Due Process and Punitive Damages: Providing Meaningful Guidance to the Jury

Thomas M. Melsheimer

Steven H. Stodghill

DUE PROCESS AND PUNITIVE DAMAGES: PROVIDING MEANINGFUL GUIDANCE TO THE JURY

*Thomas M. Melsheimer**
*Steven H. Stodghill***

"The Horror, The Horror"[1]

I. INTRODUCTION

FEW things can be more frightening to a civil defendant than the prospect of a massive punitive damages award. This extra-compensatory form of damages, originally limited to the rare case involving extreme or outrageous conduct, has in recent years taken center stage in arguments about tort reform. Critics of the current system for awarding punitive damages argue that the availability of such awards has fueled litigation by creating a windfall for a successful plaintiff. Defenders of the status quo argue that the prospect of a large punitive award is one of the only weapons available for society in general, and injured persons in particular, to make reckless or malicious defendants pay for their mistakes.[2] Given the perception that punitive damage awards are not only increasing, but are somehow "out of control," this type of damage, which merited scant attention in the literature thirty years ago, has come under increasing scrutiny from courts and commentators.[3]

The scrutiny has reached the highest level of our legal system on two separate occasions in just a two year period. In *Pacific Mutual Life Insurance Co. v. Haslip*[4] and *TXO Production Corp. v. Alliance Resources Corp.*,[5] the Supreme Court considered, and ultimately rejected, due process challenges

* B.A., University of Notre Dame 1983; J.D., University of Texas 1986; Partner, Lynn, Stodghill & Melsheimer, L.L.P., Dallas, Texas; Adjunct Professor of Law, Southern Methodist University School of Law.

** B.A., University of Texas 1983; J.D., University of Texas 1987; Partner, Lynn, Stodghill & Melsheimer, L.L.P., Dallas, Texas.

1. JOSEPH CONRAD, HEART OF DARKNESS 147 (Signet Classic ed., Doubleday and Co. 1950).

2. David D. Haddock et al., *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1 (1990).

3. *See, e.g.*, Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System*, 140 U. PA. L. REV. 1147 (1992); Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L.J. 859 (1991).

4. 499 U.S. 1 (1990).

5. 113 S. Ct. 2711 (1993).

to substantial punitive damages awards. Although it was hoped, first in *Haslip*, and more recently in *TXO*, that the Court would give direction to the lower courts for evaluating punitive damages awards, little in the way of guidance was forthcoming from either case.

This article will first briefly survey the current empirical data on punitive damages awards. Are punitive damages on the rise, holding steady, or decreasing? This is a seemingly important question because much of the impetus behind reform of the punitive damages system is the perceived explosion in the size and frequency of such awards. For reasons explained below, we conclude that the empirical debate, though an interesting one, is ultimately irrelevant to the issue of reforming the punitive damages system.

The article will next review the current constitutional landscape of punitive damages awards. We conclude that the Supreme Court has been rightfully reluctant to impose explicit substantive limits on punitive damage awards. In the one area in which the Supreme Court ought to provide sensible guidance—procedural due process—it has remained curiously unhelpful.

The political landscape, consisting of a hodge-podge of efforts for modifying the way punitive damages are awarded, will also be reviewed. With the exception of bifurcation of the issues of liability and punitive damages, these efforts undermine the strength of the American jury system and do not address the core problem of the punitive damages system.

The core problem, as we see it, is the failure of trial courts to guide the exercise of the jury's discretion in awarding punitive damages. Until the jury is given sensible, flexible instructions that cabin its discretion within meaningful parameters, punitive damage awards, of whatever amount, will continue to come under fire. Our recommendation is a simple one: instruct the jury in comprehensible and specific terms that will allow each party's advocate to make reasonable arguments about whether punitive damages should be awarded and, if so, in what amount.

II. EMPIRICAL DEBATES

In theory, awards of punitive damages are designed to serve purposes other than compensating a plaintiff for the actual damages he has suffered because of the actions of a defendant. In this sense, the modern origin of punitive damages is found in the 18th century English decisions in which punitive damages awards seem to have been a compensation for mental distress or other intangible losses.[6] Eventually, retribution and deterrence were identified as bases for separate awards of damages. Today, in the great majority of states and the federal courts, punitive damages are fully approved as extra-compensatory awards.[7] The windfall to the plaintiff is tolerated as a means of securing public good through a kind of quasi-criminal punishment in the civil suit.[8]

6. *See, e.g.*, Dorsey D. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 12-20 (1982).

7. Dobbs, *supra* note 2, at 457.

8. *Id.*

Historically, the jury has possessed nearly unlimited discretion in determining whether to award punitive damages and the amount of the award.[9] Its decision is reviewed by the trial and appellate court under the rubric of reasonableness.[10]

For many years, this system seemed to function free of controversy. Punitive awards were infrequent and often insubstantial.[11] However, in recent years, both the size and frequency of punitive damages awards have increased. How much of an increase is, as one might expect, the subject of some controversy. Anecdotal evidence of skyrocketing awards is plentiful; hard empirical data is not. This article will not attempt to review all the literature on the extent, if any, of the increase in punitive damages awards. However, a brief review of the current literature gives some flavor of the controversy.

One recent study of the available data concluded that "every empirical study of [punitive damages] has reached conclusions that, to say the least, fail to support" the claim that "punitive damages have grown dramatically in both frequency and size."[12] This sort of analytical certitude contrasts sharply with, for example, Justice O'Connor who, dissenting in the *Haslip* case, characterized the growth of punitive damages as "staggering" and "explosive."[13]

Recently Texaco, Inc. undertook a study of whether punitive damages have increased in size and frequency in the last twenty-five years. The study, entitled "Punitive Damages Explosion: Fact or Fiction," reviewed final appellate decisions affirming punitive damage awards in four states from 1968-1971 and 1988-1991.[14] The study only looked at business related cases, defined as cases in which at least one defendant was a business enterprise. Cases against individuals and government entities were excluded from the analysis.

The results of the Texaco analysis are notable in several respects. From 1968-1971, the study found 73 business related cases in which punitive damages were awarded in California, Texas, Illinois, and New York and affirmed on appeal. The total amount of punitive damages awarded was just under $800,000. From 1988-1991, in those same four states, the study found 401 cases in which the total punitive damages awarded exceeded $300,000,000. Even correcting for inflation, the increase in punitive damages awarded is extremely substantial.

What is remarkable about the Texaco study is that it demonstrates a marked increase in certain types of punitive damages awards (*i.e.*, business litigation cases) using a very conservative methodology. For example, the

9. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).
10. *Id.*
11. Ellis, *supra* note 7, at 2.
12. Saks, *supra* note 4, at 1254.
13. *Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting).
14. A copy of this study, conducted under the supervision of Texaco's general counsel, Stephen Turner, with the assistance of the Atlanta, Georgia law firm of King & Spalding, is on file at the offices of the SMU Law Review.

study excluded from consideration punitive damages cases settled after trial or after an intermediate appeal. Inclusion of these cases no doubt would significantly increase the study's conclusions.

However, the Texaco study does not tell the complete punitive damages story. The Texaco conclusions, which seem conservative and soundly reached, are not reproduced in the area of personal injury cases. In a recent study conducted by the Roscoe Pound Foundation, researchers looked at punitive damages verdicts in products liability cases from 1965 to 1990. During that time period, the study found that punitive damages were awarded in only 355 cases. The median punitive award was $625,000.[15] This finding is consistent with an analysis by the American Bar Association, which concluded that although "punitive damages awards have grown in frequency and size over the past twenty-five years, the bulk of this growth has been in cases of intentional torts, unfair business practices, and contractual bad faith. The punitive damages picture in personal injury cases has changed very little in 25 years."[16]

Part of the problem is, of course, a statistical one burdened by the adage that one can prove anything with statistics. For example, an analysis of the mean punitive damages award in a given jurisdiction could lead to a conclusion that the average award is very high when, in fact, the mean is distorted by one or a few very large awards. A calculation of the median award would avoid this problem but it fails to capture the upper limits of what juries have awarded. Finally, most assessments, statistical or anecdotal, often fail to account for the tendency of punitive damage cases to be substantially reduced or overturned on appeal.[17] Is a punitive damages award that is substantially reduced or overturned on appeal, evidence of "skyrocketing" punitive damages awards or rather evidence that the current system adequately cabins the jury's discretion?

Nonetheless, the picture, broadly painted, is a punitive damage system that, in the personal injury context, is not out of control, but is functioning with some stability. In the business litigation context, however, punitive damages are on the increase. The magnitude of the increase is open to debate.

---

15. MICHAEL RUSTAD, DEMYSTIFYING PUNITIVE DAMAGES IN PRODUCTS LIABILITY CASES: A SURVEY OF A QUARTER CENTURY OF TRIAL VERDICTS 23 (1991).

16. Report of the Special Committee on Punitive Damages. Punitive Damages: A Constructive Examination 2-1 (ABA 1986). In the business context, part of the growth identified by the ABA is in substantive areas of law that barely existed 25 years ago such as contractual bad faith. The punitive damages system cannot be fairly faulted for an expansion of substantive causes of action.

17. *See, e.g.*, Mason v. Texaco, Inc., 948 F.2d 1546 (10th Cir. 1991) (holding $25 million punitive award excessive; reduced to $12.5 million), *cert. denied*, 112 S. Ct. 1941 (1992); Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991) (reversing $100,000 punitive damage award); General Motors Corp. v. Johnston, 592 So. 2d 1054 (Ala. 1992) (holding $15 million punitive award excessive and reducing to $7.5 million); Wollersheim v. Church of Scientology, 6 Cal. Rptr. 2d 532 (Cal. Ct. App. 1992) (reducing $24 million punitive award to $2 million).

Almost every state permits trial court remittitur of excessive punitive damages. *See generally* 2 JAMES GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 18.02 (Supp. 1993).

We conclude that the resolution of this issue is, at best, an interesting side light in the punitive damages debate. The defects in the current system of awarding punitive damages exist whether punitive damages are increasing, decreasing, or staying the same. The defects inhere in the way the current system awards punitive damages—at the hands of jurors who are told very little about the important task they are undertaking. Jurors rely on the courts to provide them with a meaningful, sensible framework for their decisionmaking. In the punitive damages context, they have been treated to little in the way of meaning or sense.

III. THE SUPREME COURT STEPS IN, THEN ASIDE

The Supreme Court first took a serious crack at resolving the punitive damages "problem" in *Haslip*.[18] Although affirming a state judgment awarding substantial punitive damages, the Court held that the Due Process Clause of the Fourteenth Amendment protects a party in a state court proceeding from a punitive damages award that is "unreasonable."[19] The Court gave very little guidance as to how reasonableness is to be measured, though it noted with approval the Alabama state system, which provided appellate review of awards based on factors such as the seriousness of the defendant's conduct, the desirability of deterrence, and the impact of the award on the parties.[20]

On the issue of jury instructions, the Court favorably noted instructions that told the jury no more than that in calculating an award of punitive damages, they must "take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong."[21] Although the Court went on to speak approvingly of Alabama's appellate review of punitive awards, it failed to articulate how review of such broadly exercised discretion can produce intelligent results.[22]

Although enshrining a substantive due process right to a "reasonable" punitive damages award, the *Haslip* court did little to clarify the constitutional standing of the process by which punitive damages are awarded. Courts following *Haslip* have used its rationale both to uphold and to reject the constitutionality of punitive damages schemes.[23] There has certainly been

18. Before *Haslip*, in Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989), the Court rejected the notion that the excessive fine provision of the Eighth Amendment applied in the punitive damages context. It declined to review, however, any due process issues.

19. *Haslip*, 499 U.S. at 20.

20. *Id.* at 20-21.

21. *Id.* at 6 n.1.

22. It should be emphasized that this criticism is not simply a disguised way of implying that punitive damages awards are too high. The authors represent litigants seeking large punitive awards, and litigants who seek to avoid such damages. There is not, nor can there be, a normative prescription for a fixed level of punitive damages. Indeed, there is nothing intrinsic in the broadly worded Alabama-type instruction to suggest that an award under that approach will necessarily be higher than one in a system that provides more detailed instructions. The goal advanced by the authors is more intelligent jury decision-making, not "lower" punitive damage awards.

23. *See infra* note 25.

little evidence to suggest that *Haslip* or its progeny had any real impact on the size or frequency of punitive damage awards.[24]

In effect, the *Haslip* Court gave the Alabama punitive damages system a passing grade without providing the definite standards under which it was graded. For example, the Alabama system, unlike many states, prohibited the introduction of evidence before the jury regarding the defendant's net wealth.[25] Was this an important factor for the majority in *Haslip*? If so, it is hard to explain a post-*Haslip* case like *Robertson Oil Co. v. Phillips Petroleum Co.*,[26] in which the Eighth Circuit approved an Arkansas jury instruction that permitted the jury to consider the wealth of the defendant in calculating punitive damages. In other words, by broadly endorsing the Alabama system without analyzing how each element effects the due process analysis, the Court invited additional constitutional challenge in the lower courts.

The most recent pronouncement from the Supreme Court, and likely the "final" word on punitive damages for the foreseeable future, is *TXO Production Corp. v. Alliance Resources Corp.*[27] Though much anticipated by critics of the current punitive damages system, the *TXO* decision effectively closed the door on substantive due process challenges to punitive damage awards.[28] Moreover, it deliberately avoided addressing the key defect of the current system—the process by which punitive damages are awarded in the first instance.

TXO arose from a dispute over rights to explore oil beneath a tract of land in West Virginia. TXO, a subsidiary of USX Corporation, leased a portion of the natural gas rights from Alliance in 1985. Subsequently, TXO learned that another party, a coal company, might have acquired the natural gas rights to the property via a 1958 deed. Although the coal company claimed no natural gas rights in the property, TXO persuaded the company to sign a quitclaim deed, transferring all rights it had to TXO. The quitclaim deed gave TXO a claim to all the natural gas rights, not just the portion it had leased from Alliance. The day after TXO obtained the deed it paid Alliance the previously negotiated purchase price for the gas rights.

With the quitclaim deed in hand, TXO demanded royalty concessions from Alliance, in effect seeking to renegotiate the lease contract. TXO informed Alliance that if it refused, TXO would file suit to have the court

24. *See, e.g.*, Latham Seed Co. v. Nickerson Am. Plant Breeders, Inc., 978 F.2d 1493 (8th Cir. 1992) ($10 million punitive damages award upheld), *cert. denied*, 113 S. Ct. 3037 (1993); Braswell v. ConAgra, Inc., 936 F.2d 1169 (11th Cir. 1991) ($9.1 million punitive damages award upheld); Republic Ins. Co. v. Hires, 810 P.2d 790 (Nev. 1991) ($5 million punitive damages award upheld); Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 839 S.W.2d 866 (Tex. App.—Austin 1992, writ granted) ($14.3 million punitive damages award upheld); Smart v. Caterpillar, Inc., 1992 Wisc. App. LEXIS 657 (Wis. Ct. App., Aug. 18, 1992) ($7.5 million punitive damages upheld).

25. *Haslip*, 499 U.S. at 6.

26. 979 F.2d 1301 (8th Cir. 1992), *vacated and rehearing granted en banc*, 979 F.2d 1314 (1993).

27. 113 S. Ct. 2711 (1993).

28. Perhaps the only remaining issue in the substantive due process context is the constitutionality of a punitive award that confiscates most or all of a defendant's net worth.

declare TXO the rightful owner of all the gas rights and Alliance would lose all interest in the property. When Alliance refused to capitulate, TXO filed a declaratory judgment seeking to have itself declared the true owner of the gas rights. Alliance counterclaimed for slander of title.

The West Virginia trial court declared TXO's quitclaim deed void. On its counterclaim, Alliance introduced evidence that TXO's actions with respect to the quitclaim deed were in bad faith. Under the Federal Rules of Evidence 404(b), Alliance introduced evidence of TXO's alleged bad faith with respect to other oil and gas property.

The jury awarded Alliance and the other property owners $19,000 in compensatory damages for their attorneys' fees expended in defending what the jury found to be a malicious lawsuit. The jury also assessed $10 million in punitive damages.[29]

In the Supreme Court, TXO complained that it was denied substantive and procedural due process in several respects. TXO challenged the jury instructions as inadequate, the failure of the trial court to issue a written opinion overruling its post-trial motions, and the lack of any real notice of the possibility of a large punitive award. TXO also contended that the award was so excessive as to be unconstitutional.

Although the Court produced no majority opinion, it affirmed the punitive damage award.[30] A clear majority rejected TXO's contention that a punitive damage award 526 times greater than the compensatory award violated substantive due process under *Haslip*. However, a variety of views emerged from the Court's nine members.

Justice Stevens, in the plurality opinion joined by Justice Blackmun and Chief Justice Rehnquist, rejected a bright-line test based on the ratio of punitive damages to actual damages. Instead, the test is simply one of "reasonableness."[31]

The plurality approved of Alliance's theory of "potential harm" as justifying the award as "reasonable."[32] Alliance argued on appeal that, although the punitive award was substantially greater than the actual damages, it bore a reasonable relationship to the potential harm that could have resulted if TXO's scheme to deprive Alliance of its royalty interests had succeeded. Alliance had alleged that its potential loss was between five and eight million dollars had TXO's scheme succeeded.

The plurality specifically rejected TXO's challenge to the admission of "other bad acts" evidence in the form of other bad faith land dealings TXO had across the country. The plurality noted that such evidence is "typically considered in assessing punitive damages."[33]

Significantly, the plurality declined to address TXO's procedural due process objections to the jury charge on the ground that TXO had not preserved

29. *Id.* at 2717.
30. *Id.* at 2724.
31. *Id.* at 2720.
32. *Id.* at 2721-22.
33. *Id.* at 2722 n.28.

this objection in the trial court.[34] As discussed below, because the lack of adequate jury guidance is the core problem with the current punitive damages system in the first instance, the Court's failure even to comment on the issue will undoubtedly produce additional constitutional challenges and conflicting results in the lower courts.

In a separate concurring opinion, Justice Kennedy rejected the plurality's focus on reasonableness in favor of a test that focuses "not on the amount of money a jury awards in a particular case, but on its reasons for doing so."[35] Justice Kennedy failed to explain how this test would operate in practice but it appears to be one geared towards detecting bias, passion, or prejudice in a jury's award of punitive damages.[36]

Justices Scalia and Thomas, though affirming the judgment, distanced themselves from the plurality's view of reasonableness. Justice Scalia flatly rejected the notion that the Constitution enshrines a reasonableness test in a due process analysis of a punitive damages award. A litigant is entitled to a fair and rational procedure—she is not entitled to a substantively reasonable amount of damages.[37]

In a strong dissent, Justice O'Connor, joined by Justices Souter and White, characterized the punitive damages award as "monstrous,"[38] and indicated she would impose a constitutional requirement of "meaningful review."[39] Although she recognized that no "bright line" test existed, she described as "quite probative" some of the factors articulated by TXO as guideposts for review: the relationship between actual damages and punitive damages, the size of other punitive damage awards in the jurisdiction, the size of awards in other jurisdictions, and legislatively designated penalties for similar misconduct.[40]

What the Court, along with many critics of the current system, has simply ignored is that to the extent there exists a problem of constitutional dimensions in the punitive damages system, it is a problem of procedural due process. Punitive damages awards should not be suspect solely because of the size of the award. Under the right circumstances, punitive damages in the millions or tens of millions could be appropriate. Consequently, substantive limits on such awards are not sensible and are reminiscent of the Court's jurisprudence in the *Lochner* era.[41] Nonetheless, punitive damages remain suspect in our current system because of the clumsy, half-in-the-dark process that we foist upon jurors in determining an appropriate award. We tell jurors relatively little about what they should consider in fixing a punitive award.[42] Moreover, what we do tell them is oblique and often misleading.

34. *Id.* at 2723.
35. *Id.* at 2725.
36. *Id.* at 2725-26.
37. *Id.* at 2726-27.
38. *Id.* at 2728.
39. *Id.* at 2742.
40. *Id.* at 2732.
41. Lochner v. New York, 198 U.S. 45 (1905).
42. In some sense, this failure to inform is an unintentional throwback to the early days of American jurisprudence where juries were not instructed on the law at all but were presumed

That the numbers they come up with seem intellectually unsatisfying should surprise no one.

Most jurisdictions have adopted some version of the following as a jury instruction for punitive damages:

> If you find that the acts of defendant were willful, wanton, and maliciously done, then you may add to the actual amount of damages such amount as you shall agree is proper. The purpose of punitive damages is not to compensate plaintiff, but rather to punish the defendant, and to deter the defendant and others from committing such acts in the future.
>
> An act is willfully done if done voluntarily and intentionally and with the specific intent to commit such an act.
>
> An act is wantonly done if done in careless disregard of, or indifference to, the rights of the injured party.
>
> An act is maliciously done if prompted or accompanied by ill-will or such gross indifference to the rights of others as to amount to a willful act done intentionally without just cause or excuse.[43]

Many jurisdictions specifically add an instruction telling the jury that, in considering the amount of punitive damages, it may consider the net worth of the defendant.[44]

These sort of general instructions are little better than advising the jury to "do the right thing."[45] The jury is given no guidepost with which to measure whether one million dollars or one hundred is appropriate punishment. In any other context, the lack of adequate jury guidance would render general instructions constitutionally suspect.[46] Why such generality is tolerated in the punitive damages context is simply inexplicable.

In *Giaccio v. Pennsylvania*[47] the plaintiff challenged a 100-year-old Pennsylvania statute that governed the imposition of costs in misdemeanor cases.

---

capable of deriving the law from their own experience. *See* William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 732-36 (1981).

43. EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 86.09 (4th ed. 1987).

44. Forty-three states allow the introduction of the defendant's net worth for the jury to consider in assessing punitive damages. Indeed, some states *require* the introduction of such evidence. *See, e.g.*, Bould v. Touchette, 349 So. 2d 1181, 1187 (Fla. 1977) (allowing jury to consider net worth); Poulsen v. Russell, 300 N.W.2d 289, 295 (Iowa 1981) (allowing jury to consider net worth); O'Donnell v. K-Mart Corp., 100 A.D.2d 488, 492 (N.Y. App. Div. 1984) (allowing jury to consider net worth); Lunsford v. Morris, 746 S.W.2d 471, 473 (Tex. 1988) (allowing jury to consider net worth); *see also* Caron v. Caron, 577 A.2d 1178, 1180-81 (Me. 1990) (requiring jury to consider net worth); Cruz v. Montoya, 660 P.2d 723, 727 (Utah 1983) (requiring jury to consider net worth).

45. Indeed, some significant jurisdictions advise the jury in much briefer terms than the pattern instruction. In Texas, for example, the jury's task with respect to punitive damages is explained in one sentence: " 'Exemplary damages' means an amount which you may, in your discretion, award as an example to others and as a penalty by way of punishment, . . . in addition to any amount which may have been found by you as actual damages." *See* K-Mart Corp. v. Pearson, 818 S.W.2d 410, 417 (Tex. App.—Houston [1st Dist.] 1991, no writ).

46. *See, e.g.*, Stringer v. Black, 112 S. Ct. 1130 (1992) (holding that due process requires clear jury instructions in sentencing phase of criminal case).

47. 382 U.S. 399 (1966). Justice O'Connor cited to *Giaccio* in her *Haslip* dissent in support of her position that the Alabama system violated due process. *Haslip*, 499 U.S. at 49 (O'Connor, J. dissenting). The majority distinguished *Giaccio* with nothing more than the *ipse dixit* assertion that the case was not "helpful." *Id.* at 24 n.12.

The statute provided that, after an acquittal, the jury had to determine whether the county, the prosecutor, or the defendant should bear the costs of prosecution. Writing for a unanimous Court, Justice Black observed:

> It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.[48]

The State argued that, even if the statute was vague as written, instructions given by the court to the jury cured any due process challenge. A string of state court decisions in Pennsylvania had approved instructions limiting the imposition of costs to defendants whose conduct, though not illegal, was "reprehensible," "improper," or otherwise constituted "misconduct of some kind."[49] Justice Black squarely rejected the notion that these instructions told the jury anything meaningful.

> It may possibly be that the trial court's charge comes nearer to giving a guide to the jury than those that preceded it, but it still falls short of the kind of legal standard due process requires. At best it only told the jury that if it found [the defendant] guilty of "some misconduct," less than that charged against him, it was authorized by law to saddle him with the state's costs in its unsuccessful prosecution. It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as "misconduct," or "reprehensible conduct." If used in a statute . . . such loose and unlimiting terms would certainly cause the statute to fail to measure up to the requirements of the Due Process Clause.[50]

Appellate review, no matter how searching, cannot cure the defects of inadequate trial court guidance for the jury. The problem is standardless juries, not inadequate appellate review.[51] The Supreme Court has long recognized the due process problems inherent in appellate review of inadequate trial procedures.[52]

The principle that a litigant is entitled to a impartial and rational adjudication in the first instance is the cornerstone of due process.[53] Two examples of the limits of appellate review as a cure for defects at trial, one a constitutional issue decided by the Supreme Court and the other a punitive damages case decided by the Fifth Circuit, demonstrate this point.

---

48. *Giaccio*, 382 U.S. at 402-03 (citations omitted).

49. *Id.* at 404.

50. *Id.*

51. Appellate intrusion on the prerogative of the jury in assessing an appropriate damage award is a relatively recent phenomenon. Between 1879 and 1933, the Supreme Court held in 11 separate cases that it lacked the authority to review the size of a jury's verdict. *See, e.g.*, Fairmount Glass Works v. Cub Fork Coal, Co., 287 U.S. 474, 481-82 (1933) ("The rule that this Court will not review the action of a federal trial court in . . . denying a motion for a new trial . . . has frequently been applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a Circuit Court of Appeals.").

52. Godfrey v. Georgia, 446 U.S. 420 (1980); Gregg v. Georgia, 428 U.S. 153 (1976).

53. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886).

In *Ward v. Village of Monroeville*[54] the Supreme Court considered the constitutionality of a system for the adjudication of traffic offenses before the village mayor. Ward challenged the system on due process grounds, arguing that, because the village derived a portion of its revenues from traffic tickets, the mayor was not a fair and impartial arbiter. The village argued that, because the mayor's decision was reviewed *de novo* in the County Court of Common Pleas, any problem with impartiality could be disregarded. The Court disagreed and held the village system unconstitutional.

> [The procedural safeguard of *de novo* review] does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. [Ward] is entitled to a neutral and detached judge in the first instance.[55]

Ward has never been cited by the Supreme Court in the punitive damages debate. Although *Ward* involved the right to an impartial adjudication, its principle—not even *de novo* appellate review can cure deficient trial procedures—resonates strongly in the context of punitive damages where jurors are given no meaningful guidance in calculating punitive damages. Appellate review is no antidote to the illness of vague jury instructions. A defendant is entitled to an intelligent adjudication throughout the judicial process.

The Fifth Circuit echoed a similar theme in the context of a large punitive damage award in *Auster Oil & Gas, Inc. v. Stream*.[56] In *Auster* an oil lessee sued its lessor and others for violation of its constitutional rights under 42 U.S.C. § 1983. The jury awarded the plaintiff $250,000 in compensatory damages against each defendant and a total of $5,000,000 in punitive damages.

Although the trial court ordered a substantial remittitur of the punitive award, the Fifth Circuit nonetheless reversed the entire punitive award and ordered a new trial on the issue. The *Auster* court concluded that the size of the award was not supported by the factual record and was "inherently indicative . . . that the jury was motivated by passion and prejudice in their award of punitive damages."[57]

Auster is a perfect example of the limits of appellate review in the punitive damage context. At some point, appellate review is nothing more than one group, an appellate panel, substituting its judgment as to what is fair and appropriate for that of another group, the jury.

Just as there is no basis for deferring to the judgment of a jury motivated by extreme passion and prejudice, there is no rational justification for a post-verdict review process that attaches extraordinary deference to punitive

54. 409 U.S. 57 (1972). The authors are indebted to Robert E. Goodfriend, a nationally recognized appellate specialist practicing in Dallas, for first identifying the application of the *Ward* principle in the punitive damages context.

55. *Ward*, 409 U.S. at 61-62.

56. 835 F.2d 597 (5th Cir. 1988).

57. *Id.* at 603-04.

damages verdicts unless they are the product of juries whose discretion is intelligently cabined. Post-verdict review is not meaningful in this context because, colloquially put, the cow is already out of the barn.[58]

Telling the jury that the imposition of damages is entirely within their discretion and that a punitive damages award should take into account the "nature of the wrong" is without meaning. To the extent it has any meaning at all, it would seem to present the risk that juries, as Justice O'Connor pointed out in *Haslip*, will award damages based on what they "feel" about the defendants' actions or some other improper basis.[59]

Mattison v. Dallas Carrier Corp.,[60] a Fourth Circuit case invalidating on procedural due process grounds the South Carolina system for awarding punitive damages, is a good model for analyzing the due process problems inherent in most punitive damage systems. Its scholarly reasoning and sound practical advice go a long way in bringing rationality and order to the punitive damages debate.

Mattison was a diversity action based on South Carolina negligence law. The trial court gave the jury the following instruction on punitive damages: "The amount of punitive damages assessed against any defendant may be such sum as you believe will serve to punish that defendant and deter it and others from like conduct."[61] The Fourth Circuit rightly concluded that such uncabined discretion violated the basic tenets of procedural due process.

> When a jury is left to its own devices to take property or mete out punishment to whatever extent it feels is best in the course of the process, our sensibilities about that process are offended. . . . In circumstances where conduct is found to be reckless, gross or wanton, a jury instructed under South Carolina law is permitted to assess any amount that it feels appropriate to punish or to deter, without any meaningful standard or limitation, . . .
>
> . . . When we recognize that under a rule of law, principles of law are announced in advance so that the law can be known and the people can conform their conduct accordingly, an award of punitive damages which is entered without a legal standard is unacceptable, regardless of the amount.[62]

To remedy the due process deficiencies, the *Mattison* court set out the factors on which a jury *must* be instructed in a punitive damages case, factors derived from *Haslip* and a South Carolina Supreme Court case involving appellate review of punitive awards:

---

58. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 757 (1982) ("Retrospective case-by-case analysis cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard."); Baggett v. Bullitt, 377 U.S. 360, 373 (1964) ("[J]udicial safeguards do not neutralize the vice of a vague law.").

59. *Haslip*, 499 U.S. at 44-45 (O'Connor, J., dissenting); *see also Browning Ferris*, 492 U.S. at 279 (Brennan, J., concurring).

60. 947 F.2d 95 (4th Cir. 1991).

61. *Id.* at 100.

62. *Id.* at 105-106; *see also* ROSCOE POUND, THE SPIRIT OF THE COMMON LAW, 183 (Beacon Press ed. 1963) (1921); OLIVER W. HOLMES, THE COMMON LAW 89 (M.D. Howe ed. 1963).

(1) Relationship to harm caused: Any penalty imposed should take into account the reprehensibility of the conduct, the harm caused, the defendant's awareness of the conduct's wrongfulness, the duration of the conduct, and any concealment. Thus any penalty imposed should bear a relationship to the nature and extent of the conduct and harm caused, including the compensatory damage award made by the jury.
(2) Other penalties for the conduct: Any penalty imposed should take into account as a mitigating factor any other penalty that may have been imposed or which may be imposed for the conduct involved, including any criminal or civil penalty or any other punitive damages award arising out of the same conduct.
(3) Improper profits and plaintiff's costs: The amount of any penalty may focus on depriving the defendant of profits derived from the improper conduct and on awarding the costs to the plaintiff of prosecuting the claim.
(4) Limitation based on ability to pay: Any penalty must be limited to punishment and thus may not effect economic bankruptcy. To this end, the ability of the defendant to pay any punitive award entered should be considered.[63]

The *Mattison* instruction may not be perfect, and it is certainly not the only language available to guide the jury's exercise of discretion.[64] It could be refined to make the guidance more comprehensible.[65] However, this language goes a long way in the right direction. It gives the jury guidance on

---

63. *Mattison*, 947 F.2d at 110.

64. In Martin v. Texaco, Inc., 726 F.2d 207, 213 (5th Cir. 1984), long before *Haslip* or *TXO*, the Fifth Circuit approved the following detailed instructions given in an industrial accident case by the district judge in the Eastern District of Texas:

> If you determine that the plaintiffs are entitled to a verdict and after you have determined the amount of actual damages, then you shall consider and determine the amount of punitive damages to be awarded, if any. As I told you earlier, punitive damages you award for gross negligence must bear a reasonable relationship to the actual damages suffered by the plaintiffs, no precise ratio between actual or punitive damages have [sic] been established. Instead, the requirement has been that the amount awarded as punitive damages not so greatly exceeds the actual damages as to indicate that the jury has been guided by passion and prejudice rather than reasoning.
>
> The appropriate ratio will vary from case to case, depending on such factors as the character of the wrongful conduct, the extent to which the defendant is involved in the conduct and the extent to which that conduct offends a public sense of justice and propriety.

Id. at 212-13. The court went on to use examples of punitive damage awards, including specific ratios of actual damages to punitive damages, that had been upheld and overturned in the courts. *Id.* One commentator has noted that, although the instruction in *Martin* is "far from perfect [,] . . . it provides a good starting place for the formulation of meaningful instructions on punitive damages, and it provides defendants with some precedent to support requests for more detailed punitive damage instructions." *See* Robert E. Goodfriend, *Preserving Error in Punitive Damages Cases*, 53 TEX. B.J. 1282, 1290 (1990).

65. Based on our belief that a jury can only make intelligent decisions when its discretion is properly channeled, we propose by way of example the following instruction to guide the jury's calculation of punitive damages following a fact-finding of gross negligence. Its general language could be modified to fit the facts of a particular case.

> Because you have found the defendant was grossly negligent, you must now determine whether to award punitive damages. The law permits, but does not require you, to award such damages to punish or make an example of the defendant and to deter the defendant and others from similar conduct in the fu-

several important factors. First, it tells them that any punitive award should bear a relationship to the harm caused and the nature of the defendant's conduct. This instruction is critical to focusing the jury on the defendant's wrongful act and its consequences. It specifically avoids, however, telling

---

ture. Any amount that you award in punitive damages will be received by the plaintiff in addition to any compensatory damages you have found.

An award of punitive damages is up to your judgment and common sense. You may award such damages or you may choose not to. If you decide to award punitive damages in this case, the following factors should be used by you to guide your determination of the amount of such damages:

(1) Relation of punitive damages to the defendant's conduct. Any award of punitive damages should take into account the actual harm caused or harm that could have been caused by the defendant's conduct. How long did the defendant's conduct last? Was it brief or did it cover a long period of time? How long was the defendant aware of the wrongfulness of his conduct? If the defendant's conduct did not cause the risk of great harm, you may decide that the defendant's punishment should be small. However, if the defendant's conduct, though causing limited harm in this case, created a risk of much greater harm, then you may decide that a larger punishment is justified.

If the defendant concealed or tried to cover up his actions, you may consider that in your punitive damages determination. You may also consider whether the defendant made a good faith attempt to correct the problem or prevent it from happening in the future. In other words, you should consider all the actions of the defendant in determining whether he should be punished or made an example of in this case.

In reaching an appropriate amount of punishment, you may also consider, for example, the profits gained by the defendant from his conduct, if any, as well as the costs and time spent by the plaintiff in having to bring this case to court. These factors, as well as others that your common sense and judgment tell you are important, can enter into your discussion about the proper amount of punitive damages to award, if any.

The law does not require that there be a fixed ratio between what you have awarded as actual damages and what you may award as punitive damages. In other words, the punitive damages can be more than, less than, or equal to the amount of actual damages. However, as I stated earlier, you should consider the actual harm that was caused or that could have been caused in evaluating how much, if any, punitive damages are fair in this case.

(2) Wealth of the defendant. A small penalty may have a great impact on a poor defendant, but very little impact on a wealthy one. You have been presented evidence of the defendant's wealth to help you evaluate what would be a proper penalty for this defendant. In our system of justice, we do not punish people or businesses simply because of their wealth. That would be unfair. Thus, you should not decide to award a substantial figure of punitive damages simply because the defendant has what you view as a substantial amount of assets. The defendant's wealth has been given to you solely to allow you to come up with a punitive damage award that makes sense under the facts of this case. Any other use of this evidence would be improper.

Keep in mind that any punitive award should not financially cripple the defendant or put the defendant out of business—but should, as I stated earlier, deter the defendant and others in his position from acting wrongfully in future cases.

(3) Other penalties that have or may be imposed. If, based on the evidence you have heard, the defendant has received, or is likely to receive, other penalties for the conduct in this case, you may decide that such circumstances should reduce your calculation of a punitive damage award.

This instruction, though admittedly lengthy, provides the kind of educated guidance that a jury needs to make a sensible determination of a punitive damages issue. *See generally* Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 90-91 (1988).

the jury that a punitive award must have some proportional relationship to any compensatory award, merely that any compensatory award should be considered by the jury in assessing a punitive total.

Moreover, the *Mattison* instruction, consistent with the analysis in *TXO,* properly focuses the jury on the profits the defendant received (or, arguably, could have received) as a basis for calculating punitive damages. This gives the jury a general benchmark for deliberation.

Finally, the jury is cautioned that their calculation of a punitive award should take into account a defendant's ability to pay. This allows a consideration of net worth but limits the ability of a single punitive award to bankrupt a defendant.[66]

IV. THE POST-TXO LANDSCAPE

Mattison was decided after *Haslip* but before *TXO.* Unfortunately, the few reported decisions post-*TXO* have rejected the *Mattison* approach to providing more guidance to the jury in the punitive damages determination. Though *TXO* expressly declined to review the West Virginia jury charge for compliance with due process, the tone of the Court's analysis has created an atmosphere hostile to any challenge, even a procedural one, to the punitive damages system. Two recent cases, one state and one federal, are instructive in this regard.

In *Missouri Pacific Railroad Co. v. Lemon*[67] the Houston Court of Appeals became one of the first courts to apply a *TXO* analysis to its state's common-law method of awarding punitive damages. In this case, Missouri Pacific ("MoPac") and its engineer, Raymond Johnson, appealed from a judgment awarding over $2 million in actual damages and $10 million in punitives arising out of a railway accident that caused the death of Sharon Lemon.

In its appeal, MoPac mounted a comprehensive attack on the punitive damage award, focusing on its alleged excessiveness under both the accepted standards of Texas appellate review and, more broadly, under the federal and state constitutions.

In two points of error, MoPac complained that the Texas system for awarding punitive damages violated the due process clause of the federal constitution and the "due course of law" provision of the Texas constitution. Citing to *Haslip* and *TXO,* the court rejected these challenges. The court

66. There have been a few states that have legislatively adopted the approach advocated by the authors regarding more detailed jury instructions. With the exception of Minnesota and New Jersey, however, the statutes simply provide definitions of terms like malice and fraud as opposed to providing detailed guidance. *But see* MINN. STAT. ANN. § 549.20(3) (West 1992). The Minnesota statute requires instruction that punitive damages "shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct . . . the profitability of the misconduct to the defendant . . . the financial condition of the defendant and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct," including other compensatory and punitive awards and criminal penalties.

67. 861 S.W.2d 501 (Tex. App.—Houston [14th Dist.] 1993, writ requested).

concluded that the Texas system provided adequate procedural safeguards for an award of punitive damages.[68]

The court also rejected MoPac's challenge to the brief jury instruction approved in Texas for guiding the jury's determination of punitive damages.[69] The court approved this instruction as satisfying due process because it properly defines the two primary purposes for punitive damages, deterrence and punishment, and limited the jury's discretion to these purposes. Although acknowledging that the instruction was not as detailed as that upheld in *Haslip*, the instruction nonetheless "enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory."[70]

The *Lemon* court's approval of the Texas "instruction" is frustrating. The court did not even attempt to grapple with the issue of how the unchannelled, unfettered discretion provided by the Texas pattern charge intelligently instructed the jury to do anything.[71] To be sure, the creation of appropriately detailed instructions that both create and cabin discretion is a difficult task, but mere difficulty is certainly no excuse for failing even to try. The courts of appeal exist to give trial courts guidance on how to conduct trials fairly and rationally, and formulation of proper instructions is at the core of a just trial procedure.

The *Lemon* approach is a serious blow to judicial attempts to reform the punitive damages process in Texas and elsewhere. In addition to rejecting MoPac's challenge to the jury instructions, the court also rejected a number of other challenges to the fundamental fairness of the Texas system, including MoPac's request for a bifurcated trial.[72]

---

68. *Id.* at 524. The court cited to TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.001-.009 (Vernon Supp. 1993). These sections, which act as part of Texas' tort reform legislation, set out numerous safeguards in the punitive damage context. They include limiting the amount of damages recoverable in certain tort actions, specifying the grounds for recovering punitive damages to three statutorily defined circumstances involving fraud, malice, and gross negligence, and eliminating punitive damages in a case where only nominal damages are awarded.

69. *Lemon*, 861 S.W.2d at 525.

70. *Id.*

71. MoPac had proposed the following instruction:

> "Exemplary damages" means an amount which you may in you [sic] discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages. In determining the amount of exemplary damages, you may consider the nature of the wrong, the character of the conduct involved, the degree of culpability of the wrongdoer, the situation and sensibilities of the parties concerned . . . and [MoPac]'s net worth. However, the evidence of net worth is not to be used . . . for any purposes of vindictiveness or out of any passion of prejudice against [MoPac] simply because it is prosperous.

Id. at 526. The *Lemon* court dismissed MoPac's claim of error based on the trial court's refusal to submit this instruction on the ground that the Texas pattern instruction satisfied due process and the failure to submit an alternative instruction was not an abuse of discretion. *Id.*

72. In rejecting MoPac's request for a bifurcated trial, the court noted, without analysis, that Texas law does not mandate such a proceeding, and there is nothing in either *Haslip* or *TXO* that mandates bifurcated proceedings. The court additionally noted that, other than suggesting that a bifurcated trial would minimize the prejudicial impact of net worth evidence,

The federal courts have shown no more interest than the state courts in taking steps to guide the jury's discretion following *TXO*. In *Dunn v. Hovic*[73] the Third Circuit considered, *inter alia*, a procedural due process challenge to jury instructions on punitive damages in an asbestos case. The jury awarded the plaintiff Dunn $500,000 in compensatory damages and $2 million in punitive damages.[74] The defendant challenged the jury instructions as violative of its right to due process.

The district court instructed the jury that punitive damages are allowed "for wanton and reckless behavior . . . [where] defendant's conduct was outrageous because done with an evil motive or done with reckless indifference to the rights of others."[75] As for the determination of a proper amount of punitive damages, the court simply told the jury that "it should be an award which stings [i.e., punishes] the defendant and will act as a deterrent to such conduct by the defendant in the future and a warning to others."[76] After citing to *Haslip* and *TXO*, the Third Circuit concluded that "[w]hile we acknowledge that the district court could have given the jury more guidance on the issue of punitive damages, we cannot conclude that the charge was constitutionally defective."[77]

How the Third Circuit intended to guide future instructions is far from clear. Is the court's finding that the instructions satisfied minimal due process an unreserved imprimatur on such language in future charges? But what of the court's "acknowledgement" that the instruction could have given the jury more guidance? In what respect? The court's failure to provide additional language, even if merely precatory, is an abdication of the court's responsibility to provide meaningful standards for the exercise of jury discretion.[78] Litigants on both sides of the docket are entitled to an intelligent trial procedure. The circuit courts should aid, not hinder, this goal.

The failure of the courts in general to recognize the procedural due process problems inherent in the vague and generalized instructions jurors are given on punitive damages is made all the more frustrating by empirical research unequivocally demonstrating that the wording of instructions has a profound effect on juror comprehension. Professors Steele and Thornburg conducted empirical research concerning juror comprehension of certain

---

MoPac demonstrated no actual harm arising out of the trial court's refusal to conduct bifurcated proceedings. *Id.* at 527-28.

73. 1 F.3d 1371 (3rd Cir. 1993) (en banc).

74. If one uses a ratio-bound approach to the punitive damages debate, then this award seems well within acceptable actual to punitive ratios. Again, however, the amount of punitive damages is not the issue. Perhaps $2 million dollars is not enough, perhaps it is too much. The issue is not the amount, but the process by which the amount is reached.

75. *Dunn*, 1 F.3d at 1380.

76. *Id.*

77. *Id.* (footnote omitted).

78. While the court cites Section 908(2) of RESTATEMENT (SECOND) OF TORTS, this reference is not enough to explain the standards to be used by a jury in arriving at an appropriate punitive damage award. *See id.* at 1374. The RESTATEMENT (SECOND) OF TORTS provides in Section 908(2) that: "punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." RESTATEMENT (SECOND) OF TORTS § 908(2).

pattern jury instructions in Dallas County, Texas. Their research revealed that jurors instructed on such terms as proximate cause and negligence were able to paraphrase correctly an accurate statement of the law less than 13% of the time. Instructions rewritten to clarify meaning resulted in over a 90% increase in comprehension.[79]

There is little dispute that juror comprehension of instructions can be outcome determinative.[80] If a jury cannot make sense of the instructions it receives, it cannot reach a sensible verdict. There can be few areas in the civil law where juror comprehension is more important than punitive damages. The jury's role in determining punitive damages transcends the pure fact finding involved in a determination of liability or compensatory damages. In assessing punitive damages, the jury is supposedly balancing sophisticated interests like retribution and deterrence all without the benefit, in most jurisdictions, of guidance more detailed than simply "do the right thing."[81]

V. MISGUIDED LEGISLATIVE ATTEMPTS TO LIMIT THE JURY

The jury's discretion has been limited in specific ways in many states, generally under the guise of tort reform. The typical response has been to modify legislatively the way punitive damages are awarded either by changing the burden of proof or by limiting the amount of punitive damages that can by awarded. Neither of these reforms is an appropriate solution to the problem.[82]

Some states, typically by statute, have created a higher burden of proof for an award of punitive damages. The revised standard is usually one of "clear and convincing evidence."[83] One state legislature has passed a statute that actually imposes the criminal standard of "beyond a reasonable doubt" upon a plaintiff seeking to recover punitive damages.[84] The rationale for these statutes is often predicated on the notion that, because punitive damages are quasi-criminal in nature, the burden of proof should be more than a mere preponderance.

The problem with this sort of solution is that it cuts against the whole concept of the requirements of proof in a civil trial, a trial between two private parties seeking to redress a private wrong. Punitive damages are not automatically available to every plaintiff. In all jurisdictions that allow such

79. Steele & Thornburg, *supra* note 66, at 90-91.

80. *See* REID HASTIE ET AL., INSIDE THE JURY 232 (1983) (finding that mock juries reach improper verdicts when instructions fail to guide deliberations in coherent manner); Richard D. Katzev & Scott S. Wishart, *The Impact of Judicial Commentary Concerning Eyewitness Identifications on Jury Decision Making*, 76 J. CRIM. L. & CRIMINOLOGY 733 (1985) (describing impact on juries of cautionary instructions regarding eyewitness testimony in criminal case).

81. *Browning-Ferris*, 492 U.S. at 281 (Brennan, J., concurring).

82. *But see* MINN. STAT. ANN. § 549.20(3) (West 1992).

83. ALA. CODE § 6-11-20 (1993); ALASKA STAT. § 09.17.020 (1992); GA. CODE ANN. § 51-12-5.1 (Supp. 1993); IND. CODE § 34-4-34-2 (1992); KAN. STAT. ANN. § 60-3701(c) (Supp. 1992); KY. REV. STAT. ANN. § 411.184 (1992); MINN. STAT. § 549.20(1) (1986); MONT. CODE ANN. § 27-1-221 (1992); OHIO REV. CODE ANN. § 2315.21 (Anderson 1991); OR. REV. STAT. § 41.315 (1992); UTAH CODE ANN. § 78-18-1 (1983).

84. COLO. REV. STAT. ANN. § 13-25-127 (1993).

damages, the plaintiff must show, for example, something more than mere negligence. She must show gross negligence, reckless conduct, bad faith or malicious conduct.[85] Saddling a plaintiff with an additional burden seems not simply unfair, but irrational. In a civil lawsuit, every fact at issue is governed by a single standard—preponderance of the evidence. Singling out the fact determination that forms the basis for a particular type of damages makes no sense and has no real parallel anywhere in the law. Moreover, making punitive damages harder to prove rewards the defendant for gross misconduct and, from an economic efficiency standpoint, does not provide the proper disincentive for undesirable behavior.[86]

Another remedy for the perceived punitive damages problem is statutorily imposed caps or limits on the total amount the jury may award. Instead of directly addressing the real problem of unintelligible jury instructions, caps simply limit damages either by creating an acceptable ratio between punitive and actual damages or, in some cases, by setting a flat limit.[87]

Again, this solution seems ill-suited to the problem. What legislatively imposed ratio or limit can account for the wide variety of conduct that can lead a jury to impose punitive damages? Moreover, why should a defendant who has acted recklessly or in bad faith receive what amounts to a free pass from the legislature for his conduct? This approach seems akin to a parent who, concerned with his adolescent's disruptive behavior, imposes an early curfew without ever inquiring as to the motivation for the behavior in the first place. What is short-sighted parenting in one instance is ill-conceived lawmaking in another.

Statutory caps or fixed ratios will also be inadequate in a situation where the defendant's conduct is egregious but the actual harm inflicted is not. In *Hospital Authority of Gwinnett County v. Jones*[88] the jury awarded $5001 in compensatory damages and $1.3 million in punitive damages. From the perspective of caps or ratios, this appears to be an outrageous verdict. Yet the facts warranted a large award.[89] The defendant hospital transported a burn victim by helicopter to a distant member of the hospital's chain for treatment even though a comparable burn unit was available in a nearby rival hospital. The helicopter crashed but caused only minor additional injuries to the burn victim. Though the actual damages were small, the risk of injury created by the defendant's conduct justified a large punitive award.

Some commentators have suggested that caps or ratios cut against the

85. ALA. CODE § 6-11-20 (1993); FLA. STAT. ANN. § 768.73 (West 1993); GA. CODE ANN. § 51-12-5.1 (Supp. 1993); MONT. CODE ANN. § 27-1-221 (1992); OHIO REV. CODE ANN. § 2315.21 (Anderson 1992).

86. *See supra* notes 82-85 and accompanying text.

87. *See, e.g.*, FLA. STAT. ANN. § 768.73(1)(a)-(b) (West Supp. 1993) (stating that judgment for total amount of punitive damages may not exceed three times the amount of compensatory damages); GA. CODE ANN. § 51-12-5.1(g) (Supp. 1993) (stating that punitive damages in tort actions shall not exceed $250,000); TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon Supp. 1993) (stating that punitive damages, in certain causes of action, may not exceed four times the amount of actual damages or $200,000, whichever is greater).

88. 409 S.E.2d 501 (Ga. 1991), *cert. denied*, 112 S. Ct. 1175 (1992).

89. *See id.* at 503.

type of claim for which punitive damages are most desirable—small frauds or acts of bad faith spread out amongst a large number of victims. Moreover, to the extent punitive damages are intended to encourage private redress of public wrongs, caps or ratios make the risk of enforcement less attractive to potential plaintiffs.

Caps or ratios also fail to capture the full economic benefit that a defendant derives from his wrongful conduct. In a property rights case like *TXO*, for example, compensatory damages are inadequate to make the plaintiff whole because "[t]hey do not restore [the plaintiff's] preexisting opportunities for obtaining exchange value[s] . . . . The now impossible trade would have made [the plaintiff] more than whole."[90]

Arbitrary limits on punitive damages also fail to account for society's interest in deterring and punishing wrongful conduct. Society punishes a thief, for example, by doing more than simply making him return the stolen property. Society adds an "undefinable kicker" to represent its interest in protecting the rules of property.[91]

Moreover, legislative solutions like enhanced burdens of proof or limits on punitive damages, to some degree devalue the role of the jury as the purveyor of justice in our society, a role guaranteed by the Seventh Amendment. That amendment is a considered reflection, made by the founders of our government, that judges (and to some extent, legislators) could not be relied upon to reflect the conscience of the community. As Chief Justice Rehnquist once observed:

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny . . . a safeguard too precious to be left to the whim of . . . the judiciary. . . . Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, . . . and thus keep the administration of law in accord with the wishes and feelings of the community. . . . Those who favored juries believed that a jury would reach a result that a judge either could not or would not reach.[92]

In spite of the limits of legislative tinkering, there is one reform, adopted in several states, that is consistent with the authors' thesis that a properly informed and channelled jury is the key ingredient missing from the punitive damages system.[93] That reform is the bifurcation of the liability and puni-

---

90. Haddock, *supra* note 3, at 16.

91. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1126 (1972).

92. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting).

93. *See, e.g.*, CAL. CIV. CODE § 3295(d) (West Supp. 1993) (requiring that the trial court "shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression or fraud" and such evidence "shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression or fraud."); MINN. STAT. ANN. § 549.20(4) (West Supp. 1993). "In a civil action in which punitive damages are sought, the trier of fact shall, if requested by any of the parties, first determine whether any compensatory damages are to be awarded. Evidence of the financial condition of the defendant and other evidence rele-

tive damages determination at trial. Bifurcation takes nothing away from the jury, nor does it arbitrarily limit or cap the jury's determination. Rather, by separating the issue of whether the defendant is liable from whether the defendant should be punished (which must sensibly include telling the jury how much the defendant can afford to pay),[94] the risk that the issue of the defendant's wealth will taint the liability determination is minimized, if not completely eliminated.[95] Although bifurcation has typically been mandated by statute, there is nothing to stop a court from imposing this procedure as a matter of practice.[96] Courts that have refused to adopt this indisputably fair procedure are neglecting their responsibility to bring order and rationality to the justice system.[97]

VI. CONCLUSION

In most jurisdictions, the punitive damages system is in need of reform. Attempts to constitutionalize substantive limits smack of improper judicial legislation. Legislative tinkering with the burden of proof or prescribing fixed caps or ratios seem unnecessarily outcome determinative and tend to undermine the role of the jury. Sensible reform ought to emphasize the strength of the American judicial system—the common sense and conviction of ordinary citizens who serve on juries. No one would ever expect any jury to sort out an antitrust or securities case or even the simplest of criminal cases without detailed and intelligent instructions. An assessment of punitive damages should be no exception. A jury whose exercise of discretion is guided by intelligent instructions that detail the purposes of punitive damages and provide some conceptual benchmarks by which such damages should be calculated will produce fair results for both sides of the litigation. A jury guided by the current, near-meaningless language of most pattern

---

vant only to punitive damages is not admissible in that proceeding. After a determination has been made, the trier of fact shall, in a separate proceeding, determine whether and in what amount punitive damages will be awarded." *Id.*

Some states have taken the bifurcation concept too far, removing the punitive damage determination issue from the jury entirely. Thus, the jury's role as conscience of the community is abrogated. *See, e.g.*, OHIO REV. CODE ANN. § 2315.21(C)(2) (Anderson 1993) ("In a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court.").

94. "[T]he underlying deterrent rationale of punitive damages seems to demand consideration of a defendant's wealth, since a sum that would deter a poor person may have little or no impact on a rich person." Jerry J. Phillips, *A Comment on Proposals for Determining Amounts of Punitive Awards*, 40 ALA. L. REV. 1117, 1119 (1989).

95. *See* Dobbs, *supra* note 2, § 3.11 at 488. Evidence that a defendant is wealthy may make it easier for some triers of fact to find that a tort was committed in the first place, to award higher compensatory damages or to award punitive damages that otherwise would have been rejected.

96. *See, e.g.*, Herman v. Sunshine Chem. Specialties, Inc., 627 A.2d 1081, 1090 (N.J. 1993). In *Herman*, the court mandated that the punitive damages determination be bifurcated from the liability determination in all claims arising under New Jersey law even though the New Jersey legislature's requirement of bifurcation applied by its terms only to products liability cases.

97. The Texas court in *Lemon*, for example, would have been well within its authority to require, or at the very least to endorse, bifurcated proceedings. *See* TEX. R. CIV. P. 174(b).

instructions cannot produce the fundamentally fair and reasonable results that procedural due process guarantees. Uninformed juries are nothing more than a lottery. Due process ought to be more than a game of chance.

Essays