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Comparison to Criminal Sanctions in the Constitutional Review of Punitive Damages

COLLEEN P. MURPHY*

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INTRODUCTION

The Supreme Court in *BMW v. Gore*¹ announced three “guideposts” for reviewing whether the amount of a punitive damages award is so

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1. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

excessive as to violate due process: the degree of reprehensibility of the defendant's conduct, the ratio between punitive damages and compensatory damages,² and the difference between punitive damages and civil and criminal penalties for comparable misconduct.³ Recently, in *State Farm Mutual Automobile Insurance Co. v. Campbell*,⁴ the Supreme Court elaborated on all three guideposts. With respect to reprehensibility, it discussed limits on the power of courts to consider conduct by the defendant other than the conduct that harmed the plaintiff.⁵ Of the ratio between punitive and compensatory damages, the Court stated that "few awards exceeding a single-digit ratio . . . to a significant degree, will satisfy due process."⁶ It added that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."⁷ As for the third *Gore* guidepost, the Court in *Campbell* discounted the relevance of comparing punitive damages to criminal sanctions for comparable conduct.⁸

This article focuses on the third guidepost, specifically, comparison to criminal sanctions.⁹ Part I of the article examines the Supreme Court's language in several cases about the relevance of criminal sanctions to the question whether a punitive award is constitutionally excessive. It criticizes the *Campbell* effort to distinguish between civil and criminal penalties under the third guidepost. Part II suggests that the third guidepost, in theory, wrongly constrains courts from imposing sanctions

2. Although it is common to refer to the ratio between punitive damages and "compensatory damages," the Supreme Court repeatedly has referred not only to the ratio between punitive damages and compensatory damages, but also to the disparity between punitive damages and actual harm or potential harm to the plaintiff. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (stating that *Gore* instructs courts to consider "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award"), *cert. denied*, 125 S. Ct. 114 (2004); *Gore*, 517 U.S. at 575, 582–83; *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 459–62 (1993) (holding that a ratio of ten times the potential harm to plaintiffs was not so "grossly excessive" as to violate due process, although it was 526 times greater than the actual damages awarded by the jury). For further discussion of how courts have considered plaintiff harm in comparison to the amount of punitive damages, see Colleen P. Murphy, *The "Bedbug" Case and State Farm v. Campbell*, 9 ROGER WILLIAMS U. L. REV. 579, 586–91 (2004).

3. *Gore*, 517 U.S. at 574–83.

4. 538 U.S. 408 (2003), *cert. denied*, 125 S. Ct. 114 (2004).

5. *Id.* at 419–24.

6. *Id.* at 425.

7. *Id.*

8. *Id.* at 428.

9. See also Victor E. Schwartz et al., *Selective Due Process: The United States Supreme Court Has Said That Punitive Damages Awards Must Be Reviewed for Excessiveness, but Many Courts Are Failing to Follow the Letter and Spirit of the Law*, 82 OR. L. REV. 33, 48–61 (2003) (discussing court applications of the third guidepost).

above those created by the legislature and fails to recognize that the conduct addressed by a punitive award may be more blameworthy than that addressed by an applicable statute. Part III considers how comparisons to criminal sanctions have influenced constitutional review of punitive awards in the lower courts, both before and after *Campbell*. Aside from a few post-*Campbell* courts that have deemed comparison to criminal sanctions no longer relevant,¹⁰ lower courts have approached comparisons to criminal sanctions in a variety of ways, with some considering the possibility of imprisonment and others emphasizing fines.¹¹ Although the third guidepost theoretically creates limits on the amount of punitive awards, courts commonly have approved punitive awards far in excess of criminal fines for comparable misconduct.¹² This calls into question whether the third guidepost has much practical effect. I conclude with the suggestion that although there may be theoretical and practical reasons to dispense with the third guidepost, as long as the Supreme Court continues to require its use, comparisons to criminal sanctions should be as relevant to constitutional review as civil sanctions.

I. THE SUPREME COURT'S TREATMENTS OF COMPARISONS TO CRIMINAL SANCTIONS

A. *Pre-Campbell Conceptions of Comparisons to Criminal Sanctions*

The Supreme Court first reviewed whether a punitive award might violate due process in 1990, in *Pacific Mutual Life Insurance Co. v. Haslip*.¹³ In upholding the \$1 million award at issue in the case, the *Haslip* Court commented that although the punitive damages far exceeded the statutory fine that could be imposed for comparable misconduct, “[i]mprisonment . . . could also be required of an individual in the criminal context.”¹⁴ In a subsequent case, the Supreme Court

10. See *infra* notes 69–70 and accompanying text.

11. See *infra* notes 66–67 & 83–101 and accompanying text.

12. See *infra* notes 68 & 85 and accompanying text.

13. 499 U.S. 1, 18 (1991) (“[U]nlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one’s constitutional sensibilities.”).

14. *Id.* at 23 (upholding a \$1 million award in punitive damages for insurance fraud, more than four times the amount of compensatory damages). Prior to *Haslip*, Justice O’Connor had advocated review of punitive awards for unconstitutional excessiveness, suggesting that “because punitive damages are penal in nature, the court

stated that a grossly excessive punitive damages award would violate due process,¹⁵ but it was not until *Gore* that the Court found a specific award to have been unconstitutionally excessive.¹⁶ The Court invalidated a \$2 million punitive award against BMW for not disclosing that a car that it had represented as “new” had in fact been repainted.

Stating that “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the severity of the penalty that a State may impose,” the Court found that BMW had not received fair notice of the “magnitude of the sanction” that could be imposed for its conduct.¹⁷ In concluding that the punitive award against BMW was grossly excessive, the Court referenced “the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.”¹⁸ The Court then discussed each of these three guideposts in turn, finding that the guideposts did not support the amount of punitive damages awarded in the case.¹⁹

In a section entitled “Sanctions for Comparable Misconduct,” the Court phrased the third guidepost as a comparison between “the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct.”²⁰ By including comparison to criminal

should compare the civil *and* criminal penalties imposed” in the jurisdiction and elsewhere. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O’Connor, J., concurring in part, dissenting in part). She also asserted that in considering criminal penalties, “the court should consider not only the possible monetary sanctions, but also any possible prison term.” *Id.*

15. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453–58 (1993).

16. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–85 (1996) (finding violative of due process a \$2 million punitive award when the plaintiff had incurred only \$4000 in actual damages, and comparable civil penalties authorized by statutes were far less than the punitive award).

17. *Id.* at 574.

18. *Id.* at 574–75.

19. *Id.* at 574–85. Stating that “[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct,” the Court observed that BMW’s conduct was not particularly reprehensible. *Id.* at 575–80. Second, as the plaintiff’s compensatory award was only \$4000, the Court indicated that the 500 to 1 ratio between punitive damages and compensatory damages supported the conclusion that the punitive award was unconstitutionally excessive. *Id.* at 580–83.

20. *Id.* at 583. At the end of the “Sanctions for Comparable Misconduct” section, *Gore* pursued a line of inquiry distinct from the third guidepost. The Court commented that “[t]he sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal.” *Id.* at 584. This seems to impose on reviewing courts an obligation to inquire whether a lesser award could produce the desired level of deterrence, but it does not directly implicate a comparison to civil or criminal sanctions for similar conduct.

penalties, this language differs from the earlier and more specific language in the decision that referred only to “civil penalties authorized or imposed in comparable cases.”²¹ The Court’s earlier language focusing on civil penalties in comparable cases was, however, specific to the award against BMW; on the facts of the case, there were no comparable criminal sanctions.

The Supreme Court stated that a court reviewing a punitive award for unconstitutional excessiveness should “‘accord ‘substantial deference’ to legislative judgments concerning appropriate sanctions for the conduct at issue.’”²² The Court noted that *Haslip* had compared punitive damages to criminal legislative sanctions, including imprisonment.²³

Applying the third guidepost to the \$2 million punitive award against BMW, the Court found that the award was “substantially greater than the statutory fines” available in the state and elsewhere for similar conduct.²⁴ It concluded that the comparable statutes did not provide “fair notice” that the offender might be subject to a multimillion dollar penalty.²⁵ The Court added that “there does not appear to have been any judicial decision in Alabama or elsewhere indicating that [BMW’s conduct] might give rise to such severe punishment.”²⁶ At the end of the opinion,

21. *Id.* at 575.

22. *Id.* at 583 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O’Connor, J., concurring in part and dissenting in part)).

23. *Id.* at 583 & n.38.

24. *Id.* at 584.

25. *Id.* The Court observed: “The maximum civil penalty authorized by the Alabama Legislature for a violation of its Deceptive Trade Practices Act is \$2,000; other States authorize more severe sanctions, with the maxima ranging from \$5,000 to \$10,000.” *Id.* (citations omitted).

26. *Id.* An important issue arising from this language and the *Gore* language of “civil penalties authorized or imposed in comparable cases” is whether the third guidepost encompasses comparison to punitive damages imposed in other cases. Several lower courts since *Gore* have interpreted the third guidepost to require comparison to other punitive awards. *See, e.g.,* *DiSorbo v. Hoy*, 343 F.3d 172, 187–89 (2d Cir. 2003) (noting that comparable criminal penalty of \$1000 could not have provided fair notice of a \$1.275 million award, but comparing punitive award to punitive damages awarded in other police misconduct cases and concluding that “a punitive damages award of \$75,000 more accurately reflects the severity of [the defendant’s] acts under the *Gore* guideposts”); *Dunn v. Vill. of Put-in-Bay*, No. 3:02CV7252, 2004 WL 169788, at *3 (N.D. Ohio Jan. 26, 2004) (comparing compensatory and punitive damages awarded in excessive force cases to awards in cases involving Fourth Amendment violations); *Waits v. City of Chicago*, No. 01 C 4010, 2003 WL 21310277, at *6 n.2 (N.D. Ill. June 6, 2003) (examining punitive awards in other cases as part of the third guidepost); *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, No. Civ. A 00-5481, 2003 WL 21321370, at *3 (E.D. Pa. May 30, 2003) (“Because attorney’s fees are authorized by [state bad faith statute]—and have been granted in amounts roughly equal to the punitive damages award in this case—the relevant considerations under the third guidepost also support the

the Court commented that it did not accept the conclusion of the state supreme court that “BMW’s conduct was sufficiently egregious to justify a punitive sanction that is tantamount to a severe criminal penalty.”²⁷ This comment that the punitive award was tantamount to a severe criminal penalty was unexplained; *Campbell*, as will be discussed, more strongly equated excessive punitive awards to criminal penalties.

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,²⁸ the Court seemingly narrowed the third guidepost. The Court stated that *Gore* had required consideration of “the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.”²⁹ The Court did not mention comparison to criminal penalties.³⁰ The *Cooper* Court cited the early passage in *Gore* that summarized why the specific award against BMW was grossly excessive.³¹ It is unclear whether the omission of criminal penalties in *Cooper* was purposeful or an oversight. In *Campbell*, however, the Supreme Court reintroduced the notion of comparing a punitive award to criminal penalties.

imposition of the \$150,000 award.”); *Sufix, U.S.A., Inc. v. Cook*, 128 S.W.3d 838, 842–43 (Ky. Ct. App. 2004) (making comparison of punitive damages awards in other products liability cases); *Haggar Clothing Co. v. Hernandez*, No. 13-01-009-CV, 2003 WL 21982181, at *7 (Tex. Ct. App. Aug. 21, 2003) (mem.) (“Judicial decisions at the time of the misconduct are relevant under *Gore*’s third prong to ascertain whether a defendant had notice that its misconduct could subject it to a large punitive damages award.”); *Daka, Inc. v. McCrae*, 839 A.2d 682, 700 (D.C. 2003) (comparing punitive award to an award in a similar workplace discrimination case).

Thorough examination of whether the third guidepost requires comparisons to other punitive damages is beyond the scope of this article, but I offer a few comments. *Gore* did not link its comment on judicial decisions to its more substantial discussion of deference to legislative judgments. Moreover, it is not clear from the context whether “judicial decisions” encompasses only cases imposing legislative sanctions or includes as well cases imposing punitive damages. In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), the Supreme Court declined to require that an award of punitive damages be compared to punitive awards in analogous cases, although it commented that such a comparative approach might be permissible. *Id.* at 458–59 (plurality opinion). In its fleeting reference to judicial decisions, *Gore* did not mention *TXO*. Finally, the *Gore* comment on the absence of judicial decisions giving notice leaves unanswered whether the presence of judicial decisions imposing substantial punitive damages would support the constitutionality of a punitive award, even when comparable legislative sanctions are far less substantial.

27. *Gore*, 517 U.S. at 585 (emphasis added).

28. 532 U.S. 424 (2001). It is in this case that the Supreme Court held that federal appellate courts should apply a de novo standard when reviewing a district court’s determination of the constitutionality of a punitive award. *Id.* at 436.

29. *Id.* at 440.

30. *Id.*

31. *Id.* (citing *Gore*, 517 U.S. at 574–75).

B. *The Campbell Commentary on Comparisons to Criminal Sanctions*

Campbell involved claims against State Farm of fraud, intentional infliction of emotional distress, and bad faith refusal to settle within insurance policy limits.³² After finding that the \$145 million punitive award was disproportionate to the \$1 million compensatory award, the Court turned to the third guidepost. It quoted the narrow *Gore* language about comparisons to civil penalties,³³ but it added: “We note that, in the past, we have also looked to criminal penalties that could be imposed.”³⁴ For this statement, the Court cited the language in *Gore* referencing comparison to both civil and criminal penalties, and it cited *Haslip*.³⁵ Commenting that it “need not dwell long on this guidepost,” the Court found that the \$145 million punitive award against State Farm “dwarfed” the maximum \$10,000 civil penalty for comparable misconduct.³⁶ The Court added that the state supreme court’s speculation about possible imprisonment and other sanctions should be discounted because it was based on evidence of out-of-state and dissimilar conduct.³⁷ Shortly after asserting that the \$145 million punitive award dwarfed the maximum \$10,000 civil penalty for comparable misconduct, *Campbell* stated that application of the three *Gore* guideposts to the facts of the case “likely would justify a punitive damages award at or near the amount of compensatory damages,” which was \$1 million.³⁸

The Supreme Court thus indicated approval of a possible punitive award that would be 100 times the maximum civil penalty for comparable misconduct, although it remanded the case to the Utah Supreme Court for calculation of punitive damages in the first instance.³⁹ This starkly raises the question whether the third guidepost has practical significance

32. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 412–15 (2003), *cert. denied*, 125 S. Ct. 114 (2004).

33. *Id.* at 428 (citing the narrow passage in *Gore*, 517 U.S. at 575); *see also id.* at 418.

34. *Id.* at 428.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 429.

39. *Id.* On remand, the Utah Supreme Court held, contrary to the U.S. Supreme Court’s suggestion that the punitive damages award be at or near the amount of compensatory damages, that the insurer’s conduct warranted punitive damages of nine times the amount of compensatory and special damages, for a total punitive award of \$9,018,780.75. *Campbell v. State Farm Mut. Auto. Ins. Co.*, No. 981564, 2004 WL 869188, at *10 (Utah Apr. 23, 2004), *cert. denied*, 125 S. Ct. 114 (2004).

when the amount of punitive damages is permissible under the first and second guideposts.

On the facts of *Campbell*, the Supreme Court did not find any criminal sanctions to be relevant. The Court, however, took the opportunity to minimize the usefulness of comparison to criminal penalties.⁴⁰ It asserted:

The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. 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. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.⁴¹

This passage reveals a significant shift from the Court's prior suggestions in *Haslip* and *Gore* about the relevance of comparable criminal sanctions in determining whether a punitive award is unconstitutionally excessive. The Court's assertion that criminal penalties have "less utility"⁴² in determining the dollar amount of a punitive award possibly was a reaction to the state supreme court's opinion in *Campbell*. The state court had, in applying the third guidepost and approving the \$145 punitive award, commented that State Farm's officers could be imprisoned for up to five years, "an extremely important consideration for the *BMW* court."⁴³ The Supreme Court could also have been responding to the practice in some lower courts of validating substantial punitive awards in part because the legislature had authorized imprisonment for comparable misconduct.⁴⁴

Recall, however, that one of the reasons proffered in *Gore* for comparisons to civil and criminal sanctions was that the defendant should have notice of the "magnitude of the sanction" that might be imposed.⁴⁵ This statement was made when the only comparable sanctions were civil. Arguably, a legislative authorization of imprisonment, with all the stigma, loss of liberty, and financial consequences that are entailed,

40. *Campbell*, 538 U.S. at 428.

41. *Id.*; see also *id.* at 417 ("Although these [punitive] awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered.").

42. *Campbell*, 538 U.S. at 428.

43. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1155 (Utah 2001), *rev'd*, 538 U.S. 408 (2003), *cert. denied*, 125 S. Ct. 114 (2004).

44. See *infra* note 66 and accompanying text.

45. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996).

should count as fulfilling the requirement that the defendant—whether an individual or an entity—must have notice of the magnitude of the sanction that could be imposed. Moreover, in authorizing imprisonment, the legislature might be viewed as indicating that a defendant should not be able to violate the law at an economic price. *Haslip*, in which the Court referenced the possibility of imprisonment in upholding the \$1 million punitive award, supports the idea that an authorization of imprisonment might go far to validate a significant punitive award. *Campbell*, however, cast doubt on such a notion, with its language that “the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.”⁴⁶

With respect to fines, *Campbell* seemed to establish a dichotomy that has little meaning for the constitutional review of punitive damages. *Campbell* implied that comparisons to criminal penalties are less useful than comparisons to civil penalties in determining the constitutional maximum of a punitive award. But legislatures have much leeway in labeling an action civil or criminal.⁴⁷ The *Campbell* interpretation of the third guidepost thus leads to constitutional review that will depend on whether the legislature has chosen to label a particular fine as civil or criminal. This is significant, for onerous fines can be imposed under civil statutes (and, accordingly, under lesser procedural protections) as well as under criminal statutes.⁴⁸

46. *Campbell*, 538 U.S. at 428.

47. The Supreme Court, when determining which procedural protections apply when the government brings an action, generally has deferred to the legislature’s denomination of a remedy or sanction as civil or criminal. See, e.g., *Smith v. Doe*, 538 U.S. 84, 92 (2003) (stating in a case involving the Ex Post Facto Clause: “[b]ecause we ‘ordinarily defer to the legislature’s stated intent . . . ‘only the clearest proof’ will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.”) (citations omitted), *cert. denied*, *Doe v. Tandeske*, 125 S. Ct. 56 (2004); *Seling v. Young*, 531 U.S. 250, 260–65 (2001) (holding that statutory commitment scheme for sexually violent predators was civil based on legislative intent), *cert. denied*, *Turay v. Seling*, 125 S. Ct. 181 (2004); *United States v. Bajakajian*, 524 U.S. 321, 327–34 (1998) (reading legislation as indicating forfeiture was a criminal sanction and thus holding that Excessive Fines Clause of the Constitution applies).

48. Several articles address problems of the divide between civil and criminal punishment. See generally, e.g., Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679 (1999); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992); Stephen R. McAllister, *A Pragmatic Approach to the Eighth Amendment and Punitive Damages*, 43 KAN. L. REV. 761 (1995); Carol S. Steiker,

The Supreme Court's caution against using "the civil process to assess criminal penalties"⁴⁹ is curious. The Court seemed to be suggesting that if a punitive award is equivalent to, or greater than, a criminal sanction, then the civil process has in effect assessed a criminal penalty. But mere equivalence between the amount of a punitive award and a criminal fine should not be seen as converting punitive damages into a criminal penalty. An award of punitive damages does not have the stigma of a criminal conviction, nor does it implicate imprisonment. A private party, rather than the state, may seek the punishment.⁵⁰ Perhaps these differences account for why the Supreme Court prior to *Campbell* had stopped short of calling a punitive award a criminal penalty.⁵¹ That punitive damages have punishment and deterrence as their aim may suggest that greater procedural protections should be guaranteed the defendant. But concerns about whether adequate procedures have been afforded the defendant are distinct from whether a punitive award is unconstitutionally excessive. On the precise question of excessiveness, the Supreme Court in *Campbell* did not offer persuasive reasons as to why, if the third guidepost continues to have validity, criminal penalties are not as relevant as civil penalties.

II. SOME THEORETICAL ISSUES CONCERNING THE THIRD GUIDEPOST

The third guidepost generally has been criticized in court opinions and legal commentary.⁵² Many have argued that comparison of punitive awards to statutory sanctions is unwarranted because the existing sanctions often are not a sufficient deterrent to unlawful conduct, either because the sanctions are too meager, the statutes are out-of-date, or

Foreword, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997).

49. *Campbell*, 538 U.S. at 428.

50. *Cf. Klein, supra* note 48, at 691:

[T]he framers wished to protect individuals from the government, not from private parties and juries of their peers. On the other hand, when the government attempts to punish an individual in a civil forum, it should give us pause, as our federal Constitution guarantees certain procedural protections to defendants in criminal trials.

51. *See, e.g., Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (describing punitive damages as "quasi-criminal"); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (saying that punitive damages "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing"); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996) (stating that a \$2 million punitive award was "tantamount" to a severe criminal penalty).

52. *See, e.g., Aken v. Plains Elec. Generation & Transmission Coop.*, 49 P.3d 662, 672 (N.M. 2002) ("Our own cases have expressed a dissatisfaction with the comparison urged by the third guidepost.").

prosecutors have not enforced existing statutes.⁵³ The criticism in essence suggests that a defendant should not be able to violate the plaintiff's rights simply because the defendant is willing to "pay the price" of existing legislative sanctions.⁵⁴ One response to this criticism is that even if comparison to legislative sanctions in theory would cap the amount of punitive damages that are constitutionally acceptable, the prospect of compensatory damages serves as an additional deterrent beyond the sanctions authorized by the legislature.

The law of contempt, however, supports an argument that the third guidepost is flawed. In criminal contempt, court-fashioned sanctions may exceed sanctions provided by the legislature. When a person or entity engages in conduct that violates not only a statute but also an injunction proscribing that conduct, the criminal contempt sanction may legitimately exceed the statutory penalties.⁵⁵ Although one justification for this possibility is that the contempt sanction vindicates the authority

53. See, e.g., *BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507, 514 (Ala. 1997) (stating that when statutory penalties for comparable misconduct are meager, "a consideration of the statutory penalty does little to aid in a meaningful review of the excessiveness of the punitive damages award"); *Rhein v. ADT Auto., Inc.*, 930 P.2d 783, 791 (N.M. 1996) (suggesting that compensatory damages and criminal sanctions may not be sufficient to deter an employer from illegally discharging an employee); Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1605 (1997) ("[S]tatutory penalties often are outdated and obsolete. Statutory penalties, once fixed, rarely are adjusted for inflation. In fact, punitive damages are generally most beneficial in areas where regulation is unable to police or to keep abreast with advancement."); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1329-30 & n.299 (1993) (stating that many large corporations are "entities too powerful to be constrained" by remedies provided by "criminal and civil law"); Sabrina C. Turner, Note, *The Shadow of BMW of North America, Inc. v. Gore*, 1998 WIS. L. REV. 427, 461 ("[C]riminal and civil sanctions are often minimal and ineffective. Punitive damages frequently serve to fill that void, and offset weak administrative controls."); cf. Brief Amicus Curiae of California Consumer Health Care Council, Inc. at 16-24, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (No. 01-1289), available at 2002 WL 31399608, at *16-24 (arguing that punitive awards are necessary because insurance commissions do not have the power to regulate insurance companies adequately).

54. Cf. *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003) ("[A] standard principle of penal theory is that 'the punishment should fit the crime' in the sense of being proportional to the wrongfulness of the defendant's action, though the principle is modified when . . . the crime is potentially lucrative (as in the case of trafficking in illegal drugs).").

55. See, e.g., *United States v. United Mine Workers*, 330 U.S. 258 (1947) (upholding contempt fines in excess of statutory fines for behavior that violated both the statute and an injunction).

of the court, distinct from that of the legislature, another justification is that the existing statutory sanctions were not adequate to deter the defendant from violating the law or to constitute suitable punishment. A court might also order the defendant to compensate the plaintiff for harms resulting from the defendant's violation of the injunction. The imposition of compensatory contempt does not lessen the court's power to impose a criminal contempt sanction in excess of the penalty set by the legislature. Thus, the contempt model suggests that a court, in appropriate circumstances, should be able to punish and deter in excess of the analogous legislative sanction, even when compensation also is awarded.

Whether comparing punitive awards to statutory sanctions undermines deterrence and punishment seems to be a question more of theory than practice. As will be discussed in Part III, courts applying the third guidepost typically do not view statutory sanctions for comparable misconduct as capping the amount of punitive damages that are constitutionally acceptable.

Another issue arising from the third guidepost is that the conduct necessary to trigger the availability of punitive damages may be more blameworthy than that which would constitute a violation of a civil or criminal statute. The defendant may have committed a crime or violated a civil statute, but without additional evidence of state of mind such as willfulness or recklessness or malice toward the plaintiff, the defendant will not be liable for punitive damages.⁵⁶ Arguably, then, statutory sanctions are not an appropriate comparison to the amount of punitive damages when the punitive award is directed at blameworthiness above that which would be covered by the comparable statute.⁵⁷

With respect to criminal sanctions in particular, comparisons pose additional issues. The search for a criminal statute that prohibits conduct analogous to the defendant's behavior may be strained.⁵⁸ When a

56. For example, issuing fraudulent stock certificates in Rhode Island is a felony punishable by up to ten years in prison. R.I. GEN. LAWS § 11-18-29 (1956). The Rhode Island Supreme Court has held that criminal stock fraud does not support an award of punitive damages unless the plaintiff proves that the defendant's conduct was motivated by malice directed specifically towards the plaintiff. *Sarkisian v. Newspaper, Inc.*, 512 A.2d 831, 837 (R.I. 1986).

57. In some instances, of course, a court might say that the gap between the conduct required for the availability of punitive damages and the conduct made illegal by statute is so significant that no comparable statute exists for purposes of the third guidepost.

58. See, e.g., *McAllister*, *supra* note 48, at 795 ("[N]ot all conduct that gives rise to liability for punitive damages finds a close counterpart in the criminal law. Examples where this is likely to be true include products liability, medical malpractice and defamation, none of which generally involve conduct that is punished criminally."). Moreover, there may be "serious disputes over characterization" as to which statute is most analogous. *Id.* at 796. For example,

[I]t may be difficult to decide in a bad faith case against an insurer who declined to pay a claim of the insured whether the insurer's conduct, if deemed tortious,

comparable criminal statute does exist, any authorized term of imprisonment raises questions about how to translate the severity of that sanction into a constitutionally acceptable level of punitive damages.⁵⁹

Having outlined some of the issues arising from the notion that civil and criminal statutory sanctions inform whether a punitive award is unconstitutionally excessive, it is worth probing how courts have implemented the third guidepost with respect to criminal sanctions. As will be demonstrated in the next part, lower court comparisons to criminal sanctions, both before and after *Campbell*, have had varying influence in determining the constitutional maximums for punitive awards.

III. THE PRACTICAL EFFECTS OF COMPARISONS TO CRIMINAL SANCTIONS

In articulating the third guidepost, the Supreme Court has provided few details on how comparisons to civil and criminal sanctions should affect a court's review of a punitive award.⁶⁰ The Supreme Court's opinion in *Campbell*—describing the \$10,000 statutory civil fine as being “dwarfed” by the \$145 million punitive award but indicating that a \$1 million punitive award might be constitutional⁶¹—seems to give courts much leeway. As the Utah Supreme Court on remand in *Campbell* commented, “somewhere between \$1 million and \$145 million, the difference between the \$10,000 civil penalty and the punitive damages award becomes so great that the latter ‘dwarfs’ the former.”⁶² Lower courts generally have declined to read the third guidepost as meaning that a comparable statutory sanction caps the amount of a constitutionally

should be punished by reference to the State's general prohibitions on fraudulent conduct or rather by focusing on specific provisions in the State's insurance code that might apply to the conduct.

Id.

59. See, e.g., *id.* at 796 (noting the challenge of “placing a value on the potential for imprisonment”); Pace, *supra* note 53, at 1605–06 (discussing the difficulty of translating incarceration into monetary sanctions).

60. See, e.g., *S. Union Co. v. Southwest Gas Corp.*, 281 F. Supp. 2d 1090, 1105 (D. Ariz. 2003) (“The exact method of application of [the third guidepost] is unclear in *Gore* or *Campbell*.”).

61. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003), *cert. denied*, 125 S. Ct. 114 (2004).

62. *Campbell v. State Farm Mut. Auto. Ins. Co.*, No. 981564, 2004 WL 869188, at *10 (Utah Apr. 23, 2004), *cert. denied*, 125 S. Ct. 114 (2004).

acceptable punitive award.⁶³ This leaves room for much variation in applications of the third guidepost.

A. Cases Before Campbell

After *Haslip* but before *Campbell*, many courts considered the comparison of punitive awards to criminal sanctions to be a significant aspect of the constitutional review of punitive damages. One federal appellate court inferred from the Supreme Court's statements that criminal sanctions for comparable misconduct were particularly useful in determining whether a punitive award was unconstitutionally excessive.⁶⁴ A federal trial court in a securities case that upheld a \$10 billion aggregate punitive award suggested that the mere availability of criminal proceedings and injunctive relief "reveals a congressional intent to make harsh sanctions available for potential violations. Even exorbitant punitive damage awards are not inconsistent with these potential penalties."⁶⁵

In terms of how the courts before *Campbell* applied the third guidepost with respect to criminal sanctions, a variety of approaches emerged. Several courts treated a legislative authorization of imprisonment as legitimizing a sizeable punitive award.⁶⁶ Other courts focused solely on

63. One exception—in the context of a comparison to a civil statutory penalty—is *Lincoln v. Case*, 340 F.3d 283 (5th Cir. 2003). The court reduced a punitive award of \$100,000 to the maximum civil penalty of \$55,000 under the Fair Housing Act and stated: "We simply conclude that in this case a punitive damages award coextensive with the statutory maximum civil penalty is reasonable and proportionate to the wrong committed." *Id.* at 294.

64. *In re Exxon Valdez*, 270 F.3d 1215, 1245 (9th Cir. 2001) ("Criminal fines [in applying the third guidepost] are particularly informative because punitive damages are quasi-criminal").

65. *Sanders v. Gardner*, 7 F. Supp. 2d 151, 178 (E.D.N.Y. 1998) (upholding a \$10 million aggregate punitive damages award imposed by arbitrators and noting that "the Arbitrators, in determining the punitive damages award, may have reasonably concluded that the previous sanctions imposed upon [the defendant] were ineffectual in preventing . . . persistent practices deemed dangerous to the investing public, and that a sizeable award might have a deterrent effect").

66. See, e.g., *Bielicki v. Terminix Int'l Co.*, 225 F.3d 1159, 1166 (10th Cir. 2000) (stating that "[a]lthough the punitive damages award is exceptional when compared only to the applicable fines, the authorization of imprisonment in the criminal context can justify a higher award," and upholding multiple six figure punitive damage awards when the comparable legislative sanctions included up to one year imprisonment); *Mathie v. Fries*, 121 F.3d 808, 816 (2d Cir. 1997) (upholding \$500,000 punitive award for sexual abuse of inmate in defendant's custody, when first-degree sodomy was punishable by imprisonment of up to twenty-five years); *In re Exxon Valdez*, 236 F. Supp. 2d 1043, 1067 (D. Alaska 2002) (noting that although "it is not possible to imprison a corporate defendant in a criminal case, provision for imprisonment is a recognized legislative signal of heightened seriousness of the offense, and therefore, for purposes of the *BMW* analysis, justifies a punitive damages award 'much in excess of the fine that could be imposed'" (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583 (1996)); *Aken v.*

the statutory fine for comparable criminal misconduct, ignoring or downplaying that the comparable criminal statute also authorized imprisonment.⁶⁷ When courts identified a criminal fine for comparable misconduct, they commonly approved punitive awards far in excess of the statutory fine.⁶⁸

Plains Elec. Generation & Transmission Coop., 49 P.3d 662, 672–73 (N.M. 2002) (stating that “[t]he possibility of a jail sentence justifies a substantial punitive damages award,” and upholding combined punitive awards of \$2.05 million in wrongful termination and defamation case when comparable criminal statute authorized maximum fine of \$1000 and imprisonment for up to one year); *Wightman v. Consol. Rail Corp.*, 715 N.E.2d 546, 554–55 (Ohio 1999) (indicating that possibility of involuntary manslaughter prosecution against railroad for failing to maintain a safe crossing, combined with possible civil penalties, rendered a punitive award of \$15 million permissible under the third guidepost); *Blume v. Fred Meyer, Inc.*, 963 P.2d 700, 709 (Or. Ct. App. 1998) (stating that “[a]ssuming that an incarcerative sanction may fairly be viewed as some notice of a possibly severe punitive damage for a corporate defendant in a somewhat analogous civil action, we agree with plaintiff that a five-year term shows the offense to be serious” and upholding a \$450,000 punitive award for malicious prosecution and false arrest when compensatory damages were \$25,000).

67. See, e.g., *Watkins v. Lundell*, 169 F.3d 540, 546–47 (8th Cir. 1999) (concluding that punitive damages of \$3.5 million failed third guidepost when the maximum criminal fine for the defendant’s fraudulent conduct would be \$10,000, but failing to mention that the statute for comparable misconduct also authorized imprisonment of up to ten years); *Lee v. Edwards*, 101 F.3d 805, 811 (2d Cir. 1996) (remarking about comparable criminal sanctions that “[a] year’s imprisonment is certainly a serious sanction, although the maximum fine of \$2,000 gives little warning that the offense could entail a \$200,000 [punitive] award” and commenting that “the criminal and civil penalties for comparable conduct are middling”); *Life Ins. Co. v. Johnson*, 701 So. 2d 524, 531 (Ala. 1997) (noting that the comparable criminal statute provided for up to twenty years imprisonment, but concluding that “there is little basis for comparing [the statutory penalty for deceitful conduct] with any meaningful punitive damages award” because the comparable criminal fines were so low); *Mgmt. Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 539 N.W.2d 111, 124–25 (Wis. Ct. App. 1995) (mentioning that criminal sanctions for comparable misconduct include up to \$10,000 fine and five year’s imprisonment, but focusing on criminal fines in determining that punitive damages more than sixty-five times the maximum fine was permissible under due process), *aff’d*, 557 N.W.2d 67, 80–83 (Wis. 1996).

68. See, e.g., 2660 Woodley Rd. Joint Venture v. ITT Sheraton Corp., 2002-1 Trade Cas. (CCH) ¶ 73,601 (D. Del. 2002), available at 2002 WL 53913, *6, *8 (noting in an intentional business tort case that the maximum penalty for an analogous crime was \$10,000 fine and up to five years in prison, and saying that the “guideposts weigh in favor of a punitive damages award” to some extent, but that the other guideposts—particularly the high compensatory damages of \$11 million—required a reduction in the punitive award to \$17 million), *rev’d on other grounds*, 369 F.3d 732, 744–45 (3d Cir. 2004); *In re New Orleans Train Car Leakage Fire*, 795 So. 2d 364, 387 (La. Ct. App. 2001) (In class action toxic tort suit in which maximum criminal fine for comparable conduct was \$1 million, court rejected “the notion that the third guidepost . . . , standing alone, ‘caps’ punitive damages in this case” and upheld \$850 million punitive damages award under other two guideposts.); *Mgmt. Computer Servs., Inc.*, 539 N.W.2d at 124–25 (determining

B. Cases After Campbell

After *Campbell*'s discussion on permissible ratios between punitive and compensatory damages, some courts have all but dispensed with considering the third guidepost.⁶⁹ Courts that have incorporated the third guidepost into their constitutional review have varied in their consideration of comparable criminal sanctions. At one extreme, some courts have treated the *Campbell* language as indicating that comparisons to criminal penalties are no longer relevant to constitutional review.⁷⁰ At the other extreme, at least one court has considered comparable criminal sanctions without confronting the *Campbell* language on criminal penalties.⁷¹

In between these extremes, courts have offered differing interpretations of the *Campbell* language on criminal penalties. For example, the Seventh Circuit, in an opinion written by Judge Posner, asserted that an inquiry into "the regulatory or criminal penalties to which the defendant exposed itself" is "recommended by the Supreme Court," and it cited for support

that punitive damages award more than sixty-five times the maximum criminal fine was permissible under due process), *aff'd*, 557 N.W.2d at 80–83.

69. See, e.g., *Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824, 827–29 (8th Cir. 2004) (applying only the first two guideposts in affirming lower court decision that reviewed punitive award under all three guideposts); *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 135 Cal. Rptr. 2d 736, 759 n.33 (Ct. App. 2003) (stating that "[l]ike the *Campbell* court, 'we need not dwell long on [the third *Gore*] guidepost'" and concluding that the "marginally analogous statutes" are "not particularly helpful, and the other *Gore* guideposts are sufficient for purposes of our analysis").

70. See, e.g., *Textron Fin. Corp. v. Nat'l Union Fire Ins. Co.*, 13 Cal. Rptr. 3d 586, 605 (Ct. App. 2004) (terming potential criminal penalties to be "of little assistance here" in light of *Campbell*), *modified*, 2004 Cal. App. LEXIS 977; *Bocci v. Key Pharm., Inc.*, 76 P.3d 669, 675–76 (Or. Ct. App. 2003) (treating plaintiff's argument that defendant could have been subjected to criminal prosecution as irrelevant in light of the *Campbell* language on criminal comparisons), *modified*, 79 P.3d 908 (Or. Ct. App. 2003).

71. See, e.g., *DiSorbo v. Hoy*, 343 F.3d 172, 187–88 (2d Cir. 2003). In *DiSorbo*, decided a few months after *Campbell*, the U.S. Court of Appeals for the Second Circuit compared criminal sanctions to a punitive award without mentioning *Campbell*'s discussion on the issue. *Id.* The jury had assessed punitive damages of \$1.275 million against a police officer who engaged in acts of police brutality. *Id.* at 181. The comparable criminal sanction was a maximum one year sentence of imprisonment and a maximum fine of \$1000. *Id.* at 187–88. The court commented that "[w]hile a year's imprisonment is undoubtedly a substantial punishment" the maximum fine of \$1000 did not give adequate warning of the possibility of a punitive award in excess of \$1 million. *Id.* at 188. The appellate court noted, however, that police officers generally are on notice as to the gravity of police brutality and thus for purposes of reviewing punitive awards, "criminal penalties understate the notice when the misconduct is committed by a police officer." *Id.* (citing *Lee v. Edwards*, 101 F.3d 805, 811 (2d Cir. 1996)). The court ultimately concluded that a punitive award of \$75,000 was appropriate under the *Gore* guideposts, reaching that amount by examining punitive awards against police officers in other cases within the Circuit. *Id.* at 188–89. The Second Circuit previously had indicated that to determine the appropriate level of punitive damages, a court must look to punitive awards in comparable cases. See *Edwards*, 101 F.3d at 812.

the page of the *Campbell* opinion that discounts the importance of comparisons to criminal penalties.⁷² By contrast, a California appellate court, in a case involving rollover problems with the Ford Bronco, cited the same page of *Campbell* for the proposition that “the failure of prosecutors to seek criminal convictions in cases of the present sort does not permit an enhancement of the punitive damages award in a civil case.”⁷³ Some courts have asserted that *Campbell* did not prohibit consideration of comparable criminal penalties, emphasizing that *Campbell* commented that such penalties reflect the seriousness with which the government views the defendant’s wrongful conduct.⁷⁴

Other courts have disagreed about the meaning of the specific *Campbell* language that comparisons to criminal sanctions have “less utility” in determining the “dollar amount” of a punitive award. In *Eden Electrical, Ltd. v. Amana Co.*,⁷⁵ involving a fraud action between two business entities, the federal district court noted that, for comparable misconduct, a defendant could be sentenced to ten years in prison and a maximum criminal fine of \$10,000. It suggested that these penalties indicated the seriousness with which the state viewed the conduct and that the penalties “support[] a finding of substantial punitive damages”⁷⁶ Echoing *Campbell*, however, *Eden Electrical* commented that comparable criminal “penalties shed little light on what amount of punitive damages are constitutionally permissible.”⁷⁷ The court then

72. *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003), *cert. denied*, 125 S. Ct. 114 (2004), as well as other pages in *Campbell* and *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996)).

73. *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 812 (Ct. App. 2003). The court, without further elaboration, then “conclude[d] the third *Gore* factor requires neither a higher or lower ratio between the compensatory and punitive damages award.” *Id.*

74. *See, e.g., Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1372 (Fed. Cir. 2003) (rejecting defendant’s argument that *Campbell* prohibits comparison to criminal sanctions and quoting *Campbell* language that “[t]he existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action”), *cert. denied*, 124 S. Ct. 1423 (2004); *In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1107 (D. Alaska 2004) (“The potential size of criminal sanctions . . . tells us that Alaska (and Federal) authorities view oil spills as very serious”); *Bardis v. Oates*, 14 Cal. Rptr. 3d 89, 107 (Cal. Ct. App. 2004) (“Although we are aware that defendants’ conduct has not been adjudicated in a criminal proceeding, we take note of these penalties as reflective of ‘the seriousness with which [our] State views the wrongful action.’” (quoting *Campbell*, 538 U.S. at 428)).

75. 258 F. Supp. 2d 958 (N.D. Iowa 2003), *aff’d*, 370 F.3d 824 (8th Cir. 2004).

76. *Id.* at 972.

77. *Id.*

proceeded to determine that the punitive award was unconstitutionally excessive under the other two guideposts and to order a reduction in the award from \$18 million to \$10 million.⁷⁸ Thus, in *Eden Electrical*, the federal district court indicated that the punitive award needed to be reduced *despite* its finding that comparable criminal sanctions justified a substantial punitive award.

By contrast, in *Trinity Evangelical v. Tower Insurance Co.*,⁷⁹ the Supreme Court of Wisconsin apparently viewed a \$10,000 maximum criminal fine as supporting a lesser award than the first two guideposts would support. The court upheld a punitive award of \$3.5 million in a bad faith action against an insurance company, observing that the defendant's unlawful conduct was quite reprehensible because it was repetitive and that the ratio of punitive damages to compensatory damages in the case was an acceptable 7 to 1.⁸⁰ The court suggested that the \$10,000 maximum criminal penalty for comparable misconduct was not as important a factor, citing the *Campbell* language that a criminal penalty has "less utility" when determining whether a punitive award is unconstitutionally excessive.⁸¹ The dissent criticized this use of the *Campbell* language, stating that "the Court in *Campbell* was cautioning against using the existence of an applicable criminal penalty as grounds to *sustain* a punitive damages award, not the converse."⁸² The dissent has the better view on this, for certainly *Campbell* was attempting to limit the use of criminal sanctions to legitimize large punitive awards.

Of the post-*Campbell* courts that have considered comparable criminal sanctions to be relevant under the third guidepost, some have merely cited analogous criminal sanctions without any elaboration or comparison to the punitive award.⁸³ Other courts have grappled with how to translate a

78. *Id.* at 972–75 (reducing award from approximately \$18 million to \$10 million for fraudulent conduct). Although the court in *Eden Electrical* reasoned that it could reduce the punitive damages outright, rather than offering a remittitur to the plaintiff in lieu of a new trial, it is questionable whether the Seventh Amendment permits such outright reduction of a punitive award. *Id.* at 975. See generally Colleen P. Murphy, *Judgment as a Matter of Law on Punitive Damages*, 75 TUL. L. REV. 459 (2000) (discussing split in the courts on the issue and arguing that the Seventh Amendment does not allow outright reduction of a punitive award).

79. *Trinity Evangelical Lutheran Church & Sch.-Freistadt v. Tower Ins. Co.*, 661 N.W.2d 789 (Wis. 2003), *cert. denied*, 124 S. Ct. 925 (2003).

80. *Id.* at 801–03.

81. *Id.* at 803. The court did not mention that the same statute authorizes imprisonment up to three years. WIS. STAT. § 601.64(4) (1995 & Supp. 2004).

82. *Trinity*, 661 N.W.2d at 812 n.4. The dissent noted that the ratio of punitive damages to the maximum criminal penalty was 350 to 1, and that the punitive award, like the \$145 million punitive award in *Campbell*, "dwarfed" the \$10,000 fine for comparable conduct. *Id.*

83. See, e.g., *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 300 F. Supp. 2d 1055, 1064 (D. Or. 2004) (recounting the civil and

comparison to possible criminal fines or imprisonment into a numerical limit on punitive damages.⁸⁴

With respect to criminal fines, several of the post-*Campbell* cases that have made comparisons to criminal sanctions have approved punitive awards that far exceeded the analogous fines.⁸⁵ Thus, many courts, both before and after *Campbell*, have not viewed comparable criminal sanctions as capping the amount of a constitutionally permissible punitive award. Although the *Campbell* litigation involved comparison to civil, rather than criminal, statutory sanctions, it is interesting to note that the Utah Supreme Court on remand approved a punitive award of more than \$9 million—far greater than the statutory fine of \$10,000 for comparable misconduct.⁸⁶ The U.S. Supreme Court recently denied the defendant's petition for certiorari.⁸⁷

Sometimes, an analogous criminal fine can be so large that it is viewed as validating a substantial punitive damages award. Such is the

criminal penalties available under the applicable statute but comparing the punitive award only to the analogous civil penalties); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 670 (S.D. 2003) (citing comparable criminal sanctions but drawing no conclusions as to their impact on the due process limits of the punitive award).

84. See *infra* notes 85–101 and accompanying text.

85. See, e.g., *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003) (upholding \$186,000 punitive award to each plaintiff when maximum criminal fine for comparable misconduct was \$2500 and commenting that defendant could be subject to revocation of its hotel license, a worse sanction for the defendant than the punitive damages award); *Stack v. Jaffee*, 306 F. Supp. 2d 137, 141–42 (D. Conn. 2003) (commenting that a maximum criminal fine of \$2000 “gives little warning that a comparable civil rights violation could entail a \$200,000 punitive award” but finding that punitive award of \$25,000 would be constitutionally permissible); *S. Union Co. v. Southwest Gas Corp.*, 281 F. Supp. 2d 1090, 1105–06 (D. Ariz. 2003) (noting that comparable criminal fine would be up to twice the compensatory award, but upholding a punitive award that was more than 153 times the amount of the compensatory award); *Eden Elec., Ltd. v. Amana Co.*, 258 F. Supp. 2d 958, 972–75 (N.D. Iowa 2003) (finding \$10 million punitive award constitutionally permissible when maximum criminal fine was \$10,000), *aff'd*, 370 F.3d 824 (8th Cir. 2004); *Trinity*, 661 N.W.2d at 803 (upholding \$3.5 million punitive award when comparable criminal sanction was \$10,000).

86. *Campbell v. State Farm Mut. Auto. Ins. Co.*, No. 981564, 2004 WL 869188, at *10 (Utah April 23, 2004), *cert. denied*, 125 S. Ct. 114 (2004). The state court reasoned:

[T]he quest to reliably position any misconduct within the ranks of criminal or civil wrongdoing based on penalties affixed by a legislature can be quixotic. For example, while a \$10,000 fine for fraud may appear modest in relationship to a multi-million dollar punitive damages award, it is identical to the maximum fine which may be imposed on a person in Utah for the commission of a first degree felony, the classification assigned our most serious crimes.

Id. at *10.

87. 2004 WL 2074132 (U.S. Oct. 4, 2004) (No. 04-116).

case in the Exxon Valdez oil spill litigation, in which a jury awarded punitive damages of \$5 billion. With respect to this award, the case has bounced between the federal district court in Alaska and the U.S. Court of Appeals for the Ninth Circuit.⁸⁸ In the most recent district court decision, issued after a remand from the appellate court to reconsider in light of *Campbell*, the district court asserted that the criminal fine against Exxon for recklessly spilling crude oil into Prince William Sound could have reached \$5.1 billion.⁸⁹ Because the punitive award was less than the potential criminal fine, the district court concluded that the punitive award did not violate the third guidepost.⁹⁰ The district court opined that the *BMW* guideposts indicated that the \$5 billion was not grossly excessive, but it ultimately ordered a remittitur to \$4.5 billion because the court of appeals had directed the district court to reduce the punitive award.⁹¹ Although the district court acknowledged that after *Campbell*, “there has been some discussion as to whether comparable criminal penalties are still appropriate for consideration under the third guidepost,” it asserted that criminal sanctions “are a useful double-check of what Exxon reasonably would have understood was the outside limit of punishment that it could incur by reckless conduct.”⁹²

At least one court after *Campbell* has chosen a punitive award that was far less than the analogous criminal fine.⁹³ A bankruptcy judge,

88. See *In re Exxon Valdez*, 270 F.3d 1215, 1246–47 (9th Cir. 2001) (vacating \$5 billion punitive damages award and remanding so that “the district court can set a lower amount in light of the *BMW* and *Cooper Industries* standards”); *In re Exxon Valdez*, 236 F. Supp. 2d 1043, 1068 (D. Alaska 2002) (on remand from appellate court decision reported at 270 F.3d 1215, ordering remittitur from \$5 billion jury award of punitive damages to a reduced amount of \$4 billion); *Sea Hawk Seafoods, Inc. v. Exxon Corp.*, Nos. 30-35166 & 03-32519, 2003 U.S. App. LEXIS 18219, at *1–2 (9th Cir. Aug. 18, 2003) (vacating district court judgment reported at 236 F. Supp. 2d 1043 and remanding for reconsideration of amount of punitive damages in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), cert. denied, 125 S. Ct. 114 (2004)); *In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1110–11 (D. Alaska 2004) (on remand from appellate court decision reported at 2003 U.S. App. LEXIS 18219, ordering remittitur from \$5 billion jury award of punitive damages to reduced amount of \$4.5 billion).

89. *In re Exxon Valdez*, 296 F. Supp. 2d at 1107–09. This district court opinion restated much of the third guidepost discussion contained in the earlier district court opinion reported in 236 F. Supp. 2d at 1065–67.

90. *In re Exxon Valdez*, 296 F. Supp. 2d at 1107–10.

91. *Id.* at 1110. Ironically, in its earlier opinion on remand from the Ninth Circuit for reconsideration in light of *BMW* and *Cooper Industries*, the district court had ordered a greater remittitur of the punitive award, to \$4 billion. See *In re Exxon Valdez*, 236 F. Supp. 2d at 1068–69. In both opinions, the district court asserted that the \$5 billion award was not unconstitutionally excessive, but explained that it was reducing the award because the appellate court had directed it to do so. See *In re Exxon Valdez*, 296 F. Supp. 2d at 1110; *In re Exxon Valdez*, 236 F. Supp. 2d at 1068–69.

92. *In re Exxon Valdez*, 296 F. Supp. 2d at 1107.

93. *In re John Richards Homes Bldg. Co.*, 291 B.R. 727, 739 (Bankr. E.D. Mich. 2003), *aff’d*, 312 B.R. 849 (E.D. Mich. 2004).

imposing punitive damages in the first instance, assessed \$2 million against a creditor who had petitioned for involuntary bankruptcy in bad faith. The judge stated that this award was the “minimum punitive damage amount that will address the dual purposes of adequate deterrence and punishment.”⁹⁴ Before announcing the punitive award, the judge reviewed the *Gore* factors and noted that the maximum criminal fine for comparable conduct was over \$8 million.⁹⁵ Because the judge in the first instance assessed the amount of punitive damages, this case arose in a different procedural posture than the other cases discussed here, where courts reviewed existing punitive awards for unconstitutional excessiveness.

Aside from the relevance of criminal fines, there is the question of how a statutory authorization of imprisonment for comparable misconduct should affect constitutional review of punitive awards after *Campbell*. As with pre-*Campbell* cases, some courts have treated the possibility of imprisonment for comparable misconduct as supporting the constitutional validity of a substantial punitive award.⁹⁶ In the district court’s most recent opinion on punitive damages in the Exxon Valdez litigation, the court stated that “provision for imprisonment is a recognized legislative signal of heightened seriousness of the offense, and therefore, for purposes of the constitutional analysis, justifies a punitive damages award ‘much in excess of the fine that could be imposed.’”⁹⁷ One state

94. *Id.*

95. *Id.* Before settling on a dollar amount for the punitive award, the court first discussed the traditional factors that bear on awarding punitive damages in bankruptcy proceedings and then described the Supreme Court’s pronouncements on “the reasonableness of punitive damage awards in the context of constitutional due process and fair notice considerations.” *Id.* at 737.

96. See, e.g., *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003) (discussing possible regulatory and criminal penalties for the defendant’s misconduct, including imprisonment, and commenting that while “a corporation cannot be sent to prison,” the criminal sanctions were “just the beginning” of the court’s consideration of the regulatory and criminal penalties to which the defendant exposed itself); *Bardis v. Oates*, 14 Cal. Rptr. 3d 89, 107 (Ct. App. 2004) (in discussing civil and criminal penalties for like conduct, mentioning possibility of imprisonment and stating that “[a]lthough we are aware that defendants’ conduct has not been adjudicated in a criminal proceeding, we take note of these penalties as reflective of ‘the seriousness with which [our] State views the wrongful action’”) (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003), *cert. denied*, 125 S. Ct. 114 (2004)); *Alabama v. Exxon Corp.*, No. 99-2368 (Montgomery Cty. Cir. Ct., Ala. Mar. 29, 2004) (finding that a punitive award of \$3.5 billion would be consistent with constitutional constraints and, in its discussion of comparable civil and criminal sanctions, noting that “Exxon or its executives could . . . have faced criminal penalties up to and including imprisonment”).

97. *In re Exxon Valdez*, 296 F. Supp. 2d at 1108 (quoting *BMW of N. Am., Inc. v.*

supreme court equated possible imprisonment with a precise dollar amount. In *Alfa Life Insurance Corp. v. Jackson*,⁹⁸ the Alabama Supreme Court found that a jury's award of punitive damages in the amount of \$5 million was unconstitutionally excessive, and it likewise invalidated the district judge's reduced award of \$1.5 million.⁹⁹ Finding that the reprehensibility and ratio guideposts supported a \$300,000 punitive damages award, the court turned to the third guidepost.¹⁰⁰ Noting that a criminal statute for comparable misconduct authorized imprisonment for two to twenty years, the court asserted that while imprisonment in the upper part of the range "might not equate with a punitive-damages award of \$5,000,000 or \$1,500,000, it at least equates with a punitive-damages award of \$300,000."¹⁰¹

Thus, while some courts after *Campbell* have dispensed with the third guidepost generally or have determined that comparable criminal penalties are no longer relevant, many courts have continued the practices existing before *Campbell*. Both before and after *Campbell*, some courts have treated the authorization of imprisonment for comparable misconduct as a factor legitimating large punitive awards. Moreover, courts continue to approve punitive awards that far exceed analogous criminal fines, indicating that comparisons to statutory fines often have little practical effect.

CONCLUSION

It is debatable whether review for constitutional excessiveness of a punitive award should be guided by comparisons to civil and criminal statutory sanctions. To the extent that comparative review based on statutory sanctions—despite its theoretical and practical shortcomings—continues, criminal sanctions should play no less of a role than civil sanctions. *Campbell* did not present a persuasive case for why criminal sanctions are less relevant than civil sanctions, and its language should not be read as foreclosing a court, in an appropriate case, from finding that the severity of an analogous criminal sanction may validate a large punitive award.

Gore, 517 U.S. 559, 583 (1996), which in turn quotes *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991)).

98. Nos. 1001854 & 1002002, 2004 WL 1009367 (Ala. May 7, 2004).

99. *Id.* at *14.

100. *Id.* at *12–14.

101. *Id.* at *14.