



federal intervention, via the Fourteenth Amendment's Due Process Clause, to prevent states from violating substantive rights that some justices believe to be secured by the U.S. Constitution.

Contrasting the majority opinion in *State Farm* with the terse dissents by Scalia and Thomas, I hope to shed light on the battle between conservatives who want to rein in runaway punitive damage awards and other conservatives who find no federal judicial power to do so. First, I set the stage with a few comments on the purpose of punitive damages, the need for reform, and the Court's major stab at the problem in the *BMW* case. Then I summarize the facts in *State Farm*, the majority holding, and the Ginsburg dissent, which accuses the Court of usurping legislative powers. Next, elaborating on the Scalia and Thomas dissents, I explore the controversy over the Court's substantive due process jurisprudence. Finally, I offer a few recommendations to restore sanity in the punitive damages arena while honoring traditional notions of federalism.

## II. Background

### A. *The Purpose of Punitive Damages*

Compensatory damages are supposed to redress any loss that the plaintiff suffers because of the defendant's wrongful conduct. Punitive damages serve a different purpose. They "are aimed at deterrence and retribution."<sup>6</sup> The logic goes like this: A defendant whose misbehavior causes injury will neither be adequately punished nor deterred from similar misbehavior in the future if he is held accountable only for the losses he causes. That's because some wrongful acts are never litigated and others are incorrectly decided in the defendant's favor. Proper deterrence, therefore, has to make adjustments for an imperfect system of compensation. In *State Farm*, for example, the Utah Supreme Court relied on trial testimony indicating that "State Farm's actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability."<sup>7</sup>

Naturally, there are also errors that favor plaintiffs, including holding a defendant liable for conduct that is legally permissible. Prominent Washington, D.C., lawyer C. Boyden Gray describes the

<sup>6</sup>Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001).

<sup>7</sup>Quoted in *State Farm*, 123 S. Ct. at 1519.

ideal tort system, along with the risks of damage awards that are too low, too high, or capricious.

[T]he tort system should perform two functions: compensate victims and deter potentially dangerous behavior. . . . If these principles are applied correctly, torts are minimized, because any benefits of such behavior would be eliminated by the expected costs of the damage award. When awards are too low, bad actors are not deterred. . . . Awards that are too large pose problems as well, as costs increase and products are no longer available. When awards are arbitrary, it becomes impossible to discern any relevant incentives from the pattern of damage awards, leaving businesses only to guess at what business practices will not instigate damage claims.<sup>8</sup>

Paradoxically, most states set no limit on punitive damages for civil acts, yet punishment for criminal acts is strictly limited. One would think that the goal of deterrence would be more compelling in the criminal sphere, where injuries to victims of murder, rape, and robbery are not ameliorated by the social utility of the acts committed. In the civil sphere, by comparison, the product or service that is deterred may have considerable value. Respected law and economics scholars have noted that “overdeterrence is a real danger when punitive damages are available. . . . A doctor who has been negligent once may nonetheless provide useful medical care.”<sup>9</sup>

Moreover, when punitive damages are unbounded and unpredictable, many firms will avoid making rational risk-assessment calculations. That result—the suppression of cost-benefit analyses—is another downside of overdeterrence. “[A]ny consideration of risk in product design can later be interpreted by a jury as evidence that the firm knew it was producing a risky product and ‘traded profits for lives.’”<sup>10</sup>

Thus, punitive damages can be an appropriate means of inhibiting injurious behavior or an inappropriate device that restrains trade in valuable goods and services. Tort reform advocates argue that judges

<sup>8</sup>C. Boyden Gray, *Damage Control*, WALL STREET JOURNAL, Dec. 11, 2002, at A18.

<sup>9</sup>Paul H. Rubin et al., *BMW v. Gore: Mitigating the Punitive Economics of Punitive Damages*, 5 SUPREME COURT ECONOMIC REVIEW 179, 184–85 (1997).

<sup>10</sup>*Id.* at 191.

and juries have allowed punitive damage awards to explode without regard to their harmful impact on the economy and without a rational link to the real need for deterrence. The evidence seems to support that view.

*B. The Need for Reform*

Consider the recent *Engle* tobacco class action litigation,<sup>11</sup> in which an inflamed Florida jury resolved to pilfer \$145 billion in punitive damages from hapless cigarette companies. Trial judge Robert Kaye, in the face of a contrary opinion from the state's attorney general, permitted the jury to decide punitive damages for the entire class after hearing evidence on only three of the claimants.<sup>12</sup> The selected plaintiffs were not the designated class representatives; yet they were plucked from among the class members, with the judge's consent, because the lawyers knew that the three case histories would resonate with the jury.

No one knew the names of the other class members. No one even knew how many smokers were in the class; estimates ranged from 30,000 to nearly a million. No one knew anything about their alleged injuries or how much if any compensatory damages might be warranted. Yet Judge Kaye approved an award of punitive damages in the aggregate, as if it did not matter whether 50,000 plaintiffs had a raspy throat or 500,000 died from lung cancer, whether they started smoking as kids or as consenting adults, and whether they were ever influenced by the industry's so-called deceptive ads. Ultimately, a Florida appellate court decertified the class and reversed the punitive damages award because there had been no prior determination of compensatory damages. Still, the *Engle* case demonstrates the enormous potential for mischief when state courts impose punitive damages on out-of-state defendants.

If the *Engle* fiasco were the only evidence that punitive damage awards are out of control, that would be bad enough. But there's more. According to the *National Law Journal*, the largest punitive award in 2002 was \$28 billion. Five verdicts exceeded \$500 million

<sup>11</sup>See *Liggett Group v. Engle*, 2003 Fla. App. LEXIS 7500 (Fla. Dist. Ct. App. May 21, 2003).

<sup>12</sup>For further commentary on the *Engle* case, see Robert A. Levy, *Tobacco Class Decertified in Florida: Sanity Restored*, THE HILL, June 11, 2003, [http://www.thehill.com/news/061103/ss\\_tobacco.aspx](http://www.thehill.com/news/061103/ss_tobacco.aspx).

and 22 exceeded \$100 million. The total of the top 100 verdicts for 2002 was nearly three-and-a-half times the total for 2001. Longer term, 38 verdicts topped \$20 million in 1991; 66 verdicts were more than \$20 million in 1996. But in 2002, \$20 million did not make the top 100 list.<sup>13</sup> No doubt, nine U.S. Supreme Court justices were aware of the problem—if not the specifics, at least the general trend. Perhaps that's why, seven years ago, the Court took a first step toward reform.

C. *BMW v. Gore*

When Dr. Ira Gore discovered that his new BMW had been repainted, he sued the American distributor for fraud. BMW conceded that its policy was not to notify dealers or consumers if repairs for predelivery damage to a new car cost less than 3 percent of the suggested retail price. Gore's car, repainted for approximately \$600, had originally cost \$40,000. On the basis of testimony that a repainted car would lose 10 percent in value, an Alabama jury found BMW liable for \$4,000 in compensatory damages, then imposed an additional \$4 million in punitives, computed by multiplying the compensatory award by roughly 1,000 similar sales nationwide. On appeal, the Alabama Supreme Court concluded that only in-state sales should have been considered, then reduced the punitive award to \$2 million, without explaining how it reached that result. The U.S. Supreme Court declared that state sovereignty and comity prevented one state from imposing its own policy choices on other states. In remanding the case, the Court held that the unwarranted award violated BMW's rights under the Due Process Clause of the Fourteenth Amendment.

First, said the Court, Gore's injury was purely economic. None of the aggravating factors associated with reprehensible conduct by the defendant was present. Second, the ratio of punitive damages to compensatory damages was 500 to 1, which was clearly outside the acceptable range. Third, Alabama's fine for comparable misconduct was only \$2,000—an amount so much lower than the punitive award that out-of-state defendants would not have fair notice of their exposure to a multimillion dollar sanction.

<sup>13</sup>David Hechler, *Tenfold Rise in Punitives*, NATIONAL LAW JOURNAL, Feb. 3, 2003, at C3.













































