

Punitive Damages After *Campbell*: The Role of Out-of-State Conduct

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INTRODUCTION

A three-year-old boy, left unattended for a moment, crawls into his father's Ford truck, which has been parked in their sloped driveway. The boy somehow knocks the gearshift into neutral, putting the weight of the truck on a defective parking brake. The child falls out of the truck, and is killed under its wheels as the defective parking brake gives way and the truck rolls downhill.

The parents file suit in a Nevada court against Ford, alleging defective design and failure to warn. There is ample evidence of similar nation-wide failures, including emotional testimony of a Pennsylvania mother whose child was injured in a similar roll-away accident. The parents argue that Ford knew about the failures and breached a duty to warn when they did not recall the truck for repairs.

Their attorney asks the jury to send a message to the manufacturer for its conduct nationwide: "Your verdict should vindicate the interests of all Ford truck owners everywhere with a verdict that will make the front page of every newspaper in the country, so that the chief executive officer and other top officers of Ford Motor Company will pour out of their chairs like water and crumple on the floor." Plaintiffs' attorney introduces evidence of the number of trucks sold nationwide, and asks the jury to calculate its award based on Ford's nationwide conduct. The jury returns a verdict of \$150 million in punitive damages, and \$2.3 million in compensatory damages.¹

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1. The preceding fact pattern is adapted from *White v. Ford Motor Co.*, No. CV-N-95-0279-DWH, 2003 WL 23353600 (D. Nev. Dec. 30, 2003). The facts are drawn from the case, however the preceding quotation is a composite. A case tried and reversed before *Campbell* and which went to a second trial post-*Campbell*, *White* offers a unique case study on *Campbell's* role in a large products liability action. I return to an analysis of *White* in Section IV.

Defense attorneys thought such trials were a thing of the past in the wake of *State Farm Mutual Automobile Insurance Co. v. Campbell*,² and *BMW of North America, Inc. v. Gore*.³ *Campbell* and *Gore*, they argued, set dramatic limits on the ratio of punitive damages to compensatory damages.⁴ Moreover, *Campbell* practically prohibited the use of out-of-state evidence on the issue of punitive damages.⁵ Plaintiffs' attorneys insisted that *Campbell* imposed only relaxed controls on the use of out-of-state evidence and observed that the purported limits on punitive damages were merely "guidelines," and their application highly fact-specific.⁶

Much has been written about the watershed nature of *Campbell*. Few writers have examined in any detail what is perhaps *Campbell*'s most relevant holding for practitioners faced with a mass tort or bad faith trial: the permissible use of out-of-state evidence. *Campbell* did prohibit the use of lawful and unlawful out-of-state conduct to punish the defendant. The Supreme Court was adamant that federalism prohibited a state from imposing punishment for extraterritorial conduct.⁷ The above attorney's request to "send a message" to Ford and mete out punitive damages based on nation-wide conduct is clearly prohibited.

Campbell holds, however, that out-of-state conduct *may* be used to demonstrate deliberateness and culpability to bolster reprehensibility.⁸ What did the Court mean by this? How can such evidence be used to bolster reprehensibility, and therefore impose a higher punitive damages award, but not to punish? What if such evidence has dual use for an underlying cause of action as well as punitive damages? Out-of-state conduct permeates any mass tort or large bad faith case: failure to warn invites examination of a defendant's notice of nationwide harm; bad faith invites examination of a defendant's past conduct to negate an "honest mistake" defense. In a case saturated with damaging out-of-state conduct, how does a court ensure that a defendant is not punished unconstitutionally?

2. 538 U.S. 408 (2003).

3. 517 U.S. 559 (1996).

4. See, e.g., John T. Kolinski, *Gore, Cooper Industries, and State Farm v. Campbell: Game, Set, and Match for Exorbitant Punitive Damage Awards*, FLA. B. J., Nov. 2003, at 34.

5. *Campbell*, 538 U.S. at 421.

6. See, e.g., Larry S. Stewart, *Constitutional Requirements for Punitive Damages: Reality, Not Hyperbole – The Real Import of State Farm v. Campbell*, FLA. B. J., Mar. 2003, at 34.

7. *Campbell*, 538 U.S. at 422.

8. *Id.*

This article examines the scope of out-of-state conduct that may be used after *Campbell*. I begin Section I with a brief look at the evolution of the Court's holdings limiting punitive damages. In Section II, I review *Campbell*, with particular attention to its holding with respect to out-of-state conduct. I also examine the Court's excessiveness analysis, giving attention to the facts the Court considered relevant in determining the constitutionally permissible ratio of punitive to compensatory damages. In Section III, I examine in greater detail the permissible use of out-of-state conduct, beginning with the authority underpinning the Court's permissive use of such conduct. I attempt to reconcile the Court's historically permissive use with *Campbell*'s holding prohibiting extraterritorial punishment and punishment for other plaintiffs' claims not before the Court. Furthermore, in Section III C, I argue that two limitations appear to flow from *Campbell*: (1) out-of-state conduct should not be used to demonstrate recidivism, and (2) conduct introduced to demonstrate deliberateness and culpability must be acts upon which liability was premised. Typically such acts will either have a causal relationship to plaintiff's harm, or be similar to plaintiff's harm. In Section IV, I look at several cases applying *Campbell* on the issue of out-of-state conduct; we see that courts struggle with *Campbell*'s imprecise language, but generally arrive at reasonable solutions. Finally, in Section V, I will offer some observations and recommendations for practitioners faced with a punitive damages case involving nationwide conduct.

I. THE COURT'S PRE-*CAMPBELL* PUNITIVE DAMAGES LAW

Campbell marks the latest in a series of Supreme Court decisions which limit punitive damages awards. The Supreme Court first indicated in a 1991 decision, *Pacific Mutual Life Insurance Co. v. Haslip*, that the Due Process Clause limited unreasonable punitive damages awards.⁹ Two years later, in *TXO Production Corp. v. Alliance Resources Corp.*, the Court reaffirmed the Due Process limitation, adding that a court considering the permissible ratio of punitive to compensatory damages could look not only to the actual damages but also consider the potential harm that could have resulted from the defendant's conduct.¹⁰

9. 499 U.S. 1, 18-19, 23 (1991) (noting that a four-to-one ratio of punitive to compensatory damages, which it upheld, "may be close to the line").

10. 509 U.S. 443, 460-61 (1993).

The Court finally struck down a punitive damages award in *Gore*.¹¹ *Gore* marked a significant formalization of the Court's analysis. The Court reasoned that punitive damages awards must further a legitimate state interest in punishing unlawful conduct and deterring its repetition.¹² Due Process requires notice of the conduct for which one will be punished as well as the severity of penalty.¹³ A punishment for unforeseen conduct or punishment that is unforeseeably large goes beyond these interests and is an "arbitrary deprivation of property without due process of law."¹⁴

Gore created three "guideposts" to measure the constitutionality of punitive damages awards. First, and "[p]erhaps the most important," courts examine the reprehensibility of the defendant's conduct, including whether the defendant was a recidivist.¹⁵ Second, courts look to the ratio of punitive damages to compensatory damages.¹⁶ The Court in *Gore* expressly refused to draw bright lines regarding the permissible ratio.¹⁷ *Gore* reaffirmed *TXO*'s holding that a court may account for potential harm in addition to actual compensatory damages.¹⁸ The Court offered some guidance in reviewing ratios. Low compensatory damages may support high punitive damages where a defendant's conduct was egregious.¹⁹ Higher punitive damages may likewise be appropriate where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."²⁰ *Gore*'s third benchmark asked courts to compare punitive damages with civil and criminal sanctions for the same conduct.²¹ Courts should "accord

11. 517 U.S. 559 (1996) (vacating \$4 million in punitive damages where \$4,000 in compensatory damages was awarded for selling a new car that had been repainted without informing purchaser).

12. *Id.* at 568.

13. *Id.* at 574.

14. *Id.* at 586 (Breyer, J., concurring) (quoting *TXO*, 509 U.S. at 453-54).

15. *Id.* at 574-76. *Gore* did not well define how reprehensibility is determined. The Court did not offer a rigid framework for analysis. It did offer several factors it considered in concluding that the defendant's conduct was not particularly reprehensible: violence, trickery and deceit rather than mere negligence; and intentional malice. *Id.* at 575-76.

16. *Id.* at 575, 580-82.

17. *Id.* at 582-83.

18. *Id.* at 581.

19. *Id.* at 582 ("Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages.").

20. *Id.*

21. *Id.* at 575, 583.

substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.”²²

In its last pre-*Campbell* punitive damages decision, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Court held that punitive damages are reviewed under the de novo standard.²³ Quoting *Gore*, the Court reasoned: “Requiring the application of law, rather than a decisionmaker’s caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.”²⁴

II. *STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY V. CAMPBELL*

Campbell was an action alleging bad-faith failure to settle. The Campbells were sued for wrongful death and serious bodily injury which resulted from Mr. Campbell’s negligent attempt to pass six vehicles on a two-lane highway.²⁵ Despite clear evidence of liability and reasonable demands to settle within policy limits, the Campbells’ insurer – State Farm – refused to settle.²⁶ State Farm doctored the Campbells’ file to make liability seem debatable, and insisted on taking the claim to trial.²⁷ Despite State Farm’s assurances to the Campbells that their assets were safe, the trial resulted in a judgment for \$185,000 – well above the settlement offers and the Campbells’ policy limits.²⁸ State Farm refused to pay the excess, and advised the Campbells to put “for sale” signs on their property.²⁹ The Campbells then filed suit against State Farm.

At trial, plaintiffs introduced ample evidence of State Farm’s corporate practices designed to reduce claims payoffs.³⁰ Evidence of State Farm’s nationwide operations was introduced to demonstrate a pattern of fraud and bad faith.³¹ The jury returned a verdict of \$145 million in punitive damages and \$2.6 million in compensatory damages. The trial court reduced this jury award to \$25 million and \$1 million,

22. *Id.* at 583 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989)).

23. 532 U.S. 424, 436 (2001).

24. *Id.* (quoting *Gore*, 517 U.S. at 587).

25. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 412-13 (2003).

26. *Id.* at 413.

27. *Id.* at 413, 433.

28. *Id.* at 413.

29. *Id.*

30. *Id.* at 414-15.

31. *Id.* at 415.

respectively.³² However, the Utah Supreme Court reinstated the original punitive damages award of \$145 million, thereby resulting in a 1-to-145 ratio of compensatory to punitive damages.³³

The Supreme Court in *Campbell* reaffirmed the principle driving *Gore*'s due process reasoning: A party must "receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."³⁴ Punitive damages are excessive when they go beyond a state's interests in deterrence and retribution.³⁵ The Court found the \$145 million in punitive damages, in light of \$1 million in compensatory, violated State Farm's Due Process rights and remanded.³⁶

There is no doubt left after *Campbell* that the Court was serious about imposing real limits on punitive damages: "Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm."³⁷ The Court was concerned that punitive damages - a quasi-criminal sanction - are imposed in the context of civil litigation where the protections afforded defendants are lower: "[D]efendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding."³⁸ Guided by this cautionary principle, the Court sought to impose clear limits on a state's interest in the conduct to be punished, as well as the severity of the punishment.

A. *Limitations on Punishable Conduct*

The Court concluded that, rather than focusing on conduct occurring in Utah (the state in which the plaintiffs were injured), the case "was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country."³⁹ The Court sought to clearly limit the scope of conduct for which State Farm could be punished.

32. *Id.*

33. *Id.*

34. *Id.* at 417 (quoting *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996)).

35. *Id.* ("To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.").

36. *Id.* at 429.

37. *Id.* at 417 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42 (1991)).

38. *Id.*

39. *Id.* at 420.

1. *General Prohibition of the Use of Out-of-State Conduct to Demonstrate Reprehensibility*

The Court in *Campbell* made two profound pronouncements generally excluding out-of-state evidence on the issue of punitive damages.⁴⁰ First, “[a] State cannot punish a defendant for conduct that may have been lawful where it occurred.”⁴¹ Second, “[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.”⁴²

This demarcation is rooted in federalist principles: “A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.”⁴³ The Court thus rejected evidentiary rulings which permitted evidence of State Farm’s out-of-state conduct; e.g., State Farm’s nationwide claims handling practices.⁴⁴

2. *Use of Out-of-State Conduct to Demonstrate Deliberateness and Culpability: The Nexus Requirement*

Out-of-state conduct may be admitted to prove “deliberateness and culpability of the defendant’s action in the State where it is tortious”⁴⁵ However, the conduct “must have a nexus to the specific harm suffered by the plaintiff.”⁴⁶ Jury instructions are required when out-of-state conduct is admitted for this limited purpose: “[a] jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the juris-

40. The Court in *Gore* did not reach the issue of extraterritorial punishment, although the Court stated that a state has no legitimate interest in altering out-of-state conduct. “We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States.” *Gore*, 517 U.S. at 572. The *Gore* Court had no occasion to decide on extraterritorial punishment, as the Alabama Supreme Court had expressly rejected punitive damages based on out-of-state conduct in reducing punitive damages from \$4 million to \$2 million. *Gore*, 517 U.S. at 567 (quoting *BMW of North America, Inc. v. Gore*, 646 So. 2d 619, 628 (Ala. 1994)).

41. *Campbell*, 538 U.S. at 421.

42. *Id.*

43. *Id.* at 422.

44. *Id.* at 418-20.

45. *Id.* at 422.

46. *Id.*

diction where it occurred.”⁴⁷ In light of its earlier pronouncement that a state has no interest in punishing for out-of-state conduct – lawful or not – it is likely the Court would mandate a limiting instruction for unlawful conduct as well.⁴⁸

The Court did not clarify the scope of this new exception as applied to the facts before it. It apparently concluded the out-of-state evidence introduced, which plaintiffs argued was relevant to demonstrate State Farm’s motive and means, did not have a sufficient nexus to plaintiffs’ harm.⁴⁹ (The evidence demonstrated a company-wide policy aimed at minimizing claims payouts, including preying on weak claimants.⁵⁰) The Court did not identify the specific out-of-state conduct it concluded “bore no relation to the Campbells’ harm.”⁵¹ This leaves unanswered the question of what the Court meant by “deliberateness and culpability” and the requisite nexus, which we will return to in greater detail in Section III.⁵²

Apart from the vagueness of the requisite nexus requirement, a paradox is apparent from the Court’s holding: How can out-of-state conduct be relevant under a reprehensibility analysis, the most important factor in measuring the permissible magnitude of punitive damages,⁵³ and yet not used to punish the defendant? Given the Court’s repeated concerns that punitive damages not be the product of “passion or prejudice” or intended to punish extraterritorial conduct, should courts be vigilant in applying a probative value versus prejudi-

47. *Id.*

48. There is no sound reason to differentiate between lawful and unlawful out-of-state conduct on this point. Both may be equally relevant to deliberateness and culpability. A state may punish for neither, therefore, the required instruction remains the same.

49. *Campbell*, 538 U.S. at 422 (concluding plaintiffs’ motive and method argument “misses the mark” and then pronouncing the exception for out-of-state conduct to prove deliberateness and culpability).

50. *Id.*

51. *Id.*

52. *See id.* at 436 (Ginsberg, J., dissenting) (observing that State Farm’s policies and practices were responsible for plaintiffs’ injuries and the “means used to implement those policies could be found callous, clandestine, fraudulent, and dishonest” (internal quotation marks omitted)). At first glance, it is difficult to conceive how a policy used as an instrument to harm the plaintiffs is not relevant to deliberateness and culpability. The Court’s rejection of this evidence reveals the gravity of the constitutional considerations, as I will discuss in greater detail below in Section III.

53. *Id.* at 419 (“The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” (quoting *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996))).

cial danger analysis in admitting evidence of out-of-state conduct under the exception? Courts have come to differing conclusions on this question, as we will see in Section IV.

3. *Use of Other Acts to Demonstrate Recidivism: The Similarity Requirement*

After demarking evidentiary borders around the forum state, the *Campbell* Court went further and held that only conduct similar to that which harmed the plaintiff would be admissible to demonstrate reprehensibility by recidivism.⁵⁴ The Court stated that “courts must ensure the conduct in question replicates the prior transgressions.” The Court found no such similar conduct was proven.⁵⁵ Rather than showing similar bad-faith failures to settle third-party lawsuits, the plaintiffs demonstrated only general claims-handling malfeasance.⁵⁶ This was insufficient: “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.”⁵⁷

Given this guidance, it remains unclear whether out-of-state conduct is relevant for purposes of recidivism. The Court does not identify any acts in *Campbell* that are relevant for recidivist purposes, so no conclusions can be directly drawn. The Court’s brief discussion of recidivism focuses on the requirement that the “conduct in question replicates the prior transgressions.”⁵⁸ Later the Court rejects the relevance of a \$100 million out-of-state punitive damages award against State Farm on the issue of reprehensibility because the Texas award was a first-party action and therefore dissimilar.⁵⁹ It is not clear whether the Court would consider a similar third-party action Texas award as relevant to deliberateness and culpability or recidivism. Below I will posit that such an award would be admissible as deliberateness and culpability evidence. While such an award would also be recidivist evidence in this case, we will see that evidence of recidivism is not always the same as deliberateness and culpability evidence in all cases.

The Court plainly holds that a state, as a general rule, does not have a legitimate concern in imposing punitive damages to punish a

54. *Id.* at 423-24.

55. *Id.* at 423.

56. *Id.* at 423-24.

57. *Id.* at 424.

58. *Id.* at 423.

59. *Id.* at 426-27.

defendant for out-of-state conduct.⁶⁰ Similar to the paradox identified above, how can prior acts introduced for the purpose of demonstrating recidivism (and therefore reprehensibility) serve as a basis to measure the magnitude of punitive damages without punishing the defendant for those acts?

B. *Permissible Ratios of Punitive to Compensatory Damages and Comparison to Civil and Criminal Penalties*

The Supreme Court in *Campbell* declined to offer the Holy Grail on the issue of permissible ratios: a bright line rule.⁶¹ From the Court's decision, however, we can draw several principles, which should prove adequate in most cases.

A single-digit ratio is the first benchmark, and quadruple damages might be a firm stopping point in most cases. The Court stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety."⁶²

Campbell held open the door cracked by *Gore* for larger ratios where "a particularly egregious act has resulted in only a small amount of economic damages."⁶³ Conversely, *Campbell* swung the door both ways to limit punitive damages to a ratio "perhaps only equal to compensatory damages" where compensatory damages are substantial.⁶⁴

1. *Factors Affecting Permissible Ratio*

In deciding that the 145-to-1 ratio in *Campbell* was unreasonable, the Court considered several factors weighing in favor of a punitive damages award "at or near the amount of compensatory damages."⁶⁵ First, the compensatory damages - \$1 million - were substantial and "complete compensation."⁶⁶ Second, the Campbells' harm was eco-

60. *Id.* at 421.

61. *Id.* at 425 ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed.").

62. *Id.* The Court also cited *Gore*, which refers to a 700-year-old legislative history supporting double, treble, or quadruple damages to deter and punish. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996).

63. *Id.* (quoting *Gore*, 517 U.S. at 582, "a higher ratio *might* be necessary where the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine").

64. *Id.*

65. *Id.* at 426-29.

66. *Id.* at 426.

conomic and did not involve physical assault or trauma.⁶⁷ Third, the Court noted State Farm's subsequent conduct: State Farm paid the excess verdict before the Campbells filed suit against it.⁶⁸

Finally, and perhaps most intriguing for tort practitioners, the Court noted that the compensatory damages were already somewhat punitive in nature.⁶⁹ The Court observed that the Campbells' compensatory damages consisted primarily of emotional damages.⁷⁰ Damages for emotional distress, the Court argued, already contain a punitive

67. *Id.* The Court instructed consideration as to whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id.* at 419. The Court noted absence of all of these factors "renders any award suspect." *Id.*

Numerous commentators and courts have slavishly bound their analysis to a mechanical application of *Campbell's* and *Gore's* reprehensibility criteria, citing each factor as a magic constitutional talisman. At times, the results can be absurd. See, e.g., *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1370-71 (Fed. Cir. 2003) (claiming that *Campbell* added "intentional malice, trickery, or deceit" to the mix of factors a court could consider), *cert. denied*, 540 U.S. 1183 (2004). It is an ironic reflection of the state of the profession that lawyers (judges included) feel they need the Supreme Court to tell them what makes conduct reprehensible. From a legal realist perspective, it is instructive to examine the weight courts are giving the *Campbell/Gore* factors. From a normative perspective, however, courts should not let their analysis become a lifeless application of a laundry list of factors. The Supreme Court is not the final arbiter of morality. It would be arrogant for the Court to so assume. Moralists have struggled with reprehensibility for millennia. Reprehensibility is within a jury's common experience. Courts and juries are independently well equipped to define "wrongness" without mindless reference to a list of factors in a Supreme Court decision. See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 457 (1993) (rejecting a formalized comparative test much like the one adopted in *Gore*: "[Punitive damages] awards are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages awards [sic] must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make."). In practice it would seem appellate courts are deferential to juries' implicit qualitative judgment with regard to reprehensibility.

68. *Campbell*, 538 U.S. at 426.

69. *Id.*

70. *Id.* Because State Farm had already paid the excess judgment, the Court concluded that the Campbells "suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them." The Court stated that "[t]he compensatory damages for the injury suffered here . . . likely were based on a component which was duplicated in the punitive award." *Id.*

element.⁷¹ Therefore, given the punitive element present in an emotional damages award (which can often be substantial in the most serious tort cases), *Campbell* militates against a punitive damages award greater than compensatory damages where substantial emotional harm is compensated.

2. *Disfavored Factors: Factors Insufficient to Support an Award*

The Court noted several factors which were insufficient to support a large punitive damages award. The Court frowned upon references to the low probability of detecting State Farm's bad conduct (which would argue for a higher award in the rare case it was caught) as well as reference to its assets.⁷² A defendant's wealth is insufficient to justify "an otherwise unconstitutional punitive damages award."⁷³ The Court reaffirmed its holding in *Gore* that proof of wealth to determine punitive damages was not impermissible, but that "this factor cannot make up for the failure of other factors"⁷⁴

Among the disfavored factors the Court noted was comparison to criminal sanctions under *Gore*'s third guidepost - reference to penalties authorized in comparable cases.⁷⁵ Though relevant, criminal sanctions are poor benchmarks because their application is contemplated only after a defendant is afforded the heightened protections of the criminal process.⁷⁶ The Court cautioned, "[p]unitive damages are not a substitute for the criminal process"⁷⁷

71. *Id.* (quoting Restatement (Second) of Torts § 908, cmt. C (1977) ("In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.")).

72. *Id.* at 427 (reasoning that these "had little to do with the actual harm sustained by the Campbells").

73. *Id.*

74. *Id.* (quoting *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 591 (1996) (Breyer, J., concurring)).

75. *Id.* at 428 (citing *Gore*, 517 U.S. at 575).

76. *Id.* ("Great 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.").

77. *Id.*

3. *Punitive Damages May Not be Directly Based on Out-of-State Conduct*

One lesson is clear from *Campbell*: A jury may not use out-of-state conduct to directly compute punitive damages. For example, a jury may not be asked specifically to punish defendant's nationwide conduct.⁷⁸ Nor may a jury use nationwide evidence, such as sales or revenue, as a multiplier in determining punitive damages.⁷⁹

III. UNANSWERED QUESTIONS: THE ROLE OF OUT-OF-STATE CONDUCT

The Court held that out-of-state conduct may be admitted under the first *Gore* guidepost - reprehensibility - to prove "deliberateness and culpability of the defendant's action in the State where it is tortious . . ." ⁸⁰ The conduct "must have a nexus to the specific harm suffered by the plaintiff."⁸¹ *Campbell* also may have approved the use of out-of-state conduct to demonstrate recidivism, also under the reprehensibility analysis, provided present conduct "replicates the prior transgressions."⁸²

As questioned above, how can these holdings be squared with the admonition that out-of-state conduct may not be used to punish the defendant? Is reprehensibility not used to measure the proper punishment? May out-of-state conduct be used to demonstrate recidivism? How can use of out-of-state conduct to demonstrate recidivism be reconciled with *Campbell's* holding that a defendant may not be punished for out-of-state conduct, lawful or otherwise? There are no clear answers, but an examination of the pedigree of the Court's permissive approval of the use of out-of-state conduct and decisions applying *Campbell* is instructive. Examining the Court's precedent on this issue reveals a weak foundation for the argument that out-of-state conduct should be used to demonstrate recidivism.

In light of the new nexus and similarity requirements in *Campbell*, together with *Campbell's* strong federalism language, defense attorneys have ammunition to exclude much out-of-state conduct as irrelevant or cumulative and prejudicial. Further, in light of the facts of *Campbell*, the nexus requirement considerably restricts the type of evidence admissible on the issue of deliberateness and culpability. It appears that to satisfy the nexus requirement, acts must either be causally

78. *Id.* at 422.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 423 (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 n.28 (1993)).

related to the plaintiff's harm or similar to the plaintiff's harm.⁸³ There is some argument that similarity is not itself sufficient in all cases, and the evidence must be causally related in certain types of actions (e.g., where intent is not an element of plaintiff's cause of action).

A. *Prior Punitive Damages Decisions and the Role of Out-of-State Conduct*

1. *Gore: Noting Relevance of Out-of-State Conduct, Citing TXO*

Before *Campbell*, the Court opined several times on the use of out-of-state conduct on the issue of punitive damages. Most recently, the Court in *Gore*, relying on *TXO*, noted that out-of-state conduct "may be relevant to the determination of the degree of reprehensibility of the defendant's conduct."⁸⁴ Both *Campbell* and *Gore* cite *TXO*'s note 28: *Campbell* in support of its approval of recidivism evidence, provided the conduct "replicates prior transgressions."⁸⁵

2. *TXO: Approving Use of Out-of-State Conduct, Citing Haslip*

In *TXO*'s note 28, the Court approved the use of out-of-state conduct to assess punitive damages.⁸⁶ The Court dismissed via footnote several errors assigned by *TXO*, including the use of out-of-state evidence: "TXO also contends that the admission of evidence of its alleged wrongdoing in other parts of the country, as well as the evidence of its impressive net worth, led the jury to base its award on impermissible passion and prejudice."⁸⁷ The Court cited *Haslip* in support of its conclusion that all of these factors were properly considered under "well-settled law," but the Court's reliance was misplaced.⁸⁸

Out-of-state conduct factored into the *TXO* Court's approval of punitive damages. The Supreme Court in *TXO* reasoned that punitive damages were justified, in part, because "the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and

83. Because prior decisions do not recognize a distinction between "deliberateness and culpability" and "recidivism," the survey below of Supreme Court decisions treats them together.

84. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 n.21 (1996) (citing *TXO*, 509 U.S. at 462, n.28).

85. *Campbell*, 538 U.S. at 423.

86. *TXO*, 509 U.S. at 462 n.28.

87. *Id.*

88. *Id.* (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991) (approving consideration of the Alabama court's reprehensibility criteria, including examination of "the existence and frequency of similar past conduct . . . [and] the 'financial position' of the defendant"))).

[because of] petitioner's wealth."⁸⁹ However, *Haslip* provides no authority for the use of out-of-state conduct because no such conduct was involved. Further, the defendant in *TXO* did not argue that federalism should exclude out-of-state evidence, but rather that such evidence ought to have been excluded as impermissible character evidence.⁹⁰

3. *Haslip*: No Out-of-State Conduct Admitted on Punitive Damages

Haslip approved the Alabama Supreme Court's review of punitive damages, which used criteria including "the existence and frequency of similar past conduct." *Haslip* did *not* approve the use of prior similar out-of-state conduct.⁹¹ A brief examination of the facts is in order. The plaintiffs in *Haslip* were city employees.⁹² Pacific Mutual arranged for Union, a group health insurer, to provide city employees with group health insurance.⁹³ The premiums were paid to Pacific Mutual through defendant Ruffin, who misappropriated most of the payments.⁹⁴ Upon non-receipt of premiums, Union sent notices of lapsed health coverage to plaintiffs in care of Ruffin. Unsurprisingly, Ruffin never forwarded the notices.⁹⁵ When Plaintiff *Haslip* was hospitalized, her coverage was denied, and consequently she could not pay her bill.⁹⁶ The bill was sent to collection, damaging her credit.⁹⁷ At trial against Pacific Mutual, a substantial general verdict was awarded, which the trial court found included a significant punitive damages component.⁹⁸ The Supreme Court held that Pacific Mutual was liable for Ruffin's actions under Alabama law, noting that Pacific Mutual had notice that Ruffin had engaged in a prior pattern of fraud.⁹⁹ All relevant acts occurred in Alabama.¹⁰⁰

Plaintiffs in *Haslip* never introduced evidence of out-of-state conduct to bolster reprehensibility or to demonstrate recidivism. *Haslip* was a case of a discrete act of misappropriation, although prior acts were relevant to demonstrate that Pacific Mutual had notice of Ruffin's

89. *Id.* at 462.

90. *Id.* at 465.

91. *Haslip*, 499 U.S. at 21.

92. *Id.* at 4-5.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 14.

100. *Id.* at 4-5.

habit of fraud. There was no indication that any of these prior acts took place outside Alabama.

Recall that *Haslip* was the first case in which the Court scrutinized the constitutionality of punitive damages. A case involving no out-of-state conduct, therefore, appears to be the progenitor of the doctrine purporting to permit use of out-of-state conduct in a due process review of punitive damages.

4. *TXO revisited: The Out-of-State Conduct and Defendant's Objections*

The Court in *TXO* did not discuss the sort of out-of-state conduct it permitted as a result of its footnote holding. One must look to the West Virginia Supreme Court's decision to see that, analyzed in light of *Campbell*, most of this out-of-state conduct would not be relevant to punitive damages. The out-of-state conduct, however, may have been relevant to plaintiff's underlying cause of action. *TXO* foreshadowed the post-*Campbell* problem that arises when out-of-state conduct is relevant to a plaintiff's cause of action, but has little bearing on the issue of punitive damages.

In *TXO*, Alliance sold oil and gas rights in valuable mineral-rich West Virginia land to TXO in exchange for cash and royalties.¹⁰¹ Alliance promised to return consideration to TXO if TXO's attorney determined that "title had failed."¹⁰² TXO subsequently discovered that Alliance's predecessor in interest had transferred coal rights to a third party.¹⁰³ TXO knew that the oil and gas rights transferred to it from Alliance were not affected by this prior transaction.¹⁰⁴ The coal rights previously sold were transferred several times.¹⁰⁵ Upon learning of the previously assigned rights, TXO purchased them via a quitclaim deed and filed it without telling Alliance.¹⁰⁶ TXO also unsuccessfully attempted to get one of the intermediate purchasing parties to sign an affidavit saying the original transfer of coal rights might have included oil and gas rights.¹⁰⁷

TXO then wrote to Alliance, indicating that there may be a cloud on the title, and that it had purchased oil and gas rights in the prop-

101. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 447-48 (1993).

102. *Id.*

103. *Id.* at 448.

104. *Id.* at 448-49.

105. *Id.*

106. *Id.* at 449.

107. *Id.*

erty from a third party.¹⁰⁸ TXO knew it had purchased no such rights. Under this cloud of false doubt, TXO attempted to renegotiate Alliance's royalties under the original agreement.¹⁰⁹ When Alliance rejected these overtures, TXO brought a declaratory judgment action to clear title to the property.¹¹⁰ Alliance filed a counter-claim alleging that TXO's claim was frivolous and brought to slander Alliance's title.¹¹¹

Alliance introduced at trial videotaped depositions of attorneys involved in other disputes with TXO.¹¹² TXO's prior bad acts were extensive. Alliance introduced evidence that TXO exerted pressure on a functionally illiterate Louisiana woman to sign over her mineral rights.¹¹³ TXO had also refused to pay royalties due to a Texas partnership, falsely asserting doubts about the title.¹¹⁴ TXO under-reported gas extracted from another Texas well and paid only minimal shut-in royalties to another Texas businessman, even though the wells were producing normally.¹¹⁵ An Oklahoma attorney testified about a scheme whereby TXO acquired interest in Oklahoma land through fraud and misrepresentation.¹¹⁶ This attorney also testified about a pending case, vaguely alleging that TXO had violated the rights of "hundreds or thousands of other people across the nation, as a result of this willful, wanton action."¹¹⁷

TXO's objection to this out-of-state conduct was based on the West Virginia rules of evidence and not founded on federalist principles.¹¹⁸ TXO argued that these prior bad acts were inadmissible character evidence.¹¹⁹ The West Virginia court rejected TXO's argument, holding that these acts were relevant to prove TXO's malice, an element of Alliance's slander of title claim.¹²⁰ The evidence, the court rea-

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *TXO Prod. Corp. v. Alliance Res. Corp.*, 419 S.E.2d 870, 881 (W. Va. 1992).

113. *Id.* at 881-82.

114. *Id.* at 882.

115. *Id.* Shut-in royalties are minimal royalties paid even when a well is not producing.

116. *Id.*

117. *Id.* at 882-83.

118. *Id.* at 883.

119. *Id.*

120. *Id.* at 884.

soned, negated TXO's defense that its dispute with Alliance was merely a good-faith mistake.¹²¹

The dispute in this pre-*Campbell* case did not focus on *Campbell*'s federalist implications, but rather on an evidentiary principle - whether out-of-state character evidence was relevant to an issue other than punitive damages.¹²² Nonetheless, out-of-state conduct was considered on the issue of punitive damages.¹²³ In applying West Virginia law on the issue of whether punitive damages bore a reasonable relationship to compensatory damages, the West Virginia court noted that the punitive damages were necessary because of TXO's out-of-state conduct: "[A]n award of this magnitude is necessary to discourage TXO from continuing its pattern and practice of fraud, trickery and deceit."¹²⁴

If TXO were decided in the wake of *Campbell*, almost none of the out-of-state conduct the courts allowed would be admissible on the issue of reprehensibility. Applying the recidivism standard, the only act which might be permitted is the case in which TXO raised doubts about the title in the Texas property in order to avoid paying royalties.¹²⁵ Applying *Campbell*'s exception permitting out-of-state conduct on the issues of deliberateness and culpability, none of the out-of-state conduct in TXO had a sufficient nexus to Alliance's harm.¹²⁶ This insufficient nexus is evident from an examination of the conduct in *Campbell*, which the Court concluded "bore no relation to the Campbells' harm."¹²⁷

B. *The Court's Uncertain Holding on Relevant Out-of-State Conduct: Applying Campbell to Campbell, TXO, and Gore.*

One would think that by looking at the out-of-state conduct the Court considered relevant in *Campbell*, we could gain insight into the type of conduct permitted under the "deliberateness and culpability" and recidivism exceptions. *Campbell* does not provide such easy guidance. Rather, *Campbell* summarily concluded that the trial was used to punish State Farm for its nation-wide conduct.

121. *Id.* at 883-84.

122. *Id.* at 883.

123. *Id.* at 889-90.

124. *Id.*

125. *Id.* at 882. *Campbell* is unclear as to whether out-of-state conduct is permitted to demonstrate recidivism, however.

126. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003).

127. *Id.*

In *Campbell*, plaintiffs introduced evidence of State Farm's "Performance, Planning and Review" policy, which plaintiffs argued embodied a company-wide scheme to "meet corporate fiscal goals by capping payouts on claims company-wide."¹²⁸ Plaintiffs introduced copious evidence of an extensive practice of falsifying files, attacking claimants' character, and exerting corporate pressure on adjusters to reduce payments.¹²⁹ Plaintiffs also introduced evidence of an "Excess Liability Handbook," which the State Farm adjusters relied upon in their treatment of the plaintiffs' case.¹³⁰ The handbook instructed employees to pad files with self-serving documents and to omit other items, such as evaluations of insured's exposure.¹³¹ Several former employees testified to a State Farm policy of:

[Attacking] the weakest of the herd . . . the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit, or who have little money and hence have no real alternative but to accept an inadequate offer to settle a claim at much less than fair value.¹³²

The Court did not identify what conduct it considered relevant, but emphasized that in this case "[t]he courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."¹³³ Apparently third-party lawsuits were the gold standard the Court sought: "the Utah court erred here because evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length."¹³⁴

In holding that State Farm's conduct merited some measure of punitive damages, the Court cited only conduct which proximately affected the plaintiffs: State Farm altered company records to make the Campbells less culpable (falsely bolstering a claim that it could defend the lawsuit and need not settle); disregarded the high likelihood of liability and near-certain probability of a judgment in excess of policy limits; and falsely assured the plaintiffs their assets were safe, only to later tell them post-judgment that they should put a "for sale" sign on

128. *Id.* at 415.

129. *Id.* at 432-33.

130. *Id.* at 433.

131. *Id.*

132. *Id.*

133. *Id.* at 422.

134. *Id.* at 423-24.

their house.¹³⁵ All of this conduct bore a causal nexus to plaintiffs' harm.¹³⁶ Implicit in the Court's analysis is that the balance of the out-of-state conduct was not probative on the issue of deliberateness and culpability.¹³⁷

In *TXO* the trial court rejected TXO's argument that it had good-faith doubts about whether the title it acquired from Alliance conveyed rights to oil and gas.¹³⁸ Holding the deeds to be clear and unambiguous, the court granted summary judgment to Alliance dismissing TXO's claim to clear title in its favor.¹³⁹ The court nonetheless let a jury decide Alliance's claim for slander of title.¹⁴⁰ This claim required proof of malice and forced Alliance to negate TXO's good-faith defense.¹⁴¹ Applying *Campbell*, this out-of-state conduct could be admitted in *TXO* only with a limiting instruction prohibiting its use on the issue of punitive damages.¹⁴²

This evidence, however, might not be admissible under *Campbell*. The Court in *Campbell* seemed content to award punitive damages based solely on the conduct that proximately affected the plaintiffs.¹⁴³ Under this reasoning, the plaintiff in *TXO* could likewise have demonstrated liability and entitlement to punitive damages based solely on TXO's conduct with respect to the property at issue. Reference to out-of-state conduct is cumulative: it does not further negate an honest mistake, and only serves to invite punishment for other out-of-state acts.¹⁴⁴

Returning to the out-of-state conduct considered in *Gore*, there the plaintiff argued that his harm was part of the defendant's "nationwide pattern of tortious conduct."¹⁴⁵ The Court approved admission of recidivist conduct in principle: repeatedly engaging in conduct that a defendant knows is illegal justifies a more severe punishment.¹⁴⁶ The Court stated, "Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is

135. *Id.* at 419-20.

136. *Id.*

137. *Id.* at 422-23.

138. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 449-50 (1993).

139. *Id.* at 450.

140. *Id.*

141. *Id.*

142. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003).

143. *Id.* at 419-20.

144. *Id.* at 423.

145. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 576 (1996).

146. *Id.* at 576-77.

more reprehensible than an individual instance of malfeasance.”¹⁴⁷ The Court found, however, that the law governing the defendant’s conduct was unclear: many states permitted defendant’s conduct of repainting cars damaged in manufacture or transit, and selling them as new when the cost of repair was less than three percent of the suggested retail price.¹⁴⁸ Therefore, the evidence failed to support recidivism because the defendant did not have notice that the conduct was illegal.¹⁴⁹

Gore emphasized the now-familiar precept that out-of-state conduct may not be used to punish. The Court agreed with the Alabama Supreme Court’s conclusion that it would be error to use out-of-state conduct as a multiplier in determining punitive damages.¹⁵⁰ Nonetheless, the *Gore* Court failed to reconcile this prohibition with its acknowledgement that such conduct may be useful in determining reprehensibility, and therefore punishment.¹⁵¹

C. *Reconciling Campbell with Precedent: Rationalizing a Doctrine Permitting Out-of-State Conduct*

The *Campbell* Court never explains how out-of-state conduct can enhance reprehensibility and support larger punitive damages while not punishing the defendant for such out-of-state conduct.¹⁵² To rationalize such a position, one must consider the twin purposes of punitive damages: deterrence and retribution.¹⁵³ It is clear that retribution, which in this sense appears to be synonymous with punishment, is not legitimately served by considering out-of-state conduct.¹⁵⁴ Deterrence, however, arguably is distinct from punishment, and may justify the use of out-of-state conduct.

While out-of-state conduct may be relevant to deterrence, constitutional considerations drastically restrict the manner in which punitive damages can further a state’s interest in deterrence.¹⁵⁵ For example, absurdly large punitive damages, while serving to deter the defendant, are prohibited by the Due Process Clause.¹⁵⁶

147. *Id.* at 577.

148. *Id.* at 577-78.

149. *Id.* at 578-79.

150. *Id.* at 574 n.21.

151. *Id.*

152. Indeed, the Court does not specifically hold that out-of-state conduct may be permitted to demonstrate recidivism.

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

154. *Id.* at 421-22.

155. *Id.* at 416-17.

156. *Id.*

The Constitution limits a state's power to further deterrence in other ways. A state may not mete out punitive damages with the intent of regulating conduct in other states.¹⁵⁷ As the Court stated in *Gore*: "We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other [s]tates."¹⁵⁸

A state has an interest in deterring conduct within its borders.¹⁵⁹ This of course includes specific deterrence with respect to the defendant. Specific deterrence invites examination of the defendant's past conduct: a defendant who has done it before is more likely to do it again. A higher punitive award may be necessary to deter a recidivist. While the Court in *Gore* does not discuss specific deterrence, it compares the permissive use of recidivist acts to a criminal court's examination of a defendant's past conduct, including lawful conduct, in enhancing a sentence.¹⁶⁰ The Court expressly denies that using prior acts in this way constitutes punishment for prior acts.¹⁶¹ Therefore, when the Court speaks about prior acts used to bolster reprehensibility, it may be aiming at their relevance to specific deterrence.

Unfortunately the unrestrained implications of this rationalization are not harmonious with the Court's holding in *Campbell*. Under this rationalization, all of a defendant's past acts that bear on the likelihood of the defendant repeating the conduct would be relevant. A defendant with a history of intentionally tortious behavior, regardless of the similarity of that behavior to plaintiff's harm, is more likely to repeat the conduct that harmed plaintiff. A criminal court has wide latitude to consider these acts.¹⁶²

Campbell restricts this latitude considerably.¹⁶³ If offered to demonstrate recidivism, prior acts must replicate the conduct at issue.¹⁶⁴ This restriction is motivated by concerns that the defendant not be subjected to punishment for all its misdeeds in one trial, and punished multiple times for a single misdeed in multiple trials.¹⁶⁵

157. See *id.*; *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572 (1996).

158. *Gore*, 517 U.S. at 572.

159. *Id.* at 568.

160. *Id.* at 573.

161. *Id.* at 573 n.19.

162. *Id.*

163. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003).

164. *Id.*

165. *Id.* at 423 ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . Punishment on these

This restriction is, essentially, an arbitrary line. The line fully vindicates neither the state's interest in deterrence, nor a defendant's right to be free from defending prior unrelated misdeeds. The "replicate" requirement is a rigid line, which might not best serve deterrence in all cases. One could imagine a case in which a defendant has engaged in particularly egregious prior acts, which indicate a high likelihood of recidivism but do not replicate the conduct at issue, and do not pose a significant threat of liability. In this case the balance of interests favors admission of the prior dissimilar acts. Under *Campbell*, there is no latitude to mete out punitive damages based on such dissimilar acts, regardless of their relevance to deterrence.¹⁶⁶ The rigid nature of the "replicate" requirement underscores the Court's sensitivity to protecting defendants against excessive or duplicative punishment.

We see a similar purposive limitation on the use of out-of-state evidence to demonstrate deliberateness and culpability: the prior acts must have a "nexus" to the harm suffered by the plaintiff.¹⁶⁷ This limitation is motivated by the same concerns limiting recidivist evidence to similar harm: precluding punishment for other acts.¹⁶⁸ It is also motivated by federalist concerns limiting a state's legitimate penal interest.¹⁶⁹ These principles, taken together, support the conclusion that out-of-state evidence should not be used to demonstrate recidivism.

1. *Out-of-State Conduct Should Not Be Used To Demonstrate Recidivism*

There is some indication the Court would exclude out-of-state conduct for the purpose of demonstrating recidivism.¹⁷⁰ Federalism and a general sense of fairness and judicial efficiency appear to outweigh deterrence.¹⁷¹ The line the *Campbell* Court draws with respect to limiting recidivist evidence to conduct similar to that which injured the plaintiff is arbitrary. This line is motivated by the overarching principles of federalism and due process in general, which limit punitive damages such that they further state interests and do not subject a defendant to over-punishment.¹⁷² Under the same reasoning justifying

bases creates the possibility of multiple punitive damages awards for the same conduct").

166. *Id.* at 422.

167. *Id.*

168. *Id.*

169. *Id.*

170. *See id.*

171. *See id.*

172. *Id.*

the similarity requirement, out-of-state conduct should not be permitted to demonstrate recidivism.

It could be argued that proof of recidivism is relevant to culpability: out-of-state conduct evincing recidivism should be permitted under the Court's express exception permitting out-of-state evidence on the issue of deliberateness and culpability. Culpability is typically associated with the level of guilt on a spectrum of negligent, reckless, knowing, or purposeful.¹⁷³ It is derived from the Latin "culpa," which means neglect or negligence.¹⁷⁴ It is synonymous with a defendant's state of mind or level of intent. In this sense, recidivist acts do not necessarily relate to a defendant's state of mind (e.g., negligence, recklessness).

Campbell did not hold any conduct at issue - out-of-state or not - relevant to the issue of recidivism.¹⁷⁵ *Campbell* is therefore not controlling authority with respect to out-of-state conduct offered to demonstrate recidivism. The Court's separate treatment of culpability and recidivism in its discussion indicates that the two concepts were distinct to the Court. After pronouncing the nexus requirement with respect to out-of-state conduct offered on the issue of deliberateness and culpability (and emphasizing that federalism requires that the award not serve as punishment for out-of-state conduct), the Court concludes that the fundamental error was the dissimilarity of State Farm's bad acts from the specific acts that harmed the Campbells.¹⁷⁶ Only then does it turn to recidivism, finding that recidivism was not established for the same reason: because the prior conduct did not replicate the conduct at issue.¹⁷⁷

To be sure, there is often a great deal of similarity between deliberateness and culpability evidence and recidivist evidence. Out-of-state conduct that satisfies *Campbell's* "replicate" recidivism requirement may also satisfy *Campbell's* nexus requirement and relate to deliberate-

173. BLACK'S LAW DICTIONARY 406 (8th ed. 2004).

174. *Id.*

175. *Campbell*, 538 U.S. at 426-27. The Court, in its rejection of a \$100 million Texas punitive damages award against State Farm, premised on dissimilarity of that case (a first party action, not a third party action as in *Campbell*), states that a similar out-of-state award would be relevant under the reprehensibility analysis. The Court does not clarify whether that evidence would relate to deliberateness and culpability or recidivism. In this case it clearly would be both. Therefore, the Court is not holding that a similar Texas award would be admissible as out-of-state recidivist evidence. We will see below that recidivist evidence may not always relate to deliberateness and culpability.

176. *Id.* at 422.

177. *Id.* at 423.

ness and culpability. In such circumstances, the out-of-state conduct is expressly admissible under *Campbell*.¹⁷⁸ Recidivist evidence, however, does not necessarily relate to deliberateness or culpability, as we see below in Section III C (2) and (3).

Even if a court chose not to extend *Campbell*'s reasoning to preclude the use of out-of-state conduct to demonstrate recidivism, these concerns argue in favor of a highly cautious treatment of such evidence. Where possible, the prejudicial impact of the evidence should be mitigated by jury instructions, permissive stipulation, and the exclusion of inflammatory testimony as more prejudicial than probative.

a. Federalism Militates Against Use of Out-of-State Conduct to Demonstrate Recidivism

As discussed above, the Court in *Campbell* was emphatic that a state has no legitimate interest in punishing a defendant for its out-of-state conduct.¹⁷⁹ A civil trial may not be used to excoriate a defendant for its nationwide activities.¹⁸⁰

Campbell's holding that out-of-state conduct can be used to determine the appropriate level of punitive damages, yet may not be used to punish, is absurd. There is always the risk of punishment based on out-of-state conduct. A jury faced with numerous similar out-of-state acts introduced to demonstrate recidivism cannot help but be tempted to punish a defendant for those acts. To ask a jury to weed out the "punishment" from the "enhancement" is to ask the impossible. A punishment by any other name (e.g. "enhancement") would still be punishment.¹⁸¹

In light of the Court's unambiguous language on the issue of federalism, due deference to this risk argues against admitting out-of-state conduct to demonstrate recidivism. If a defendant's conduct is truly pervasive and nationwide, then there should be sufficient intra-state

178. *Id.* at 422-23.

179. *Id.* at 421 ("Nor, 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."); accord *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572 (1996) ("We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.").

180. See *Campbell*, 538 U.S. at 421.

181. It is difficult to conceive of adequate instructions on the fine distinction between enhancement versus punishment (if, indeed, there is a distinction). One can almost hear jurors changing mental channels as a judge drones on about federalism and specific deterrence versus retribution.

conduct to demonstrate recidivism. Therefore, in the worst case of recidivism, little is lost by excluding out-of-state conduct.

b. Risk of Duplicate Punishment Militates Against Use of Out-of-State Conduct to Demonstrate Recidivism

Due process considerations prohibit adjudication of other parties' claims in a punitive damages trial.¹⁸² As the Court stated in *Campbell*, "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct" ¹⁸³ A single case is not the proper vehicle by which a defendant is tried for all its out-of-state torts: "Any 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."¹⁸⁴

The risk of "multiple punitive damages awards for the same conduct" was a factor the Court cited in justifying its limitation of evidence on the issue of deliberateness and culpability to only conduct which had a nexus to plaintiff's specific harm.¹⁸⁵ The Court accepts this risk in permitting *any* evidence of recidivism: each bad-faith failure to settle a third-party lawsuit could, theoretically, be used ad infinitum to enhance punitive damages against a defendant. This risk is greatly amplified when out-of-state conduct is permitted to demonstrate recidivism.

The Court did not expressly accept the risk that a defendant may be punished multiple times for out-of-state conduct. In fact, the Court rejected any "punishment" for out-of-state conduct.¹⁸⁶ Out-of-state conduct can only be permitted to demonstrate recidivism, and therefore enhance punitive damages, under the absurd argument that enhancement is not punishment.¹⁸⁷ The risk of duplicative punishment is greatly avoided by not permitting out-of-state conduct to demonstrate recidivism.

182. See *Campbell*, 538 U.S. at 421-23.

183. *Id.* at 423.

184. *Id.* at 421-22.

185. *Id.* at 422-23.

186. *Id.*

187. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 573 (1996) (reasoning that using prior acts to enhance penalty does not constitute punishment for prior acts).

2. *Requisite Nexus: Out-of-State Conduct Offered to Demonstrate Deliberateness and Culpability Must Be Acts upon Which Liability Was Premised*

As discussed in Section III B, above, *Campbell* implies that out-of-state conduct must be causally related to plaintiff's injury to satisfy the nexus requirement of the deliberateness and culpability exception. All of the conduct cited by the Court in support of its conclusion that State Farm's conduct "merits no praise" was causally related to the Campbells' harm.¹⁸⁸

Campbell's language indicates a causal or similarity requirement.¹⁸⁹ After pronouncing the rule excluding out-of-state evidence and the exception for deliberateness and culpability, the Court concluded that the "fundamental reason" the Utah courts erred was that the punitive damages were awarded to punish and deter "conduct that bore no relation to the Campbells' harm."¹⁹⁰ The Court continued: "[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."¹⁹¹

The out-of-state conduct must be part of the basis upon which liability was premised.¹⁹² Causal conduct clearly fits this definition. Also, where notice is an element of plaintiff's claim, similar out-of-state conduct may provide the requisite notice in some cases.

A products liability case is a good illustration of both these principles. In a failure to warn products liability case, out-of-state conduct is offered to demonstrate a defendant's notice of product defect. With respect to defect, similarity is required in order for out-of-state conduct to be relevant to plaintiff's underlying claim. Notice of dissimilar defect does not have the requisite nexus because it is "independent from the acts upon which liability is premised."¹⁹³ Therefore, the out-

188. *Campbell*, 538 U.S. at 419. State Farm altered company records to make plaintiff less culpable (falsely bolstering a claim that it could defend the lawsuit and need not settle); disregarded the high likelihood of liability and near-certain probability of a judgment in excess of policy limits; and falsely assured the plaintiffs their assets were safe, only to later tell them post-judgment that they should put a "for sale" sign on their house. *Id.*

189. *Id.* at 422.

190. *Id.*

191. *Id.* at 422-23.

192. *Id.* at 422. Out-of-state conduct must not be "independent from the acts upon which liability was premised."

193. *Id.*

of-state conduct has both a causal relationship and a similarity relationship.

With respect to bad faith, the application of this standard is less clear. *TXO*, without much discussion, permitted dissimilar acts to demonstrate bad faith.¹⁹⁴ *Campbell* states that “[a] defendant’s dissimilar acts. . . may not serve as the basis for punitive damages.”¹⁹⁵ It qualifies this dissimilar act prohibition, however: the Court notes that only dissimilar acts “independent from the acts upon which liability was premised may not serve as the basis for punitive damages.”¹⁹⁶ Acts that form the basis of liability, such as the dissimilar acts in *TXO* and even in *Campbell*, arguably bear a sufficient nexus to the specific harm in that they negate an “honest mistake” defense.¹⁹⁷ But, as we have seen, the Court in *Campbell* analyzed State Farm’s acts under a very narrow definition of similarity.

Under the same reasoning in which I argue that out-of-state conduct should not be used to demonstrate recidivism, dissimilar acts should not be, and indeed were not, permitted to form the basis of punitive damages. It is one thing to say that a defendant’s “honest mistake” defense is negated by a history of conduct, and quite another to say that the bad faith at issue is made more reprehensible by a history of unsavory business dealings. The risk of punishment for prior acts is evident. *Campbell* was rife with out-of-state conduct which was arguably relevant to negate a mistake defense to a bad faith claim. But the Court rejected the relevance of this conduct, which it held to be dissimilar, to the issue of punitive damages.¹⁹⁸

Overlaying a requirement that admissible acts must be those which form the basis of liability serves to narrow the scope of conduct to that bearing a close nexus to plaintiff’s harm. *Campbell* also held that out-of-state conduct, if not causally related, must be similar to plaintiff’s harm.¹⁹⁹ Notice, in the case of products liability, is satisfied logically only by similar defects. In the case of bad faith actions, considerations against punishment for all of a defendant’s misdeeds weigh against admission of dissimilar conduct.

194. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 n.28 (1993).

195. *Campbell*, 538 U.S. at 422.

196. *Id.*

197. *Id.* at 436 (Ginsburg, J., dissenting).

198. *Id.* at 422-23.

199. *Id.* at 419.

3. *Deliberateness and Culpability Versus Recidivism*

Acts which satisfy the “replicates” requirement of recidivism will satisfy the nexus requirement of deliberateness and culpability in many punitive damages cases. We have seen above how this is true in products liability cases and bad faith actions. In some cases prior similar acts do not necessarily bear on deliberateness and culpability. Where notice or lack of mistake is not an issue, identical past conduct may not bear on the deliberateness of the defendant’s conduct. Typically such cases, e.g., negligence, are not where one would expect punitive damages. Some such actions are ripe for punitive damages, though.

In a defamation action, for example, a defendant’s past defamations do not relate to the basis upon which liability was premised. A plaintiff must show that the defendant knew or should have known the defamatory statement was false. Whether a defendant has defamed in the past has little relevance to this inquiry (and would be inadmissible character evidence). Unlike in *Campbell*, where prior bad-faith failure to settle claims may have shown a deliberate plan to gamble with plaintiff’s excess exposure,²⁰⁰ a defendant’s similar prior defamations do not necessarily reveal a deliberate scheme to defame. Such prior defamatory statements would be evidence of recidivism, but not relate to deliberateness and culpability.

Similarly, in a DWI case prior offenses may bolster recidivism but do not necessarily demonstrate deliberateness or culpability. A defendant does not act more deliberately or culpably by getting intoxicated and operating a car by virtue of the fact that he has done so previously. The deliberateness and culpability of a defendant’s actions in that case are measured by the defendant’s state of mind when he commits the act of DWI that injures the plaintiff. The defendant’s prior acts of DWI are irrelevant to this analysis.

IV. CASES APPLYING *CAMPBELL* ON THE USE OF OUT-OF-STATE CONDUCT

As indicated above, some lessons from *Campbell* are clear and some are not. A jury cannot be asked to send a message, nor compute punitive damages directly based on out-of-state conduct. *Campbell* creates difficulties when out-of-state conduct is relevant to a plaintiff’s case in chief *and* offered on the issue of punitive damages.

200. *Id.* at 413.

A. *Cases Holding Out-of-State Conduct May Not Be Used to Punish Defendant*

Several cases have reversed punitive damages awards because they were based on out-of-state conduct. *Sand Hill Energy, Inc. v. Smith* followed remand from the Supreme Court for consideration in light of *Campbell*.²⁰¹ On remand, the court vacated punitive damages because the jury was not instructed that it could not punish the defendant for out-of-state conduct.²⁰² At trial, the plaintiff had argued that the defendant should be punished for such conduct.²⁰³

In *Lockyer v. R.J. Reynolds Tobacco Co.*, \$20 million in “sanctions” against a tobacco company was awarded to California for the tobacco company’s violation of a settlement agreement by targeting advertising to youth.²⁰⁴ The court held that punitive damages law was instructive, and the trial court’s \$20 million sanctions had been impermissibly based on national advertising budget and revenues, rather than conduct in California.²⁰⁵

B. *Cases Admitting Out-of-State Conduct*

Several cases are illustrative of the permissible role of out-of-state conduct in light of *Campbell*.

1. *Out-of-State Conduct with Causal Relationship Admissible*

In a recent decision, the West Virginia Supreme Court demonstrated the difficulty courts have in deciding cases under *Campbell*. In *Boyd v. Goffoli*, the court permitted evidence of out-of-state conduct to support punitive damages.²⁰⁶ The defendants induced plaintiffs, West Virginians, to quit their jobs and become truck drivers for defendant Falcon Transport.²⁰⁷ The defendants instructed plaintiffs to take a certification course in Pennsylvania and represent to Pennsylvania authorities that they were Pennsylvania residents so they could obtain in-state drivers’ licenses.²⁰⁸ The plaintiffs questioned the legality of this plan, but the defendants represented that it was legal and commonly

201. 142 S.W.3d 153, 164-66 (Ky. 2004).

202. *Id.*

203. *Id.*

204. 11 Cal. Rptr. 3d 317 (Cal. Ct. App. 2004), *petition for review denied*, 2004 Cal. LEXIS 5444 (June 9, 2004).

205. *Id.* at 345-48.

206. 608 S.E.2d 169 (W. Va. 2004).

207. *Id.* at 175.

208. *Id.*

done.²⁰⁹ The Pennsylvania authorities discovered this fraud and detained the plaintiffs, but did not file charges.²¹⁰ Plaintiffs thereafter refused to complete the certification process and filed suit.²¹¹ The jury returned a verdict of \$75,000 in compensatory damages and \$250,000 in punitive damages for each plaintiff.²¹² On appeal, the court rejected defendants' argument that out-of-state conduct - the Pennsylvania fraud - was improperly used to punish in violation of *Campbell*.²¹³ The court distinguished its facts from *Campbell*, observing that the out-of-state conduct at issue was causally related to plaintiffs' harm.²¹⁴

The *Boyd* court's reasoning can best be described as odd: it characterized as dictum *Campbell*'s language that a state has no legitimate interest in punishing unlawful out-of-state conduct.²¹⁵ The *Boyd* court held that a state has a legitimate interest in punishing defendants for unlawful out-of-state conduct where the punishing 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."²¹⁶

This is an odd gloss on *Campbell*'s strong out-of-state conduct punishment prohibition - one the *Boyd* court need not have made. The court was wrong in its characterization of the facts in *Campbell*: the out-of-state conduct there at issue was not all unlawful. *Campbell*'s holding on that point was not dicta.²¹⁷ Had *Boyd* applied *Campbell*'s out-of-state conduct exception - that such conduct may be relevant to prove deliberateness and culpability - it need not have made its own nexus-based holding. In doing so, *Boyd* simply restated the holding of *Campbell*. Clearly, the jury needed to hear about the Pennsylvania fraud. The scheme makes no sense if plaintiffs' evidence is limited to a curt explanation that "defendants made us go somewhere to do some

209. *Id.*

210. *Id.* at 175-76.

211. *Id.*

212. *Id.*

213. *Id.* at 178.

214. *Id.*

215. *Id.* ("Further, this Court does not believe that the *Campbell* Court's broadly worded dictum that a state does not have a legitimate concern imposing punitive damages to punish a defendant's unlawful out-of-state conduct applies to the instant case.").

216. *Id.* at 179.

217. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) ("Here, the *Campbells* do not dispute that *much* of the out-of-state conduct was lawful where it occurred.") (emphasis added).

stuff and it went pretty bad.” The out-of-state evidence went directly to plaintiffs’ underlying cause of action, and the Pennsylvania fraud made defendants’ conduct reprehensible in the first place.

Similarly, in *Eden Electrical, Ltd. v. Amana Co.*, the court upheld a punitive damages award where out-of-state conduct helped cause plaintiff’s injury.²¹⁸ The court rejected defendant’s argument that it was punished for out-of-state conduct.²¹⁹ The court reasoned that the out-of-state conduct at issue furthered the fraudulent misrepresentation within Iowa which was the subject of plaintiff’s suit.²²⁰

2. *Out-of-State Conduct with Dual Use: Plaintiff’s Cause of Action and Reprehensibility*

Boyd was, essentially, an easy case. A more difficult situation was presented in *White v. Ford Motor Co.*, from which the fact pattern that begins this article is derived.²²¹ The procedural history of *White* temporally straddles *Campbell*: the first trial and initial appeal preceded *Campbell*. The decision of most interest comes after the Ninth Circuit vacated the punitive damages award and remanded for a new trial to determine the value of punitive damages.²²²

In *White*, the plaintiffs’ child died when a Ford truck rolled away and ran over him because the parking brake failed to hold it in place after the truck was taken out of gear.²²³ At trial, plaintiffs introduced considerable evidence of other parking brake failures and roll-away accidents.²²⁴ The evidence was relevant to demonstrate defectiveness and Ford’s notice of the defect in order to bolster plaintiffs’ defect and failure to warn/recall claims.²²⁵ The out-of-state evidence was also used to demonstrate malice as a prerequisite to punitive damages under Nevada law.²²⁶ Plaintiffs’ counsel made an emotional appeal for a considerable punitive damages award based on Ford’s nationwide

218. 370 F.3d 824 (8th Cir. 2004) (involving bad-faith and misrepresentation in a distributorship agreement), *cert. denied*, 2005 U.S. LEXIS 1518 (U.S. Feb. 22, 2005) (No. 04-802).

219. *Id.* at 827.

220. *Id.* at 829.

221. 312 F.3d 998 (9th Cir. 2002).

222. *Id.*

223. *Id.* at 1002-04.

224. *Id.* at 1003-04.

225. *Id.*

226. *Id.* at 1011-12.

conduct, and urged an award impressive enough to alter Ford's conduct nationwide.²²⁷

The Ninth Circuit, in a prescient pre-*Campbell* decision, applied *Gore* and held that it was error to permit the jury to punish Ford for out-of-state conduct.²²⁸ The Ninth Circuit conceded that out-of-state conduct was relevant on the issue of reprehensibility.²²⁹ The court recognized that the distinction between reprehensibility and punishment would often be difficult for juries to put into practice:

In some cases the distinction between using the evidence as it bears on reprehensibility but not as a measure of damages might be so gossamer as to be difficult for a jury to apply, but in others the significance of the distinction will be quite clear. For example, where the jury wants to punish a national manufacturer for something it did nationally, it might well be tempted to multiply the appropriate amount of punitive damages for one plaintiff by the number of hypothetical plaintiffs the jury thinks likely to be harmed. That can't be done, under *BMW*, where the award would thereby include amounts based on out-of-state victims.²³⁰

On remand (post-*Campbell*) the district court faced numerous motions regarding the scope of trial, which was to be held solely to determine the value of punitive damages.²³¹ Defendant moved to prohibit argument asking the jury to punish it for "vehicle sales or accidents occurring outside of Nevada or, more generally, for vehicle sales or accidents affecting individuals who are not parties to this case."²³² On this motion, the court read *Campbell's* deliberateness and culpability exception to permit consideration of such evidence on the issue of reprehensibility.²³³

The defendant also moved, in a separate motion, to exclude testimony of a Pennsylvania woman whose child was injured in a similar roll-away accident.²³⁴ Plaintiffs intended to introduce the Pennsylvania

227. *Id.* at 1015 ("The entire thrust of the argument was that this Nevada jury now should vindicate the interests of all Ford truck owners everywhere with a verdict that would make the front page of every newspaper in the country, so that the chief executive officer and other top officers of Ford Motor Company would '[pour] out of their chairs like water and [crumple] on the floor.'").

228. *Id.* at 1019-20.

229. *Id.* at 1016 n.69.

230. *Id.*

231. *White v. Ford Motor Co.*, No. CV-N-95-0279-DWH, 2003 WL 23353600, at *1-3 (D. Nev. Dec. 30, 2003). Liability for failure to warn and for punitive damages was resolved against Ford in the previous trial.

232. *Id.* at *16.

233. *Id.*

234. *Id.* at *18.

mother's testimony of her child's injuries.²³⁵ Plaintiffs indicated her testimony was "necessary to give the new jury an appreciation of the oppressive and malicious nature of Ford's conduct."²³⁶ The court noted that such evidence was relevant to the issue of reprehensibility, but had concerns about its probative value versus its prejudicial damage.²³⁷ Consequently, the court denied defendant's motion, but indicated it would rule on objections when the testimony was offered.²³⁸

Ford also objected to introduction of evidence of a subsequent National Highway Traffic Safety Administration (NHTSA) recall of the parking brake, as well as Ford's response to other accidents and injuries.²³⁹ The court noted that the NHTSA recall, unlike the facts in *Campbell*, involved precisely the same kind of harm that injured the decedent.²⁴⁰ The court also observed that Ford was planning to use its own actions in other accidents in mitigation of its reprehensibility: Reasoning that the plaintiffs ought to be on a level playing field, and allowed to rebut this evidence, the court admitted the NHSTA recall.²⁴¹

Generally, the court's approach in *White* is sound: Ford's design process, notice of problems, and notice that these problems were resulting in serious injuries and death were all relevant to demonstrate the reprehensibility of Ford's conduct in failing to warn.²⁴² Similar accidents resulting from this failure to warn have a nexus to plaintiffs' harm because notice of these accidents forms the basis of a failure to recall claim. Additionally, similar accidents are, by definition, sufficiently similar to be considered under recidivism. The court permitted evidence of *dissimilar* accidents and Ford's response thereto only in rebuttal, should Ford decide to introduce such evidence.²⁴³

The court erred in two respects. First, it erred in misconstruing Ford's request that plaintiffs not argue that it be punished for other accidents, including out-of-state activity.²⁴⁴ The court construed this

235. *Id.* at *19.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at *20, 22.

240. *Id.* at *21.

241. *Id.* at *21, 22.

242. The jury in *White* found design defect, but that it did not proximately cause the accident. The Ninth Circuit struggled with this apparent inconsistency, but ultimately held that the jury could find that the defect did not proximately cause the accident, even if the failure to warn of a known defect did. *White v. Ford Motor Co.*, 312 F.3d 998, 1006 (9th Cir. 2002).

243. *White*, 2003 WL 23353600, at *22.

244. *Id.* at *16-17.

as a blanket request that all out-of-state conduct be excluded, an impression Ford might have fostered by over-arguing the point. Ford was correct in arguing that *Campbell* clearly states that out-of-state conduct may not be used to punish a defendant.²⁴⁵ Out-of-state evidence admitted to demonstrate deliberateness and culpability must be accompanied by an instruction prohibiting its use for punishment (for whatever good that will serve).²⁴⁶ Since *White* was remanded because out-of-state evidence was used as a basis for punishment, the court was vigilant in ensuring plaintiffs were not permitted to argue that Ford should be punished for its nationwide activities.²⁴⁷

Second, Ford attempted to stipulate to the facts to which the Pennsylvania mother would testify.²⁴⁸ Ford argued that if it did so her testimony would be cumulative and therefore unduly prejudicial and not probative.²⁴⁹ The court dismissed this argument. While it expressed a willingness to rule upon objections at trial, it ought to have been more

245. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003).

246. *Id.* Fortunately the liability for the underlying cause of action was already resolved in the second *White* trial. The court therefore did not have to weigh the relevance of out-of-state conduct to punitive damages in relation to its value to the underlying cause of action. Were liability still at issue, the court would still be required to take measures to ensure that the jury was not unduly prejudiced, but these measures would be limited given plaintiffs' right to put on comprehensive proof going to liability. Such a case would be a good candidate for bifurcation. See *infra* Part V C for a discussion of how bifurcation could be employed in such a case.

247. The court's jury instructions on retrial indicate that it sought to ensure that the jury's verdict comported with *Campbell*. See Transcript of Jury Instructions, *White v. Ford Motor Co.*, No. CV-N-95-0279-DWH, 2004 WL 856525 (D. Nev. Mar. 22, 2004) ("While the amount of punitive damages to be awarded lies within your discretion, the amount awarded must not exceed the amount that you find the plaintiffs have proved, by a preponderance of the evidence, is reasonably required to vindicate Nevada's legitimate interest in punishment and deterrence, if any. In determining the amount of punitive damages, if any, reasonably required to vindicate Nevada's legitimate interest in punishment and deterrence, you may not add damages to protect people or to punish harm to people outside of Nevada. However, you may consider defendant's out-of-state conduct in determining the reprehensibility, deliberateness, or culpability of the defendant in the acts for which it has been found liable in this case, provided that the out-state-conduct is both connected to and similar to the specific harm suffered by the plaintiffs."). Whether or not the jury took these instructions to heart is uncertain. After retrial, the jury returned a verdict for \$52 million in punitive damages. See *Parking Brakes: Nevada Jury Awards \$52 Million in Punitives After Remand*, *ANDREWS AUTO. LITIG. REPORTER*, Apr. 6, 2004 at 2. This was, however, a significant reduction from the \$150 million in punitive damages awarded by the first jury. *White v. Ford Motor Co.*, 312 F.3d 998, 1012 (9th Cir. 2002).

248. *White v. Ford Motor Co.*, No. CV-N-95-0279-DWH, 2003 WL 23353600, at *18 (D. Nev. Dec. 30, 2003).

249. *Id.*

sensitive to *Campbell's* repeated admonitions that a trial court must vigilantly guard against jury passion, bias, and caprice.²⁵⁰ The Court stated in *Campbell*: "Vague instructions, or those that merely inform the jury to avoid passion or prejudice, do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory."²⁵¹ The Court in *Campbell* expressed a repeated concern that a defendant be punished only for the wrong at issue.

Campbell's purpose was to establish a gatekeeping function that courts appear somewhat reluctant to fully embrace. In light of these concerns, the *White* district court's reluctance to exclude what could only have been inflammatory testimony of the Pennsylvania mother was questionable.

Demonstrative of *Campbell's* impact in a discovery dispute, the court in *Saldi v. Paul Revere Life Insurance Co.*, an insurance bad-faith termination case, generally affirmed a magistrate discovery order denying defendant insurance company's motions for protective orders.²⁵² The plaintiff in *Saldi* sought, *inter alia*, broad discovery of defendant's business practices to demonstrate a broad and extensive pattern and plan to terminate benefits under similar policies.²⁵³ The defendant objected to this discovery, relying in part on *Campbell's* prohibitions of dissimilar and out-of-state conduct.²⁵⁴ The court rejected this argument: where it is alleged that defendant's bad faith policy applied to plaintiff to terminate benefits, "the plaintiff is entitled to discover and ultimately present evidence of that policy or practice at trial in order to prove that the insurer intentionally injured the plaintiff and to show the insurer's reprehensibility and recidivism"²⁵⁵ *Saldi* noted that *Campbell* permitted out-of-state conduct to prove deliberateness and culpability.²⁵⁶ The court reasoned that defendant's policies and practices could produce evidence to counter defendant's proffered reasons for denying plaintiff's disability claim.²⁵⁷

The court limited in several respects plaintiff's request for information regarding defendant's involvement in bad-faith litigation to demonstrate reprehensibility and recidivism.²⁵⁸ The court limited dis-

250. See *Campbell*, 538 U.S. at 418.

251. *Id.*

252. 224 F.R.D. 169, 172 (E.D. Pa. 2004).

253. *Id.* at 175-76.

254. *Id.* at 176.

255. *Id.*

256. *Id.*

257. *Id.* at 178.

258. *Id.* at 196.

covery to only such cases involving the same unit in Pennsylvania that terminated plaintiff's benefits, during the same time plaintiff was requesting benefits, and involving the same kind of policy.²⁵⁹

Out-of-state conduct similar to plaintiff's harm was found to have the requisite nexus in *Diesel Machinery, Inc. v. B.R. Lee Industries*.²⁶⁰ In *Diesel Machinery*, a claim for wrongful termination of dealerships, the court rejected defendant's objection to admission of evidence of out-of-state conduct, namely identical termination of dealerships.²⁶¹ The court reasoned that this identical out-of-state conduct "proved that the conduct was not an isolated occurrence, and it demonstrated that it was intentional as opposed to a mere accident. All of these factors are relevant to the reprehensibility analysis."²⁶²

The Ninth Circuit has been reluctant to infer from *Campbell* profound limitations of out-of-state conduct in bad faith actions. In *Hangarter v. Provident Life & Accident Insurance Co.*, the Ninth Circuit affirmed punitive damages of \$5 million on \$2.6 million in compensatory damages in a claim alleging wrongful termination of disability benefits.²⁶³ As in *Saldi*, the plaintiff alleged that her disability benefits were wrongfully terminated under a policy designed to target expensive claims and use biased medical examiners to deny benefits.²⁶⁴ The Ninth Circuit attempted to distinguish the facts in *Hangarter* from *Campbell*, first by asserting that the out-of-state conduct in *Campbell* was lawful, and second, by asserting that the conduct at issue in *Hangarter* bore a sufficient nexus to plaintiff's harm, as it was company-wide, and not "scant," as the Court claimed was the case in *Campbell*.²⁶⁵

The Ninth Circuit probably did not need to distinguish itself from *Campbell* to support its holding affirming punitive damages. In doing so, its careless treatment of *Campbell* provides fodder for misuse. First, *Campbell* did not involve only lawful out-of-state conduct.²⁶⁶ There is no substantial difference between the out-of-state conduct in *Han-*

259. *Id.*

260. 328 F. Supp. 2d 1029 (D.S.D. 2003).

261. *Id.* at 1054.

262. *Id.*

263. 373 F.3d 998 (9th Cir. 2004).

264. *Id.* at 1011.

265. *Id.* at 1015 n.11 ("Moreover, the defendant's out-of-state conduct in *State Farm*, which was legal in the jurisdiction where it occurred, bore little relation to the plaintiff's harm.").

266. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) ("Here, the Campbells do not dispute that *much* of the out-of-state conduct was lawful where it occurred." (emphasis added)).

garter and *Campbell*: both cases involved an alleged company-wide policy that used unethical means to reduce and deny valid claims. The *Hangarter* court preposterously concluded the out-of-state conduct there at issue was uniformly illegal but similar out-of-state conduct in *Campbell* was perfectly legal. Further, the lawful/unlawful distinction upon which the *Hangarter* court relied is facetious. It is difficult to imagine why there should be a distinction between lawful and unlawful conduct: both may be equally relevant to deliberateness and culpability. That the focus of *Campbell* was substantially lawful conduct does not give courts *carte blanche* to admit unlawful conduct any more than it prohibits unlawful conduct with the requisite nexus.

The Ninth Circuit's conclusion that the out-of-state conduct in *Hangarter* bore a sufficient nexus to the plaintiff's harm is wanting. Distinguishing *Hangarter* from *Campbell*'s "scant" evidence, the Ninth Circuit notes "evidence presented in this case indicates that [d]efendants' challenged policies were company-wide."²⁶⁷ The Ninth Circuit clearly did not read *Campbell*. The challenged policies at issue in *Campbell* were also company-wide.²⁶⁸ *Campbell* discussed such company-wide policies and practices in far greater detail than did the Ninth Circuit in *Hangarter*. The "scant" evidence in *Campbell* was "scant evidence of repeated misconduct of the sort that injured them" to demonstrate recidivism.²⁶⁹ It was not "scant" evidence of a company-wide policy. The company-wide policy in *Campbell* was deemed "dissimilar" and "independent" from the acts upon which liability was premised and "bore no relation to the Campbells' harm."²⁷⁰ The Court in *Campbell* reached this conclusion of dissimilarity and independence despite the clear causal relationship between the company-wide policies and plaintiffs' harm.

To be fair, *Campbell* offers little guidance as to the requisite nexus of out-of-state conduct to demonstrate deliberateness and culpability. It does the law a disservice, however, to pretend the Court in *Campbell* did not find ample evidence of company-wide misconduct lacking, and to further pretend the Court did not prohibit punishment for such con-

267. *Hangarter*, 373 F.3d at 1015 n.11.

268. *Campbell*, 538 U.S. at 432-33.

269. *Id.* at 423.

270. *Id.* at 422.

duct that it held to be dissimilar and unrelated.²⁷¹ A more honest analysis of *Campbell* is required to do justice to its guiding principles.²⁷²

V. SOME CONCLUSIONS REGARDING THE PERMISSIBLE SCOPE OF OUT-OF-STATE CONDUCT

The *Saldi* court's argument, in permitting discovery relating to a corporate policy and practice resulting in bad-faith termination of benefits, has intuitive appeal. Following *TXO*'s reasoning, a plaintiff ought to be permitted to introduce evidence to rebut a defendant's "honest mistake" defense. Additionally, a plaintiff should be able to argue that it was not an honest mistake by proving that the defendant, through its policy, frequently engages in such conduct. Such evidence would be admissible under Federal Rule of Evidence 404(b) as prior acts relevant to intent.²⁷³ Similarly, where notice is relevant to plaintiff's claim, as in *White* where plaintiff alleged failure to warn of a known defect, the floodgates for out-of-state evidence are opened. Intent and notice are avenues to introduce out-of-state evidence not only through plaintiff's case in chief but also through *Campbell*'s deliberateness and culpability exception. So applied, however, the exception threatens to devour the rule.

A. *Campbell's Uncertain Scope Regarding Out-of-State Conduct: The Requisite Nexus and Problems with Dual Use Evidence*

Campbell, despite its repeated criticism that the trial court was a venue "to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country," offers little factual mortar to defense attorneys to plug the dam.²⁷⁴ The Court did not expressly state what evidence was or was not permissible to demonstrate deliberateness and culpability. *Campbell*'s oblique exception for conduct that has a "nexus to the specific harm" has no well defined borders: must the conduct have a causal nexus?²⁷⁵

271. *Id.* at 422-23 ("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 conduct that harmed the plaintiff, not for being an unsavory individual or business.").

272. This is not to say that *Hangarter* cannot be reconciled with *Campbell*. My criticism is that in misrepresenting *Campbell* the Ninth Circuit creates authority for the incorrect assertion that a company-wide policy which injures a plaintiff may come in and be used to punish a defendant without limitation, on the false basis that *Campbell* did not involve a "company-wide" policy and is therefore non-controlling.

273. FED. R. EVID. 404(b).

274. *Campbell*, 538 U.S. at 409.

275. *Id.* at 409-10.

The greatest analysis is found in the Court's discussion of recidivism, where the pre-requisite for admissibility is that the other conduct "replicate the conduct at issue."²⁷⁶ However, this analysis raises more questions than it answers. Rather than describe sufficiently similar conduct, the Court merely discusses various dissimilarities, namely: the lack of similarity between prior wrongdoings and the conduct at issue (scant evidence of third party lawsuits); evidence of State Farm's investigation into employees' personal lives and evidence of State Farm's corruptive practices, which the Court criticized as tangential; and the harmful effects on the market resulting from State Farm's unfair competitive advantage gained through under-paying claims, which the Court dismissed as irrelevant.²⁷⁷ With respect to the so-called "Performance, Planning and Review" policy, which plaintiffs argued embodied a company-wide scheme to "meet corporate fiscal goals by capping payouts on claims company-wide," the Court does not expressly hold whether such evidence is admissible under its deliberateness and culpability exception.²⁷⁸ Stating what is *not* similar does not quite establish what is sufficiently similar.

By only admitting prior litigation involving termination of benefits under similar policies, the *Saldi* court improved upon the trial court in *Campbell*, where there was no such limitation to bad-faith failure to settle third-party lawsuits. Such a limitation is ultimately arbitrary, however.

A broader corporate policy which results in injury through denial of benefits logically has a "nexus" to plaintiff's harm and may be admissible under a fair reading of the Court's holding.²⁷⁹ *Saldi* does a commendable job resolving *Campbell*'s imprecision. It fashioned a rule that balances *Campbell*'s concerns regarding federalism and duplication of punishment with plaintiff's right to obtain evidence to support its case in chief as well as to demonstrate deliberateness, culpability, and recidivism. While such evidence may be admissible, *Campbell* strongly implies that courts serve a gatekeeping function by taking a narrow view of duplicative evidence of other acts that tends to invite punishment for all a defendant's misdeeds.

276. *Id.* at 423.

277. *Id.* at 423-24.

278. *Id.* at 415.

279. *See id.* at 436-38 (Ginsburg, J., dissenting).

B. *Punishment Prohibited: A Jury May Not Send a National Message, or Base its Punitive Damages Verdict on Out-of-State Evidence*

What is clearly prohibited by *Campbell* is that a plaintiff cannot seek punishment of a defendant for out-of-state conduct directly through multipliers or some other benchmark for calculating damages.²⁸⁰ Nor may a plaintiff use magic words requesting punishment for nationwide conduct or to change the way a defendant acts in other jurisdictions.

This does not mean that creative lawyering cannot achieve the same results. Jury instructions provide some assistance, but a defense attorney walks on eggshells when damaging evidence of out-of-state conduct is admitted because requesting an instruction at the time of its admission risks drawing undue attention to the evidence as well as confusing the jury. Moreover, even if plaintiffs' attorneys cannot use the magic words of "punishment" or "message sending" with respect to nationwide conduct, they may still present copious amounts of out-of-state conduct under the reprehensibility prong, as well as to establish liability. Defense attorneys must be vigilant to prevent this from becoming a parade of out-of-state conduct designed to invite the jury to punish. Weeping mothers from other states should not be allowed to testify about their children's deaths, as the court in *White* was prepared to admit.

C. *How Defense and Plaintiffs' Attorneys Can Use Campbell: Opening and Closing the Floodgates of Out-of-State Conduct*

As an evidentiary holding, defense attorneys can argue *Campbell* limits evidence on the issues of deliberateness and culpability to causal conduct or harm similar to that which injured the plaintiff (where such evidence is relevant to notice or intent). This limitation is supported by examination of State Farm's conduct in *Campbell* which the Court noted supported punitive damages. All of the conduct cited by the Court as demonstrating State Farm's reprehensibility bore a close causal relationship to plaintiff's harm.²⁸¹ This limitation is also justi-

280. See *Sand Hill Energy Inc. v. Smith*, 142 S.W.3d 153, 164-65 (Ky. 2004); *Lockyer v. R.J. Reynolds Tobacco Co.*, 11 Cal. Rptr. 3d 317, 347-48 (2004).

281. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003). See discussion of State Farm's conduct *supra* Part III B-C. In holding that State Farm's conduct merited some measure of punitive damages, the Court cited only conduct which proximately affected the plaintiffs: State Farm altered company records to make plaintiff less culpable (falsely bolstering a claim that it could defend the lawsuit and need not settle); disregarded the high likelihood of liability and near-certain probability of a judgment in excess of policy limits; and falsely assured the plaintiffs

fied, as in *Saldi*, by balancing *Campbell's* policy interests discussed above.

With respect to conduct offered to demonstrate deliberateness, culpability, as well as recidivism, a Rule 403 exclusion may be appropriate.²⁸² Cumulative, though relevant, out-of-state conduct may be excludable because of the risk that such conduct will be used to punish the defendant. In *White*, for example, the jury could have been educated that Ford knew about the emergency brake failures and their consequences, without hearing an out-of-state mother's emotional testimony describing her child's injuries.²⁸³

Plaintiffs' attorneys appear constrained by causal and similarity requirements with respect to the deliberateness and culpability exception. In a bad-faith case, plaintiffs should argue that broad categories of harm were permitted in *TXO* to support plaintiff's cause of action and rebut a good-faith defense.²⁸⁴ A distinction between conduct relevant to a plaintiff's underlying claim and conduct permissible for punitive damages on that claim is difficult to fairly adjudicate. This argument offers a court some flexibility with regard to *Campbell's* vague holding and the means to permit virtually unlimited acts tending to show lack of mistake. Excluding dissimilar out-of-state conduct on the issue of deliberateness and culpability forces a court to hold that the Supreme Court implicitly overruled *TXO* to the extent *TXO* permitted an enhancement of reprehensibility based on dissimilar out-of-state conduct. Plaintiffs' attorneys are undermined by *Campbell's* clear implications: a great deal of related out-of-state evidence was rejected because the Court concluded it was dissimilar and bore no relation to the plaintiffs' harm.

Plaintiffs' attorneys find stronger ground on the issue of whether out-of-state conduct may be used to demonstrate recidivism. Nowhere in *Campbell* does the Court state that out-of-state conduct is not relevant to recidivism. Defense attorneys must craft an argument that may prove too policy-based to satisfy trial and appellate courts, in the absence of specific language from the Supreme Court. Indeed, distinguishing recidivist evidence from deliberateness and culpability may seem like getting angels to dance on pinheads. Here *TXO* offers some inertia against defense attorneys' argument: To exclude out-of-state evidence on the issue of recidivism, a court must hold that *TXO*, which

their assets were safe, only to later tell them post-judgment that they should put a "for sale" sign on their house. *Id.*

282. FED. R. EVID. 403.

283. *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002).

284. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 (1993).

permitted out-of-state evidence on the issue of punitive damages generally, is no longer good law, or at least not controlling.

Because of the dual use of bad-faith and notice evidence with respect to a plaintiff's cause of action and claim for punitive damages, defense attorneys are strongly urged to request bifurcation. The argument for limiting out-of-state evidence in a punitive damages phase is much stronger than when a plaintiff is also attempting to prove the underlying cause of action. This permits defense attorneys to limit *TXO*'s holding with respect to punitive damages, as *TXO* was a pre-*Campbell* decision that focused on a traditional evidentiary argument without any examination of the federalist implications.

Because much of the proof of liability and punitive damages overlap, it may be advisable to impanel two juries with one solely to determine punitive damages. The punitive damages jury could then be excused during presentation of prejudicial out-of-state evidence, saving the expense of fully bifurcating a trial. This would be conducted in much the same fashion as a multi-defendant criminal trial where separate juries are empanelled for each defendant. The jury for defendant A is excused when evidence is introduced against defendant B, but is irrelevant to defendant A and would only serve to prejudice defendant A.

D. *Conclusion: The Role of Out-of-State Conduct After Campbell*

The Court's analysis in *Campbell* is laden with concerns of constitutional magnitude. Rather than a trite effort at tort reform, *Campbell* is predicated on such constitutional concerns of federalism, notice, and fundamental fairness. With respect to the magnitude of punitive damages, it concluded that the wild days of \$100 million punitive damages upon million dollar compensatory awards were over. The Court was particularly concerned that civil cases, principally designed to settle private disputes, should not serve as a rough substitute for the proper vehicle for the state to vindicate its punitive interest. A defendant in a civil action is simply not afforded the protections of a criminal proceeding.²⁸⁵

Campbell is clear that punitive damages may not serve to punish a defendant for out-of-state conduct. Federalism thus trumps the public's interest in deterrence. The Court does not address any concern that this rule may result in under-deterrence. The Court does not come close to engaging in any law and economics analysis. To the Court, federalism and the risk of duplicative punishment rule the day.

285. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

Lower courts should take heed of *Campbell*'s constitutional implications. These implications have practical effect: an examination of State Farm's out-of-state conduct that the Court rejected as irrelevant is breathtaking in its scope. A pervasive company-wide plan which resulted in the deliberate bad-faith mishandling of plaintiffs' case was deemed irrelevant to the issue of punitive damages. In this sense, *Campbell* may be interpreted as a reaction to what the Court perceives as an epidemic of anti-corporate campaigns in the form of punitive damages actions. It presents a new battlefield for litigants to contest the scope of actions against large defendants. A court must consider *Campbell* carefully to ensure that cases do not turn into broad indictments of a defendant's misdeeds, while at the same time ensuring that a plaintiff may present his case in chief and demonstrate the reprehensibility of the defendant's acts.