
THE “MONSTROUS HERESY” OF PUNITIVE DAMAGES:
A COMPARISON TO THE DEATH PENALTY
AND SUGGESTIONS FOR REFORM

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INTRODUCTION

Of the many debatable features of the United States' civil justice system, punitive damages may be one of the most derided. Designed to punish defendants for especially egregious conduct or to provide optimum deterrence when compensatory damages are insufficient, punitive damages are often awarded in an incoherent manner. The high levels of variation in awards have led many scholars—and judges—to question whether punitive damages are appropriate in most cases.¹ In response to these concerns, the Supreme Court has recently attempted to rein in punitive damages, chiefly in *BMW of North America, Inc. v. Gore*,² *State Farm Mutual Automobile Insurance Co. v. Campbell*,³ and *Philip Morris USA v. Williams*.⁴ The holdings in the first two cases rest on the Fourteenth Amendment's doctrine of substantive due process—that is, that the *excessiveness* of some awards may offend the Constitution.⁵ In *Williams*, however, the Court invoked procedural due process (i.e., the *process* through which juries decide punitive damages) as another limit on awards.⁶ Although *Williams's* holding is arguably narrow, the case may signal the Court's willingness to reevaluate the problem of arbitrary punitive damages awards.⁷

One highly visible area in which the Court has evaluated the procedural requirements of a certain punishment is the death penalty, specifically in the context of the Eighth Amendment. In *Furman v. Georgia*,⁸ the Court decided, in a brief per curiam opinion, that Georgia's death penalty statute violated the Eighth Amendment's ban on

¹ See *infra* Section I.B (discussing critiques of punitive damages).

² 517 U.S. 559 (1996).

³ 538 U.S. 408 (2003).

⁴ 549 U.S. 346 (2007).

⁵ See *BMW of N. Am., Inc.*, 517 U.S. at 562 (discussing the Fourteenth Amendment's ban on "grossly excessive" punishments (internal quotation marks omitted)); see also *State Farm*, 538 U.S. at 416-17 (citing *BMW's* discussion of due process). Note that one of the Court's most recent punitive damages cases, *Exxon Shipping Co. v. Baker*, was grounded in the Court's authority to enact common law rules pursuant to its maritime jurisdiction. See 128 S. Ct. 2605, 2619 (2008) ("Exxon raises an issue of first impression about punitive damages in maritime law, which falls within a federal court's jurisdiction . . .").

⁶ See *Williams*, 549 U.S. at 353 ("[W]e need now only consider the Constitution's procedural limitations.").

⁷ Cf. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 24 (1991) (finding no procedural due process defect with Alabama's punitive damages regime).

⁸ 408 U.S. 238 (1972).

"cruel and unusual punishments"⁹ as incorporated against the states through the Fourteenth Amendment.¹⁰ This case in essence found death penalty statutes that lead to the arbitrary infliction of capital punishment to be "cruel and unusual." In other words, a constitutional death penalty statute should produce similar sentences for similar capital defendants. In response to *Furman*, Georgia developed a variety of procedural protections in capital sentencing cases, which the Court later held to meet the requirements of the Eighth Amendment in *Gregg v. Georgia*.¹¹

The Eighth Amendment has no bearing on civil penalties, including punitive damages.¹² However, the Court in *Furman* did not follow typical Eighth Amendment reasoning; rather, the Court's focus on the arbitrariness of the death penalty appears more akin to a procedural due process analysis under the Fourteenth Amendment. Further, there is some support for the notion that *Furman* is properly understood as a Fourteenth Amendment procedural due process holding.¹³ Thus, plaintiffs seeking to challenge the constitutionality of punitive damages have two arguments to make. First, plaintiffs can argue that *Furman* is a Fourteenth Amendment procedural due process case directly applicable to other types of jury verdicts. Second, plaintiffs can argue that, in any event, the rationale underlying *Furman* should serve as persuasive authority in the procedural due process realm. Since *Furman* at its core is concerned with the arbitrariness of capital punishment, the arbitrary imposition of punitive damages should pose procedural due process issues similar to the Eighth Amendment problem in *Furman*. If this is the case, the states' response to *Furman* can also provide constitutional insight into how states could repair their punitive damages statutes.

⁹ U.S. CONST. amend. VIII.

¹⁰ See *infra* notes 120-123 and accompanying text (discussing suggestions that the Court's striking down of death penalty statutes may be due to the statutes' arbitrariness). This Comment will refer to "the Eighth Amendment as incorporated against the states through the Fourteenth Amendment" as "the Eighth Amendment" for simplicity's sake.

¹¹ See 428 U.S. 153, 207 (1976) (plurality opinion) (holding that Georgia's reformed death penalty statute did not violate the Constitution).

¹² See, e.g., *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989) (holding that the "Excessive Fines Clause" of the Eighth Amendment does not apply to punitive damages between private parties). For arguments that the Eighth Amendment's Excessive Fines Clause should apply to punitive damages, see generally Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1234 (1987).

¹³ See *infra* Section III.B (discussing *Furman* as a procedural due process decision).

Two decades ago, the Court rejected an argument that one state's imposition of punitive damages was unconstitutionally arbitrary.¹⁴ Thus, defendants seeking to mount a procedural due process challenge against punitive damages have an uphill battle. However, the existence of some support on the current Supreme Court for the notion that the Fourteenth Amendment's "basic guarantee of nonarbitrary governmental behavior" prevents the current arbitrary imposition of punitive damages is reassuring.¹⁵ More importantly, whether punitive damages are being applied arbitrarily is an empirical question: either plaintiffs can show arbitrariness or they cannot. If mounting empirical evidence begins to show more convincingly that punitive damages are imposed in an arbitrary fashion, plaintiffs should ask the Court to reconsider whether the Fourteenth Amendment applies. If such a challenge were successful, it is unclear exactly what procedural requirements the Court would require for punitive damages. But *Furman*—in addition to the Court's current punitive damages jurisprudence and behavioral law and economics literature—may provide clues. More importantly, if such a challenge were unsuccessful (or if no plaintiff mounted such a challenge), states looking to reform their punitive damages law would be well served by a consideration of these factors.

Although some scholars have noted the similarities between *Furman* and punitive damages,¹⁶ this Comment seeks to analyze these similarities in much greater depth. Specifically, this Comment argues that post-*Furman* changes provide the clearest example of states addressing a constitutionally flawed jury decisionmaking process, and that the successes and failures of this endeavor should guide states in the punitive damages field. Because recent research—particularly in the field of behavioral law and economics¹⁷—helps illustrate how and why punitive damages are being applied in a nonsensical fashion, states are in a unique position to use this research to craft new statutes with stronger procedural safeguards. Furthermore, the Court's punitive damages jurisprudence continues to provide a separate source of guidance for states.¹⁸ This Comment seeks to describe these recent

¹⁴ See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (concluding that the punitive damages award at issue did not violate Fourteenth Amendment due process).

¹⁵ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 597 (1996) (Breyer, J., concurring).

¹⁶ See *infra* note 171.

¹⁷ See, e.g., CASS R. SUNSTEIN ET AL., *PUNITIVE DAMAGES: HOW JURIES DECIDE* 236 (2002) (examining juries' behavior patterns and the effects of cognitive, social, and emotional processes on awards of punitive damages).

¹⁸ See *infra* Part II.

insights into the substantive and procedural problems with punitive damages and to use both frameworks to suggest a new model for punitive damages statutes.

Part I of this Comment describes the history of and economic justifications for punitive damages, as well as various arguments for why punitive damages awards are highly variable. Part II documents the Supreme Court’s recent punitive damages case law. Part III discusses the Court’s *Furman* jurisprudence and criticisms thereof. Part IV argues that the Court should reexamine the constitutionality of arbitrary punitive damages under procedural due process in light of *Furman*. Barring that possibility, Part IV also argues that states should consider all these sources of criticism—the variability of awards, the Court’s *BMW* jurisprudence, and the analogy to the death penalty—in drafting new punitive damages statutes. Part V presents a model jury instruction based on those considerations.

I. THEORIES AND CRITIQUES OF PUNITIVE DAMAGES

A. *The History and Theories of Punitive Damages Awards*

Punitive damages are hardly a recent development. Legal systems as ancient as the Code of Hammurabi have allowed plaintiffs to recover money above and beyond the measure of adequate compensation, especially when a defendant has acted in an especially culpable fashion.¹⁹ Other ancient codes, such as the Bible, included provisions for punitive damages; these damages also figured heavily in Roman law.²⁰ By the eighteenth century, English common law provided “exemplary damages” to plaintiffs when defendants committed “intentional aggravated misconduct.”²¹ United States common law has featured punitive damages since at least 1784,²² and the Supreme Court

¹⁹ See THE CODE OF HAMMURABI 63 (L.W. King trans., Forgotten Books 2007) (c. 1760 B.C.E.) (“If a herdsman, to whose care cattle or sheep have been entrusted, be guilty of fraud and make false returns of the natural increase, or sell them for money, then shall he be convicted and pay the owner ten times the loss.”).

²⁰ See Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1285-86 (1993) (describing these sources of law as “precursors to the modern remedy of punitive damages”).

²¹ *Id.* at 1287-90.

²² See Jacqueline Perczek, Note, *On Efficiency, Punishment, Deterrence, and Fairness: A Survey of Punitive Damages Law and a Proposed Jury Instruction*, 27 SUFFOLK U. L. REV. 825, 825 (1993) (“Punitive, or exemplary, damages have been part of American tort law since 1784.” (footnote omitted)). These damages came under a variety of names,

acknowledged the existence of punitive damages in 1818 in *The Amiable Nancy*.²³ Early state courts typically imposed punitive damages against defendants who committed violent torts.²⁴ However, courts later began to impose punitive damages more frequently against large corporations, such as railroad companies, whose gross negligence had the potential for serious harm but who could not be prosecuted under criminal law.²⁵

Punitive damages are an “anomaly” of the law, which usually awards damages to compensate victims for injuries that they have actually suffered.²⁶ The division of our justice system into tort and criminal law reflects the separate goals of each—compensation in the case of tort law and punishment in the case of criminal law. By including a punitive element in tort law, states blend these different functions, creating a hybrid remedy. When it banned punitive damages in *Fay v. Parker*, New Hampshire’s Supreme Court called them “a monstrous heresy . . . deforming the symmetry of the body of the law.”²⁷ To the New Hampshire court, commingling the civil justice system with punitive aims was an absurd juxtaposition born out of “a zealous eagerness to visit justice and punishment for wrong upon a convicted offender, by means of the first judicial process which might happen to bring his sins to light.”²⁸ Punitive damages are thus one of the numerous, odd intersections between our usually separate justice systems.²⁹

such as “exemplary damages” and “vindictive damages.” Rustad & Koenig, *supra* note 20, at 1292.

²³ See 16 U.S. (3 Wheat.) 546, 558 (1818) (“[I]f this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct.”).

²⁴ See Rustad & Koenig, *supra* note 20, at 1293-94 (noting the award of punitive damages for female plaintiffs in battery and rape cases, as well as punitive awards for other malicious acts).

²⁵ See *id.* at 1295-97 (“The awarding of exemplary damages was one of the few effective social control devices used to patrol large powerful interests unimpeded by the criminal law.”).

²⁶ See, e.g., *Smith v. Wade*, 461 U.S. 30, 57-58 (1983) (Rehnquist, J., dissenting) (calling the compensation function of damages a “fundamental premise of our legal system”).

²⁷ 53 N.H. 342, 382 (1873). New Hampshire presently allows “liberal” or “enhanced” compensatory damages in “exceptional” cases of “wanton, malicious, or oppressive” conduct. *Stewart v. Bader*, 907 A.2d 931, 942 (N.H. 2006).

²⁸ *Fay*, 53 N.H. at 382.

²⁹ Other examples include the “private attorneys general” theory underlying 42 U.S.C. § 1988(b) (2006), which provides for attorneys’ fees in private § 1983 suits, and qui tam actions, see The False Claims Act, 31 U.S.C. §§ 3729–3733 (2006).

Punitive damages are justified in law and economics literature chiefly as a means of providing correct levels of deterrence.³⁰ Imagine a scenario in which a tortfeasor can evade liability for some harms she causes. If an individual is caught and sued every time she commits a tortious act, she will be correctly deterred from committing those acts in the future because she knows she will have to pay to offset all of the harm she causes. However, if an individual is caught and sued after only half of the tortious acts she commits, the level of deterrence this individual feels is only half of what would be optimal. This individual thus has incentives to repeat the tortious act, since she only pays for half of the harm she commits. However, if punitive damages equal to compensatory damages may be imposed, the individual will be deterred at precisely the optimal level. Thus, punitive damages cure the underdetection problem.³¹ Similarly, if measuring actual damages is difficult for a particular type of tort (for example, defamation), a court may wish to impose presumed damages greater than the mean amount of harm the tort causes. Although in some cases this award would be supercompensatory (i.e., greater than actual damages), this strategy can help prevent underdeterrence if the court's measure of damages, on average, would otherwise be too low.³²

In addition, punitive damages are often justified as a way to punish reprehensible behavior.³³ Economic theories that do not take into account the utility individuals derive from antisocial behavior will want to deter this type of behavior. Imagine an individual who derives twice as much enjoyment from assaulting other individuals as her victims incur suffering. If no punitive damages are imposed, and even if there is full detection, the individual will have incentive to continue accosting victims, as she derives surplus utility from the assaults even after providing remuneration.³⁴ Furthermore, society's independent sense of morality may dictate that individuals who commit reprehens-

³⁰ See, e.g., STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 244 (2004) (discussing the problem of "[e]scape from suit," in which tortfeasors are not held liable for the harms they cause).

³¹ See generally *id.* Imposing punitive damages to correct for underdetection will deter only those tortious acts that are not socially optimal.

³² See WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 161 (1987) ("[P]unitive damages may be justified because it is too costly to measure actual damages accurately . . .").

³³ See Rustad & Koenig, *supra* note 20, at 1293-94 (observing the use of punitive damages for malicious acts).

³⁴ See generally SHAVELL, *supra* note 30, at 246 (noting further "undesirable repercussions" ensuing from such a situation).

ible acts be punished, regardless of whether or not such punishment serves the goal of deterrence. This will be true if society accords utility to adherence to its moral dictates, apart from individual utility. In this case, utility may be maximized if society awards punitive damages, independent of whether society wants to discount the inherent utility tortfeasors gain from their tortious acts.³⁵

B. Critiques of Punitive Damages

Criticism of punitive damages is widespread. The problem of successive awards is a common complaint; for example, high punitive damages awards may bankrupt defendants before successive plaintiffs have the opportunity to get full compensation.³⁶ Furthermore, assume a very high punitive damages award is calculated on the basis of a low detection rate. Publicity over this high award may incite more plaintiffs to bring suit, and successful punitive damages claims in those suits will force the defendants to overpay for their harmful conduct.³⁷ Of course, overdeterrence of harmful conduct may not be the most instinctively troublesome aspect of punitive damages. However, this issue is particularly salient when large punitive damages awards in products liability cases force companies that produce valuable products to close down or to take those products off the market.³⁸ Claims for punitive damages may also lead to broader discovery, making it easier for plain-

³⁵ See *id.* at 247, 603 (explaining the difference between social utility functions that do and do not count the utility gained from acquiescence to moral norms). Note that these two justifications (underdetection and reprehensibility) may both be present in some cases. For example, people commit many intentional torts, like conversion, solely because the tortfeasor seeks to avoid compensating the victim. These crimes are reprehensible specifically because defendants commit them solely for the purposes of nondetection. After all, if a defendant in a conversion suit knew that the detection rate was one hundred percent, there would be no incentive for the defendant not to pay the plaintiff full compensation for the property to begin with. Thus, in this class of torts, the reprehensibility and detection theories for punitive damages converge. See LANDES & POSNER, *supra* note 32, at 160 (arguing that “theft and robbery and the like are wrongful” only because market transactions are feasible).

³⁶ See James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1155 (1984) (discussing bankruptcies that resulted from asbestos litigation).

³⁷ See John D. Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 887 (1976) (describing the problem of punitive damages in relation to mass-disaster torts).

³⁸ See Victor E. Schwarz, Mark A. Behrens & Joseph P. Mastro Simone, *Reining in Punitive Damages “Run Wild”: Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1010-11 (1999) (documenting how punitive damages-liability concerns forced the antinausea drug Bendectin off the market).

tiffs with borderline-frivolous claims to press defendants into settlement to avoid heavy pretrial costs.³⁹ Varieties on these themes are prevalent.

The variability of punitive damages awards is another significant concern. A 1996 study of punitive damages stressed the difference between mean and median punitive damages awards.⁴⁰ In the study, the median punitive damages award was \$50,000, but the *mean* award reached \$859,006; this outcome suggests many relatively small awards, but also a substantial number of very large awards.⁴¹ Specifically, fifteen percent of punitive damages awards exceeded three times the value of corresponding compensatory damages.⁴² One seminal study showed a reassuring correlation between compensatory and punitive damages awards but acknowledged that "the possible range of punitive awards is . . . broad"—for a compensatory damages award of \$500,000, five percent of related punitive damages awards were less than \$10,000, while five percent were greater than \$6.5 million.⁴³ Furthermore, studies show broad agreement that punitive damages awards vary widely based on the jurisdiction in which they are awarded.⁴⁴

The recent growth of the field of behavioral law and economics has added new arguments against punitive damages. Professors Sunstein, Kahneman, and Schkade have documented the phenomenon of wildly divergent punitive damages awards.⁴⁵ They began one study by noting the excessiveness of some punitive damages awards, including the \$4 million award in *BMW of North America, Inc. v. Gore* for a dealer's failure to disclose that a car sold as "new" had been repainted.⁴⁶ Additionally, they observed that median punitive damages verdicts ranged

³⁹ See Sales & Cole, *supra* note 37, at 1157-58 ("[T]he defendant must choose between the Scylla of economically devastating discovery costs . . . and the Charybdis of outrageous and unwarranted monetary settlements.").

⁴⁰ Brian J. Ostrom, David B. Rottman & John A. Goerdts, *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233, 237 (1996).

⁴¹ *Id.* at 239 & fig.11.

⁴² *Id.* at 240 fig.12.

⁴³ Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 657 (1997).

⁴⁴ See, e.g., Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 33 ("Every empirical study on trends of punitive damages finds substantial variation within and between jurisdictions.").

⁴⁵ Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998). A version of this paper is reproduced as a chapter in a later book, see SUNSTEIN ET AL., *supra* note 17, at 31-42.

⁴⁶ Sunstein, Kahneman & Schkade, *supra* note 45, at 2075-76 (citing *BMW of N. Am., Inc. v. Gore*, 646 So. 619, 622 (Ala. 1994), *rev'd*, 517 U.S. 559, 585-86 (1996)).

from under \$10,000 in some counties to over \$200,000 in others.⁴⁷ The authors therefore sought to determine, through psychological experiments, the source of this variation. Their conclusions centered on individuals' inability to convert gut feelings of reprehensibility into dollar amounts.⁴⁸

Participants in the study had a surprisingly high rate of agreement on the reprehensibility of various types of tortious conduct, signifying that jurors are capable of agreeing on the outrageousness of a defendant's actions.⁴⁹ Where jurors failed was in translating that level of outrage into a dollar value. In the study, "[t]he variability of individual dollar judgments [was] so large that even the medians of the judgments of twelve-member juries [were] quite unstable."⁵⁰ As a result, the authors proposed to allow jurors to act in their area of expertise—determining the level of outrage, preferably on a bounded scale⁵¹—and letting some governmental actor (for example, the judge or an administrative agency) convert that level of outrage to a dollar amount. The effect would be to link dollar awards directly to outrage, which is a much less variable determination.⁵²

In a companion study, the authors attempted to determine what causes juries to produce such variable awards.⁵³ The authors devised another psychological experiment to replicate the deliberation experience in order to identify problematic factors.⁵⁴ One such factor is "polarization," a phenomenon in which a discussion between individ-

⁴⁷ *Id.* at 2076.

⁴⁸ *Id.* at 2097-99.

⁴⁹ *See id.* at 2097-98 ("Judgments of intent to punish in these personal injury scenarios evidently rest on a bedrock of moral intuitions that are broadly shared in society.").

⁵⁰ *Id.* at 2103.

⁵¹ The lack of a modulus (i.e., an upper bound to permissible awards) was another relevant factor in the Sunstein study, because decisionmaking will inevitably be more variable in the absence of a modulus. *See id.* at 2106-07 (describing the lack of a modulus as "[t]he [u]nderlying [p]roblem").

⁵² *Id.* at 2109-25. Note that jurors' difficulty in determining a dollar value is not confined to punitive damages: other studies demonstrate that jurors have similar problems converting shared perceptions of the severity of a nonpecuniary injury into a dollar value for compensatory awards. *See* Roselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 794 (1999) (noting that "jurors have essentially no experience assigning a dollar value to injuries").

⁵³ David Schkade, Cass R. Sunstein & Daniel Kahneman, *Are Juries Less Erratic than Individuals? Deliberation, Polarization, and Punitive Damages* (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 81, 1999) available at <http://ssrn.com/abstract=177638>. A version of this paper is reproduced as a chapter in a book by the same authors. *See* SUNSTEIN ET AL., *supra* note 17, at 43-61.

⁵⁴ SUNSTEIN ET AL., *supra* note 17, at 44-46.

uals with moderately favorable views on a subject tends to produce more heavily favorable views in that group.⁵⁵ Another issue is “severity shifts”—that is, the tendency for deliberations to trend toward one extreme or the other.⁵⁶ A jury moderately inclined to impose a penalty may find itself imposing a substantially harsher penalty after deliberation—a harsher penalty than any individual juror would have recommended prior to deliberation.⁵⁷ In response, the authors discussed the suggestions made in the original article and additionally noted the possibility of dispensing with the jury entirely.⁵⁸

Other factors make the determination of a correct punitive damages value difficult for juries. Some researchers suggest that juries remember jury instructions poorly and thus may not strictly follow judges’ dictates.⁵⁹ The lack of an “anchor” besides the plaintiff’s requested award—in other words, the absence of an idea of the average award in similar cases—puts jurors at sea in trying to estimate appropriate punitive damages.⁶⁰ Along similar lines, an individual juror’s conception about whether plaintiffs in general are under- or over-compensated may be “the most powerful predictor” of the size of the award that the individual juror supports.⁶¹ These problems, when combined, ensure that jury calculations of punitive damages are often very difficult, if not arbitrary, decisions.

II. THE SUPREME COURT’S PUNITIVE DAMAGES JURISPRUDENCE

The Supreme Court has attempted to curb excessively harsh punitive damages awards in recent years, beginning primarily with *BMW of North America, Inc. v. Gore*.⁶² In *BMW*, Ira Gore purchased a purported-

⁵⁵ *Id.* at 57-58.

⁵⁶ *Id.*

⁵⁷ *See id.* at 61 (“[D]eliberating juries produce more unpredictability than would be found by taking the median of pre-deliberation judgments from jurors.”).

⁵⁸ *See* Schkade, Sunstein & Kahneman, *supra* note 53, at 35-37 (suggesting reforms based on the study’s results).

⁵⁹ *See, e.g.*, Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 144-46 (2002) (discussing studies Reid Hastie conducted that showed juries’ difficulty in recalling instructions).

⁶⁰ *See* Sunstein, Kahneman & Schkade, *supra* note 45, at 2109-10 (finding that anchors can play an important role in the determination of jury awards). Note the intuitive observation that, if the plaintiff’s requested award does serve as an anchor, plaintiffs will have a strong incentive to increase that request.

⁶¹ Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 309 (1998).

⁶² 517 U.S. 559 (1996).

ly new car from a BMW dealership.⁶³ Upon discovering that the car had been repainted, Gore sued the distributor.⁶⁴ At trial, BMW admitted that it typically repainted new cars that suffered minor damage in transit.⁶⁵ Gore proved actual damages of \$4,000—the diminution in value of the car as a result of the damage and repainting.⁶⁶ He then argued that, given an estimate of 1,000 cars repainted and sold throughout the United States, punitive damages of \$4 million were appropriate.⁶⁷ The jury obliged, assessing \$4,000 in compensatory damages and \$4 million in punitive damages.⁶⁸

The Court determined that this award violated the substantive component of the Due Process Clause of the Fourteenth Amendment.⁶⁹ It began by noting that states can only legitimately “punish” plaintiffs by imposing damages corresponding to the harm committed within the state itself, and thus the 1,000-car multiplier was suspect.⁷⁰ More importantly, the Court provided three “guideposts” to be used in determining whether an award is so “grossly excessive” as to violate the Constitution: (1) the degree of reprehensibility (in the Court’s view, the most important factor); (2) the disparity between the harm suffered and the punitive damages award; and (3) the difference between the punitive damages award and state-authorized civil or criminal penalties.⁷¹ The Court then applied each factor to the facts of the case. It noted that the economic harm in this case was not terribly reprehensible, despite its repeated occurrence.⁷² As to the second factor, the 500:1 ratio between the remitted punitive damages and compensatory damages well exceeded the 10:1 ratio that functions as a maximum “[i]n most cases.”⁷³ Finally, relevant civil-fraud penalties in this case would not have ex-

⁶³ *Id.* at 563.

⁶⁴ *Id.*

⁶⁵ *Id.* at 563-64.

⁶⁶ *Id.* at 564.

⁶⁷ *Id.*

⁶⁸ *Id.* at 565.

⁶⁹ *Id.* at 585-86.

⁷⁰ *Id.* at 572. The Alabama Supreme Court remitted the award to \$2 million in punitive damages based in part on these concerns. *See id.* at 567, 573-74 (explaining that the Alabama Supreme Court “based its remitted award solely on conduct that occurred within Alabama”).

⁷¹ *Id.* at 574-85.

⁷² *See id.* at 575-80 (“[T]his case exhibits none of the circumstances ordinarily associated with egregiously improper conduct . . .”).

⁷³ *Id.* at 581, 583.

ceeded \$2,000.⁷⁴ For these reasons, the Court held that Gore's punitive damages award "transcend[ed] the constitutional limit."⁷⁵

The Court further expounded on its guideposts in *State Farm Mutual Automobile Insurance Co. v. Campbell*.⁷⁶ In *State Farm*, Campbell had driven the wrong way on a highway and caused Todd Ospital to crash.⁷⁷ Ospital's family brought a wrongful death and tort action, and Campbell's insurance company, State Farm, refused to settle Campbell's liability for \$50,000, despite evidence that Campbell was at fault.⁷⁸ A jury determined Campbell was at fault and returned a judgment for \$185,849.⁷⁹ State Farm refused to cover this judgment, despite having told Campbell prior to trial that his "assets were safe."⁸⁰ Campbell subsequently initiated a bad-faith action against State Farm (ninety percent of the proceeds of which would go to Ospital, in consideration of Ospital's decision not to execute the original verdict).⁸¹ The state supreme court upheld the judge's reduced \$1 million compensatory damage award for fraud and intentional infliction of emotional distress and the jury's original \$145 million award of punitive damages.⁸²

As to the first "guidepost," the Court acknowledged that State Farm's actions "merit[ed] no praise."⁸³ However, the trial court's award appeared to take into account State Farm's pattern of conduct nationwide, including fraudulent conduct of a different character than that presented in the case.⁸⁴ Retribution for such a broad range of conduct is impermissible under *BMW*, and thus the Court held that State Farm's conduct was less reprehensible than the trial court's presumption.⁸⁵ Furthermore, the Court underscored the notion that

⁷⁴ See *id.* at 584 (describing the maximum civil penalty the relevant Alabama statute authorized).

⁷⁵ *Id.* at 586.

⁷⁶ 538 U.S. 408 (2003).

⁷⁷ *Id.* at 412-13.

⁷⁸ *Id.* at 413.

⁷⁹ *Id.*

⁸⁰ *Id.* (internal quotation marks omitted) (quoting *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1142 (Utah 2001)).

⁸¹ *Id.* at 413-14.

⁸² *Id.* at 415. The trial court judge had reduced the jury's award from \$2.6 million in compensatory damages and \$145 million in punitive damages to \$1 million in compensatory damages and \$25 million in punitive damages. *Id.* The state supreme court affirmed the judge's reduced compensatory damage award but reinstated the jury's \$145 million punitive damage award. *Id.*

⁸³ *Id.* at 419.

⁸⁴ *Id.* at 420.

⁸⁵ *Id.* at 424.

“[s]ingle-digit multipliers are more likely to comport with due process” than are larger multipliers.⁸⁶ Thus, the Court had “no doubt that there is a presumption against an award that has a 145-to-1 ratio.”⁸⁷ Finally, the corresponding civil penalty was only \$10,000. Thus, the Court remanded for calculation of a new punitive damages award.⁸⁸

Another case of note is *Philip Morris USA v. Williams*,⁸⁹ in which the Court discussed the ways in which juries, in assessing punitive damages, may take into account harm that the defendant has caused to nonparties. In *Philip Morris*, Williams, the widow of a cigarette smoker, sued the tobacco company for negligence and deceit.⁹⁰ On appeal, Philip Morris challenged the rejection of its proposed jury instructions, which would have directed the jury to disregard Williams’s suggestion that the jury should punish Philip Morris for the widespread harm cigarettes caused in the state.⁹¹ The Supreme Court agreed, determining that those arguments affronted procedural due process by denying the defendant the opportunity to raise defenses as to the allegedly harmed nonparties.⁹² However, the Court accepted that juries could consider actual harm to nonparties in determining the reprehensibility of the defendant’s conduct, since conduct that risks harm to more people tends to be more reprehensible.⁹³ Thus, judges must make clear to juries that they cannot punish defendants for harm to nonparties but can consider harm to nonparties in assessing reprehensibility.⁹⁴

BMW and its progeny have produced a variety of criticisms from the bench. Justice Scalia’s dissent in *BMW* argued that “the Constitution does not make [excessive punitive damages awards] any of our business,”⁹⁵ and further that the Court’s rationale would apply to claims of excessiveness with respect to any civil remedy—“a stupefying proposition.”⁹⁶ In short, Justice Scalia sees as unprincipled the idea that the Fourteenth Amendment has any bearing on the extent to which a state can impose punitive damages. Taking a more muted tone, Justice Ginsburg’s dissent in *BMW* expressed concerns regarding

⁸⁶ *Id.* at 425.

⁸⁷ *Id.* at 426.

⁸⁸ *Id.* at 428-29.

⁸⁹ 549 U.S. 346 (2007).

⁹⁰ *Id.* at 349.

⁹¹ *Id.* at 350-51.

⁹² *Id.* at 353-54.

⁹³ *Id.* at 355.

⁹⁴ *Id.*

⁹⁵ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 598 (1996) (Scalia, J., dissenting).

⁹⁶ *Id.* at 607.

the Court's invasion into state prerogatives (a nod to federalism sufficient to convince Chief Justice Rehnquist to sign onto her dissent).⁹⁷ Justice Ginsburg stressed the extent to which states have capped punitive damages awards in some or all cases; have allocated a fraction of punitive damages awards to benefit state agencies, rather than the plaintiff; and have bifurcated the liability and penalty proceedings.⁹⁸ Justice Ginsburg argued that the Court's ruling at its core required the Court to venture into "territory traditionally within the States' domain," even though "the Court is not well equipped for this mission."⁹⁹

This jurisprudence (*Philip Morris* excepted) has centered on the supposition that the excessiveness of punitive damages awards implicates substantive due process under the Fourteenth Amendment. However, some support still exists in the Court for the proposition that the award of punitive damages generally implicates *procedural* due process. The Court repudiated a claim along these lines in *Pacific Mutual Life Insurance Co. v. Haslip*.¹⁰⁰ That case, decided prior to *BMW*, involved punitive damages under Alabama's common law.¹⁰¹ The jury instructions stated that the jury could impose punitive damages at its discretion to punish the defendant and deter other potential tortfeasors.¹⁰² According to the Court, "unlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."¹⁰³ However, the Court determined that the jury instructions, by focusing the jury's attention on deterrence and retribution, provided sufficient guidance against arbitrary conduct.¹⁰⁴

Justice Breyer, joined by Justices O'Connor and Souter, expressed the contrary view in his concurrence in *BMW*. Justice Breyer began his *BMW* concurrence by noting that procedural due process assures "the uniform general treatment of similarly situated persons that is the essence of law itself."¹⁰⁵ This guarantee requires standards that "offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior."¹⁰⁶ Breyer's concern

⁹⁷ *Id.* (Ginsburg, J., dissenting).

⁹⁸ *See id.* app. at 615-19 (providing a comprehensive appendix of such state laws).

⁹⁹ *Id.* at 612-13.

¹⁰⁰ 499 U.S. 1 (1991).

¹⁰¹ *Id.* at 14.

¹⁰² *Id.* at 6 n.1.

¹⁰³ *Id.* at 18.

¹⁰⁴ *Id.* at 20.

¹⁰⁵ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring).

¹⁰⁶ *Id.* at 588.

was that the Alabama Supreme Court's interpretation of the Alabama punitive damages statute did not, in fact, constrain the jury's discretion.¹⁰⁷ The Alabama Supreme Court's doctrine did not distinguish between conduct warranting large or small damages,¹⁰⁸ did not illustrate what a "reasonable" relationship to compensatory damages might be,¹⁰⁹ allowed for unprincipled increases of awards based on the defendant's wealth,¹¹⁰ and was not tied to any economic theory or community understanding.¹¹¹ As a result, the award was "the product of a system of standards that did not significantly constrain a court's, and hence a jury's, discretion in making that award."¹¹² In the absence of standards that provide jury guidance, there is "a substantial risk of outcomes so arbitrary that they become difficult to square with the Constitution's assurance, to every citizen, of the law's protection."¹¹³ Thus, Justice Breyer found himself disagreeing with the rationale of the Court in *Haslip* and concluding that the purported "guidance" that juries receive is purely illusory.¹¹⁴

The core question in the procedural due process analysis is whether the standards given to the jury are detailed enough to prevent arbitrary decisionmaking (as opposed to the substantive due process analysis, which could conceivably hold unconstitutional a nonarbitrary yet excessive jury verdict).¹¹⁵ This appears to be the sort

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 589.

¹¹⁰ *Id.* at 591.

¹¹¹ *Id.* at 593-94.

¹¹² *Id.* at 595.

¹¹³ *Id.* at 596.

¹¹⁴ *Id.* at 588 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

Note that in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the Court's majority acknowledged concerns about deficient jury instructions. Although the Court firmly based its holding on the excessiveness of the award, it noted that "[v]ague [jury] instructions . . . do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." 538 U.S. at 418. The Court cited both Justice Breyer's concurring opinion in *BMW* and Justice O'Connor's dissenting opinion in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993)—opinions that stress procedural concerns regarding the imposition of punitive damages. 538 U.S. at 416-18. *TXO* upheld a \$10 million punitive damages award that corresponded to a \$19,000 compensatory damages award. 509 U.S. at 446, 466. Justice O'Connor, joined by Justice White and in relevant part by Justice Souter, surmised that the disproportionate award was not the product of reasoned discretion, but of impermissible bias against a wealthy, out-of-state firm. *Id.* at 486-95 (O'Connor, J., dissenting). Justice O'Connor also argued that the state denied the defendant adequate postverdict review. *Id.* at 495-500.

¹¹⁵ *BMW*, 517 U.S. at 588 (Breyer, J., concurring).

of question that one might answer empirically. Thus, one way to determine whether jury decisionmaking is unconstitutionally arbitrary would be simply to analyze the data on punitive damages in an attempt to determine whether juries award overly erratic punitive damages. If the data show that juries are imposing punitive damages with little variability, then the majority in *Haslip* was most likely correct: there is no constitutional concern regarding how juries reach those decisions. However, if the data show that juries are in fact imposing punitive damages capriciously, then Justice Breyer is most likely correct: current punitive damages statutes do not provide sufficient guidance to juries. As noted in Part I, recent studies suggest the latter by explaining the psychological barriers to principled jury decisionmaking. If such evidence continues to mount, defendants may find themselves positioned to convince the Court to reexamine the conclusion it reached in *Haslip*.¹¹⁶

III. THE SUPREME COURT’S EIGHTH AMENDMENT ARBITRARINESS JURISPRUDENCE

A. *Furman v. Georgia and Its Aftermath*

There is another area of law in which the risk of arbitrary outcomes became impossible to square with the Constitution’s assurances of due process—the death penalty. In 1972, the Supreme Court struck down Georgia’s death penalty regime—and, by implication, similar regimes in other states—in *Furman v. Georgia*.¹¹⁷ It did so through a brief, one-paragraph per curiam opinion, providing no ex-

¹¹⁶ Of note is one of the Court’s most recent cases on punitive damages, *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008). In that case, the Court, acting as a common law court under its maritime jurisdiction, determined that punitive damages could not exceed compensatory damages in maritime cases. *Id.* at 2634. The Court in *Exxon* noted its awareness of “a body of literature . . . examining the predictability of punitive awards,” including Sunstein, Kahneman, and Schkade’s article, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*. *Exxon*, 128 S. Ct. at 2626 n.17 (citing Sunstein, Kahneman & Schkade, *supra* note 45). However, since “this research was funded in part by Exxon,” the Court declined to consider it. *Id.* Presumably, the Court would be willing to consider this body of literature in a case featuring a different defendant.

The Court also considered a punitive damages award under maritime jurisdiction in *Atlantic Sounding Co., Inc. v. Townsend*, 129 S. Ct. 2561 (2009). There, the Court described the “general rule that punitive damages [that] were available at common law extended to claims arising under federal maritime law.” *Id.* at 2567.

¹¹⁷ 408 U.S. 238 (1972).

planation for its decision.¹¹⁸ Five Justices filed concurrences; Justices Brennan and Marshall did so on the grounds that the death penalty per se violated norms of decency enshrined in the Eighth Amendment.¹¹⁹ However, the case's more narrow holding is that Georgia's capital punishment regime was unconstitutionally arbitrary.¹²⁰

This view is expressed most clearly in an oft-quoted passage from Justice Stewart's concurring opinion:

[The petitioners'] death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.¹²¹

Similarly, Justice White argued that death penalty statutes provide "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."¹²² In subsequent cases, the Court would take these two Justices' opinions as controlling.¹²³

A flurry of legislation and litigation followed. States attempted to cure the constitutional defects in their capital punishment regimes by passing new statutes, while prisoners challenged their validity.¹²⁴ A new

¹¹⁸ *Id.* at 239-40.

¹¹⁹ See *id.* at 290 (Brennan, J., concurring) ("Death is truly an awesome punishment."); *id.* at 305 (arguing that death is per se cruel and unusual); *id.* at 370-71 (Marshall, J., concurring) (same).

¹²⁰ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion) ("[T]he holding of the Court [in *Furman*] may be viewed as that position taken by . . . MR. JUSTICE STEWART and MR. JUSTICE WHITE."); Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 288 (2008) (observing that the Justices in *Furman* thought the death penalty "was too arbitrary in its application to pass constitutional muster").

¹²¹ *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring) (footnotes omitted).

¹²² *Id.* at 313 (White, J., concurring).

¹²³ See, e.g., sources cited *supra* note 120; Paul Litton, *The "Abuse Excuse" in Capital Sentencing Trials: Is It Relevant to Responsibility, Punishment, or Neither?*, 42 AM. CRIM. L. REV. 1027, 1040-41 (2005) ("The opinions of Justices Stewart and White represent the holding of *Furman*, according to the Court's subsequent jurisprudence.")

¹²⁴ See Smith, *supra* note 120, at 289, 290 & n.20 ("Faced with what they took to be an unjustified assault on their prerogatives, legislatures quickly revised their death penalty statutes to satisfy the new constitutional mandates.")

model for a death penalty statute soon emerged in *Gregg v. Georgia*.¹²⁵ Georgia’s revised statutory scheme listed six categories of crimes for which capital punishment could be imposed. Capital trials were bifurcated: the first part was a straightforward guilt-or-innocence determination, and in the second part, the jury heard evidence with regard to aggravating factors from the prosecution and mitigating factors from the defendant. The jury then had to find the existence of one of ten statutorily designated aggravating factors and had to consider the effect of mitigating factors before imposing the death sentence.¹²⁶

Because these procedures channeled the jury’s discretion and focused its attention on the particular circumstances of the individual defendant, the Court was convinced that the new statute cured the arbitrariness concerns discussed in *Furman*. Under this statute, “[n]o longer can a jury wantonly and freakishly impose the death sentence”; rather, the jury “is always circumscribed by the legislative guidelines.”¹²⁷ Theoretically, this statute would limit the number of defendants who would qualify for death penalty, and would help guide the jury’s process in deciding which defendants would receive the punishment. These advantages would ensure that juries imposed the death penalty in a principled fashion.¹²⁸ The statute thus comported with the Eighth Amendment.¹²⁹

Following its decision in *Gregg*, the Supreme Court has listed other procedural requirements for capital sentencing decisions.¹³⁰ Furthermore, the Court’s attention recently has focused on the substantive question of when the Eighth Amendment categorically bars the death penalty.¹³¹ However, the basic structure of *Furman* and *Gregg* remains today.

¹²⁵ 428 U.S. 153 (1976) (plurality opinion).

¹²⁶ *Id.* at 162-66. The statute also provided for expedited appellate review. *Id.* at 166.

¹²⁷ *Id.* at 206-07.

¹²⁸ *Id.*

¹²⁹ *Id.* at 207.

¹³⁰ See, e.g., *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (deciding that a jury, not a judge, must find the existence of the aggravating factors necessary to impose a death sentence); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (plurality opinion) (determining that the legislature cannot restrict a defendant from arguing relevant mitigating factors).

¹³¹ See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2664 (2008) (holding that imposing the death penalty for child rape violates the Eighth Amendment); *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005) (holding that applying the death penalty to juveniles violates the Eighth Amendment); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that imposing the death penalty on mentally retarded defendants violates the Eighth Amendment).

B. *Properly Understood, Furman Is a Procedural Due Process Decision*

Though couched in the language of the Eighth Amendment, *Furman v. Georgia* is at heart a holding under the Due Process Clause of the Fourteenth Amendment. This conclusion follows from the interplay between *Furman* and a case decided only one year earlier: *McGautha v. California*.¹³² In *McGautha*, two petitioners challenged their respective states' capital punishment procedures.¹³³ For one petitioner, the jury instruction told jurors that they were "entirely free to act according to [their] own judgment" in determining whether to impose death.¹³⁴ For the second petitioner, the jury instructions merely told the jury that "the punishment is death, unless [they] recommend mercy" and that they should deliberate with "impartiality."¹³⁵ Both petitioners argued that the lack of standards governing the jury's deliberation violated the Due Process Clause of the Fourteenth Amendment.¹³⁶

The Court disagreed, finding no constitutional infirmity in the jury instructions at issue.¹³⁷ Justice Harlan, writing for the majority, discussed the history of capital punishment. He noted the early phenomenon of jury nullification: in the face of a mandatory death penalty for murderers, juries would refuse to convict when they thought death inappropriate.¹³⁸ States facing this problem eliminated the mandatory character of the punishment, allowing juries to decide in their discretion whether to impose death.¹³⁹ Thus, the history of the death penalty undermined the petitioners' claim. Furthermore, Justice Harlan expressed skepticism that a more detailed capital punishment statute could reduce arbitrariness, characterizing various proposals for jury instructions as granting only "the most minimal control" over the jury's decisionmaking process.¹⁴⁰ Because of the history of the punishment and the unlikelihood that judicial intervention would make a noticeable difference, the Court affirmed the constitutionality of the death penalty procedures.¹⁴¹

¹³² 402 U.S. 183 (1971).

¹³³ *Id.* at 185.

¹³⁴ *Id.* at 189 (internal quotation marks omitted).

¹³⁵ *Id.* at 194-95 (internal quotation marks omitted).

¹³⁶ *Id.* at 196 (internal quotation marks omitted).

¹³⁷ *Id.*

¹³⁸ *Id.* at 199.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 207.

¹⁴¹ *Id.*

That the Court in *Furman* would take issue with the arbitrariness of capital punishment—and that the Court in *Gregg* would characterize Georgia’s more detailed statute as curing that problem—is thus surprising. Although *McGautha* was decided under the Due Process Clause of the Fourteenth Amendment and *Furman* and *Gregg* were decided under the Eighth Amendment, one might still wonder whether *Furman* constructively overruled *McGautha*. The dissenters in *Furman* took just such a view. Chief Justice Burger, whose opinion the three other dissenters joined, wrote:

Although the Court’s decision in *McGautha* was technically confined to the dictates of the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment as made applicable to the States through the Due Process Clause of the Fourteenth Amendment, it would be disingenuous to suggest that today’s ruling has done anything less than overrule *McGautha* in the guise of an Eighth Amendment adjudication.¹⁴²

Similarly, Justice Powell, whose opinion the other three dissenters also joined, wrote:

MR. JUSTICE STEWART . . . disposes of *McGautha* in a footnote reference indicating that it is not applicable because the question there arose under the Due Process Clause. MR. JUSTICE WHITE, who also finds the death penalty intolerable because of the process for its implementation, makes no attempt to distinguish *McGautha*’s clear holding. For the reasons expressed in the CHIEF JUSTICE’s opinion, *McGautha* simply cannot be distinguished. These various opinions would, in fact, overrule that recent precedent.¹⁴³

Note that Justices White and Stewart were in the majority in *McGautha* and wrote the principal opinions in *Furman*. As Justice Powell suggested, there is little in their opinions in *Furman* that attempts to distinguish *McGautha*. Even Justice Douglas, who concurred with the Court’s per curiam opinion in *Furman*, intimated that *Furman* and *McGautha* were irreconcilable.¹⁴⁴

In *Gregg v. Georgia*, the Court explicitly addressed the tension between *Furman* and *McGautha*. Justice Stewart, who authored a plurality opinion announcing the judgment of the Court, wrote:

In *McGautha v. California*, this Court held that the Due Process Clause of the Fourteenth Amendment did not require that a jury [in a capital case] be provided with standards to guide its decision *McGautha* was not an Eighth Amendment decision, and to the extent it purported to

¹⁴² *Furman v. Georgia*, 408 U.S. 238, 400 (1972) (Burger, C.J., dissenting).

¹⁴³ *Id.* at 427 n.11 (Powell, J., dissenting) (citations omitted).

¹⁴⁴ *Id.* at 248 n.11 (Douglas, J., concurring).

deal with Eighth Amendment concerns, it must be read in light of the opinions in *Furman v. Georgia*. There the Court ruled that death sentences imposed under statutes that left juries with untrammelled discretion to impose or withhold the death penalty violated the Eighth and Fourteenth Amendments. While *Furman* did not overrule *McGautha*, it is clearly in substantial tension with a broad reading of *McGautha*'s holding. In view of *Furman*, *McGautha* can be viewed rationally as a precedent only for the proposition that standardless jury sentencing procedures were not employed in the cases there before the Court so as to violate the Due Process Clause.¹⁴⁵

Although the Court said that *Furman* did not overrule *McGautha*, it did so through questionable logic. The Court limits *McGautha* to the proposition that, for some unexplained reason, the death penalty statutes at issue in that case did not offend procedural due process—while simultaneously conceding that *Furman* implies similar statutes might indeed offend that clause. This confusion has led some scholars to label *Furman* as a procedural due process case.¹⁴⁶ At any rate, the Court's equivocation about the relationship between *Furman* and *McGautha* certainly provides an argument that *Furman* has precedential value under the Fourteenth Amendment as well as the Eighth Amendment. If so, *Furman* may apply to other types of arbitrary jury verdicts besides the death penalty—such as punitive damages.

C. Criticisms of the Court's Death Penalty Regime

Regardless of which amendment is doing the work, scholars seriously question whether post-*Furman* statutory changes have made capital punishment sentences less arbitrary.¹⁴⁷ The very nature of the question makes it hard to answer conclusively, given the absence of quantitative data regarding the reprehensibility of capital crimes. Still, this has not dissuaded scholars from attempting to draw conclu-

¹⁴⁵ *Gregg v. Georgia*, 428 U.S. 153, 195 n.47 (1976) (plurality opinion) (citations omitted).

¹⁴⁶ See, e.g., Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 332 (1997) (characterizing *Furman* as a "Procedural Due Process" case arising under the Eighth Amendment); see also Lupe S. Salinas, *Is It Time to Kill the Death Penalty?: A View from the Bench and the Bar*, 34 AM. J. CRIM. L. 39, 49 n.60 (2006) (characterizing *Furman* as overruling *McGautha*).

¹⁴⁷ It is noteworthy that the American Law Institute, whose Model Penal Code death penalty statute laid the groundwork for post-*Furman* state statutes, has decided to abandon its death penalty project. See Adam Liptak, *Shapers of Death Penalty Give Up on Their Work*, N.Y. TIMES, Jan. 5, 2010, at A11 ("[T]he institute voted . . . to disavow the structure it had created in light of the current intractable institutional and situational obstacles to ensuring a minimally adequate system for administering capital punishment." (quoting the American Law Institute) (internal quotation marks omitted)).

sions about the effectiveness of the *Gregg* regime—the procedures that Georgia and other states added to capital sentencing proceedings—using a variety of methodologies.

David McCord argues that, pursuant to *Furman*, state death penalty statutes must at least narrow the class of defendants upon whom the death penalty may be imposed.¹⁴⁸ Under this view, successful death penalty statutes should cause juries to (1) reserve the death penalty for the worst offenders, (2) sentence those types of offenders to death at a robust rate, (3) generally impose capital punishment more often for crimes of greater reprehensibility, and (4) deviate from these guidelines only for rational reasons.¹⁴⁹ McCord surveyed news reports of capital crimes to try to determine whether these goals are currently achieved.¹⁵⁰ For each report, he attempted to quantify the number of "aggravating" factors in the description of the crime and the number of "mitigating" factors in the description of the crime and the criminal.¹⁵¹ Based on these factors, he gave each crime a total "depravity point" score.¹⁵² His study concluded that state statutes failed on all four goals, arguing, for example, that "[d]eath sentences were imposed on fewer than half . . . of the defendants who [committed murders] so ridiculously or enormously aggravated that it boggles the mind."¹⁵³

Other academics question whether state statutes are at all successful in narrowing the class of defendants eligible for capital punishment. One seminal study, led by David Baldus, compared the imposition of the death penalty in Georgia following *Gregg* with the imposition of the death penalty under Georgia's pre-*Furman* statute.¹⁵⁴ The study found some improvements, namely, "a substantial reduction in the proportion of excessive death sentences" (i.e., fewer death sen-

¹⁴⁸ David McCord, *Lightning Still Strikes: Evidence from the Popular Press That Death Sentencing Continues to Be Unconstitutionally Arbitrary More than Three Decades After Furman*, 71 BROOK. L. REV. 797 (2005).

¹⁴⁹ See *id.* at 808 (providing these four guidelines in question form).

¹⁵⁰ See *id.* at 800 (describing the search).

¹⁵¹ *Id.* at 833.

¹⁵² *Id.* at 833-40.

¹⁵³ *Id.* at 864. McCord goes on to note that "[t]errorist bomber Terry Nichols . . . was spared a death sentence by a jury, . . . yet Cory Maye, who . . . shot [a police officer] with a bullet that just missed hitting the officer's bulletproof vest, was death-sentenced by a jury." *Id.*

¹⁵⁴ See DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS I (1990) ("This book is a study of equal justice in death sentencing during the fifteen-year period between two United States Supreme Court decisions from Georgia, *Furman v. Georgia* (1972) and *McCleskey v. Kemp* (1987).").

tences imposed in the “least aggravated cases”).¹⁵⁵ However, “[e]ven when viewed in the most favorable light, only 50 percent to 60 percent of Georgia’s death-sentence cases appear[ed] to be presumptively evenhanded, and nearly a third of them [we]re presumptively excessive.”¹⁵⁶ Most importantly, “more than 90 percent of the pre-*Furman* death sentences were imposed in cases whose facts would have made them death-eligible under Georgia’s post-*Furman* statute.”¹⁵⁷ So although Georgia’s *Gregg* statute may have succeeded in eliminating capital punishment for the least culpable cases, it failed to single out sufficiently the classes of capital defendants who are truly reprehensible.¹⁵⁸

Another study by Adam Gershowitz argues that the imposition of the death penalty varies widely across jurisdictions depending on the extent to which prosecuting attorneys are inclined to seek it.¹⁵⁹ The Supreme Court focuses its jurisprudence on the sentencing segment of the trial and only attempts to reduce arbitrariness on the part of the jury. Even if its jurisprudence succeeded in that regard, the Court “has failed to provide prosecutors with incentives or constraints to bring only the worst cases into the death-penalty system.”¹⁶⁰ If prosecutors are free to seek the death penalty at their discretion, there is no procedural protection in place to ensure that prosecutors will not, for example, only seek the death penalty in the *least* culpable of cases—or that prosecutors will adhere to any standard in deciding for whom they will seek the death penalty. This failing introduces an element of arbitrariness into capital proceedings independent of how well coached the jury is—and, most importantly, injects that arbitrariness into the proceeding whenever prosecutors in different regions of the same state approach the choice differently.¹⁶¹ As a result, Gershowitz’s

¹⁵⁵ *Id.* at 131.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 102.

¹⁵⁸ See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 375 (1995) (explaining that the Baldus study “strongly suggests that Georgia has not articulated a carefully circumscribed theory of what the state might regard as the ‘worst’ murders”).

¹⁵⁹ See Adam M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 MO. L. REV. 73, 74-76 (2007) (“Prosecutors have incredibly wide discretion to choose which cases they will pursue, and their discretion is nearly as broad in determining whether to seek the death penalty.” (footnotes omitted)).

¹⁶⁰ *Id.* at 98.

¹⁶¹ See *id.* at 95 (“The long-time district attorney for Philadelphia County . . . makes it a practice to seek the death penalty whenever it is available. By contrast, the former district attorney of comparably sized Allegheny County (which includes Pittsburgh) rarely sought the death penalty during his tenure.”).

study argues that the Court should cap the number of cases in which a prosecutor may seek the death penalty.¹⁶²

For a long time, many have alleged racial disparities in the imposition of the death penalty.¹⁶³ The seminal researcher in this area, the aforementioned David Baldus, conducted a variety of studies on the subject. One such study of racial disparities served as the basis for an Equal Protection Clause and Eighth Amendment habeas corpus challenge to the death penalty that lost in the Supreme Court on a 5–4 vote.¹⁶⁴ One article that Baldus coauthored describes a General Accounting Office (GAO) report on twenty-eight relevant examinations of the effect of race in death penalty cases.¹⁶⁵ The GAO concluded that "[i]n 82 percent of the studies, [the] race of [the] victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty."¹⁶⁶ The Baldus article then presents a statistical analysis of data derived from capital cases in Philadelphia and concludes that "it would be extremely unlikely to observe [racial] disparities of both this magnitude and consistency if substantial equality existed in this system's treatment of defendants."¹⁶⁷

Of course, there is inherent difficulty in crafting objective, statistical answers to the question of whether *Gregg* statutes work. The determination of whether a crime is heinous enough to warrant the death penalty is inherently subjective, as is the existence and effect of mitigating factors. Determining, on the whole, whether the people

¹⁶² *Id.* at 104.

¹⁶³ See, e.g., Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 42-45 (1984) (describing a variety of such racial-impact studies).

¹⁶⁴ See *McCleskey v. Kemp*, 481 U.S. 279, 286-91 (1987) (describing the Baldus study as "flawed"). The petitioner in *McCleskey* relied heavily upon the Baldus study; the lower courts' analyses focused on the validity of the study and, assuming its validity, its equal protection ramifications. *Id.* at 283-91. The majority argued that evidence of racial discrimination generally does not prove that the jury in the defendant's specific case acted with discriminatory intent. See *id.* at 294-95 ("[T]he application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection . . ."). The dissent noted that, though this argument may appear correct for the Equal Protection Clause, it has no bearing on the Eighth Amendment analysis of arbitrary imposition. See *id.* at 323-25 (Brennan, J., dissenting) ("[O]ur inquiry under the Eighth Amendment has not been directed to the validity of the individual sentences before us").

¹⁶⁵ David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1659 (1998).

¹⁶⁶ *Id.* (internal quotation marks omitted).

¹⁶⁷ *Id.* at 1715.

getting the death penalty are really of a separate class of reprehensibility is a tall task, though not an impossible one. One possibility is to attempt the sort of multiple-regression analysis done by Baldus, or by other studies purporting to show a racial bias in the imposition of the death penalty.¹⁶⁸ Another would be an experiment like that done by Sunstein, Kahneman, and Schkade in *Assessing Punitive Damages*.¹⁶⁹ A similar experiment could have a series of mock juries attempting to decide whether to impose the death penalty in hypothetical cases. A control group would be asked to decide which punishment to inflict with no guidance (i.e., in its sole discretion), based on the facts presented. Another group would be asked to do the same, but subject to statutory schemes in place today. Information about the facts would be presented, as would “arguments” by the prosecution and the defense about whether the death penalty should be imposed (fake videos could even be filmed). The results of such a study would be illuminating.¹⁷⁰

IV. APPLYING *FURMAN* TO PUNITIVE DAMAGES

A. *The Requirements of Furman Should Apply to Punitive Damages*

The issue of whether the death penalty is being inflicted arbitrarily is, on its face, similar to the issue of whether punitive damages are imposed arbitrarily.¹⁷¹ Scholars of punitive damages should thus con-

¹⁶⁸ See Gross & Mauro, *supra* note 163, at 42-45 (listing various racial impact studies).

¹⁶⁹ See *supra* notes 45-52 and accompanying text.

¹⁷⁰ A similar study could also be conducted for the jury instructions that Part V ultimately proposes. A control group could be presented with a test case and allowed to set punitive damages in its sole discretion. Another group would then be presented with the same test case and be allowed to set punitive damages subject to the instructions proposed in this Comment. The results may show whether the instructions reduce variability between juries and would indicate whether states should seriously consider these proposed reforms.

¹⁷¹ This comparison was made in Bernard W. Bell, *Byron R. White, Kennedy Justice*, 51 STAN. L. REV. 1373, 1418 n.294 (1999) (book review), which linked Justice O'Connor's dissent in *TXO* to Justice White's concurrence in *Furman* with a “see also” signal; briefly in Darryl K. Brown, *Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrines*, 47 HASTINGS L.J. 1255, 1315 (1996), which discussed *Furman* as a precursor to *BMW* in terms of distrust of juries; in an examination of the ramifications of *Exxon Shipping Co. v. Baker* in Jeffrey L. Fisher, *The Exxon Valdez Case and Regularizing Punishment*, 26 ALASKA L. REV. 1, 5-6 (2009); in an argument for enhanced appellate review of punitive damages in Stephan Landsman, *Appellate Courts and Civil Juries*, 70 U. CIN. L. REV. 873, 903 (2002); briefly in Sunstein, Kahneman & Schkade, *supra* note 45, at 2091, which observed that “Justice Breyer's opinion can be understood as connecting the outcome in *BMW* with . . . the constitutional attack on the death penalty in *Furman v. Georgia*”; and in Penny J. White,

sider whether *Furman* and *Gregg* provide a blueprint for how the Court might respond to a procedural challenge to punitive damages and for how the states would likely react. The first question is whether and to what extent the requirements of *Furman* and *Gregg* bind the states with respect to their punitive damages statutes. Under current precedent—namely *Haslip*—the imposition of punitive damages does not implicate due process. Admittedly, any bet that the Court is poised to overrule *Haslip* (even if only constructively) and, further, to apply *Furman*'s requirements to punitive damages faces long odds. Regardless, the following Section presents an argument that Fourteenth Amendment procedural due process may indeed require greater regularity in punitive damages awards.

First, recall the discussion in Section III.B of the interplay between *McGautha* and *Furman*. *McGautha* held that untrammelled juror discretion did not offend procedural due process under the Fourteenth Amendment, while *Furman* held that untrammelled juror discretion did offend the Eighth Amendment. A majority of the Court in *Furman* acknowledged that *Furman* constructively overruled *McGautha*.¹⁷² Meanwhile, the Court in *Gregg* stopped just short of admitting as much, attempting to limit the holding of *McGautha* in an unconvincing fashion. Thus, one could rationally conclude that *Furman* does in fact overrule *McGautha*. This determination would imply that *Furman* is valid precedent for both the Eighth Amendment and procedural due process under the Fourteenth Amendment. And if this is the case, then *Furman* may apply to other types of verdicts that juries are imposing arbitrarily. Thus, if punitive damages face this arbitrariness problem, they are unconstitutional under *Furman*.

Even if one hesitates to characterize *Furman* as a procedural due process holding, the Court could still validly treat *Furman* as persuasive authority in the procedural due process context. Such an argument proceeds as follows. A state is required under *Furman* and *Gregg* at least to narrow the class of defendants upon whom the death penalty can be imposed,¹⁷³ because the Eighth Amendment prevents the arbi-

Can Lightning Strike Twice?: Obligations of State Courts After Pulley v. Harris, 70 U. COLO. L. REV. 813, 856-59 (1999), which noted that Justice O'Connor's dissent in *TXO* expresses similar themes to Justice Breyer's concurrence in *BMW* and argued that similar values apply in the death penalty context. The author is unaware of other articles making this comparison.

¹⁷² This majority is comprised of the four dissenting Justices, plus Justice Douglas. See *supra* notes 142-146 and accompanying text.

¹⁷³ The Supreme Court appears to have backed away from the requirement that capital punishment statutes channel the jury's discretion, or at least it appears to have

trary imposition of capital punishment. Under controlling doctrine, capital punishment is “cruel and unusual” if individuals have no way of telling why one criminal defendant receives that punishment, while another criminal defendant on trial in a substantially similar case receives life in prison. Defendants must not be subject to “wanton[] and . . . freakish[]”¹⁷⁴ imposition of this ultimate punishment; rather, state law must signal to the jury the factors that can make a capital defendant’s particular offense of sufficient reprehensibility to warrant the death penalty.

Meanwhile, the Due Process Clause prohibits arbitrary government action. The dictates of procedural due process ensure that individuals are protected from “the arbitrary exercise of the powers of government.”¹⁷⁵ The requirement that government “follow appropriate procedures . . . promotes fairness.”¹⁷⁶ As a result, in criminal and civil cases, the jury’s discretion must be guided “within reasonable constraints” to satisfy due process—otherwise, the jury’s unbridled discretion risks arbitrary, irrational results.¹⁷⁷ Along these lines, “unlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one’s constitutional sensibilities.”¹⁷⁸ Whether the instructions currently given to jurors provide adequate guidance is inherently a matter of judgment, and, as discussed, the Court has ruled that at least one state’s punitive damages regime provided that requisite guidance.¹⁷⁹ However, as argued in Part II, current (or future) studies may demonstrate that punitive damages are in fact being imposed arbitrarily.

If studies demonstrate this arbitrariness, then a constitutional problem is raised; this problem is inescapably similar to that addressed in *Furman* and *Gregg*. *Furman*’s concern about the “wanton[] and . . . freakish[]”¹⁸⁰ imposition of the death penalty mirrors current

conflated this requirement as coextensive with the narrowing requirement. See Steiker & Steiker, *supra* note 158, at 380-82 (explaining “[t]he collapsing of the channeling requirement into the narrowing function”).

¹⁷⁴ *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

¹⁷⁵ *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)).

¹⁷⁶ *Id.*

¹⁷⁷ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20 (1991).

¹⁷⁸ *Id.* at 18.

¹⁷⁹ See *id.* at 20 (“These instructions . . . reasonably accommodated Pacific Mutual’s interest in rational decisionmaking and Alabama’s interest in meaningful individualized assessment of appropriate deterrence and retribution.”).

¹⁸⁰ *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

concerns about the unguided imposition of punitive damages. The Court in *Gregg* approved one way of curing the constitutional defects of legal procedures that produce arbitrary results—namely, using jury instructions that provide more guidance about the jury’s role. This simplified answer, it seems, should apply equally to punitive damages. The problem of arbitrariness is the same, and it appears clear that more detailed jury instructions could resolve the problem in both areas. Applying Eighth Amendment doctrine to punitive damages under the broader dictates of procedural due process thus makes intuitive sense. In addition, this application has the benefit of interpreting like constitutional provisions alike. If the Eighth Amendment includes some sort of procedural component, it ought to provide protections similar to the Due Process Clause of the Fourteenth Amendment.¹⁸¹ The Court, if inclined to find that punitive damages are currently being applied in an impermissibly arbitrary fashion, could easily follow the path that *Furman* forged: strike down existing statutes as unconstitutional and wait for states to pass new ones with additional procedural protections. These statutes could take a variety of forms but may mirror *Gregg* statutes. One would hope the statutes would provide the jury with better guidance.

The observation that the Court’s rationale in *Furman* and *Gregg* may also be binding or persuasive authority in the punitive damages realm does more than merely suggest that jury guidance should be improved; it provides guidance to states about how exactly to accomplish this task. Because the Court has found states’ efforts to minimize the arbitrary imposition of the death penalty to be successful, states could use similar methods to reduce the arbitrary imposition of punitive damages. Furthermore, even if the Constitution does not *require* states to revamp their punitive damages statutes in accordance with *Furman*, this does not mean that enterprising states cannot *consider* the lessons of *Furman* while engaging in punitive damages reform. Notably, if one believes that punitive damages are not variable to the point of caprice—and thus that *Haslip* retains force—one can still acknowl-

¹⁸¹ Cf. *Bolling v. Sharpe*, 347 U.S. 497, 498-500 (1954) (holding that the Fifth Amendment’s Due Process Clause includes an equal protection component). The Court in *Bolling* argued that it would be “unthinkable” that the states’ and the federal government’s equal protection obligations could differ. *Id.* at 500. One might counter that this principle of constitutional coherence need not apply to clauses of fundamentally different substance—in this case, the Eighth Amendment’s Cruel and Unusual Punishments Clause, and the Fifth and Fourteenth Amendments’ Due Process Clauses. However, if the Eighth Amendment incorporates some facet of procedural regularity, it would be anomalous for the Due Process Clause to offer less protection in this regard.

edge that state punitive damages reform could be useful. Thus, states can and should use *Gregg* statutes as a model for a successful punitive damages statute, while taking into account the current criticisms of state death penalty sentencing procedures.

B. *Furman Should Apply to Punitive Damages Regardless of Criticisms of the Case*

Given criticism of *Furman*, there is a question of whether, as a policy matter, modeling punitive damages statutes after *Gregg* statutes makes sense. Section III.C is not a comprehensive survey of the literature skeptical of the Court's efforts, but it attempts to illustrate the variety of criticisms. If there is such ample literature dispelling the efficacy of *Gregg* statutes, one might not be inclined to impose such an inefficient system upon another area of the law. However, these criticisms should not dissuade the Court or state legislatures from considering *Gregg's* applicability to punitive damages statutes. Whether states have adequately responded to the concerns in *Furman* does not change the conceptual soundness of those concerns. Thus, states seeking to reform punitive damages should take the lessons of *Furman* to heart and learn from the mistakes in the death penalty realm.

First, as noted in Section III.C, potential reformers must be aware that empirical research is unlikely to indicate whether the Supreme Court's jurisprudence has had its intended effect in the death penalty realm. This is because of the difficulty of crafting a quantitative description of the heinousness of a specific capital crime. However, were states to modify their punitive damages statutes, a wealth of data would become available with which to analyze the effect of the change. For example, the new average and median punitive damages awards, the new range of punitive damages awards, and the new ratios between compensatory damages and punitive damages could all be studied. If such studies indicated that these reforms had a real effect on the amount and variability of punitive damages, this would provide evidence that the Court's post-*Furman* rulings have succeeded in reducing the arbitrary imposition of the death penalty. Thus, duplicating the *Furman* experiment in the punitive damages realm may lead to empirically valuable information on *Furman's* efficacy in both contexts.

Although many doubt the practical success of *Furman*, such skepticism does not necessarily imply that its goals are invalid. A main concern with states' responses to *Furman* is that the new statutes are just as broad as pre-*Furman* ones. Thus, the statutes fail to narrow sufficiently the class of defendants to whom the death penalty can be ap-

plied and are less in accord with *Furman* than the Court would like to think. The core contribution to this problem is that states may have drafted lists of aggravating factors broad enough to apply to nearly any capital defendant.¹⁸² But though the states' responses to *Furman* may have been unsuccessful at reducing arbitrariness in the imposition of the death penalty, the central idea of channeling juror discretion and narrowing the class of defendants eligible for the death penalty remains a logical endeavor. For example, imagine a state death penalty statute that had as its sole aggravating factor a past conviction for a capital crime. Such a statute would seriously reduce the number of death penalty-eligible defendants and would limit the death penalty to a type of criminal categorically more culpable than most others. Furthermore, state statutes could guide juror deliberations in a more robust fashion—rather than merely telling jurors to weigh mitigating factors against aggravating factors, the statutes could suggest to the jurors how various factors might relate to or offset each other. This sort of statute would better meet the constitutional goals laid out in *Furman*.

Thus, although the Supreme Court may have failed in enforcing the constitutional requirements of the Eighth Amendment, this does not bear on the question of whether the requirements themselves are valid and whether they can or should carry over into other settings. In fact, these requirements could translate well into the punitive damages realm. States seeking to eliminate the arbitrariness of punitive damages statutes pursuant to these requirements would have two goals in mind. First, new statutes should attempt to narrow the class of defendants to whom punitive damages can be applied. They should do so by delineating clearly the situations in which punitive damages make sense from an economic standpoint. In this way, they would reduce the number of punitive damages awards and would ensure that such awards are given only in the most deserving of scenarios. Second, these statutes should attempt to guide the jury's deliberative process. They should do so by instructing the jury to reflect on factors relevant to the amount of punitive damages that is warranted in a given case. Such a hypothetical statute has the potential to reduce arbitrariness in the imposition of punitive damages by taking the *Furman* concerns seriously—untrammelled juror discretion in choosing the amount of pu-

¹⁸² See BALDUS ET AL., *supra* note 154, at 131 (noting that the "statutory aggravating circumstances do not provide a meaningful basis for distinguishing between the relatively few defendants who are sentenced to death and the vast majority who receive life sentences or less").

nitive damages and the possibility of punitive damages for every defendant. The question, then, is what such a statute would look like.

C. *How the Procedural, Substantive, and Behavioral Criticisms of Punitive Damages Should Influence New Statutes*

This Comment recounts three important shortcomings of the current punitive damages regime: (1) the inability of jurors to translate consensus on reprehensibility into dollar amounts in Section I.B, (2) the substantive excessiveness of some awards in Part II, and (3) the lack of guidance that troubled the Court in *Furman* in Part III. A state seeking to reform its statute—whether compelled by the Court in a *Furman*-esque decision or of its own accord—ought to take into account these criticisms. The following is an example of how a state might do so. It uses as a foundation the standard capital punishment statute, in order to satisfy the third criticism, and expands upon it in ways responsive to the first two criticisms.

First, the state should bifurcate the jury's role. The proceedings would begin with a liability and compensatory phase, during which the jury would determine the existence of the elements of a tort claim and the proper amount of compensatory damages.¹⁸³ Then, if a successful plaintiff seeks punitive damages, the state should proceed with a punitive phase. During this stage of the proceedings, the plaintiff and the defendant would argue for and against the imposition of punitive damages. The plaintiff would have a range of statutorily prescribed aggravating factors to argue, while the defendant would have a range of statutorily prescribed mitigating factors to argue.¹⁸⁴ A bifurcated proceeding is advantageous because it allows for the admission of evidence not strictly relevant to the issue of liability for compensato-

¹⁸³ A number of states do indeed bifurcate the proceedings in punitive damage trials. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, app. at 618-19 (1996) (Ginsburg, J., dissenting) (listing states that use this approach); see also Schwartz, Behrens & Mastrosimone, *supra* note 38, at 1019 (listing legal organizations, including the American Bar Association, that support bifurcation).

¹⁸⁴ The Court's decision not to limit the types of mitigating factors that a capital defendant can argue is rooted in the categorical difference between death and other punishments. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (recognizing that "the imposition of death by public authority is . . . profoundly different from all other penalties"). That concern is not present in the punitive damages setting. Thus, a legislature could choose to limit the number of both mitigating and aggravating factors, of neither, or of one or the other. This decision would depend on the extent to which a legislature wants to favor plaintiffs or defendants, as narrowing one class would work to that side's detriment. For the sake of explication and impartiality, this Comment assumes that there are statutorily prescribed factors on both sides.

ry damages.¹⁸⁵ Bifurcation is also helpful for focusing the jury's attention solely on the imposition of punitive damages.¹⁸⁶ Further, such a rule would mirror the protections that states have extended to capital defendants. Following argument, the jury would retire to deliberate.

The core of the jury's deliberations would be a balancing of aggravating and mitigating factors. Like in the capital punishment realm, the jury should have to find the existence of at least one aggravating factor by clear and convincing evidence; this higher burden of proof better comports with the "quasi-criminal nature of punitive damages."¹⁸⁷ These aggravating factors should be precise and limited, such that juries may not impose punitive damages in every tort case.¹⁸⁸ Examples of aggravating factors germane to a decision to impose punitive damages could include: (1) the defendant acted with intent and was motivated by a desire to cause harm; (2) the defendant has caused similar types of harm in this state, and victims usually do not recover for those harms; (3) the defendant's actions needlessly created a grave risk of serious bodily injury or death to a large number of people, and the defendant was aware of the risk; and (4) the defendant has been found liable in a similar tort case within the past three years, for which punitive damages were not imposed.¹⁸⁹ Legislatures seeking to narrow further the class of defendants to whom punitive damages may apply could consider requiring a jury to find the existence of more than one aggravating factor before imposing punitive damages.

If jurors found clear and convincing evidence that at least one aggravating factor was present, they would then be instructed to consider mitigating factors. Each juror would have to consider independently whether or not the aggravating factors outweighed the mitigating factors present and could only vote to impose punitive damages if she found that the aggravating factors did outweigh the mitigating factors. Imposition of punitive damages would require a unanimous vote by

¹⁸⁵ Cf. *Gregg v. Georgia*, 428 U.S. 153, 190-92 (1976) (plurality opinion) (explaining the benefits of separate evidentiary standards in a bifurcated sentencing proceeding).

¹⁸⁶ See, e.g., Schwartz, Behrens & Mastro Simone, *supra* note 38, at 1018 (discussing the "compartmentaliz[ation]" effect on jurors' ability to distinguish between the different burdens of proof for compensatory and punitive damages).

¹⁸⁷ *Id.* at 1013.

¹⁸⁸ As noted, some scholars worry that current capital murder statutes fail to achieve this limiting objective. See, e.g., BALDUS ET AL., *supra* note 154, at 131 (noting that the post-*Furman* Georgia statute lacked sufficient guidance for determining when to employ the death penalty).

¹⁸⁹ These factors would be subject, of course, to the dictates of *Philip Morris USA v. Williams*. See *supra* notes 89-94 and accompanying text.

the jury. Examples of possible mitigating factors include: (1) the harm was caused by the defendant's production of a product of significant importance to society; (2) the victim knowingly submitted to the harmful conduct (even though that submission does not defeat the defendant's compensatory liability); (3) the defendant has provided, or has attempted to provide, remuneration to substantially all its victims; and (4) although negligent, the defendant made some attempts to mitigate or eliminate the risk of harm.

The purpose of these aggravating and mitigating factors would be to limit the imposition of punitive damages to situations in which it is economically beneficial. These include situations in which defendants act tortiously because they gain utility from the act of causing harm itself (or because they otherwise act in a substantially reprehensible fashion) and situations in which defendants will not be adequately deterred because of detection problems. Punitive damages should not be awarded when compensatory damages will adequately deter conduct, when there are concerns of overdetering beneficial conduct, and when the defendant's conduct is not particularly reprehensible. These four aggravating and four mitigating factors attempt to channel the jury to impose punitive damages only when appropriate, though different factors and other constructions may prove more helpful to this end.

These instructions would cure procedural defects in the jury's decision to impose punitive damages but would not necessarily guide the jury in its choice of a monetary amount. References to the Supreme Court's punitive damages jurisprudence and to the behavioral law and economics literature may provide such guidance. Jurors should thus be instructed that punitive damages that exceed compensatory damages by a factor of ten are usually unconstitutional.¹⁹⁰ Thus, a jury should only impose punitive damages more than ten times greater than compensatory damages in the most reprehensible of cases—for example, if there are three or more aggravating factors and no mitigating factors present. Furthermore, the jury should be instructed that comparable civil or criminal penalties should provide a baseline award amount. (The defendant or the plaintiff would likely introduce evidence of these penalties in the punitive damages hearing, depending on the size of the applicable fine.) Finally, jurors should be provided with information about the average punitive damages award for the

¹⁹⁰ See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996) (discussing cases in which courts upheld punitive damages awards ranging from four to ten times the compensatory damages).

causes of action presented (this information could be introduced in the punitive damages hearing as well).

This instruction would conform to the Supreme Court’s relevant jurisprudence and mitigate the behavioral issues juries face in assessing a monetary penalty. As noted, Sunstein and others express concern about the unbounded nature of the jury’s choice; the jury has neither an anchor (a suggested award) nor an upper limit on the damages award it can impose.¹⁹¹ This instruction would provide the jury with a lower bound to its award (zero), an upper bound to its award (ten times compensatory damages, except in the most egregious of cases), and two potential anchors—the comparable civil or criminal penalties and the average punitive damages award. The jury could choose either as its anchor, or it could average the numbers. The jury would then be directed to discuss the extent to which aggravating factors outweigh mitigating factors. Only if multiple aggravating factors completely dominated mitigating factors could a jury depart from the ten-times-compensatory-damages limit. In all other cases, the jury should be instructed that the presence of mitigating factors should counsel a downward departure from the modulus, and the presence of multiple aggravating factors should counsel an upward departure from the modulus, staying within the prescribed limits.

Other features of the jury instructions could attempt to cure remaining behavioral problems. For example, Sunstein, Kahneman, and Schkade discuss how deliberation by itself can lead juries to tend to extremes and to choose larger awards than they otherwise might.¹⁹² The jury should thus be clearly instructed that in almost all cases, a ratio of less than 10:1 between punitive and compensatory damages will be appropriate. Judges should also instruct juries that the foreman’s role in ensuring a balanced debate between jurors in support of and in opposition to large punitive damages is paramount. Finally, each juror should be instructed to take care to voice concerns when deliberations produce a punitive damages award substantially larger or substantially smaller than her initial impulse as to the correct amount. Although curing the effects of deliberation is not easy, these instructions should help ensure that jurors are at least aware of the problem.

¹⁹¹ See *supra* notes 53 and 60 and accompanying text.

¹⁹² See Sunstein, Kahneman & Schkade, *supra* note 45, at 2101 (“No doubt group dynamics can push deliberations in unexpected directions, sometimes toward the most extreme member of the group.”).

V. A PROPOSED JURY INSTRUCTION

Though not perfect, the following proposed instruction attempts to respond to the foregoing analysis.¹⁹³ Though it is long, some suggest that brief and technically written jury instructions can be unhelpful;¹⁹⁴ having a judge present these instructions and explain them thoroughly may aid the jury's ability to follow the instructions carefully.

"Having found the defendant liable for compensatory damages, your task is now to determine whether to impose additional damages, called punitive damages, and if so, how much. Punitive damages are designed to punish defendants for especially reprehensible conduct and to deter defendants who commit tortious acts frequently and who are infrequently prosecuted. When one or both of these conditions is present, punitive damages are appropriate.

"You have just heard evidence from the plaintiff and the defendant as to the propriety of punitive damages in this case. Using this evidence, you must first determine whether to impose punitive damages at all. To do so, you must find clear and convincing evidence of at least one of the following aggravating factors:

"(1) The defendant acted with intent and was motivated by a desire to harm the victim.

"(2) The defendant has caused similar types of harm to victims in this state, and those victims infrequently recover for the harm they suffer.

"(3) The defendant's actions needlessly created a grave risk of serious bodily injury or death to a large number of people, and the defendant was aware of the risk. This usually occurs when a defendant was aware of very inexpensive safety precautions that would avoid a very likely and very severe harm, and the defendant did not take those precautions. However, if a defendant does not take expensive safety precautions that would avoid an unlikely or relatively small harm, this aggravating factor is not present.

"(4) The defendant has been found liable in a tort case within the past three years, for which punitive damages were not imposed.

¹⁹³ Other authors have similarly suggested model jury instructions for punitive damages. See, e.g., Jacqueline Perczek, Note, *On Efficiency, Punishment, Deterrence, and Fairness: A Survey of Punitive Damages Law and a Proposed Jury Instruction*, 27 SUFFOLK U. L. REV. 825, 868-73 (1993).

¹⁹⁴ See Robbenolt, *supra* note 59, at 185-86 (discussing problems that arise when juries do not receive adequate guidance). But see *id.* at 144-46 (noting problems with lengthy instructions).

“If you find the existence of one of these factors, you must move on to consider mitigating factors. Each juror must independently determine whether any mitigating factors are present. Each juror must then weigh the aggravating factors against the mitigating factors. Only if each juror determines that the aggravating factors outweigh the mitigating factors can you impose any punitive damages. The mitigating factors are as follows:

“(1) The harm caused was the byproduct of conduct on the part of the defendant that has significant value to society.

“(2) The victim knowingly submitted to the harmful conduct, even though the victim’s actions do not fully eliminate the defendant’s liability for compensatory damages.

“(3) The defendant has provided, or has attempted to provide, remuneration to substantially all of its victims.

“(4) Although negligent, the defendant made some attempts to mitigate or eliminate the risk of harm. If the defendant’s attempt to mitigate a risk of harm was the source of the harm in this case, that is also a mitigating factor.

“If, by unanimous vote, you determine that the aggravating factors outweigh the mitigating factors, you must then decide the dollar amount of punitive damages you will impose. This should correlate to the reprehensibility of the conduct, both as that term is traditionally used and to the extent to which the defendant has avoided liability for similar harms in this state. In determining what award to impose, you should be mindful that the Supreme Court of the United States has determined that, in most cases, punitive damages that are greater than ten times the awarded compensatory damages are unconstitutionally excessive. Therefore, in only the most reprehensible of cases may you exceed that limit. For example, you might exceed that limit if there are three aggravating factors present and no mitigating factors present.

“Assuming that this is not such an exceptional case, you should treat the value of ten times compensatory damages as the upper limit to punitive damages. You should start by considering two values—the corresponding civil or criminal penalties and the average punitive damages award for this type of conduct—both of which were argued during the punitive damages hearing. You may choose one of these values to serve as a ‘baseline,’ or you can elect instead to pick a baseline somewhere within these values.

“Once you have chosen the baseline, you must then determine whether to depart from that baseline in an upward or a downward direction. You should only depart upward if aggravating factors sub-

stantially outweigh mitigating factors: for example, if there are multiple aggravating factors and no mitigating factors. On the other hand, you should depart downward if aggravating factors outweigh mitigating factors only by a small amount. The extent to which you depart from the baseline should mirror the degree to which you believe that aggravating factors dominate mitigating factors.

“Please note the following subtle distinction: you may not use punitive damages to punish defendants for harms to individuals other than the defendant, but you may consider the possibility of harm to other individuals in determining the reprehensibility of the conduct. Make sure that your choice of award considers the possibility that the defendant’s conduct could harm many people but that your award does not attempt to punish the defendant for harm caused to nonparties.

“Be mindful that the foreman has a special role in moderating deliberations. The foreman is charged with ensuring a healthy debate between jurors who support an upward departure and jurors who support a downward departure. Minority views should be treated with careful attention. In addition, keep in mind that the process of deliberation can lead groups to choose more extreme positions than any individual would initially support. This means that you might choose a level of punitive damages higher or lower than any of you would have initially supported. Be aware of this tendency, and if you believe that its effects are present, be sure to voice that concern.

“Thank you for your service.”

CONCLUSION

The teachings of *Furman v. Georgia*, the Supreme Court’s recent punitive damages jurisprudence, and behavioral law and economics literature may, when combined, provide suggestions for the creation of procedures that alleviate the potential constitutional infirmities of current punitive damages statutes. Above all, our punitive damages regimes should attempt to guide the jury’s discretion such that the jury chooses to award punitive damages only when it is appropriate to do so, and such that the jury chooses a level of punitive damages that corresponds with reprehensibility and falls within defined limits. The above proposal is just one suggestion for how a legislature, responsive to these three main concerns, could attempt to construct such a system.

It seems that the variability of punitive damage awards, in addition to their occasional excessiveness, is an important problem that the Supreme Court’s jurisprudence declines to acknowledge. Defendants

in punitive damages cases should begin reasserting as a defense the procedural guarantees of the due process clauses. Such claims are not guaranteed success, but current developments in punitive damages scholarship may lead the Court to take these claims more seriously. Assuming that the Court will not force reform on the states, individuals should petition their state legislatures to reform punitive damages procedural schemes of their own volition. And if these attempts at reform are successful, these states could finally boast that punitive damages are no longer the "monstrous heresy"¹⁹⁵ that some have believed them to be.

¹⁹⁵ *Fay v. Parker*, 53 N.H. 342, 382 (1872).