Punitive Damages, Descriptive Statistics, and the Economy of Civil Litigation

Stephen C. Yeazell
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INTRODUCTION

One of David Shapiro's more remarkable virtues as a scholar is his versatility. He moves easily from dialogues concerning federal jurisdiction to theories of statutory interpretation to pioneering pieces of empirical scholarship designed to find out just how discovery really works in the world of practice, and how big a burden prisoner petitions really were for federal judges. This third vein in David's scholarship is my inspiration for this foray into the Supreme Court's struggles with the apparatus it has created for judging punitive damages. David Shapiro's empirical work reflects a determination to uncover the facts lying behind deeply embedded demonologies of litigation. That task is worth performing on a regular basis—the world has enough real demons without our inventing extra ones. The Supreme Court has struck a blow at one of civil litigation's favorite demons—excessive punitive damages. My task is to explain what might really be happening with punitive damages and to assess how the Court's actions might affect the conduct of civil litigation in unexpected ways.

* David G. Price & Dallas P. Price Professor of Law, UCLA School of Law. I am particularly pleased at having this opportunity to thank David for his years of encouragement, despite which I have never taught Federal Courts—to his distress but doubtless to the benefit of generations of law students. In making this exploration, I have learned much from Theodore Eisenberg, from Allen M. Katz, and from Joseph Doherty (of UCLA School of Law's Empirical Research Group), none of whom shares responsibility for what I have misunderstood.


2 The demonologies in question were the assertedly widespread abuse of discovery and the burden on federal courts in disposing of massive numbers of unfounded prisoner petitions.
I. PUNITIVE DAMAGES IN THE SUPREME COURT

Before last Term's case, State Farm Mutual Automobile Insurance Co. v. Campbell, the Court had been wrestling with this issue for fifteen years. During that period the Court decided seven punitive damages cases, most exhibiting irritated uncertainty about how to deal with what the majority perceived as a problem of constitutional dimensions. Unfortunately, the Court's perception that there was a problem has often proved more robust than its sense of what the problem was or how to solve it. I want to suggest, respectfully and tentatively, that part of the difficulty of the problem may have flowed from the place of punitives in the folklore—the demonology, if you will—of civil litigation.

A. Struggling for an Approach

The Court's first step, in Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., involved a commercial dispute in which the defendant's managers were told to put the competitor-plaintiff out of business—"Do whatever it takes. Squish him like a bug" instructions they appear to have accepted enthusiastically. The jury considering the state law tortious interference with contractual relations claim ancillary to federal antitrust claims awarded $51,000 in compensatory and $6 million in punitive damages. The defendant appealed, arguing that the punitives violated the Eighth Amendment's prohibition on cruel and unusual punishments and excessive fines. The opinion upheld the award, saying that the Eighth Amendment had no bearing on a civil action not brought by the state, but hinted that there might be circumstances under which an excessive punitives verdict would violate the Due Process Clause.

The defense bar wasn't long in accepting this invitation. In 1991 and 1993 the Court decided two cases under the Due Process Clause in which it upheld large punitive verdicts while continuing to insist that there might be some amount awarded under some circumstances that would finally shock its conscience (a phrase the Court did not

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5 Id. at 260.
6 Id. at 262.
7 Id. at 276–77.
use, but which nicely evokes the uncertain steps the Court took in this phase of its search for an approach to punitives). Its central difficulty was that, having insisted that the Eighth Amendment did not apply, but that due process did, the court was sailing in uncharted waters. The problem flowed from the fact that it was the amount of damages that was primarily objectionable, not the process by which the jury arrived at that amount. That meant that if the Due Process Clause applied, it was the part of the Court's due process jurisprudence not in fashion—the substantive due process cases in which the Court had notoriously said in the early part of the twentieth century, to paraphrase: "The state simply can't do this."

Unprepared to venture on those seas, the modern Court spent the first half of the decade looking for a way in which to rein in what it thought might be excessive awards. Toward the middle of the nineties it found what appeared to be, in concept, a workable approach. First, in a genuinely procedural ruling, it held that appellate review of punitive damage awards was required. It has since refined this requirement to require that the appellate review in question be de novo. More ambitiously, in BMW of North America, Inc. v. Gore, it held that in awarding and reviewing punitive damages the courts must consider three substantive factors: the reprehensibility of defendant's conduct, the disparity between the punitive damage award and the actual or potential harm suffered by plaintiff, and the relation of the punitive award to any civil penalties authorized for its conduct. Moreover, in contrast to the earlier cases in which it agonized about but did not reverse awards, the Court in Honda, Gore, and Cooper In-

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9 The phrase comes from another line of due process cases, those regulating police conduct. Refusing to incorporate the entire Bill of Rights in the Fourteenth Amendment, Justice Frankfurter preferred to examine each case individually: "Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience." Rochin v. California, 342 U.S. 165, 172 (1952).


14 Id. at 575–85.
dustries demonstrated that it is willing to reverse cases in which either the procedure was deficient or the amount of the award excessive.

By 1996 the Court had established a framework that, though not elegant, was coherent, and encompassed both process and substance. Due process required courts to deploy a serious appellate scrutiny of punitive damage awards. Substantively, due process required trial and appellate courts to look seriously at the relation of the punitives award to several other relevant factors. An arguable defect in the scheme is that, by making every punitives judgment a constitutional case, it placed a significant burden on the courts that do such review, particularly on the Supreme Court itself, since in the run-of-the-mill state case, the U.S. Supreme Court will be the only possible federal forum for such review. Having put itself in that situation, the Supreme Court may have felt some pressure either to review a significant number of state punitive damages cases or to establish more specific guidelines in order more effectively to delegate that task. In Campbell it took the latter course.

B. Rationing Punitives with Ratios

Like all but one of the punitive damage cases in which the Supreme Court has granted review, Campbell involved a commercial wrong rather than a personal injury. A bad faith claim against an insurer, it scrutinized the behavior of an insurer whose behavior looked bizarrely short-sighted. Having issued an auto liability policy to the Campbells, who were then involved in a serious accident that had cost a life, the insurer insisted on mounting a no-liability defense where the facts looked quite bad for its insured—who had decided to pass six vans in a row on a two-lane road. The damage verdict was almost certain to exceed policy limits if liability was found. Lawyers representing those injured or killed in the accident offered to settle for the policy limits of $50,000 (for multi-claimant accidents), and, seeking to persuade State Farm to accept this offer, pointed out that a refusal to do so might subject State Farm to bad faith liability. State Farm's response was to ask its investigator to change his report, to reassign the investigator, and to assign the case to outside counsel. That situation put State Farm, the lawyer it had retained for the Campbells, and the Campbells in a complex though common conflict

15 Honda is the exception, involving an alleged product defect that had caused "severe and permanent injuries." Honda, 512 U.S. at 418.
of interest: the lawyer representing them was now risking their personal assets as well as the insurance coverage. That situation, sometimes by requirement of state law, sometimes because of counsel’s prudence, calls for the lawyer or carrier to alert the represented insured to a possible conflict of interests and recommend that they consider retaining additional counsel to advise them.\(^{18}\)

Instead, the Campbells’ lawyer reassured them that they risked no liability and that “their assets were safe.”\(^{19}\) He proved to be wrong: the jury returned a verdict of $185,849 against the Campbells, an amount $135,000 more than their policy limits.\(^{20}\) State Farm refused to cover the excess amount and helpfully advised the Campbells, “You may want to put for sale signs on your property to get things moving.”\(^{21}\) State Farm also declined to post a supersedeas bond in excess of its policy limits. Apparently jolted into awareness of their predicament, the Campbells retained new counsel who both prosecuted an appeal and negotiated an arrangement that relieved the Campbells of personal liability and left State Farm believing that it, not the Campbells, had been the victim of bad faith.\(^{22}\) In this agreement the plaintiffs in the original case agreed not to seek to satisfy the excess judgment against the Campbells. In return, the Campbells agreed to pursue a bad faith claim against State Farm, in which they would be represented by the lawyers prosecuting the original plaintiffs’ claims. Moreover, the Campbells agreed to allow the original plaintiffs to have a say in major litigation decisions in that suit and to remit to those plaintiffs 90% of any eventual proceeds of the claim.\(^{23}\)

The Campbells’ last set of lawyers were more successful than their first. They presented evidence not only of the carrier’s alteration of documents in this case, but of what they alleged was a pervasive practice of settlement practices and systems of pressuring State Farm employees to disregard what plaintiffs contended were the carrier’s fiduciary responsibilities to their insureds.\(^{24}\) Although State Farm had by then thought better of its refusal to pay the original award, the jury

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18 See, e.g., CAL. CIV. CODE § 2860 (West 1993) (requiring insurer to notify insured of conflict and to pay the fees of such an independent counsel if not waived).

19 Campbell, 65 P.3d at 1142. Neither the Utah Supreme Court’s opinion, nor that of the U.S. Supreme Court indicates whether the lawyer was conveying his own views (which might bind the carrier on a theory of apparent agency), or had been instructed so to inform the Campbells. The Campbells do not appear to have sued the lawyer for malpractice.

20 See Campbell, 538 U.S. at 413.

21 Id.

22 See id.

23 Id. at 413–14.

24 See Campbell, 65 P.3d at 1143.
awarded $2.6 million in compensatory damages to the two Campbells and $145 million in punitives. The trial court reduced the compensatory damages to $1 million (a remittitur the Campbells accepted) and the punitives to $25 million. The Utah Supreme Court reversed, reinstating the $145 million award of punitives; it did so in the face of Utah authority that presumptively limited punitive awards to three times compensatory damages. At this point the case that plaintiffs had offered to settle for $50,000 had become, exclusive of legal fees, a $146 million liability.

State Farm sought certiorai and the U.S. Supreme Court reversed, holding that the amount of punitives was vastly in excess of constitutional limits. Along the way, the Court changed the landscape of punitive damages in two ways. Reaffirming Gore, Campbell gives it both more specific texture and supplies some evidentiary guidelines to trial judges. First, it limits the evidence adduced to justify punitive damages to the kinds of behavior (inflicted within the state imposing punitives) that harmed the plaintiffs. In so doing, it had harsh words for the Utah courts (and by implication the plaintiffs’ lawyers) who had produced, at some expense, “extensive expert testimony regarding fraudulent practices by State Farm in its nation-wide operations.”

Second, the Court decided to give Gore more specificity by finding in its prior cases the lesson that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” The opinion went on immediately to suggest that the appropriate ratio might be even lower: “In Haslip, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.” That proposition appeared to have special force where there had already been a “substantial” award of compensatory damages.

The opinion is in some ways surprising and, if seen only through the eyes of doctrine, relatively unsupported. Though the Court asserted that its prior cases had taught the lesson about arithmetic ratios between compensatory and punitive damages, many readers of those cases might find it difficult to discover that lesson. Browning-Ferris had upheld a punitives verdict 106 times the compensatory damages.

25 Id.
27 Campbell, 65 P.3d at 1143.
28 Campbell, 538 U.S. at 425.
29 Id.
TXO had upheld punitives 526 times the compensatory damages.\textsuperscript{31} Haslip had affirmed punitives four times the compensatory damages and 200 times the plaintiff's out-of-pocket expenses.\textsuperscript{32} There is surely something to be said for upper limits and rules of thumb. Maximum sentences have long been part of criminal law. But the Court made no effort to reconcile this rule of thumb with the basic justification for punitive damages. Nine (or four) are nice round multipliers, but it is difficult to say why they are the right ones.

Even more difficult is the relation between the "substantiality" of compensatory damages and the ratio of punitives. Campbell suggests, without squarely so holding, that punitives should, all things being equal, be less when compensatory damages are nontrivial. Why? One might argue the opposite: that the existence of substantial punitive damages demonstrates the seriousness of the harm for which, other things being equal, the defendant should be punished more, not less, seriously if punitives are warranted. I do not think that this argument is clearly stronger than that put forth by the Court, but I do not think it is any weaker, either. Moreover, if ratios have constitutional mooring, they might be easier to find in the Eighth Amendment cases than in due process precedents. In some respects the Court in Campbell did what legislatures do when they set maximum sentences for particular crimes. Campbell establishes not an absolute maximum but a presumptive ratio between harm as measured by compensatory damages and punitive sanctions. Something is missing.

One can see in Campbell a commentary on the economics of personal injury litigation, and perhaps also some impatience with state courts that have not taken the Court's punitive damages cases sufficiently to heart. That commentary is in many respects incomplete and it may in part rest on myth and demonology rather than what we know with some empirical certainty. But it is also connected to the real world in ways that the opinion does not make clear. The next Part describes what we know about that world, before turning back to the implications of Campbell.

II. PUNITIVE DAMAGES IN THE REAL WORLD

Punitive damage awards do not come very often, and mostly they are not very high, either in absolute amounts or in relation to the compensatory damage awards. They play two roles, one involving out-of-court, pre-litigation behavior, the other involving the decision to bring litigation and the parties' ensuing litigation conduct. To use

the facts of *Honda* as an example: the prospect of punitive damages may affect the manufacturer's decision about product design, warning labels, and marketing—all pre-suit conduct. The availability of punitives may also affect the behavior of Honda and the plaintiff's lawyer in litigation. There is a rich and often thoughtful literature concerning the role that punitives play in deterring and shaping conduct;\(^3\) I do not intend to address that literature. I shall rather concentrate on the way in which the availability of and limits on punitive damages affect litigation conduct—the propensity to sue, defend, and settle, and some aspects of litigation strategy.

*Campbell* itself combines these two aspects in a potentially confusing way: because it is an insurance bad faith claim, the primary conduct complained of was itself the conduct of litigation—the original litigation arising from the auto accident claims against Campbell. The availability of punitive damages for bad faith claims have some effect on insurance carriers' settlement behavior; those effects are not the focus of this exploration. When the settlement of that suit turned into a bad faith claim against the Campbells' insurer, the second aspect of the case surfaced; it is on that aspect of the case I want to focus, after standing back from the case's particulars to see how punitives function in the economy of civil litigation.

**A. Punitive Damages and Litigation Behavior**

The starting point is a model of litigation in which, in most cases involving punitive damages, both the plaintiff and the defendant will treat the case as part of a litigation portfolio, with the plaintiff seeking to maximize gain and the defendant seeking to minimize loss. Without defending that model in any detail,\(^4\) one can sketch its outlines quickly and intuitively. Most defendants sued for substantial punitive


damages will be large institutions. Those institutions and their insurers will treat punitives as a regrettable cost of doing business, and will seek to minimize their occurrence and impact through the management of litigation. On the plaintiffs' side the picture is more complex. First, some punitive damage awards are sought and gained by business entities; those entities will behave like their defendant counterparts, seeking to maximize gain, managing this piece of litigation as part of an overall business strategy. Another group of plaintiffs will look like the Campbells, individuals for whom the conduct of any litigation, much less punitive damage litigation, is a once-in-a-lifetime event. But in the overwhelming majority of the latter cases, such litigation will be handled by lawyers operating on a contingent fee basis. Those lawyers will typically be part of smallish firms, which select cases and clients, advance litigation costs, and provide legal representation in return for a share of the eventual recovery. Although the final decision to sue, settle, or try rests in clients' hands, those inexperienced clients are likely to seek and follow the advice of their lawyers in making such decisions. Many of the key aspects of litigation thus will depend on the perceptions of the lawyers, who are handling not only the individual case but a portfolio of claims, ranging from small and low-risk to large and high-risk. Successful defendants and successful plaintiffs' lawyers manage those litigation portfolios, with an eye not only to the individual case but to the relationship of that case to others.

Punitive damages cases occupy symmetrically opposite positions in the litigation portfolios of plaintiffs and defendants. Punitive damages are the venture capital investments of the plaintiffs' bar. They are rapidly falling high-risk stock picks for defendants and their insurers. In both situations they represent a relatively rare form of liability with high up- and down-sides for the parties to the lawsuit. Because the size of the potential gain or loss is unknown, such claims require the litigants to make or cover big bets, with all the expectable reactions seen in high-stakes investments.

35 Tom Baker has recently given us added anthropological evidence to support this intuition. See Tom Baker, Blood Money, New Money, and the Moral Economy of Tort Law in Action, 35 LAW & Soc'y REV. 275, 275-78 (2001) (noting the conditions under which "blood money"—payments that hurt defendants as opposed to insurers—is sought).

36 Although punitive damages are not insurable, they will often be blended with claims for compensatory damages—even more often after Campbell—that are insured, so the defense will often be conducted in whole or part by an insurer.

37 Again, the defendants may also seek to minimize the long-term cost of punitives by changes in the fundamental conduct of business, but that decision is not the focus of this exploration.

38 See infra note 59 and accompanying text.
The point is most obvious for the plaintiffs' bar. Most such work is handled on a contingency basis, with the lawyer bearing the risk of an unsuccessful claim in return for a share of the recovery in successful claims. A well capitalized and diversified plaintiffs' lawyer will want a range of cases in her litigation portfolio, with some relatively certain, if low returns, and others requiring more risk but carrying higher potential returns. In some law offices workers' compensation claims might typify the first set of cases, and personal injury claims the second. Such a litigation portfolio will enable the lawyer to pay the electric bill while investing sufficient time and money in all cases to yield, on average, good service to clients and a satisfactory income for her. But portfolio managers typically invest a small portion of their assets in much riskier ventures, which carry a much higher potential for return: venture capital is the typical designation. For a plaintiffs' lawyer "venture capital" cases are those with a small possibility of an unusually high return on invested time and money. Punitive damages cases will typically fall into such a category. They often require large investments—in investigation and discovery, in experts, and in trial itself, since the largest awards of punitives usually come after a trial. But trials are notoriously uncertain, and, as we shall see, many punitive damages awards are quite low. So, for the plaintiff's lawyer such a case is risky, and she should take it only if she can cover that risk with other, lower-return, less-risky cases.

Consider the operation of these propositions in Campbell. The lawyers who litigated the bad faith claims initially held much more ordinary litigation portfolios. They had agreed to represent the two parties alleging injury and death from Campbell's negligent driving. These claims were standard litigation investments—maybe a bit riskier than some, because the $50,000 limit on all claims from a single accident meant that the recovery wouldn't be large. When the insurer said it would contest liability, these claims became substantially riskier, because the plaintiffs' lawyers now knew they might not recover anything at all and would have to invest substantially more to take the case to trial. In the final stage of the litigation—after their clients had agreed not to execute on the Campbells' personal assets in return for


41 So will some cases where punitives are not in prospect but there is substantial doubt about liability and high compensatory damages if liability exists.

assignment of the Campbells’ bad faith claims against their insurer—their clients’ claims took on a third coloration. Now those claims had a significantly higher upside—the original tort plaintiffs stood to collect their entire personal injury judgment and there was a prospect of punitives in addition. But to collect either they would have to invest even more—to show that State Farm’s actions were other than an act of inadvertence or poor judgment—and that would involve discovery into State Farm’s operations, expert testimony about insurers’ practices, and the like. Moreover, because State Farm paid the excess judgment after the punitive damages claim was filed, it now asserted that there were no compensatory damages for bad faith, so the entire claim might evaporate. This had become the sort of case a firm can’t afford very many of. And all that was before the Supreme Court rendered its judgment.

For the insurer, bad faith claims for punitive damages represent a different sort of litigation portfolio management problem—holding an investment in a rapidly falling market. Both insurers and self-insurers hold litigation portfolios too. But they are in the position of hedge-fund operators, trying to minimize losses while other parts of the portfolio—the business operations—produce gains. The task is to know which securities not to buy at all (immediate settlement being the analogue of a no-buy decision), which to invest in (by commencing a defense), and which to sell (by settling on the courthouse steps or at trial) if the market unexpectedly falls. For State Farm, Campbell initially represented a liability claim at the high end of the ordinary—an insured allegedly causing serious injury and harm to two claimants, but with exposure capped by the policy limits, here $50,000. Generically speaking, the carrier wants to pay out as little as possible on the portfolio of such claims, some by settling early, some by successfully defending liability. But much turns on evaluating the merits of the

43 See id. at 414.
44 We should not allow our focus on the principal antagonists in Campbell to obscure what may have been the most imaginative and effective representation in the case—that of the Campbells’ second lawyer, whom they retained after the insurer had told them to sell the house and to put up their own funds for the appeal bond. That lawyer was representing in the first instance not a plaintiff but a defendant who had suffered an adverse judgment for an amount larger than his insurance coverage. The case’s potential depended on being able to turn the excess judgment into a claim for the insurer’s bad faith, with the excess judgment itself becoming evidence of the harm done to the client. The record does not reveal whether this second lawyer approached the plaintiffs’ representatives with the claim-assignment/release proposal, or whether it came from the plaintiffs. In either case, this risk-shifting agreement solved the Campbells’ problems while allowing those who had the greatest capability and incentive to pursue the bad faith litigation to do so.
cases, and in making regular reassessments as the cases develop. And
for insurers, there is both an added twist and a moral temptation. In
the case of a security one has bought, a collapse of the market leaves
its holder with the loss of that amount. In the case of an insurer, the
loss can be for more than the value of the policy. That creates a tem-
\textit{}\textit{\textsuperscript{45}}\textit{p}\textit{\textsuperscript{t}}\textit{\textsuperscript{a}tion for the insurer to gamble with the insured's interests as well as
its own: because the typical policy places the decision to settle in the
insurer's hands, the carrier is in a position to exact a forced loan from
the insured—a loan in an amount that will be unknown until the judg-
ment. To create incentives not to succumb to this temptation, most
states have created a cause of action for bad faith failure to
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states have created a cause of action for bad faith failure to settle.}\textit{\textsuperscript{45}}
Those claims typically carry punitive damages. To continue the invest-
ment metaphor, for the insurance carrier operating in a bad faith ju-
risdiction, the wrongfully unsettled case is like a nineteenth century
stock in which the holder could lose not only its original value but also
suffer a call to contribute additional capital.

Turning from the generic characteristics of bad faith/punitive
damage cases to \textit{Campbell} itself, it looks like the nightmare of every
investment manager. A low level analyst—the claims investigator—
made what turned out to be an accurate assessment—the stock/claim
should be sold/settled immediately.\textit{\textsuperscript{46}} But those to whom he reported
overruled him, presumably hoping to maximize the carrier's profit-
ability by snatching victory from impending defeat. Even worse, these
managers tried to hedge against the possibility they were wrong by
ordering the investigator to alter his initial report, thereby shifting any
resulting losses to the insured—by removing from the record evi-
dence that some thought the claim should be settled.\textit{\textsuperscript{47}} In the normal
course of events such efforts at concealment tend to come to light.
When this one did it enabled the plaintiffs (the Campbells) to con-
tend not just that they should not have to bear this loss but that the
insurer should be punished for trying to shift it to them.

Punitive damages change the stakes of civil litigation, not just by
making them higher, but by making them higher by an uncertain
amount. This was true in a big way before \textit{Campbell}, and it will con-
tinue to be true after \textit{Campbell} to a lesser extent. Risk affects litigation
behavior. Increasing risk and, for the plaintiff, linking it to the possi-
bility of a much higher than usual return on litigation should affect

\textsuperscript{45} For the most complete analysis of the situation, see Kent D. Syverud, \textit{The Duty
\textsuperscript{46} \textit{See Campbell}, 538 U.S. at 413.
\textsuperscript{47} \textit{See Campbell v. State Farm Mut. Auto. Ins. Co.}, 65 P.3d 1134, 1141–42 (Utah
2001).
litigant behavior. It will cause both plaintiffs and defendants to want to carry only a few cases with the possibility of punitive damages in their litigation portfolios. For the plaintiffs, such cases represent the small chance of a very high return; for the defendants, such cases carry the small risk of a very great loss.

*Campbell* should change the risk calculation in some respects. It will lower the ceiling of expectable return for plaintiffs and control the size of the risk for defendants. But before assessing the magnitude of this change, we need to understand the respects in which *Campbell* was an unusual case, as well as the respects in which it was a usual one. These characteristics affect its expectable impact on future litigation.

**B. The Incidence of Punitives**

We know quite a bit about punitive damages litigation. The best study of punitive damages was published in 1997, the year after *Gore* was decided. Theodore Eisenberg and collaborators at the National Center for State Courts and in the statistics department of Cornell University drew on a sample of civil litigation in the nation’s forty-five most populous counties, supplementing it with more specific studies of Cook County, Illinois, and California. Their findings deserve wide recognition, and they shed light on what *Campbell* does and does not do. In particular, though the opinion does not cite this study, the study provides both the best description and perhaps the best justification for what the Court did in *Campbell*.

The principal finding is that jury awards of punitive damages are rare. Such an award was made in about 3% of all jury trials and about 6% of the trials in which plaintiffs prevailed and recovered some dam-


49 The forty-five county sample was drawn from a National Center for State Courts project, collecting data on the seventy-five counties in which about a third of the national population is concentrated.

50 The source, date, and size of the samples is described in Eisenberg et al., *supra* note 48, at 630 n.22.

51 One form of recognition has been the contestation of some aspects of the findings. See, e.g., Cass R. Sunstein et al., *PUNITIVE DAMAGES: HOW JURIES DECIDE* 245–48, 251–52 (2002). Sunstein’s principal statistical quarrel with Eisenberg is that the latter relies on logarithmic rather than arithmetic comparisons of compensatory to punitive awards, thus masking the extent of the variation, an argument to which Eisenberg and Wells have responded. See Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions, the Impact of BMW v. Gore on Punitive Damages Awards, and Forecasting Which Punitive Awards Will Be Reduced*, 7 SUP. CT. ECON. REV. 59 (1999).
ages. That is an important fact for policymakers: whatever one thinks about punitive damages, they are not pervasive in jury decisions. We do not have equivalent information on the incidence of punitive damage \textit{claims}, as opposed to punitive damage awards, and it is predictable both that more such claims are filed than go to judgment and that some cases are settled where punitive damage awards seemed likely.

Closer to my argument is the finding concerning the size of punitive damage awards: the median punitive damage award is both relatively low in amount ($50,000) and about the same size as the median award of compensatory damages. So Campbell represents a rare outcome in punitive damage litigation. But—and this is equally important—the mean and the median awards differ by a factor of ten. Expressed in simpler terms, only a small number of very high awards, like the one rendered by the \textit{Campbell} jury, both make headlines and push the arithmetic mean much higher than the midpoint of all such awards. It also means that a high proportion of all punitive damages results from a small number of cases. So \textit{Campbell} represents the sort of case that makes a significant contribution to the total sum of punitive damage awards. By implication, a new rule that affects that small proportion will affect the total amount of punitive damages, will shift the mean closer to the median, and, likely, will change the dynamics of punitive damages litigation.

The authors found a consistent relationship between awards of compensatory damages and amounts of punitive damages awarded. That relationship was both positive—"punitive damages awards increase monotonically with compensatory damages"—and negative: "[c]ases with low or zero compensatory awards and substantial punitive awards comprise approximately 2 percent of the punitive awards." Finally, the study noted quite substantial regional variations in the award of punitive damages, a pattern that matched regional variations in the award of all damages. Most important, and most relevant to \textit{Campbell}, is the study's effort to create a statistical model that would account for the relationship for the mean punitive damage award in relationship to punitive damage awards. Using detailed data from two Rand Institute studies,

\begin{thebibliography}{57}
\bibitem{52}Eisenberg et al., \textit{supra} note 48, at 634.
\bibitem{53}Id. at 633.
\bibitem{54}See id. at 639 tbl.2.
\bibitem{55}Id. at 639.
\bibitem{56}Id.
\bibitem{57}Id. at 640 (noting that the reported range was from 0\% to 27\% of all plaintiff-winner jury trials).
\end{thebibliography}
one of California and one of Cook County, the study did regression analyses, with a conclusion that was both striking (one rarely finds exclamation points in statistical analyses) and speaks directly to *Campbell*. The authors found "a strong and statistically significant relationship between compensatory and punitive damages" and that about 80% of all punitive damage awards fell within a compensatory/punitive multiple of 8.117. The study went on to suggest that were courts or legislatures to enter this field, they would do best to adopt, not a straight multiplier, but a principle suggesting that awards more than two standard deviations above or below this line be viewed with special scrutiny.

One further finding bears on the *Campbell* litigation. Most of the successful punitive damage claims were brought by individuals, with the defendants almost evenly divided between other individuals (39%) and businesses (37%). But just over 6% of the plaintiffs were businesses. And although the largest mean awards came in individual vs. business litigation, the second highest mean punitive damages award and the highest compensatory/punitive multiplier came in business vs. business litigation.

Although two amicus briefs in *Campbell* cited the Eisenberg study, the opinion neither cited nor discussed it. But in many respects the opinion is a gloss on the findings of the article, and the study may be the best guide to the real significance of the opinion. The first point of contact is the opinion's most notable contribution to punitive damages law—its focus on the significance of the compensatory/punitive ratio. The Eisenberg study confirms the empirical significance of such a focus. The study confirms another respect in which *Campbell* was representative of punitive damage litigation: most of it involves individual plaintiffs—although the proportion of individual defendants is marginally greater than the proportion of business defend-

58 Id. at 651 (emphasis added); see id. at 651–52.
59 See id. at 652–55.
60 Id. at 634 tbl.1.
61 Id.
62 Id. at 639 tbl.2.
Whatever else the Court was doing, it was not selecting a random factor in the world of punitive damages: the relationship of compensatory to punitive damages is descriptively significant as well as—after the decision in _Campbell_—normatively important.

Second, the Court was descriptively right about another aspect of _Campbell_—the unusually high ratio of compensatory and punitive damages in _Campbell_. That circumstance alone makes _Campbell_ unusual among punitive damages cases. In a world in which the median punitive award essentially matches the award of compensatory damages, an award 145 times greater is an outlier. On one hand this means that the situation _Campbell_ confronted was quite rare—a statistical outlier that arguably called for some sort of judicial response or correction. On the other hand it means that _Campbell_ should not affect the outcome in the vast majority of punitive damage awards. So the case, because unrepresentative in the ratio of punitive to its compensatory damages, will have little effect on the "ordinary" punitive damage case.

But—because the tail of the curve is long (and the difference between the ratios of mean and median compensatory/punitive awards differs by about tenfold), _Campbell_ will have a significant effect on the right-hand tail of the curve, substantially curtailing high-end punitives.

Finally, the Eisenberg study furnishes the missing key, the Rosetta Stone to the most striking part of _Campbell_: where did the Court get its "single-digit" multiplier? The study suggests that the Supreme Court reads not only the election returns but also statistical studies. It takes, as its presumptive multiplier, what the study describes as the "best-fit" formula describing what was actually happening in its two large data sets—a multiplier of just over eight times the compensatory damage level. The Court perhaps made, however, one important change in what the studies' authors saw as the best approach to the problem of statistical outliers in punitive damages. The study suggested that outlier awards be assessed not with reference to a straight multiplier but by establishing a range—two standard deviations above and below the "best-fit" multiplier line. The Court did not introduce this refinement specifically, though one can see a lay approach to this point in the opinion's repeated admonitions that "few awards exceeding a sin-

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64 See Eisenberg et al., _supra_ note 48, at 634 tbl.1.
65 _Id._ at 653–54.
gle-digit ratio" are appropriate and that "there are no rigid benchmarks that a punitive damages award may not surpass."66

If Predictability furnishes an important key to understanding the most mysterious aspect of Campbell, it is equally important in helping us predict how the new rules it announces will affect party behavior in the prosecution and settlement of cases presenting the possibility of punitive damages cases, a topic explored in the next Part.

III. Implications and Predictions

Campbell should matter not at all in the large majority of punitive damages cases. Campbell may matter a lot in the small number of cases with outlier punitive damage awards—outliers not in the sense that they are high in absolute amount, but because they exceed the compensatory damages by an abnormal multiple.

Both points are significant. If the most common punitive damage award simply matches the compensatory damages, the new rule will not affect the outcome—unless courts hold that jurors should be instructed in awardable ratios, in which case it could conceivably increase the mean award of punitives.

But in a world in which means and medians differ by a factor of ten, the effect on means may be more important than the effect on medians. If awards are highly concentrated in a small number of judgments, rules that change the outcome of those judgments will matter. Campbell, if it proves stable,67 is likely to change those judgments by holding down the ratio to nine times compensatory damages. By doing so, it is likely to have several effects—on filings, on settlement behavior, and on litigation tactics. Each is sketched below.

First, Campbell may diminish by an unknowable proportion the numbers of claims in which punitive damages are sought. Campbell does so in two ways. Most obviously, it lowers the maximum return from investing in a given claim carrying punitive damages. If one treats compensatory damages as given (a point I will contest below), it lowers the ceiling on the maximum amount of punitives. On the facts of Campbell itself, if $1 million is the correct, sustainable figure for compensatory damages, something like $9 million would be the maxi-


67 On the stability of Campbell, see infra note 71 and accompanying text.
mum for punitives. That matters because in nearly 80% of litigated punitive damages cases the plaintiffs were individuals whose lawyers were almost certainly investing their own funds to finance the claims. Campbell required gathering a good deal of evidence—indeed too much evidence, as the Supreme Court decided—concerning State Farm's claims settlement and other practices. It required expert testimony, presumably on general insurance practices and on how State Farm's differed from the norm. Because an axiom of litigation is that every plaintiff's expert will be matched by a defense one, and because both experts will produce reports on the basis of which they will then be deposed, such investments quickly expand by more than arithmetic proportions. Because plaintiffs' lawyers will be calculating risk/investment/return expectations in making case selections, one imagines that at the margin they will pursue fewer punitive damage claims.

Reinforcing that supposition is another feature of Campbell, its holding that the proof on which punitive damages are based must concern similar behavior in the same jurisdiction. That holding increases the cost of proof in a number of cases. By insisting that the punitives be based on similar behavior in the same jurisdiction, Campbell lowered economies of scale in some punitive damage cases. In Campbell itself, the plaintiff could rely in part on testimony about national practices of the defendant, testimony from expert witnesses for whom it was worthwhile to study the practice of large national insurers. It may not be worthwhile for such experts to focus on, say, the Utah operations of a particular insurer. If one follows the implications of this proposition, Campbell may exacerbate one of defendants' complaints about punitives—their uneven geographical distribution. By requiring punitive plaintiffs to produce localized proof, Campbell may further concentrate the incidence of punitive damages. It will be worthwhile, one can predict, for experts and lawyers to focus their investment in locales that either have high population concentration or a history of high punitive awards, ignoring other states. The consequence may be to concentrate even further the geographical maldistribution of punitive damages awards.

68 The opinion makes this assertion more complicated by hinting that the ceiling on punitives may be even lower where substantial compensatory damages were awarded, as in this case. Campbell, 538 U.S. at 419.
69 See Eisenberg et al., supra note 48, at 634 tbl.1.
Beyond filing behavior, *Campbell* will likely affect decisions to settle or try a case once it has been filed. If *Campbell*’s compensatory/punitives ratio proves robust, in large-stakes punitives cases defendants are risking less by going to trial on a punitive damage claim. Put simply, on the facts of *Campbell* they now face a maximum of $9 million in exposure, not a sky-is-the-limit risk. This may be the single most important effect of *Campbell*, but it is an effect that will be difficult to measure. Paradoxically, one indicator of this effect might well be an *increase* in the number of reported punitive damages verdicts, though with lower compensatory/punitive ratios than in the most dramatic pre-*Campbell* cases. If defendants are more willing to risk trial (because they have lower prospective losses), *Campbell* might well result in more cases going to trial, and, since one assumes that plaintiffs will bring stronger rather than weaker cases to trial, more punitive damage judgments, at a lower compensatory/punitive ratio, could result.

Third, because *Campbell* links the maximum punitive damages to the compensatory damage award, it will place more pressure on proof of ordinary damages, including noneconomic damages. Such damages—in *Campbell* it was emotional distress resulting from the threatened loss of their home72—that will serve two purposes. They will provide additional recovery and they will provide a higher multiplier for punitives. Both sides will invest proportionally more in proof of compensatory damages, knowing that they are affecting not one but two aspects of any resulting damage judgment. To illustrate again in *Campbell*, the trial judge granted a remittitur for compensatory damages, reducing them from $2.6 million to $1 million. At the time this move seemed far less significant than his lopping $120 million off the punitives. After *Campbell* it looks more important: in a post-*Campbell* world the presumptive maximum for punitive damages on a $1 million award will be $9 million, but on a $2.6 million award it will be $23 million. Presumably defendants, conscious of this factor, will now argue that appellate courts reviewing punitive awards must also review de novo the compensatory damages which supply the multiplier of those awards, and one can predict that both sides will be aiming pleas at the U.S. Supreme Court to do the same. This may not be a task the Court relishes, but by linking punitives to compensatory damages, it has set the scene for such requests.

All of the preceding speculation assumes that *Campbell* proves a durable resting point. It may not. Since *Campbell* was decided, one

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respected federal appellate judge has distinguished it and affirmed a punitive damage award thirty-seven times greater than the compensatory damages in a case alleging bedbugs in a motel room.\textsuperscript{73} By contrast, an appellate court in California has reversed a punitive damage judgment in a vehicular roll-over case, suggesting that \textit{Campbell}, properly understood, did not only address disproportionate punitive damages awards but realigned the entire focus of punitive damages, ordering remittitur unless the plaintiffs accepted punitives five times greater than the $5 million compensatory damages.\textsuperscript{74} Like the amount of the damage award in \textit{Campbell} itself, these decisions may be outliers. Or they may be signs that the roiling will continue; if it does, of course, the effects on litigation behavior will be difficult to predict, because the players will be calculating not only the odds in their cases under existing law but also the odds that they can, in this case, achieve a change in the law in their favor.

\textbf{Conclusion}

\textit{Campbell} is an interesting case. It continues the Court’s efforts to adjust the outcomes of civil litigation by concentrating on a small group of cases occupying one end of the damages distribution curve. It does so by setting what amounts to a maximum sentence that will vary with the amount of compensable harm caused by defendant’s behavior. In so doing, the Court, without explicitly saying so, is mapping the doctrine of punitive damages on the empirical data about the incidence and relationships of such rewards. As a result, the risks and rewards of punitive damages will become less speculative, somewhat more ordinary. That will have little effect on most punitive damage cases, in which the awards are rather modest. But it will shift patterns of litigation investment in the riskiest of these cases.

\textsuperscript{73} \textit{See} Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 678 (7th Cir. 2003) (Posner, J.).

\textsuperscript{74} Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 813 (Cal. Ct. App. 2003).