 (1945). The Massachusetts Bay Colony, for instance, enhanced sentences for repeat robbers and burglars in particular. Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511, 511 n.1 (1982). In Virginia, the House of Burgesses in 1705 singled out recidivist hog stealers for enhanced punishment. *Id.*

72. NORVAL MORRIS, THE HABITUAL CRIMINAL 18 (1951).

73. Brown, *supra* note 71, at 642.

74. *Id.* at 642-43. Professor Brown reports that until the beginning of the twentieth century "recidivism was generally defined in terms of successive convictions for specific crimes," meaning that no enhancement would attach if the latter conviction was for a dissimilar offense. *Id.* at 644. He notes that the shift toward "general recidivism" statutes stemmed from advances in criminological theory, in particular

In the 1990s, a new wave of recidivist laws swept the states, marked by much longer enhancements, stricter limits on exceptions to their imposition, and expanded lists of offenses triggering enhancement (including nonviolent offenses).[75] Today, all states have laws enhancing the sentences of recidivist offenders.[76] Twenty-six states have "three strikes and you're out" laws, potentially providing for life in prison upon a third felony conviction.[77]

Throughout their existence recidivist laws have been justified on several bases. Specific deterrence is thought to be served because offenders, facing enhanced sentences if they commit another offense, will likely be more law abiding,[78] and general deterrence, because the enhanced sentence imposed on recidivists will discourage criminal activity among other potential recidivists.[79] Even if not successful as a deterrent, enhanced sentences serve incapacitation interests—protecting society by keeping recidivists imprisoned for longer periods of time.[80] Finally, offenders who persist in crime are thought more culpable, justifying enhanced punishment on retributive grounds. As the Supreme Court put it over fifty years ago, an enhanced penalty is proper "for the latest crime . . .[insofar as it] is considered to be an aggravated offense because a repetitive one."[81]

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the work of Cesare Lombroso, who urged recognition of "criminal types." *Id.* For more on the social climate giving rise to the early twentieth century view supporting the existence of a class of chronic incorrigibles see Sir Leon Radzinowicz & Roger Hood, *Incapacitating the Habitual Criminal: The English Experience*, 78 MICH. L. REV. 1305, 1313-17 (1980). Today, jurisdictions continue to single out repeat violators of particular criminal laws for enhanced sentences, but do so concomitantly with recidivist provisions of general scope. *See, e.g.*, Mikell v. State, 510 S.E.2d 523 (Ga. 1999); State v. Keith, 697 P.2d 145 (N.M. 1985); Seaton v. State, 718 S.W.2d 870 (Tex. Ct. App. 1986).

75. Ronald F. Wright, *Three Strikes Legislation and Sentencing Commission Objectives*, 20 LAW & POL'Y 429, 442 (1998). For discussion of the social and political forces giving rise to the 1990s-genre laws see FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001). Interestingly, recidivist laws in the first third of the century were "seldom used," because *inter alia* they were thought too harsh and difficult to apply. *See* Brown, *supra* note 71, at 658-64.

76. Erwin Chemerinsky, *Cruel and Unusual: The Story of Leandro Andrade*, 52 DRAKE L. REV. 1, 4 (2003).

77. *Id.* at 5. In addition to recidivist statutes, most if not all state sentencing systems provide for enhancement based on past criminal misconduct. *See* Michael Edmund O'Neill, *Abraham's Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System*, 42 B.C. L. REV. 291, 305 n.52 (2001).

78. Robert Heglin, Note, *A Flurry of Recidivist Legislation Means: "Three Strikes and You're Out,"* 20 J. LEGIS. 213, 218 (1994).

79. Michael Vitiello, *"Three Strikes" and the* Romero *Case: The Supreme Court Restores Democracy*, 30 LOY. L.A. L. REV. 1601, 1643 (1997).

80. *See* Heglin, *supra* note 78, at 218.

81. Gryger v. Burke, 334 U.S. 728, 732 (1948); *see also* Spencer v. Texas, 385 U.S. 554, 571 (1967) (Warren, C.J., dissenting) ("A man's prior crimes are thought to aggravate his guilt for subsequent crimes, and thus greater than usual retribution is warranted."); Graham v. West Virginia, 224 U.S. 616, 623 (1912) ("[R]epetition of criminal conduct aggravates . . . guilt and justifies heavier penalties when they are again convicted."); *cf.* HOUSE OF COMMONS, REPORT ON THE COMMISSION OF PRISONS 31 (1895) ("[T]he real

Over the decades, an expansive body of law has come to govern how prior convictions are to be counted for purposes of enhancing sentences. In situations involving recidivists previously convicted of crimes within the jurisdiction of the sentencing court, the determinations are relatively clear-cut: State law typically specifies the types of prior offenses that can serve as predicates for enhancement.[82] With respect to prior convictions occurring elsewhere, however, the situation is more fluid and considerably more complex.

Although all jurisdictions today allow for consideration of extraterritorial misconduct,[83] they vary in how they go about doing so. The majority of states employ an "internal" view by statute or common law.[84] Under this approach, the sentencing court of the forum state examines the elements of the foreign conviction to determine if it would have qualified as a predicate for enhancement under its governing law.[85] Other states use an "external" view to assess foreign convictions for purposes of enhancement.[86] This more generous approach allows consideration of foreign convictions if they are of the same class of crime (typically a felony) that the forum state recognizes as a predicate for enhancement, regardless of whether the elements of the foreign offense satisfy a comparable predicate warranting enhancement in the forum.[87] The external approach, in short, embodies the sentiment that "[g]ood citizenship requires obedience and observance to the laws of sister states as much as those of this state."[88]

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offense is the willful persistence in the deliberately acquired habit of crime."). For further discussion of retributive principles in the context of recidivist laws see ANDREW VON HIRSH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 77-91 (1985). *But see* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 460-66 (1978) (questioning whether prior record should increase culpability).

82. *See generally* R.P. Davis, Annotation, *What Constitutes Former "Conviction" Within Statute Enhancing Penalty for Second or Subsequent Offense*, 5 A.L.R.2D 1080 (1949 & Supp. 2004).

83. Until the mid-1970s, Virginia refused to take account of any foreign conviction, allowing only prior Virginia convictions to be considered for enhancement purposes. *See* Susan Buckley, Note, *Don't Steal a Turkey in Arkansas—The Second Felony Offender in New York*, 45 FORDHAM L. REV. 76, 79 (1976). For discussion of the Virginia law in particular see Note, *Recidivism and Virginia's "Come-Back" Law*, 48 VA. L. REV. 597 (1962).

84. *See* Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. (forthcoming 2005).

85. The states vary in their rigor of this analysis. New York, for instance, uses a strict "same elements" test, whereas other states apply a "substantially" similar or equivalent test. *Id.* (citing laws in Ohio and Florida).

86. *Id.*

87. *Id.*

88. State v. Prince, 132 P.2d 146, 149 (Idaho 1942). States are considerably less generous with regard to prior convictions in foreign nations. While eight states explicitly authorize such consideration, twenty-one states and the District of Columbia expressly preclude it, and the remaining jurisdictions are unclear on the question. *See* Martha Kimes, Note, *The Effect of Foreign Criminal Convictions Under American Repeat Offender Statutes: A Case Against the Use of Foreign Crimes in Determining Habitual Criminal Status*, 35 COLUM.

For its part, federal law takes account of state court convictions in several different ways. Under the federal "three strikes" provision,[89] for instance, recidivists with qualifying criminal histories face mandatory life imprisonment.[90] Predicates include either convictions for two prior "serious violent" felonies or one prior serious violent felony and one "serious drug" conviction,[91] with both federal and state convictions being eligible.[92] In addition, the Armed Career Criminal Act[93] considers prior state convictions as predicates, and the U.S. Sentencing Guidelines[94] consider prior state convictions in assessing "criminal history" and "[c]areer [o]ffender" status.[95] Under the federal death penalty law, statutory aggravating factors take account of specified prior convictions adjudicated by state and federal courts.[96] In construing the aforementioned provisions, the federal courts have created a complex case law regarding how prior state convictions are to be assessed in determining enhancements.[97]

J. TRANSNAT'L L. 503, 507-08 (1997). Likewise, states differ on whether prior court-martial convictions can be used as an enhancement basis. *See generally* Christopher Vaeth, Annotation, *Use of Prior Military Conviction to Establish Repeat Offender Status*, 11 A.L.R.5TH 218 (1993 & Supp. 2004). On the other hand, it is generally held that federal convictions can be used to enhance state court sentences. *See* Davis, *supra* note 82, § 20.

89. 18 U.S.C.A. § 3559 (West 2000 & Supp. 2004).

90. *Id.* § 3559(c)(1).

91. *Id.* § 3559(c)(1)(A)(ii).

92. *Id.* § 3559(c)(1)(A). *See generally* R. Daniel O'Connor, Note, *Defining the Strike Zone—An Analysis of the Classification of Prior Convictions Under the Federal "Three Strikes and You're Out" Scheme*, 36 B.C. L. REV. 847, 849-51 (1995).

93. 18 U.S.C. § 924(e) (2000 & Supp. II 2002).

94. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(5) (2002).

95. O'Connor, *supra* note 92, at 855-56. Under the Guidelines, foreign nation convictions cannot play a role in a defendant's criminal history score, but they can justify an upward departure from the usual range of punishment. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 4A1.2(h), 4A1.3(a) (2002). Select federal statutes, however, do permit consideration of foreign nation convictions. *See, e.g.*, 21 U.S.C. § 802(44) (2004) (including foreign convictions as predicate "felony drug" offenses).

96. *See* 18 U.S.C. § 3592(c)(2) (2000) (specifying as an aggravator that "the defendant has previously been convicted of a Federal or State offense punishable by a time of imprisonment of more than 1 year, involving the use or attempted or threatened use of a firearm . . . against another person").

97. In *Taylor v. United States*, 495 U.S. 578 (1990), for instance, the Court wrestled with how the prior "violent felony" requirement of the Armed Career Criminal Act was to be interpreted. Petitioner contended that his prior state conviction in Missouri for second-degree burglary did not satisfy the requirement. *Id.* at 579. The Court acknowledged that states vary widely in their definitions of burglary, yet refused to infer that Congress intended to have the meaning of burglary

> depend on the definition adopted by the State of conviction. That would mean that a person convicted of unlawful possession of a firearm would, or would not, receive a sentence enhancement based on exactly the same conduct, depending on whether the State of his prior conviction happened to call the conduct "burglary."

Id. at 590-91. The Court ultimately embraced a definition in the "generic sense in which the term is now used in the criminal codes of most states." *Id.* at 598. The court adopted a "categorical approach," which examines only the statutory definitions of prior offenses, "not the . . . particular facts underlying those convictions." *Id.* at 600. On the other hand, lower federal courts, interpreting other enhancement provisions,

No such complexity, however, has been evidenced in constitutional challenges to recidivist laws, which have proven impregnable to attack. Ex post facto challenges are rejected on the reasoning that the most recent offense occurred after the enactment of the enhancement provision, justifying greater punishment for the new offense.[98] Likewise, recidivist laws withstand double jeopardy challenges because, rather than authorizing added punishment for the earlier offense, they enhance the latter: "the enhanced punishment imposed for the later offense . . . [is] 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'"[99] Equal protection challenges also regularly meet with defeat, with courts finding the special targeting of recidivists warranted by the government's police power authority.[100] Due process attacks are turned back on the rationale that recidivist laws do not create a new basis for criminal culpability, but rather merely prescribe "circumstances wherein one found guilty of a specific crime may be more severely penalized because of his previous criminalities."[101] Consistent with this view, the Supreme Court in *Apprendi v. New Jersey* carved out a special Sixth Amendment exception for prior convictions in sentencing decisions, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."[102]

Over the years, Eighth Amendment challenges to recidivist laws have achieved a degree of limited success.[103] In the Court's 2003 decision

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have embraced a "factual approach," involving review of the particular conduct supporting the predicate conviction. *See, e.g.*, United States v. Bridges, 175 F.3d 1062 (D.C. Cir. 1999) (applying factual test in determining criminal history category under Guidelines).

98. *See, e.g.*, Graham v. West Virginia, 244 U.S. 616 (1912). For a survey of ex post facto challenges brought against recidivist laws in state courts during the past ten years see Wayne A. Logan, *"Democratic Despotism" and Constitutional Constraint: An Empirical Analysis of Ex Post Facto Claims in State Courts*, 12 WM. & MARY BILL RTS. J. 439, 484-86 (2004).

99. Witte v. United States, 515 U.S. 389, 400 (1995) (citation omitted); *see also* Moore v. Missouri, 159 U.S. 673, 677 (1895) (stating that the enhanced punishment "is for the last offence committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself").

100. *See, e.g.*, McDonald v. Massachusetts, 180 U.S. 311 (1901). One exception is *Skinner v. Oklahoma*, 316 U.S. 535 (1942), where the Court granted an equal protection challenge to a law that singled out only particular types of recidivists for sterilization—a sanction distinctly different from incarceration.

101. Goodman v. Kunkle, 72 F.2d 334, 336 (7th Cir. 1934).

102. 530 U.S. 466, 490 (2000). It remains to be seen, however, whether the prior conviction exception will endure. While recent *Apprendi*-related decisions have left the exception intact, *see, e.g.*, Blakely v. Washington, 124 S. Ct. 2531 (2004), a majority of justices now appear inclined to rescind it. *See* Shepard v. United States, 125 S. Ct. 1254, 1264 (2005) (Thomas, J., concurring) (noting same).

103. *See* Solem v. Helm, 463 U.S. 277 (1983) (granting challenge to recidivist sentence of life without possibility of parole); Rummel v. Estelle, 445 U.S. 263 (1980) (rejecting challenge to recidivist sentence of life with possibility of parole). For discussion of the Court's Eighth Amendment jurisprudence with regard

Ewing v. California,[104] however, the abiding hope that meaningful limits might be imposed on recidivist laws was dashed. Ewing was convicted of stealing three golf clubs, and ultimately convicted of felony grand theft, as a result of the prosecutor's discretionary refusal to treat the misconduct as a non-qualifying offense.[105] The conviction triggered California's "three strikes" law, mandating imposition of a sentence of twenty-five years to life.[106] Noting that successful Eighth Amendment challenges to non-capital sentences "have been exceedingly rare,"[107] because the Amendment prohibits "only extreme sentences that are 'grossly disproportionate' to the crime,"[108] a plurality of the Court upheld the sentence.[109] Although Ewing's sentence was a "long one," his was not "the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[110]

With *Ewing*, the Court signaled its willingness to stand clear of what it called the "sea change in criminal sentencing" manifest in recently enacted recidivist sentencing laws.[111] In targeting recidivists, "the State's

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to non-capital sentences more generally see Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 693-709 (1998).

104. 538 U.S. 11 (2003).

105. *Id.* at 16. Ewing's offense was a "wobbler" under California law, meaning that it could be classified as either a felony or a misdemeanor. *See id.* (citing CAL. PENAL CODE § 489 (West 1999)).

106. *Id.* at 20. California adopted its "three strikes" law "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." CAL. PENAL CODE § 667(b) (West 1999). The law also permits enhancements for offenders with only one prior felony conviction, without any requirement that the prior felony be "serious" or "violent" as required by the "three strikes" law. *Id.* § 667(e)(1). If applicable, the provision doubles the length of the sentence otherwise imposed. *Id.*

107. *Ewing*, 538 U.S. at 21.

108. *Id.* at 23 (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (Kennedy, J., concurring)); *see also id.* at 20 (citation omitted) (acknowledging that the Eighth Amendment contains only a "narrow proportionality principle").

109. The main opinion was written by Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy. Justices Thomas and Scalia wrote separate concurrences, reconfirming their views that the Eighth Amendment contains no proportionality principle. *See id.* at 31 (Scalia, J., concurring); *id.* at 32 (Thomas, J., concurring).

110. *Id.* at 30 (quoting *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring)). Presumably, if gross disproportionality were found as a "threshold" matter, the Court then would assess whether the sentence was undue compared to that imposed for other crimes within the jurisdiction and for the same type of crime in other jurisdictions. This approach was endorsed by Justice Kennedy in his *Harmelin* concurrence and invoked in *Ewing*. *Id.*

111. *Id.* at 24. In a companion case, *Lockyer v. Andrade*, 538 U.S. 63 (2003), the Court rejected a proportionality challenge from a recidivist cumulatively sentenced to life in prison, with no possibility of parole for fifty years, whose second and third strikes resulted from theft of $153 worth of children's videotapes. *Andrade* involved the distinct issue of the availability of habeas corpus relief among state prisoners, allowed only if a state court decision is "contrary to," or an "unreasonable application of, clearly established federal law." *Id.* at 70 (quoting 28 U.S.C. § 2254(d)(1) (2000)). The 5–4 majority concluded that neither criterion was met, reaffirming that the gross disproportionality standard is satisfied "only in the

interest is not merely punishing the offense of conviction, or the 'triggering' offense: '[I]t is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.'"[112] Accordingly, the proportionality of the sentence imposed on Ewing was not to be assessed merely in terms of the three golf clubs stolen, but rather Ewing's entire offense history. In assessing the proportionality of a recidivist's sentence, "[w]e must place on the scales not only his current felony, but also his long history of felony recidivism."[113]

C. The Court's Ambivalent Stance on Extraterritoriality

Viewed independently, *State Farm* and *Ewing* represent the most significant decisions to date from the Court on the constitutional parameters of criminal sentence lengths and punitive damage awards. With *Ewing*, the Court signaled that for all intents and purposes the Eighth Amendment will not impede state efforts to impose harsh sentences upon criminal recidivists, even those convicted of nonviolent crimes.[114] It now appears that the Court's hypothetical scenario of deeming disproportionate a legislative choice to punish "overtime parking . . . by life imprisonment" holds the only viable promise of a successful constitutional challenge.[115] In *State Farm*, the Court made clear its acute concern over punitive damage awards, specifying for the first time that "few awards" that exceed a "single-digit" multiplier of compensatory awards will satisfy due process.[116] Moreover, the Court's decision "dealt a body blow" to the consideration of extraterritorial wrongdoing,[117]

'exceedingly rare' and 'extreme' case." *Id.* at 73 (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring)).

112. *Ewing*, 528 U.S. at 29 (quoting Rummel v. Estelle, 445 U.S. 263, 276 (1980)).

113. *Id.*

114. As a result, *Ewing* doubtless will be used in future cases as a basis to deny proportionality challenges to heavy sentences for violent crimes. *See, e.g.*, United States v. Gonzales, 121 F.3d 928, 943 (5th Cir. 1997) (using Court's decision in *Rummel*, where the Court upheld a life sentence imposed on a three-time recidivist, as "benchmark" to uphold 30-year sentence for use of a machine gun in a drug deal).

115. *Ewing*, 538 U.S. at 21 (quoting *Rummel*, 445 U.S. at 274 n.11).

116. State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

117. Mark G. Bonino, *The U.S. Supreme Court and Punitive Damages: On the Road to Reform*, 70 DEF. COUNS. J. 432, 432 (2003). The extent to which this giddy assessment is warranted remains to be seen, however. Courts are showing some willingness to consider evidence of out-of-state wrongdoing, at least in some circumstances. *See, e.g.*, Boyd v. Goffoli, 608 S.E.2d 169, 179 (W. Va. 2004) (holding that "a State has a legitimate interest in imposing damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction where the State has a significant contact or significant aggregation of contacts to the plaintiffs' claims which arise from the unlawful out-of-state conduct").

marking a reversal from its prior apparent willingness to take full account of such information.[118]

Viewed in tandem, *State Farm* and *Ewing* underscore the existence of a distinct constitutional divide in the judicial review of punitive damage awards and criminal sentences. Not surprisingly, the Court's more robust engagement with the former has not gone unnoticed. As one commentator caustically offered, the variation highlights a troubling constitutional value judgment seemingly at work in the Court: that "your money means more than your life."[119] That such heightened scrutiny should be predicated on substantive due process, a constitutional *bête noire* of the Rehnquist Court,[120] at the expense of a sovereign state court,[121] affords additional evidence to suspect that a double standard is at work.[122]

To give the Court its due, however, the divergent results plausibly can be explained at least in part by the distinct legal regimes under which punitive awards and criminal sentences are imposed. As the *State Farm* majority noted, "[a]lthough [punitive awards] serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil

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118. *See, e.g.*, TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462 n.28 (rejecting argument that it was improper for jury to consider "evidence of [defendant's] alleged wrongdoing in other parts of the country," noting that such consideration was permitted "[u]nder well-settled law"). For earlier pronouncements to this same effect see, for example, 3 J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 727 (1883) (endorsing consideration of "any facts [that] may be shown to enhance punitive damages," including "previous threats" by the defendant), and Theron Metcalf, *Damages Ex Delicto*, 3 AM. L. MAG. 270, 287 (1830) ("[C]ircumstances which form no part of the actionable matter of a suit, may be given in evidence to aggravate damages.").

119. Alan B. Morrison, *Your Money or Your Life: The Supreme Court Places More Value on the Purse than on Personal Freedom*, LEGAL TIMES, May 19, 2003, at 67; *see also* Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1080 (2004) (concluding that "[t]here is something just wrong with a Court that has no problem" with upholding a life term for a modest recidivist offense "but is outraged when too much is taken from a company in punitive damages when it defrauds its customers").

120. *See, e.g.*, Chavez v. Martinez, 538 U.S. 760, 775 (2003) (stating that "[m]any times . . . we have expressed our reluctance to expand the doctrine of substantive due process"). Of course, the Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), invalidating the criminalization of same-sex consensual sodomy on due process grounds, represents a notable—and controversial—exception. For discussion of the Court's uneven embrace of due process, with attention to its application of the doctrine in punitive damages but not challenges to civil forfeitures, see Susan R. Klein, *The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles*, 1997 U. ILL. L. REV. 453.

121. *See State Farm*, 538 U.S. at 430 (Ginsburg, J., dissenting) (noting that "[n]ot long ago, this Court was hesitant to impose a federal check on state-court judgments awarding punitive damages").

122. If indeed this is so it gives rise to an additional irony: while crime victims have come to enjoy increasing political influence and power, tort victims have experienced just the opposite, often becoming the target of political ridicule and disdain. *See* Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 3-4 (2002) (describing instances). This despite the fact that punitive damage doctrine itself has been characterized as a direct antecedent of the modern victims' rights movement in the criminal justice system. *See* Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual Private Wrongs*, 87 MINN. L. REV. 583, 635-36 (2003).

cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered."[123] Moreover, as Professor Pamela Karlan has observed, the distinct levels of judicial deference can be explained by the fact that, unlike the criminal realm where legislatures determine sentence maxima, individual civil juries assess punitive awards free of such political accountability and practical limits (assuming statutory caps are not in place).[124] Heightened scrutiny of punitive awards also might be justified by the institutional reality that the Supreme Court is the sole locus of federal review of state jury punitive awards, while state criminal sentences can be challenged collaterally in federal court as well as on direct appeal.[125]

Although these observations perhaps provide a convincing basis to explain the Court's varied treatment of proportionality in the civil and criminal contexts, they fail to account for the varied role extraterritorial misconduct can now play in the actual assessment of punitive awards and criminal sentences. Despite the Court's avowed sensitivity to repeat wrongdoing in assessing the culpability of civil and criminal wrongdoers alike, regardless of where the prior transgressions occurred,[126] *State Farm* makes clear that the worlds are not so comparable after all. Whereas states freely consider extraterritorial misconduct when sentencing criminal recidivists,[127] such freedom is absent in the imposition of punitive damage awards. "[A]s a general rule" a state has no "legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction."[128] Of course, the Court's "general rule" qualifying language leaves some possible room on the question.[129] Nevertheless, its insistence that in

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123. *See State Farm*, 538 U.S. at 417; *see also id.* at 428 (stating that "[g]reat care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof").

124. Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 912 (2004).

125. *Id.* at 910-11 (citing *State Farm*, 538 U.S. at 430 (Ginsburg, J., dissenting)).

126. *See* BMW of N. Am. v. Gore, 517 U.S. 559, 573 n.19 (1996) (emphasis added) (concluding that its prior punitive damage decisions and those "concerning recidivist statutes are not to the contrary. Habitual offender statutes permit the sentencing court to enhance a defendant's punishment for a crime in light of prior convictions, *including convictions in foreign jurisdictions*.").

127. *See supra* notes 83-88 and accompanying text.

128. *State Farm*, 538 U.S. at 421.

129. There also remains some question over whether and to what extent extraterritorial conduct may be considered in assessing punitive awards based on physical injury rather than economic harm. However, this possibility is of little consequence to the discussion here, given that in the criminal realm "economic" crimes regularly trigger enhanced sentences under recidivist laws. *See* Ewing v. California, 538 U.S. 11, 30-31 (2003) (upholding recidivist sentence of 25-life for "third strike" of stealing three golf clubs); Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 396 n.8 (1997) (citing similar examples).

"civil actions . . . the conduct in question *replicate*[ ] the prior transgressions"[130] sharply limits such consideration, and as discussed later, itself distinguishes the law's treatment of tortfeasors from criminal recidivists.

In sum, *State Farm* and *Ewing* highlight distinctly different views of how recidivist wrongdoing should figure in evaluating the appropriateness of punitive damage awards and criminal sentences. This asymmetry not only underscores the continued existence of a civil-criminal divide, but also presents an array of theoretical and practical issues that warrant exploration. It is to these issues that the discussion now turns.

III. EXTRATERRITORIALITY IN TORT AND CRIME

A. Federalism, Comity, and Recidivism

In both *Gore* and *State Farm* the Court made plain its concern over the consideration of extraterritorial misconduct in the assessment of punitive awards. The *Gore* majority took the initial step toward circumscribing such consideration. Even before evaluating the three guideposts prescribed for determining whether an award is "grossly excessive," analysis must "begin[ ] with an identification of the state interests that a punitive award is designed to serve"—retribution and deterrence.[131] These interests, however, are delimited by federalism and comity concerns: no state can "infring[e] on the policy choice[ ] of other States."[132] Citing several of the Court's early decisions endorsing the limited extraterritorial effect of state laws,[133] the *Gore* majority held that Alabama lacked "interest" in punishing or deterring conduct that was lawful elsewhere and invalidated the punitive award imposed on BMW.[134] In *State Farm*, the majority did not begin with an independent identification of state interests, electing instead to proceed directly to the excessiveness inquiry. However, it invoked the same precedent on extraterritoriality in reiterating the prohibited consideration of lawful conduct[135] and elaborated that Utah lacked a "legitimate concern in imposing punitive

130. *State Farm*, 538 U.S. at 423 (emphasis added). Moreover, definitional uncertainty exists over what might be meant by "unlawful." *See, e.g.*, Barker v. Kallash, 468 N.E.2d 39, 41 (N.Y. 1984) (noting that a distinction must be drawn between "lawful activities regulated by statute and [those] activities which are entirely prohibited by law"); *cf.* JOHN E. CONKLIN, "ILLEGAL BUT NOT CRIMINAL": BUSINESS CRIME IN AMERICA (1977) (observing that "illegal" is not synonymous with "criminal").

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

132. *Id.* at 572.

133. *Id.* at 571-72.

134. *Id.* at 573-74.

135. *State Farm*, 538 U.S. at 421.

damages to punish a defendant for unlawful acts committed outside the State's jurisdiction."[136]

The Court's position on extraterritorial civil misconduct is noteworthy in several respects. As an initial matter, it sheds light on the central question of the interrelation of sovereign laws in a federalist system. To the *State Farm* majority, the consideration of extraterritorial misconduct amounted to a choice of law question. Under this view, "[a]ny proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction."[137]

The Court's analysis, however, appears misplaced in the context of assessing the reprehensibility of a punitive damages defendant. With choice of law, the issue is whether a forum state can apply its substantive law to adjudicate liability, with the forum being free to do so if there exists a "significant contact . . . creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[138] With reprehensibility analysis, the issue is not whether the substantive law of the forum state or another state should apply to determine liability per se, but rather whether the extraterritorial misconduct of a tortfeasor aggravates the tortfeasor's culpability, justifying increased punitive damages. The *State Farm* majority thus appears to have elided the subtle distinction drawn in *Gore* between "punishing" extraterritorial misconduct (impermissible) and using it as an evidentiary basis to gauge reprehensibility in assessing damages (permissible).[139] As a consequence, it has constitutionalized a choice of law rule where none was required.[140] Furthermore, as Professor Catherine Sharkey has rightly noted, the Court created a curious inconsistency insofar as no such extraterritorial limits constrain

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136. *Id.*

137. *Id.* (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-22 (1985)).

138. *Shutts*, 472 U.S at 818.

139. *See Gore*, 517 U.S. at 574 n.21.

140. Moreover, contrary to the impression afforded in *State Farm*, "state interests" analysis in choice of law has become increasingly flexible over the years. *See* Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, The Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 482-83 (1992) (discussing evolution). Indeed, two weeks after deciding *State Farm* the Court unanimously backed the authority of a forum state to apply its law in litigation involving multistate disputes and interests, even when the law elsewhere conflicted. *See* Franchise Tax Bd. v. Hyatt, 538 U.S. 488 (2003). *Hyatt* concluded that "[w]ithout a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws." *Id.* at 499. The willingness of the Court in *State Farm* to gainsay extraterritoriality in assessing punitive damages as a constitutional matter, yet liberate jurisdictions in civil choice of law situations more generally—despite viewing the latter as precedent for the former—represents a notable paradox. *See also* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 257 (1992) (noting that "[a]t the constitutional level, the modern Supreme Court has all but abandoned the field" of choice of law doctrine and rules).

class action lawsuits comprised of litigants from multiple jurisdictions seeking compensatory (as opposed to punitive) awards.[141] Nor, for that matter, does the Court explain why or how its caveat allowing for continued potential consideration of "similar" extraterritorial misconduct lessens the threat posed by "other parties' hypothetical claims" being pressed against a punitive damages defendant.[142]

Yet, even if the matter were properly conceived as a question of substantive choice of law application, the Court's position on punitive damages in *State Farm* highlights a fundamental contrast with the criminal law realm.[143] While constitutional vicinage provisions can effectively limit the capacity of states to address extraterritorial criminal acts,[144] and the common law was predisposed against extraterritoriality,[145] the modern trend has been to the contrary.[146] In *Strassheim v. Daily*,[147] for

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141. Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 429-32 (2003). Professor Sharkey observes that "[t]he Court has yet to develop any underlying justification for such a distinction, at least with respect to states' respective territorial spheres of regulation. In fact, it is difficult to imagine any such justification based on its previously announced principles of sovereignty, comity, and choice of law." *Id.* at 431.

142. *State Farm*, 538 U.S. at 423.

143. The extraterritoriality application of domestic criminal laws remains a vastly understudied subject, which is surprising given the ever increasing reach of prosecutorial interests and interrelations among state crime control efforts. The commentary that exists largely dates from several decades ago. *See, e.g.*, Wendell Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238 (1931); Paul D. Empson, *The Application of Criminal Law to Acts Committed Outside the Jurisdiction*, 6 AM. CRIM. L.Q. 32 (1967); B.J. George, Jr., *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609 (1966); Robert A. Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 CASE W. RES. L. REV. 44 (1974); Albert Levitt, *Jurisdiction Over Crimes*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 316 (1925); Rollin M. Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155 (1971); Daniel L. Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 TEX. L. REV. 763 (1960).

Renewed scholarly interest in extraterritoriality arose in the early 1990s, triggered by the 5–4 vote in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and the specter that states would once again criminally regulate abortions, prompting question over the extraterritorial reach of such laws. *See, e.g.*, C. Steven Bradford, *What Happens if* Roe *is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87 (1993); Seth F. Kreimer, *But Whoever Treasures Freedom . . . : The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907 (1993). For an argument in favor of states' authority to regulate the extraterritorial behavior of their own citizens in particular see Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855 (2002).

144. *See* George, *supra* note 143, at 631. Professor George, however, refers to such requirements as an obstacle that "preserve[s] in constitutional amber the rote thinking" of the past. *Id.* at 636.

145. *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 4.4(a) (2d ed. 2003). Under the traditional "territorial theory" of jurisdiction, "a state has power to make conduct or the result of the conduct a crime if the conduct takes place or the result happens within its territorial limits. Conversely, there can be no territorial jurisdiction where conduct and its results both occur outside its territory." *Id.* § 4.4(a), at 295.

146. *See* People v. Betts, 103 P.3d 883, 887 (Cal. 2005) ("Although the constitutional limits of state courts' extraterritorial jurisdiction in criminal matters have not been precisely delineated, it is clear that states may extend their jurisdiction beyond the narrow limits imposed by the common law."); Kreimer, *supra* note 140, at 469-87 (tracing jurisprudential and statutory evolution away from strict adherence to territoriality principle).

147. 221 U.S. 280 (1921).

example, the defendant bribed a Michigan state official in Chicago, inducing him to overpay for inferior used machinery, and was successfully prosecuted in Michigan despite not visiting the state until long after the bribery. Writing for the Court, Justice Holmes concluded that "[a]cts done outside a jurisdiction, but intended to produce . . . detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect."[148] Similarly, in *Skiriotes v. Florida*,[149] the Court upheld application of a Florida law that prohibited sponge fishing beyond its territorial waters, reasoning that the state had a "legitimate interest" in regulating the sponge industry even outside its borders.[150] Model Penal Code section 1.03, adopted by 29 states,[151] goes even further. It provides that a defendant can be criminally liable if "the offense is based on a statute of this State that expressly prohibits conduct outside the State."[152]

Laws regarding the treatment of criminal recidivists are in accord. When a sentencing court relies upon foreign misconduct to enhance a sentence, as is customary, it is in effect engaging in extraterritoriality, despite the comity concerns often presented.[153] There is no mistaking

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148. *Id.* at 285; *see also id.* at 284-85 (stating that "the usage of the civilized world would warrant Michigan in punishing him, although he never had set foot in the State until after the fraud was complete"); Chandler v. Main, 16 Wis. 398 (1863) (concluding that a state can apply laws against its own citizens "which are binding and obligatory upon them everywhere, and for the violation of which they may be punished whenever the state can find them"); *cf.* United States v. Bowman, 269 U.S. 94, 98 (1922) (recognizing that there are "criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud, wherever perpetrated").

149. 313 U.S. 69 (1941).

150. *Id.* at 77. For more modern cases approving of state criminal jurisdiction over fishing in extraterritorial waters see, for example, *State v. Bondurant*, 546 P.2d 530 (Alaska 1976), *People v. Weeren*, 607 P.2d 1279 (Cal. 1980), and *Livings v. Davis*, 465 So. 2d 507 (Fla. 1985).

151. MODEL PENAL CODE § 1.03 cmt. 1 (1985).

152. *Id.* § 1.03(1)(f). The sole proviso is that the conduct "bear[] a reasonable relation to a legitimate interest of [the] State and the actor knows or should know that his conduct is likely to affect that interest." *Id.* § 1.03 cmt. 6. *See, e.g.*, Wheat v. State, 734 P.2d 1007, 1007 (Alaska Ct. App. 1987) (permitting prosecution of divorced father for custodial interference despite fact that "all the acts constituting the offense were committed outside of the state"). For discussion of the extraterritorial reach of criminal laws in the international context, which the Model Penal Code relied upon to create its "state interest" criterion to justify broadened domestic jurisdiction, see George, *supra* note 143, at 613-14, 626-28.

153. For example, when the sentencing forum takes account of a foreign state conviction that is (1) not considered for purposes of recidivism there, (2) has been pardoned or expunged or (3) dismissed because court-imposed conditions were satisfied, in effect there occurs a voiding of policy judgment. As one federal court put it: "the profile of the shadow that conviction casts on later events is the business of the state where those later events occur." Poo v. Hood, No. 89 Civ 7874, 1992 WL 30617, at *6 (S.D.N.Y. Feb. 12, 1992); *see also* People v. Laino, 87 P.3d 27, 40 (Cal. 2004) (stating that "[n]o matter what lenience Arizona may or may not bestow upon its recidivist criminals who have committed domestic violence felonies, once we are satisfied that . . . such conviction constitutes a strike under our three strikes law, that prior crime will count here"); State v. Pope, 927 P.2d 503, 511 (Kan. Ct. App. 1997) (enhancing sentence in Kansas based on prior juvenile adjudication in Missouri, even though Missouri recidivist law would disregard juvenile

that the varied policy judgments giving rise to such conflicts reflect basic normative differences in the perceived social gravity of unlawful acts,[154] and differences in how government should respond to them.[155] Application of the *State Farm* logic, however, would suggest that a jurisdiction would have no "valid interest" to advance when it enhanced punishment based on out-of-state prior misconduct.[156] In short, it is plain that criminal recidivist laws definitely do have "force of themselves beyond the jurisdiction" that enacted them.[157] And such force results in added deprivations of physical liberty, sometimes very significant, not monetary losses, as is the case with punitive awards.

Relatedly, the *State Farm* majority's overriding concern for notice—for example, requiring that out-of-state illegality "replicate" that justifying a punitive award—stands in sharp contrast to judicial treatment of recidivist laws. Recidivist offenders are presumed to be aware that prior extraterritorial wrongs, even of a dissimilar nature, can enhance their sentence for a later conviction. This is so despite the reality that courts

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adjudications); State v. Bush, 9 P.3d 219, 224-25 (Wash. Ct. App. 2000) (permitting Kansas misdemeanor conviction to be classified as felony for purposes of enhancement in Washington).

A similar outcome obtains when another sovereign would consider a subsequent offense for recidivist purposes, yet the sentencing forum does not. *See, e.g.*, United States v. Corona-Sanchez, 291 F.3d 1201, 1213 (9th Cir. 2002) (refusing to consider California petty theft conviction as basis for federal enhancement); Elston v. State, 687 So. 2d 1239, 1242 (Ala. Crim. App. 1996) (refusing to consider Georgia felony conviction for robbery); State v. Glenn, 493 So. 2d 806, 814 (La. Ct. App. 1996) (refusing to consider Texas felony conviction for unauthorized use of vehicle).

154. *See* McCleskey v. Zant, 499 U.S. 467, 491 (1991) ("Our federal system recognizes the independent power of a State to articulate societal norms through criminal law."); State v. Langlands, 583 S.E.2d 18, 20 n.4 (Ga. 2003) ("A state cannot express its public policy more strongly than through its penal code. When a state defines conduct as criminal and sets the punishment for the offender, it is conveying in the clearest possible terms its view of public policy.").

155. *See* Rummel v. Estelle, 445 U.S. 263, 285 (1980) (parameters of recidivist enhancement laws "are matters largely within the discretion of the punishing jurisdiction").

156. This same argument was advanced by the Ninth Circuit Court of Appeals as a reason to bar consideration of extraterritorial unlawful conduct in punitive damage awards, in a decision rendered before *State Farm*. *See* White v. Ford Motor Co., 312 F.3d 998 (9th Cir. 2002), *opinion amended and reh'g denied*, 335 F.3d 833 (9th Cir. 2003). In addition to the possible difficulty of having to identify whether the behavior at issue is unlawful elsewhere, the court reasoned that "the variation in policies of punishment, even where the conduct is unlawful in all states, amounts to an important distinction in policy." *Id.* at 1017. In support, the court discussed differences in punitive damage awards available in different states, including the existence of statutory caps in some and "split-recovery" statutes in others. *Id.*

157. State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003) (quoting Huntington v. Attrill, 146 U.S. 657, 669 (1892)). In *Attrill*, it bears mention, the Court held that the Full Faith and Credit Clause does not *require* a state to enforce the penal judgment of another state in contravention of its own statutes or policy. *See also* Williams v. North Carolina, 317 U.S. 287, 294 n.6 (1942) ("It has been repeatedly held that the full faith and credit clause does not require one state to enforce the penal laws of another."); EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 1177-78 (3d ed. 2000) (noting same). Fairly interpreted, *Attrill* thus in no way *prohibits* a state from making evidentiary use of wrongdoing in a sister state to enhance a criminal sentence. *See Laino*, 87 P.3d at 890. By extension, then, it should not prohibit evidentiary use of extraterritorial misconduct in the civil realm.

themselves must often undertake a complex, post-hoc analysis of whether the earlier extraterritorial wrongdoing warrants consideration under the enhancement law of the forum state.[158] Moreover, when assessing out-of-state wrongdoing, criminal courts often assess the entire record of the prior proceeding,[159] possibly taking into account misconduct not resulting in conviction,[160] which should (but does not) give rise to similar concern over "hypothetical claims" voiced by the *State Farm* majority. With regard to actual convictions in foreign jurisdictions, those that would not warrant recidivist treatment there,[161] or are aged[162] or have been pardoned or expunged,[163] also are all fair game. In short, unlike punitive damages defendants, criminal defendants are expected to run the risk that their prior out-of-state wrongdoing will affect a subsequent sentence, without raising constitutional concern.

The foregoing, however, fails to give weight to a key fact in both *State Farm* and *Gore*: both involved corporate defendants engaged in interstate commerce.[164] To the Court, this presents two potential concerns. The

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158. *See supra* notes 84-86 and accompanying text; *see also* People v. Woodell, 950 P.2d 85, 88 (Cal. 1998) (noting that "[t]here is . . . no guarantee the statutory definition of the crime in the other jurisdiction will contain all the necessary elements to qualify as a predicate felony in California"); State v. Gonzalez, No. C3-03-156, 2003 WL 22232900, at *1 (Minn. Ct. App. Sept. 30, 2003) (noting "ambiguities" yet holding that prior offense in Georgia did warrant severity increase under Minnesota Sentencing Guidelines).

159. *See, e.g.*, People v. Myers, 858 P.2d 301 (Cal. 1993); People v. Samms, 731 N.E.2d 1118 (N.Y. 2000); State v. Mutch, 942 P.2d 1018 (Wash. Ct. App. 1997); *see also* People v. Purata, 49 Cal. Rptr. 2d 664, 666 (Ct. App. 1996) (noting that "the trier of fact may go beyond the least adjudicated elements of the offense and consider evidence found within the entire record of the foreign conviction").

160. *See, e.g.*, United States v. Watts, 519 U.S. 148, 153-57 (1997) (per curiam) (holding that evidence of misconduct of which the defendant has been acquitted may be considered at sentencing); Witte v. United States, 515 U.S. 389, 399-401 (1995) (holding that evidence of uncharged misconduct can be considered at sentencing). This broad view is thought to be justified because sentencing requires that "the fullest information possible concerning the defendant's life and characteristics" be available, allowing for a "more enlightened and just sentence." Williams v. New York, 337 U.S. 241, 247, 250-51 (1949).

161. *See, e.g.*, State v. Pope, 927 P.2d 503, 511 (Kan. Ct. App. 1997) (enhancing sentence based on prior juvenile adjudication in foreign state, even though foreign enhancement law would disregard juvenile record). Similarly, New Jersey considers foreign misdemeanor convictions, while most other states, such as Rhode Island, do not. *See* N.J. STAT. ANN. § 2C:44-4(c) (West 1995); R.I. GEN. LAWS § 12-19-21(a) (2003). As a result, a Rhode Island misdemeanor can result in enhancement in New Jersey, but not vice versa.

162. *See, e.g.*, MISS. CODE ANN. § 99-19-81 (2002) (omitting any time limit in considering prior convictions for purposes of determining habitual offender status and expressly allowing consideration of prior convictions "whether in this state or elsewhere").

163. *See, e.g.*, People v. Biggs, 71 P.2d 214, 216 (Cal. 1937); *see also id.* ("To say . . . that the offender is a 'new man,' and 'as innocent as if he had never committed the offense,' is to ignore the difference between the crime and the criminal."); *cf.* People v. Liano, 87 P.3d 27 (Cal. 2004) (holding that prior guilty plea in Arizona, ultimately resulting in dismissal because the defendant successfully completed probation, could be used for enhancement under California's "three strikes" law).

164. Writing for the majority in *Gore*, Justice Stevens emphasized that damage awards imposed on active participant[s] in the national economy implicate[] the federal interest in preventing

first again relates to notice insofar as corporate tortfeasors are often exposed to a "patchwork" of social and economic regulations.[165] Such a concern would appear especially salient with regard to conduct that is lawful elsewhere. As *Gore* emphasized, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."[166] However, notice concerns logically dissipate when conduct is unlawful in all or even most other jurisdictions.[167] So, too, would federalism and comity concerns because no sovereign policies face risk of contradiction. Moreover, while major corporate actors were targeted in both cases, nothing in the Court's decisions would preclude their application to noncorporate actors, engaged in extraterritorial unlawful behavior of lesser geographic dimension, facing a punitive damages claim.

Additionally, the *State Farm* majority was especially concerned about "multiple punishments" being imposed on civil defendants engaged in interstate commerce. Under such circumstances, consideration of extraterritorial misconduct "creates the possibility of multiple punitive damage awards for the same conduct; for in the usual case nonparties are not bound by the judgment another plaintiff obtains."[168] In addition, as tort reform advocates emphasize, such consideration can effectively require mini-trials, leading to unreliable results and unfair disadvantage to defendants.[169]

> individual States from imposing burdens on interstate commerce. While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing it regulatory policies on the entire Nation.

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

165. *Id.* at 570; *see also id* at 574 (stating that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose").

166. *Id.* at 573 n.9 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)).

167. Notably, the Court's concern contrasts with its notice jurisprudence regarding civil regulations more generally, with its more lenient standards based on the notion that businesses can be expected to conform their conduct to relevant laws before acting. *See* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95, 498 (1982); *see also* Gilliam K. Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 CAL. L. REV. 541, 551-52 (1994) (drawing similar distinctions between commercial and private actors in civil and criminal realms). In addition, it has long been recognized that state tort law is marked by a broad diversity of views on liability and damages, and that such diversity is a central aspect of the federalist system in which businesses operate. *See* Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475, 513-18 (2002) (noting variations).

168. State Farm Auto Ins. v. Campbell, 538 U.S. 408, 423 (2003). Courts and commentators have suggested independent means to address the multiple punishments problem, such as mandating jury instructions that require consideration be given to prior punitive awards for the same course of conduct, and that appellate courts factor such prior awards into excessiveness review. *See* Colby, *supra* note 122, at 660-61. This is the approach favored by the *Restatement*. *See* RESTATEMENT (SECOND) OF TORTS § 908 cmt. e (1977).

169. *See* Sharkey, *supra* note 141, at 449 (noting concerns).

The multiple punishments concern is longstanding and surely has some validity. In the paradigmatic case of a defendant engaging in a single wrongful act, resulting in injury to multiple plaintiffs (for example, as a result of a defective, mass-produced product), obvious fairness concerns arise—both for the defendant hit with successive punitive awards and for injured parties who lose the "race to the courthouse" and possibly are left with a judgment-proof defendant.[170] However, the other misconduct at issue in *State Farm* involved misbehavior of a varied nature over a twenty-year period, a key distinction.[171] Moreover, nothing in *State Farm* would appear to limit its rationale to "single act" scenarios; indeed, its insistence on similarity would suggest the contrary.[172]

These difficulties aside, there remains the differing sensitivity of the Court to the matter of multiple punishments more generally in the civil and criminal systems. Prior to the Court's October 2002 term, a degree of symmetry existed between the two realms. A punitive damages defendant was not to be "punished" for wrongs done elsewhere, but such misbehavior could be considered in assessing "reprehensibility."[173] Similarly, a criminal recidivist was not to be punished again for prior misdeeds, but a subsequent sentence could be "stiffened" as a result of "aggravated," continued failure to adhere to the law (that is, more "reprehensible" conduct, in punitive damages parlance).[174] *State Farm*,

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170. Despite such concerns, at common law the specter of multiple awards for the same wrongful behavior was not uniformly condemned. In 1917, for instance, the Iowa Supreme Court stated that "[t]his is a situation that has often been met. The fact that a defendant has [been] or may be held liable for exemplary damages in one case has never been held as a defense in his favor against liability for exemplary damages in another case to another plaintiff." Reutkemeier v. Nolte, 161 N.W. 290, 294 (Iowa 1917). Indeed, the first reported punitive damages cases involved multiple punishments for the same course of conduct (with both awards being upheld). *See* Colby, *supra* note 122, at 629 n.168 (citing Wilkes v. Wood, 98 Eng. Rep. 489 (Crt. Cm. Pl. 1763) and Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763)); *see also, e.g.*, Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565, 1571 (6th Cir. 1985) (rejecting imposing of due process limit on multiple awards); Greco v. Ford Motor Co., 937 F. Supp. 810, 817 (S.D. Ind. 1996) (same).

171. This misbehavior included, *inter alia*, fraudulent handling of first-party claims, hiding and destruction of relevant corporate documents, and general mistreatment of claimants, including discrimination based on race, gender, economic status, educational background, and age. *See* Campbell v. State Farm Mut. Ins. Co., 65 P.3d 1134, 1156 (Utah 2001), *rev'd*, 538 U.S. 408 (2003).

172. To date the Court has addressed punitive damages challenges only in single-plaintiff cases, despite the foremost concern expressed over the increasing number of mass tort claims garnering big punitive awards and the consequent risk of multiple punishment. I thank Catherine Sharkey for drawing my attention to this point.

173. BMW of N. Am. v. Gore, 517 U.S. 559, 574 n.21 (1996). Notably, the Utah trial court in *State Farm* employed a bifurcated approach that limited the likelihood that jurors would punish State Farm's past deeds or practices. Phase I determined liability, while phase II, when evidence of extraterritorial misconduct was adduced, addressed the availability of punitive damages. *See State Farm*, 65 P.3d at 1158.

174. Gryger v. Burke, 334 U.S. 728, 732 (1948). Moreover, as a result of the Court's "dual sovereignty" doctrine, permitting successive prosecutions by different states for the same crime, repeated

however, elided the subtle distinction advanced in *Gore* and largely barred consideration of extraterritorial misconduct out of fairness concerns.[175] Meanwhile, *Ewing*, with its predominant focus on criminal history, rather than the menial nature of the offense triggering re-offender status,[176] has exacerbated the growing concern that recidivist laws violate the Double Jeopardy Clause.[177]

B. Varied Views of Culpability

A second major contrast that has emerged in the wake of *Ewing* and *State Farm* concerns the distinct ways culpability is assessed in the review of punitive damage awards and criminal sentences, a matter that heretofore linked the two sanctions.[178] According to the Court, a punitive damages award "imposed on a defendant should reflect the 'enormity of his offense,'"[179] or "reprehensibility,"[180] and "the punishment should fit the crime."[181] Likewise, prison sentences must not be "grossly disproportionate" to the offender's criminal culpability.[182] As *State Farm* and *Ewing* make clear, however, this avowed symmetry is a thing of the past. The Court has embarked on a path that employs distinctly different frames of reference when evaluating culpability, the anchor point in the proportionality analysis.

Historically, the justices have reasoned that criminal recidivist enhancements are justified in retributive terms because repeated wrongdoing makes a defendant more culpable in the eyes of the law.[183] By

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punishment for a single act does not violate the Double Jeopardy Clause. *See* Heath v. Alabama, 474 U.S. 82 (1985).

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

176. For more on the significance of *Ewing*'s emphasis on recidivist history in assessing proportionality see *infra* notes 185-88 and accompanying text.

177. *See* Lockyer v. Andrade, 538 U.S. 63, 81 n.2 (2003) (Souter, J., dissenting) (observing that "[a]s triggering offenses become increasingly minor and recidivist sentences grow, the sentences advance toward double jeopardy violations"); *see also* McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986) (expressing concern that the "tail" of the sentencing fact might "wag[] the dog of the substantive offense"). For arguments in support of this point see Nathan H. Seltzer, Comment, *When the Tail Wags the Dog: The Collision Course Between Recidivism Statutes and the Double Jeopardy Clause*, 83 B.U. L. REV. 921 (2003).

178. In the past, this parallel has figured prominently in the Court's reasoning in punitive damages decisions, as evidenced in its citation to precedent addressing criminal sentence proportionality challenges. *See, e.g.*, Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 435 (2001) (citing Solem v. Helm, 463 U.S. 277 (1983) in support of *Gore*'s reprehensibility guidepost).

179. BMW of N. Am. v. Gore, 517 U.S. 559, 575 (1996) (quoting Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851)).

180. *Id.* at 575.

181. *Id.* at 575 n.24.

182. *Solem*, 463 U.S. at 288.

183. *See supra* note 81 and accompanying text. Of course, a compelling argument exists that *Ewing* once and for all eviscerated the retributive justification of recidivist laws insofar as Ewing's trifling triggering

giving effect to the entire criminal history of offenders, the Court has rebuffed ex post facto and double jeopardy challenges to recidivism-enhanced sentences.[184] In *Ewing*, the Court reemphasized that society has an interest in "not merely punishing the offense of conviction, or the 'triggering offense,'" but "in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law."[185] However, whereas in the past the Court adhered to the principle that a sentence can be "stiffened" due to repeat offending,[186] yet remain tied to the "crime for which the defendant has been convicted,"[187] *Ewing* attributed far greater weight to recidivism. After *Ewing*, a criminal defendant's history of offending, rather than the seriousness of the triggering offense, has assumed paramount importance for Eighth Amendment purposes.[188]

State Farm, as noted earlier, highlights the Court's embrace of a much narrower, misconduct-specific view when it comes to proportionality review of punitive damages. A defendant is to "be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."[189] The majority condemned the "award[ ] [of] punitive damages to punish and deter conduct that bore no relation to the [plaintiff's] harm," and held that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not

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offense surely did not warrant the "just desert" of a life term. *See* Michael Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?*, 37 U.C. DAVIS L. REV. 1025, 1071-81 (2004). However, as discussed *infra*, *Ewing* can also be read as embracing a broadened view of desert, taking to an extreme the traditional view that criminal history enhances culpability and hence "desert" for sentencing purposes.

184. *See supra* notes 98-99 and accompanying text.

185. Ewing v. California, 538 U.S. 11, 29 (2003) (quoting *Solem*, 463 U.S. at 296); *see also id.* (asserting that in assessing proportionality courts "must place on the scales not only [an offender's] current felony, but also his long history of felony recidivism").

186. Gryger v. Burke, 334 U.S. 728, 732 (1948).

187. *Solem*, 463 U.S. at 290; *see also id.* at 296 n.21 (stating that although "prior convictions are relevant to the sentencing decision," the Court "must focus on the principal felony—the felony that triggers the life sentence—since [the defendant] already has paid the penalty for the each of his prior offenses"); *cf.* Coker v. Georgia, 433 U.S. 584, 599 (1977) (noting in proportionality review of capital sentence that the defendant had "prior convictions for capital felonies . . . but these prior convictions do not change the fact that the instant crime . . . is . . . rape not involving the taking of [a human] life").

188. *See, e.g.*, Ramirez v. Castro, 365 F.3d 755, 770 (9th Cir. 2004) (deciding, post-*Ewing*, that petitioner's 25-year life sentence under California's three strikes law was an instance of the "extremely rare case" of gross disproportionality, based on petitioner's minor offense history of shoplifting).

189. State Farm Auto Ins. v. Campbell, 538 U.S. 408, 423 (2003); *see also* Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415, 423 (1989) ("[P]unishment based on the characteristics of the actors, rather than on the specific misconduct, threatens fundamental notions of freedom from governmental constraint.").

serve as the basis for punitive damages."[190] The Court emphasized that "in the context of *civil actions* courts must ensure the conduct in question *replicates* the prior transgressions."[191] Not just "any malfeasance," presumably even that properly adjudicated against a civil defendant in a court of law (as opposed to a "hypothetical claim"), suffices.[192]

By imposing such rigid requirements in *State Farm*, the Court again has created a palpable contrast with the criminal law. While early laws only targeted offenders who repeated specific crimes, today no such exclusivity exists.[193] Jurisdictions are free to decide what kinds of conduct—whether committed inside or outside the jurisdiction—can be considered for sentence enhancement purposes.[194] As a result, unlike a repeat offender convicted of analogous crimes, a tortfeasor found civilly liable for a battery in one state, followed by a fraud in another state,[195] can likely rest easy that such extraterritorial misconduct will not be considered because the torts did not "replicate" one another.[196]

In short, after *State Farm* punitive damages are to be viewed much more as a private law remedy, in contrast to the avowedly "public wrong" model predominant in recent times.[197] Punitive awards are now taken to function, as Professor Richard Wright recently advocated, as "private retribution for a discrete private dignitary injury," one distinct from "any nondiscrete 'public wrong' that was caused to each member

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190. *State Farm*, 538 U.S. at 422-23.

191. *Id.* at 423 (citation omitted) (emphasis added).

192. *Id.* at 423-24. The Court's position on this important point is not as clear as one might like. While insisting that the other misconduct "replicate[ ] the prior transgression[ ]," and condemning consideration of other misconduct that was not "similar" to the tortious third-party claim sued over, the Court noted that the other misconduct "need not be identical." *Id.* at 423.

193. *See supra* notes 70-77 and accompanying text.

194. *See supra* notes 83-88 and accompanying text.

195. *See* THOMAS H. COHEN & STEVEN K. SMITH, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001 6 (2004), *at* http://www.ojp.usdoj.gov/bjs/abstract/ctcvlc01.htm (noting that in cases where punitive damages were awarded plaintiffs 22% involved intentional torts and 17% fraud).

196. Although beyond the scope of discussion here, *State Farm* also can be interpreted to require that other *in-state* misconduct "replicate" or be "similar" to that which injured the plaintiff. *See State Farm*, 538 U.S. at 422 (stating that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages"). Again, to the extent this is accurate, a basic contrast is evident in the civil and criminal spheres: no such requirement exists when sentencing criminal recidivists on the basis of prior in-state misconduct.

197. *See supra* note 9 and accompanying text. In addition, as Professor Karlan has noted, the Court's narrow view of culpable harm in the punitive damages realm is ironic in that it parallels its jurisprudence on criminal forfeitures, which like *Ewing* entails interpretation of the Eighth Amendment. *See* Karlan, *supra* note 124, at 900-01 (discussing *United States v. Bajakajian*, 524 U.S. 321, 326,329 (1998), where the Court concluded that an *in personam* criminal forfeiture was "grossly disproportionate" in light of the defendant's "minimal level of culpability" in failing to report currency when leaving the country, an infraction that merely deprived the government of information about a comparatively modest amount of money).

of the community as a result of the same conduct."[198] The conceptual shift has been urged by scholars as being more consistent with the historic role of punitive damages[199] and by tort reformers as a basis to avoid providing "windfall[s]" to plaintiffs.[200] However, to the extent punitive awards function as "an expression of moral condemnation,"[201] with the apparent reconceptualization there must come a corresponding change in the social meaning of punitive awards.[202] Whereas in *Ewing* the Court adhered to (indeed amplified) the traditional denunciatory view that regards the criminal wrongdoer not just in terms of his last bad act, but former ones as well, in *State Farm* the Court embraced a much more atomistic view of tortfeasors' culpability.[203]

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198. Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425, 1431 (2003).

199. According to Professor Wright:

> [u]nfortunately, in all but a few states . . . the "private wrong" conception of punitive damages in tort law has given way to a 'public wrong' conception, which views such damages solely as a backstop to criminal law . . . This conception has resulted in an unprincipled law of punitive damage that is beset by a host of constitutional and theoretical problems.

Id. at 1431 n.19; *see also* Colby, *supra* note 122, at 674 (urging, before *State Farm*, recognition that "the purpose of punitive damages is not to punish the defendant for its wrongful act, but rather to punish the defendant for the wrong done, and the injury caused, to the plaintiff").

200. Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment,"* 54 S.C. L. REV. 47, 48 (2002).

201. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001). Professor Clarence Morris long ago referred to this as the "admonitory" function of punitive damages. *See* Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1206 (1931) ("The punitive damage doctrine is evidence of an age-old feeling that the admonitory function is sometimes entitled to more emphasis than it receives when judgments in tort actions are limited to compensation."); *see also, e.g.*, Wangen v. Ford Motor Co., 294 N.W.2d 437,458 (Wis. 1980) (likening "stigma" associated with assessment of punitive award to criminal liability).

202. *See* Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2074 (1998) ("[P]unitive damages may have a retributive or expressive function, designed to embody social outrage at the actions of serious wrongdoers."). For examples of the expansive literature on social meaning and expressivism more generally see, for example, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000) and Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996). For discussion of social meaning and criminal sanctions in particular see, for example, Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997). *Cf.* Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 23-24, 35-38 (discussing various ways in which tort and criminal law contain "opportunity- and preference-shaping" methods to achieve compliance).

203. The approach is also reflected in the Court's treatment of the second *Gore* guidepost, concerning the ratio between the compensatory award and the punitive damages assessed. In *State Farm* the majority finally established that "few awards" in excess of a single-digit ratio will survive due process scrutiny. State Farm Auto Ins. v. Campbell, 538 U.S. 408, 425 (2003). However, linking proportionality to compensatory damages is at odds with the retributive purpose of punitive awards. This is because "compensatory damages reflect the plaintiff's injury, not the defendant's culpability; consequently, neither the compensatory award, nor some multiple of it, necessarily bears any relation to the amount of punishment a defendant deserves." Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 58 (1985) (footnote omitted).

Indeed, with its circumscribed view of culpability, tied most closely to retribution,[204] and insistence on replication and similarity, *State Farm* suggests that deterrence has become the preeminent justification for punitive awards. With corporate actors such as State Farm, fictional entities with no "soul to be damned, and no body to be kicked,"[205] yet (ideally) susceptible of being deterred by a warning not to commit "similar" extraterritorial offenses,[206] such a shift in rationale might make sense in theoretical,[207] if not practical,[208] terms. However, it does not diminish the existence of a now stark jurisprudential divide.

IV. CONCLUSION

Despite punitive damages and criminal sentences being regarded as twins separated at birth, the Court's recent decisions in *State Farm v. Campbell* and *Ewing v. California* make clear that their kinship is now more apparent than real. This is especially true with regard to how extra-territorial wrongdoing is considered when assessing whether a punitive award or criminal sentence properly reflects an actor's culpability. In *State Farm*, the Court emphasized that "as a general rule" such misconduct cannot be taken account of in "reprehensibility" determinations, the paramount factor when assessing of whether an award satisfies due process.[209] In *Ewing*, the Court held that for all intents and purposes the Eighth Amendment does not constrain criminal recidivist laws, which

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204. *See* David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 712 (1989) (stating that "[p]unitive damages thus serve to repay the offender's 'debts' to both the victim and society, and so to restore the proper moral balance").

205. Edward, First Baron Thurlow, 1731-1806, *quoted in* MERVYN KING, PUBLIC POLICY AND THE CORPORATION 1 (1977).

206. For discussion of the arguments commonly made in favor of a deterrence-based approach to addressing corporate criminal misconduct, see Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321, 377-81 (2003).

207. *See id.* at 353-54, 359-60 (discussing anthropomorphic justification for corporate criminal liability). As Professor Karlan has pointed out to me, we simply do not think of corporate entities as "having character in the way that individuals do, so that the fact that a corporation once sold a shoddy toaster seems unconnected intuitively to their now having manipulated their stock price, while the fact that a guy graduated from burglary to armed robbery seems more continuous." E-mail correspondence from Professor Pam Karlan to Professor Wayne Logan, Aug. 10, 2004 (on file with author).

208. Whether deterrence is ultimately served by the Court's approach is subject to dispute. This is especially so relative to the second *Gore* guidepost—the ratio of compensatory to punitive damages awarded. The Court's presumption of a single-digit multiplier raises the specter that tortfeasors will internalize punitive awards as operating expenses. *See* Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984) (distinguishing prices, which are morally neutral and internalized as business cost, and sanctions, which stigmatize and carry greater potential deterrent force).

209. *State Farm*, 538 U.S. at 419, 421; *see also* Neal v. Farmers Ins. Exch., 582 P.2d 980, 990 (Cal. 1978) (asserting with respect to punitive damages that "the more reprehensible the act, the greater the appropriate punishment").

freely rely upon past extraterritorial misconduct to enhance criminal sentences. Together, the decisions leave in their wake a justice system that regards extraterritorial wrongs by civil defendants very differently from that of their criminal counterparts, while nominally regarding the former as worthy of "punitive" sanction.

To be sure, there exist distinct implications of imposing punitive damages on a corporate civil defendant such as State Farm, which conducts business nationwide, and enhancing the sentence of an individual criminal recidivist such as Gary Ewing, whose activities are of more modest geographic scope. The economic repercussions, in themselves, might well counsel against a capacious view on extraterritoriality when assessing punitive damages. Indeed, such repercussions were plainly of major importance to the *State Farm* majority, which endorsed a due process analysis strikingly similar to its Dormant Commerce Clause jurisprudence.[210] However, the Court's critical scrutiny stands in marked contrast to the blithe judicial acceptance of criminal recidivist enhancements based on extraterritorial misconduct, despite palpable double jeopardy concerns. Furthermore, nothing in *State Farm* appears to limit its reasoning to large, multistate corporate defendants; the same comity and federalism concerns expressed by the Court would logically apply to punitive awards levied against individuals or corporations with far lesser reach. As a result, for tortfeasors facing punitive awards, unlike criminal defendants facing recidivism-based sentence enhancements, the scope of wrongful conduct amenable to consideration now effectively ends at the state line.

By circumscribing the scope of conduct permissibly considered in punitive awards, *State Farm* plainly represents a major victory for tort reformers, who have long fought to decouple punitive awards from criminal sanctions.[211] Ultimately, the Court's varied regard for the

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210. The Dormant Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982). Even there, however, the Court has been at pains to acknowledge the power of states to exert control in the name of the non-economic well being of their residents. *See* H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 533 (1949) ("[The] distinction between the power of the State to shelter its people from menaces to their health and safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.").

211. Writing in 1965, for instance, one advocate asserted that if a defendant's behavior qualified for criminal conviction, then the defendant should be criminally prosecuted, but "[i]f the actions of the defendant do not constitute a crime, he then simply should not suffer punishment." James Ghiardi, *Should Punitive Damages Be Abolished? A Statement in the Affirmative*, 1965 ABA PROCEEDINGS, SECTION OF INSUR., NEGLIGENCE AND COMPENSATION LAW 282, 288; *see also* SCHLUETER & REDDEN, *supra* note 14, § 2.2(A)(2), at 30-31 (asserting that the criminal law, not the tort system, is best suited to serve society's need to punish and deter misconduct); Martin H. Redish & Andrew L. Matthews, *Why Punitive Damages are*

extraterritorial misconduct of punitive damage and criminal defendants restores the formalistic divide in public and private law that originated in the mid-nineteenth century,[212] which punitive damage awards have long threatened.[213] In recent times, punitive damages have "occup[ied] the no-man's land between the criminal law and the civil."[214] In the wake of *State Farm*, this is far less so.

Unconstitutional, 53 EMORY L.J. 1, 3 (2004) (asserting that "the concept of punitive damages represents a perverse transfer of what is inherently public power to private individuals . . . .").

212. *See* Horwitz, *supra* note 13, at 1425 (identifying divide and discussing asserted corrupting influence of punitive damages).

213. *Id.* The view was expressed most memorably by the New Hampshire Supreme Court in 1872: "[T]he idea of punishment is wholly confined to the criminal law . . . What kind of civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry of the body of the law." Fay v. Parker, 53 N.H. 342, 382 (1872). "The true rule, simple and just, is to keep the civil and the criminal process and practice distinct and separate." *Id.* at 397. For instances of less colorful but no less adamant judicial opposition from the same era see *Murphy v. Hobbs*, 5 P. 119, 121 (Colo. 1884) and *Spokane Truck & Dray Co. v. Hoefer*, 25 P. 1072, 1074 (Wash. 1891).

214. Gail Heriot, *An Essay on the Civil-Criminal Distinction with Special Reference to Punitive Damages*, 7 J. CONTEMP. LEGAL ISSUES 43, 65 (1996); *see also* Ellis, *supra* note 14, at 2 (stating that punitive damages lie "in the borderland that both bridges and separates criminal law and torts").