

**INSTRUCTING JURIES ON PUNITIVE DAMAGES: DUE PROCESS
REVISITED AFTER *PHILIP MORRIS V. WILLIAMS***

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INTRODUCTION

Amidst the debate over tort reform—from the annual report on “Judicial Hellholes”¹ to the rankings of the best and worst states for reform,² to the yearly assessment of the “top 100” verdicts³—punitive

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1 See, e.g., AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2007 (2007), <http://www.atra.org/reports/hellholes/report.pdf> (discussing jurisdictions in which judges systematically apply laws and court procedures in a manner that is perceived to be both unfair and unbalanced).

2 E.g., LAWRENCE J. MCQUILLAN & HOVANNES ABRAMYAN, PAC. RESEARCH INST., U.S. TORT LIABILITY INDEX: 2006 REPORT (2006), http://special.pacificresearch.org/pub/sab/entrep/2006/Tort_Index_06.pdf. For a discussion of the ongoing debate over the nature and existence of a punitive damages crisis, see Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 962–76 (2007) (contrasting empirical studies by Cass Sunstein, Theodore Eisenberg, and others on whether punitive damages awards are “out of control”).

3 Since 2001, the National Law Journal has tracked the top 100 damages verdicts. E.g., Leigh Jones, *Top 100 Verdicts of 2005: It’s A Harder Sell: Juries Will Make the Injured Whole, But Big Punitives Are History*, NAT’L L.J., Feb. 20, 2006, at S2. Of note, these reports reflect a sharp decline in the size of punitive damages awards starting in 2003. Compare *id.* (“Total awards among the top 100 verdicts in 2005 slid for the third straight year, indicating that juries are becoming ever stingier toward plaintiffs—at least with regard to the punitive damages they dole out.”), with Tresa Baldas, *Verdicts Swelling from Big to Bigger: Juries Desensitized, or Just Plain Angry*, NAT’L L.J., Nov. 25, 2002, at A1 (discussing rising “megaverdicts” in 2001). Some have speculated that the reported drop is the result of “defense counsel . . . [being] afraid of outlandish verdicts and . . . willing to settle to avoid the risks.” Lindsay Fortado, *Top 100 Verdicts of 2004: Despite Reputed Crisis, Med-Mal Verdicts Drop: Tort Reformers Talk of Runaway Juries, But Awards Are Down Again*, NAT’L L.J.,

damages remain a hot-button issue. While courts and academics have focused extensively on the post-verdict due process limits on punitive damages,⁴ few have analyzed the constitutionality of trial-level procedures, such as the punitive damages jury instructions used in state and federal courts across the nation.⁵

Shortly after the Supreme Court's 2003 landmark decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*,⁶ we argued that, although *State Farm* primarily concerned the standards for post-verdict review, it also suggested a sea-change in how juries must be instructed

Feb. 21, 2005, at S5 (discussing views of the general counsel to the American Tort Reform Association). Others view the drop as the result of a "public relations [tort reform] campaign" by industry aimed at convincing the public that juries are out of control. *Id.* (discussing views of a senior litigator with the Center for Constitutional Litigation). Still others have suggested that the drop could be attributed in part to plaintiffs' lawyers exercising more caution in their arguments to the jury in light of the Supreme Court's recent decisions limiting punitive damages. See David Hechler, *Top 100 Verdicts of 2004: Smaller At The Top: Big Awards Continue To Drop, As Punitives Decline After 2003's State Farm*, NAT'L L.J., Feb. 21, 2005, at S2 ("In the wake of *State Farm*, plaintiffs' lawyers . . . are trying to be careful in how they present the ratio . . ." (internal quotation omitted)). The potential reasons for the reported decline in the "top 100" punitive damages awards are beyond the scope of this Article. We note, however, that an award of only one dollar, if the result of improper procedures or considerations, can be unconstitutional.

- 4 *E.g.*, *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 674 (7th Cir. 2003) ("The defendant appeals, complaining primarily about the punitive-damages award. It also complains about some of the judge's evidentiary rulings, but these complaints are frivolous and require no discussion."); Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the BMW/State Farm Guideposts*, 37 U. MICH. J.L. REFORM 441, 449-65 (2004) (reviewing the first Supreme Court cases to place constitutional limits on jury awards of punitive damages); Laura J. Hines, *Due Process Limitations on Punitive Damages: Why State Farm Won't Be the Last Word*, 37 AKRON L. REV. 779, 782-89 (2004) (providing a review of the Supreme Court's pre-2003 punitive damages jurisprudence).
- 5 See discussion *infra* Part III.
- 6 538 U.S. 408 (2003). For discussions of the potential impact of *State Farm* on punitive damages law and practice, see generally Laura Clark Fey et al., *The Supreme Court Raised Its Voice: Are the Lower Courts Getting the Message? Punitive Damages Trends After State Farm v. Campbell*, 56 BAYLOR L. REV. 807, 858 (2004) (discussing judicial application of *State Farm* one year after the decision and concluding that *State Farm* should be considered a "landmark" case); Lauren R. Goldman & Nikolai G. Levin, *State Farm at Three: Lower Courts' Application of the Ratio Guidepost*, 2 N.Y.U. J.L. & BUS. 509, 510-11 (2006) (discussing the judicial application of *State Farm* three years after the decision and concluding that "*State Farm* has significantly altered the landscape of punitive damages litigation in a wide range of cases"); Evan M. Tager, *The Impact of State Farm v. Campbell: A Two-Year Retrospective*, COVERAGE (ABA Litig. Section, Chicago, Ill.), May/June 2005, at I (discussing the judicial application of *State Farm* two years after the decision and concluding that it has had a "mitigating effect" on punitive damages, but that this result was not as substantial as many anticipated).

to prevent arbitrary decision-making.⁷ Before *State Farm*, due process challenges to punitive damages instructions were usually futile in light of the Court's 1991 approval of broad and amorphous instructions in *Pacific Mutual Life Insurance Co. v. Haslip*.⁸ Following *State Farm*, however, we argued that this "*Haslip*-minimum" was constitutionally suspect, and that procedural due process requires states to better guide and constrain the jury's discretion.⁹ Specifically, in *State Farm*, the Court for the first time stated that a jury must be instructed on one of the substantive, post-verdict limits recognized by the Court.¹⁰ As we argued then, "[t]his convergence of substantive and procedural due process suggests that the core limits on punitive damages, traditionally considered only post-verdict, influence pre-verdict procedural requirements and therefore should be provided to the jury in the first instance."¹¹

Yet few states revised their model jury instructions after *State Farm*.¹² And, while there were exceptions,¹³ courts failed to fully implement *State Farm* in the instructional context.¹⁴

On February 20, 2007, however, the Supreme Court issued *Philip Morris USA v. Williams* (hereinafter *Philip Morris*),¹⁵ reversing a \$79.5 million punitive damages verdict against a tobacco company on the ground that the jury instruction used at trial failed to safeguard the company's due process rights.¹⁶ The Court held that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation."¹⁷ Because the plaintiff had argued that the jury should punish Philip Morris for the

7 Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After State Farm*, 6 U. PA. J. CONST. L. 423 (2004).

8 499 U.S. 1 (1991). See also Franze & Scheuerman, *supra* note 7, at 488–98 (discussing *Haslip*'s impact on procedural due process challenges).

9 Franze & Scheuerman, *supra* note 7, at 517–24.

10 538 U.S. at 422 ("A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.").

11 Franze & Scheuerman, *supra* note 7, at 427.

12 See discussion *infra* Part III.

13 See discussion *infra* Part III.

14 See discussion *infra* Part III.

15 127 S. Ct. 1057 (2007). For discussions by scholars and practitioners concerning the impact of *Philip Morris*, see Symposium, *Punitive Damages, Due Process, and Deterrence: The Debate After Philip Morris v. Williams*, 2 CHARLESTON L. REV. 287, 287–519 (2008).

16 *Philip Morris*, 127 S. Ct. at 1064–65.

17 *Id.* at 1063.

harm its alleged conduct caused to nonparties—the injuries to all sick smokers in the state—and the court failed to instruct the jury on the proper use of this argument, remand was required.¹⁸ In other words, the substantive prohibition of awards that punish a defendant for harm-to-others, traditionally considered post-verdict, should have guided the trial procedures.

Philip Morris did not, however, mandate that courts use particular jury instructions or adopt specific trial or pre-trial procedures.¹⁹ Rather, “States have some flexibility to determine what *kind* of procedures they will implement.”²⁰ At the same time, “it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one.”²¹

The core issue after *Philip Morris*, then, is how courts should ensure that juries ask “the right question, not the wrong one.” To be sure, states are free to experiment with novel procedures²² or to attempt to exclude certain types of evidence or arguments that may pollute jury decision-making.²³ The reality, however, is that most courts will turn to jury instructions as the principal means of guiding the jury.²⁴ The time, therefore, is ripe to revisit the constitutional requirements for punitive damages jury instructions.

Part I of this Article provides a brief overview of the Supreme Court’s punitive damages jurisprudence from *Haslip* to *State Farm*. It discusses the Court’s procedural and substantive due process paradigms and how those separate due process limits have merged over the years. Part II discusses *Philip Morris* and examines how the decision confirmed that the substantive limits on punitive damages awards do in fact guide the nature of procedural requirements. Part III surveys the model jury instructions used in every state and in the federal courts. This Part explains how most instructions fail to reflect the substantive limits on punitive damages and, indeed, often direct juries to consider *unconstitutional* factors in imposing punitive damages.

18 *Id.* at 1065.

19 *See id.*

20 *Id.*

21 *Id.* at 1064.

22 For arguments urging the need to look beyond “traditional approaches” to punitive damages procedures, see generally Michael P. Allen, *Of Remedy, Juries and State Regulation of Punitive Damages: The Significance of Philip Morris v. Williams*, 63 N.Y.U. ANN. SURV. AM. L. 343, 378–79 (2008).

23 *See infra* text accompanying notes 296–98.

24 *See infra* text accompanying notes 296–99.

Finally, Part IV identifies the substantive areas on which juries should now be instructed. This Part argues that *Philip Morris* rejected the premise adopted by many courts and model jury instruction committees after *State Farm* that the substantive due process limits apply only post-verdict. Part IV further contends that the Court also confirmed that the substantive due process limits guide the “reasonableness” of punitive damages jury instructions. We conclude with a proposal so simple that it should not be controversial: juries should be told of the constitutional limits by which their awards will be judged.

I. THE PUNITIVE DAMAGES PARADIGM

Over the past seventeen years, the Supreme Court has developed a punitive damages framework that imposes both procedural and substantive due process limits on punitive damages awards. In the punitive damages context, substantive due process limits the amount of an award—it asks whether an award’s amount is “excessive.”²⁵ Procedural due process, on the other hand, is not concerned with the size of the award, but the procedures used to safeguard a defendant’s rights.²⁶ As Professor Erwin Chemerinsky has explained:

Procedural due process, as the phrase implies, refers to the procedures that the government must follow before it deprives a person of life, liberty, or property. Classic procedural due process issues concern what kind of notice and what form of hearing the government must provide when it takes a particular action.

Substantive due process, as that phrase connotes, asks whether the government has an adequate reason for taking away a person’s life, liberty, or property. In other words, substantive due process looks to whether there is a sufficient justification for the government’s action.

25 *E.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (“The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) (recognizing a substantive due process right against a “grossly excessive” punitive damages award (internal quotation omitted)); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453–54 (1993) (plurality opinion) (“[T]he Due Process Clause of the Fourteenth Amendment imposes substantive limits ‘beyond which penalties may not go.’” (quoting *Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73, 78 (1907))). For a criticism of the Court’s substantive due process standard, see A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085, 1088–89 (2006) (arguing that the Court’s substantive due process restrictions on punitive damages lack precedent and conflict with the constitutional principles of reserved rights and limited powers).

26 ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 523–24 (2d ed. 2002).

....

[An] example of the distinction between procedural and substantive due process can be found in challenges to large punitive damage awards. Procedural due process requires that there be safeguards such as instructions to the jury to guide their discretion, and judicial review to ensure the reasonableness of the awards. Substantive due process prevents excessive punitive damage awards, regardless of the procedures followed.²⁷

Although the distinction is not always noted by lower courts, the Supreme Court's punitive damages decisions generally can be categorized as addressing either procedural or substantive due process.²⁸ Indeed, the Court itself has blended the concepts.²⁹ For instance, the Court has used the same base legal standard for both substantive and procedural due process rights: a "reasonableness standard."³⁰ In *Haslip*, the Court adopted a general "reasonableness and adequate guidance" test to assess the constitutionality of state punitive damages procedures, including trial-level and post-verdict procedures.³¹ In the first substantive due process decision, *TXO Production Corp. v. Alliance Resources Corp.*,³² a plurality adopted the same general "reasonableness" standard to assess whether the amount of a punitive damages award is constitutionally excessive.³³

What "reasonableness" meant for substantive due process was fleshed out in *BMW of North America, Inc. v. Gore*,³⁴ and later in *State Farm*. In *BMW*, the Court identified three "guideposts," applied post-verdict, to determine whether an award is constitutionally excessive: (1) the reprehensibility of the defendant's conduct; (2) the relationship (or ratio) of punitive to compensatory damages; and (3) the comparable civil or criminal penalties for the defendant's conduct.³⁵

27 *Id.* (footnote omitted).

28 Three of the Court's punitive damages decisions considered procedural protections. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Another three addressed substantive due process limits. *See State Farm*, 538 U.S. 408; *BMW*, 517 U.S. 559; *TXO*, 509 U.S. 443. *Philip Morris* can properly be viewed as covering both procedural and substantive due process. The substantive component can be seen in the Court's ruling prohibiting an award based on harm to non-parties. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007). The procedural component is evident in its holding that adequate procedures are required to protect the substantive right. *Id.*

29 *See Franze & Scheuerman*, *supra* note 7, at 511.

30 *See id.* (explaining the Court's use of a "reasonableness" standard in cases involving both substantive and procedural due process).

31 499 U.S. at 18.

32 509 U.S. 443 (plurality opinion).

33 *Id.* at 458.

34 517 U.S. 559 (1996).

35 *Id.* at 574-75, 583.

BMW also suggested, albeit obliquely, that punishing defendants for out-of-state conduct or for harms the defendant's conduct imposed on non-parties is constitutionally impermissible.³⁶

State Farm further developed the *BMW* guideposts, holding that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."³⁷ The Court elaborated on the considerations underlying "reprehensibility,"³⁸ including its conclusion that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."³⁹ Finally, the *State Farm* Court confirmed that punishing a defendant for out-of-state conduct is constitutionally improper⁴⁰ and further suggested that the Constitution prohibits punishing a defendant for harms its conduct caused non-parties.⁴¹

Although the Court developed procedural due process standards for post-verdict review of punitive damages,⁴² the Court's consideration of the procedural due process requirements at the trial level largely remained unexamined until *State Farm*, where signs of change emerged. There, the Court noted that a jury must be instructed on a particular substantive limit prohibiting punishment for out-of-state conduct,⁴³ thereby implicitly recognizing that substantive due process limits guide "reasonableness" for procedural due process.⁴⁴ In other words, *State Farm* signaled that substantive limits identified by the Court, such as the "guideposts" recognized in *BMW*, should be provided to the jury.

36 See *id.* at 572 ("We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.").

37 *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

38 *Id.* at 419.

39 *Id.* at 422–23. *State Farm* also noted that a defendant's wealth "bear[s] no relation to the award's reasonableness or proportionality," *id.* at 427, though the Court did not bar a jury's consideration of a defendant's wealth.

40 *Id.* at 422 ("A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.").

41 See *id.* ("[T]he Utah courts erred in relying upon [lawful out-of-state conduct] and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no relation to *the Campbells'* harm." (emphasis added)).

42 Despite being procedural due process cases, *Cooper Industries* and *Oberg* focus on post-verdict review, not trial-level procedures. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 430 (2001); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 426–29 (1994).

43 *State Farm*, 538 U.S. at 422.

44 See Franze & Scheuerman, *supra* note 7, at 507–16.

After *State Farm*, some courts and model instruction committees began to incorporate the substantive limits into instructions.⁴⁵ Most, however, did not.⁴⁶ The principal stumbling block—beyond the natural time it takes to implement changes in the law or model instructions—was that *State Farm* did not explicitly direct that all of the substantive limits be provided to the jury.⁴⁷ Thus, courts and committees often operated under a flawed assumption that the procedural due process limits apply only pre-verdict, and the substantive due process limits apply only post-verdict.⁴⁸ The Supreme Court confronted these views in *Philip Morris*.

II. PHILIP MORRIS USA V. WILLIAMS

A. *The Dispute*

Philip Morris involved what might be described as a typical tobacco personal injury case.⁴⁹ For more than forty years, Jesse Williams smoked Marlboro cigarettes manufactured by Philip Morris.⁵⁰ Following Williams's death from lung cancer, his widow sued the company

45 See sources cited *infra* notes 187–214.

46 See *infra* Part III. For a discussion of one potential reason for the slow pace of instructional reform, see generally Anthony J. Franze, *Clinging to Federalism: How Reluctance To Amend State Law-Based Punitive Damages Procedures Impedes Due Process*, 2 CHARLESTON L. REV. 297 (2008).

47 See *infra* text accompanying notes 243–52.

48 See, e.g., *White v. Ford Motor Co.*, No. CV-N-95-0279-DWH, 2003 WL 23353600, at *26 (D. Nev. Dec. 30, 2003) (finding that a reasonable relationship instruction was not required under *State Farm* and concluding that a reasonable relationship inquiry was “inappropriate for jury consideration”); H. Alston Johnson, III, *Civil Jury Instructions*, in 18 LOUISIANA CIVIL LAW TREATISE § 18.02 cmt. (2d ed. 2006), available at WL 18 LACIVL § 18.02 (“It . . . remain[s] an open question . . . whether the jury should be told that there may be constraints on their assessment of punitive damages, i.e., told that such damages might have to bear a ‘reasonable relationship’ to compensatory damages The better view is probably that this is a legal issue for post-verdict motions or appeal, if the punitive damages are claimed to exceed that relationship.”); 2 PA. SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS § 14.02 subcomm. note (Pa. Bar Inst., 3d ed. 2005) (“*Campbell* addressed the standards under which a reviewing court should measure the constitutionality of a punitive damages award where a due process challenge has been raised, not the standards a jury should apply in determining punitive damages in the first instance.”).

49 See *Williams v. Philip Morris Inc. (Philip Morris V)*, 127 P.3d 1165 (Or. 2006), *rev'd and remanded sub nom.*, *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

50 *Id.*, 127 P.3d at 1168.

for fraud⁵¹ in Oregon state court, alleging that Philip Morris had lied to Mr. Williams about the dangers of smoking.⁵²

During closing arguments, the plaintiff's lawyer urged the jury to punish Philip Morris not only for the harm the company caused Mr. Williams, but also for the harm the company's conduct caused other smokers—the "other Jesse Williams in the last 40 years in the State of Oregon."⁵³ In response, Philip Morris proposed an instruction that directed the jury to limit any punitive award to the harm caused only to Mr. Williams.⁵⁴ The trial court, however, rejected the proposed instruction.⁵⁵ Instead, the court charged the jury, consistent with the state's model jury instruction,⁵⁶ merely that "[p]unitive damages are awarded against a defendant to punish misconduct and to deter misconduct."⁵⁷ The court further instructed the jury that punitive damages "are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct."⁵⁸

51 Plaintiff also brought a negligence claim against Philip Morris. *Id.* at 1167. The jury, however, declined to award any punitive damages on this claim. *Id.* at 1171.

52 *Id.* at 1167–68.

53 Brief for the Petitioner at 3, *Philip Morris*, 127 S. Ct. 1057 (No. 05–1256), 2006 WL 2190746 (quoting the plaintiff's closing argument). Plaintiff's counsel asked the jury to punish not only for the past forty years of harm, but for future sick smokers as well: "When you determine the amount of money to award in punitive damages against Philip Morris . . . [, i]t's more than fair to think about how many more are out there in the future." *Id.* at 3–4. The Supreme Court further quoted plaintiff's closing argument: "In Oregon, how many people do we see outside, driving home . . . smoking cigarettes? . . . [C]igarettes . . . are going to kill ten [of every hundred]. [And] the market share of Marlboros [i.e., Philip Morris] is one-third [i.e., one of every three killed]." *Philip Morris*, 127 S. Ct. at 1061 (alterations in original).

54 Philip Morris proposed that the jury be charged with the following instruction:

The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.

Philip Morris V, 127 P.3d at 1175 (quoting the defendant's proposed jury instruction).

55 *Id.*

56 Oregon's model instruction provides in relevant part: "[Y]ou have the discretion to award punitive damages. In the exercise of that discretion, you may consider the importance to society in deterring similar misconduct in the future." OR. UNIF. CIVIL JURY INSTRUCTIONS § 75.02 (Or. State Bar Comm. on Unif. Civil Jury Instructions, Supp. 2006). See also *infra* note 153 (discussing Oregon's model instruction).

57 *Philip Morris*, 127 S. Ct. at 1061 (alteration in original) (quoting the trial judge's jury instruction).

58 *Id.* (internal quotations omitted).

The jury ultimately awarded the plaintiff \$821,000 in compensatory damages and \$79.5 million in punitive damages.⁵⁹ After substantial post-verdict and appellate wrangling, the case landed in the Supreme Court.⁶⁰

59 *Id.* The Oregon Court of Appeals noted that the \$79.5 million punitive damages award was equal to the company's profits for roughly a two-week period during the year closest to the trial. *Williams v. Philip Morris USA (Philip Morris I)*, 48 P.3d 824, 841 (Or. Ct. App. 2002), *aff'd on reh'g*, 51 P.3d 670 (Or. Ct. App. 2002), *vacated*, 540 U.S. 801 (2003), *remanded to* 92 P.3d 126 (Or. Ct. App. 2004), *aff'd*, 127 P.3d 1165 (Or. 2006), *vacated*, 127 S. Ct. 1057 (2007), *rev'd and remanded sub nom.*, 127 S. Ct. 1057 (2007), *verdict reinstated and aff'd*, 176 P.3d 1255 (Or. 2008), *cert. granted*, 128 S. Ct. 2904 (2008). Professor Keith N. Hylton interprets the court's use of Philip Morris's profits as an attempt "to eliminate the company's gain from fraudulent conduct." Keith N. Hylton, *Reflections on Remedies and Philip Morris v. Williams* 5 (Boston Univ. Sch. of Law Working Paper Series, Law & Econ., Working Paper No. 07-06, 2007), available at http://ssrn.com/abstract_id=977998.

60 The trial court reduced the compensatory award to \$521,000 under a state statutory cap, *Philip Morris V*, 127 P.3d at 1171, and reduced the punitive damages award to \$32 million under the *BMW* guideposts. *Id.* at 1173. On appeal, Philip Morris argued that the punitive damages award violated both procedural and substantive due process. First, the size of the award, regardless of the procedures used at trial, was so excessive that it violated due process. It stressed that the \$32 million punitive damages award, though reduced from the jury's larger award, still violated *BMW* and pointed to the 39-to-1 ratio of punitive damages to compensatory damages. *Philip Morris I*, 48 P.3d at 840-41. Second, Philip Morris challenged the jury instructions used at trial. *Id.* at 837-38. Plaintiff appealed the trial court's reduction of the punitive damages award. *Id.* at 828. The Oregon Court of Appeals rejected Philip Morris's arguments and reinstated the jury's original \$79.5 million jury award. *Id.* at 824. Philip Morris appealed, and in 2003, the United States Supreme Court "GVR'd" the case (granted the petition, vacated the judgment, and remanded the case) to the Oregon Court of Appeals for reconsideration in light of its intervening decision in *State Farm*. *Philip Morris USA v. Williams (Philip Morris III)*, 540 U.S. 801 (2003). On remand, the Oregon Court of Appeals reaffirmed its initial opinion. *Williams v. Philip Morris USA (Philip Morris IV)*, 92 P.3d 126 (Or. Ct. App. 2004). Notably, the Oregon Court of Appeals relied on Oregon's state law punitive damages factors to justify rejection of Philip Morris's proposed instruction. *See id.* at 142 ("[Oregon Revised Statute] 30.925(2)(g) requires a jury to consider evidence of punishments already imposed on the defendant when it considers the amount of an award of punitive damages."). The court further noted that those factors should be given to a jury. *Id.* The Oregon Supreme Court affirmed the \$79.5 million award, *Philip Morris V*, 127 P. 3d at 1168, and Philip Morris again petitioned for certiorari with the United States Supreme Court. On May 30, 2006, the Supreme Court granted certiorari. *Philip Morris USA v. Williams*, 126 S. Ct. 2329 (2006). For the proceeding history after the 2006 certiorari grant, see *infra* note 95.

B. *The Supreme Court's Decision*

Justice Breyer⁶¹ in a 5-4 decision, joined by Chief Justice Roberts and Justices Alito,⁶² Souter, and Kennedy, reversed and remanded the \$79.5 million punitive damages award against Philip Morris.⁶³ Although the Court had granted review to consider both the excessiveness of the award and the jury instruction issue,⁶⁴ the Court limited its decision to whether Oregon's procedures allowing the jury to punish for harm to non-parties violated the Constitution.⁶⁵ The Court found those procedures, specifically the jury instructions, constitutionally deficient.⁶⁶

1. *The Substantive Limit: Prohibiting Punitive Damages Based on Harm to Non-Parties*

In *Philip Morris*, the Court put to rest an argument urged by the plaintiffs and adopted by the Oregon Court of Appeals⁶⁷ that punitive damages could be based on alleged harms to non-parties.⁶⁸ Rather,

61 Justice Breyer has been in the majority for the Court's punitive damages opinions since he joined the Court in 1994. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). In *BMW*, Justice Breyer wrote a separate concurring opinion to explain why the Alabama standards failed to protect against arbitrary awards. 517 U.S. at 588 (Breyer, J., concurring). See also Franze & Scheuerman, *supra* note 7, at 459-60 (discussing Justice Breyer's concurring opinion).

62 *Philip Morris* was the first time Chief Justice Roberts and Justice Alito have considered punitive damages issues as members of the Supreme Court.

63 See *Philip Morris*, 127 S. Ct. at 1065.

64 *Id.* at 1062. In its petition for certiorari, Philip Morris asked the Court "to consider, among other things, (1) its claim that Oregon had unconstitutionally permitted it to be punished for harming nonparty victims; and (2) whether Oregon had in effect disregarded 'the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm.'" *Id.* (quoting Petition for Writ of Certiorari at 1, *Philip Morris*, 127 S. Ct. 1057 (No. 05-1256), 2006 WL 849860).

65 *Id.* at 1062-63.

66 *Id.* at 1065.

67 See Brief for Respondent at Part IV, *Philip Morris*, 127 S. Ct. 1057 (No. 05-1256); *Philip Morris I*, 48 P.3d at 837.

68 The plaintiff and court relied on language in *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993) (plurality opinion), in support of the premise that a jury could award punitive damages based on harm to non-parties. See *Philip Morris I*, 48 P.3d at 840-41; Brief for Respondent, *supra* note 67, at 27-28. In *TXO*, the Court upheld a 526-to-1 ratio by considering "the possible harm to other victims that might have resulted if similar future behavior were not deterred." 509 U.S. at 460. Accord Franze & Scheuerman, *supra* note 7, at 467 n.374 (explaining the "potential harm" analysis of *TXO*).

the Court held⁶⁹ that the Due Process Clause prohibits a state from imposing punitive damages based on injuries that the defendant “inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation.”⁷⁰

The Court based its conclusion on two main grounds. First, the Court reasoned that due process guarantees a defendant the “‘opportunity to present every available defense.’”⁷¹ Allowing a punitive damages award to be based on harm to non-parties would prevent the defendant from raising all possible defenses.⁷² For example, the Court noted that, unlike Mr. Williams, other allegedly injured smokers might have known smoking was dangerous⁷³ or might not have relied⁷⁴ upon Philip Morris’s statements about the risks of smoking.⁷⁵ Second, the majority expressed concern that allowing a jury to punish a defendant based on harm to non-parties “would add a near standardless dimension⁷⁶ to the punitive damages equation.”⁷⁷ The Court

69 Arguably, the Court already closed this door in *State Farm*. See Franze & Scheuerman, *supra* note 7, at 499–500 (discussing the Court’s holding that the potential harm analysis applies only to the plaintiff, not non-parties who also might have been injured by the defendant). Indeed, *Philip Morris* itself quoted *State Farm* in support of its conclusion: “[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award.” *Philip Morris*, 127 S. Ct. at 1063 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424 (2003)) (alteration in original).

70 *Philip Morris*, 127 S. Ct. at 1063. See also *id.* at 1065 (“[T]he Due Process Clause prohibits a State’s inflicting punishment for harm caused strangers to the litigation.”).

71 *Id.* at 1063 (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

72 See *id.*

73 Under Oregon law, a fraud cause of action requires the plaintiff to show:

(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer’s ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury.

Estate of Schwarz v. Philip Morris Inc., 135 P.3d 409, 422 (Or. Ct. App. 2006) (quoting *Conzelmann v. N. W. P. & D. Prod. Co.*, 225 P.2d 757, 764–65 (1950)). Knowledge that smoking is dangerous would negate the reliance element of the fraud claim.

74 Lack of reliance would defeat the fraud claim. See *supra* note 73 (describing elements of the fraud claim under Oregon law).

75 See *Philip Morris*, 127 S. Ct. at 1063 (“Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example . . . that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant’s statements to the contrary.”).

76 Justice Breyer’s language echoes the warnings of Justice O’Connor in *Haslip*. “The most modest of procedural safeguards would have made the process substantially more rational without impairing any legitimate governmental interest. The Court relies heavily on the State’s mechanism for postverdict judicial review, but this is incapable of curing a grant of

reasoned that the questions created by the addition of non-party victims⁷⁸—such as “[h]ow many such victims are there? How seriously were they injured? Under what circumstances did the injury occur?”—would add a risk of “arbitrariness [and] uncertainty”⁷⁹ and are therefore forbidden by due process.⁸⁰

2. Procedural Safeguards Needed To Protect Substantive Limit

As a threshold matter, the Court emphasized that due process entitles a defendant to procedural protections: “Unless a State insists upon proper standards that will cabin the jury’s discretionary authority, its punitive damages system may deprive a defendant of ‘fair notice . . . of the severity of the penalty that a State may impose.’”⁸¹ Thus, the Court “emphasized the need to avoid an arbitrary determination of an award’s amount.”⁸²

The Court further recognized the overlap between the substantive *BMW* guideposts and constitutionally required process.⁸³ The majority reaffirmed its determination in *State Farm* that evidence of a defendant’s harm to others may be used by the jury to gauge the “reprehensibility” of a defendant’s conduct under the *BMW* guideposts.⁸⁴ The Court explained that “[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible.”⁸⁵

But if such evidence, which could be misused by juries, is admitted, procedural protections must be adopted.⁸⁶ The jury may not “use a punitive damages verdict to punish a defendant directly on account

standardless discretion to the jury.” *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 43 (1991) (O’Connor, J., dissenting) (citation omitted).

77 *Philip Morris*, 127 S. Ct. at 1063.

78 *See id.*

79 *Id.*

80 *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (“The Due Process Clause of the Fourteenth Amendment prohibits the imposition of . . . arbitrary punishments on a tortfeasor.”).

81 *Philip Morris*, 127 S. Ct. at 1062 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996)) (first alteration in original).

82 *Id.*

83 *See id.* at 1063–64.

84 *See id.*; *see also id.* at 1065 (“[A] jury consequently may take [harm to others] into account in determining reprehensibility.”); Franze & Scheuerman, *supra* note 7, at 499, 504 (examining *State Farm*’s discussion of reprehensibility and out-of-state conduct).

85 *Philip Morris*, 127 S. Ct. at 1064.

86 *Id.* at 1065.

of harms it is alleged to have visited on nonparties.”⁸⁷ Thus, the Court held that “the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused [to] strangers.”⁸⁸

But what “assurance” is constitutionally required? As the Court itself asked, “[h]ow can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injury to others?”⁸⁹ The Court’s answer focused on the most basic procedural due process requirements: “[S]tate courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring.”⁹⁰ Thus, states must ensure that an award of punitive damages is not based on arbitrariness, passion, or bias.⁹¹ Furthermore, states must ensure that a punitive damages award is not based on extraterritorial conduct.⁹²

Beyond those general statements, however, the Court left open the question of exactly what process is required: “Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases.”⁹³ Ensuring these limits is a matter of procedural due process: “[I]t is constitutionally important

87 *Id.* at 1064.

88 *Id.*

89 *Id.* at 1065.

90 *Id.*

91 *See id.* at 1064 (noting that consideration of harm to others for reprehensibility purposes poses “risks of arbitrariness” and implicates “the concern for adequate notice”). Justice Breyer has advocated this position since *BMW*. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 588 (1996) (Breyer, J., concurring) (“Legal standards need not be precise in order to satisfy this constitutional concern. . . . But they must offer some kind of constraint upon a jury or court’s discretion, and thus protection against purely arbitrary behavior.”). The Court recognized that the risk of a procedural due process violation is heightened where evidence of harm to others is introduced at trial or where closing arguments focus on harm to non-parties. *See Philip Morris*, 127 S. Ct. at 1065 (“In particular, we believe that where the risk of that misunderstanding is a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk.”).

92 *See Philip Morris*, 127 S. Ct. at 1064 (“[P]unitive damages awards can, in practice, impose one State’s (or one jury’s) policies (e.g., banning cigarettes) upon other States . . .”); *see also Franze & Scheuerman*, *supra* note 7, at 455–56 (discussing *BMW*’s recognition of federalism and sovereignty-based limits on punitive damages awards). *But see generally* Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 *GEO. MASON L. REV.* 1 (2004) (rejecting the argument that the Court’s due process analysis incorporates federalism or sovereignty principles).

93 *Philip Morris*, 127 S. Ct. at 1065.

for a court to provide assurance that the jury will ask the right question, not the wrong one.”⁹⁴

Because the Oregon courts had assumed a punitive award could be based on harm to non-parties, the Supreme Court held that “the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris’ appeal” and remanded the case “so that the Oregon Supreme Court can apply the standard” set forth in *Philip Morris*.⁹⁵

⁹⁴ *Id.* at 1064.

⁹⁵ *Id.* at 1065. Upon remand, the Oregon Supreme Court reinstated and affirmed the \$79.5 million punitive damages award. *Williams v. Philip Morris Inc.*, 176 P.3d 1255 (Or. 2008), *cert. granted*, 128 S. Ct. 2904 (2008). This time, however, the court relied on new state law grounds. *Id.* at 1260. The court concluded that Philip Morris USA’s proposed instruction failed to correctly state the statutory *state law* factors. *Id.* at 1263–64. Specifically, the court faulted the use of the word “may” in describing the factors that the jury could consider in determining the amount of a punitive damages award. *Id.* at 1262–63. Rather, the court found that the instruction should have used the word “shall” because the statutory factors were mandatory. *Id.* The court also found that the proposed instruction misstated the Oregon standard for consideration of the defendant’s wealth. *Id.* at 1263. *But see infra* text accompanying notes 276–91 (discussing constitutional problems posed by financial condition instructions). The Oregon Supreme Court’s reliance on these two new state law grounds constitutes a transparent attempt to avoid further review by the United States Supreme Court. *See, e.g.*, *Michigan v. Long*, 463 U.S. 1032, 1039 (1983) (holding that presence of independent and adequate state ground precludes review by the Supreme Court); *see also Williams*, 176 P.3d at 1260 (finding that remand rests “on an independent and adequate state ground for affirming the trial judge’s ruling”). The Oregon Supreme Court’s remand decision has been criticized as unprincipled and results-oriented. *See, e.g.*, Anthony J. Sebok, *The Oregon Supreme Court Once Again Affirms a Blockbuster Punitive Damages Award Against Philip Morris—Even in the Face of a U.S. Supreme Court Decision Seemingly to the Contrary*, FINDLAW, Feb. 12, 2008, <http://writ.news.findlaw.com/sebok/20080212.html> (“I would like the United States Supreme Court to take some time out of its busy schedule to vacate the recent Oregon decision, and to remand with instructions that the jury verdict to be retried with instructions that do not violate the Constitution. That would be a fitting response to a state court that seems to think that winning is the only thing that matters.”). Just before this Article went to press, on June 9, 2008, the Supreme Court granted certiorari, but limited its review to whether the Oregon Supreme Court’s use of a state law procedural bar was proper. *Philip Morris USA v. Williams*, 128 S. Ct. 2904 (2008); *see also* Petition for a Writ of Certiorari, *Philip Morris USA v. Williams*, No. 07–1216, available at 2008 WL 795148.

C. Justice Stevens's Dissent

In his first dissenting opinion in a punitive damages case,⁹⁶ Justice Stevens appeared to reverse his stance on punitive damages.⁹⁷ On the one hand, he reiterated his view that *State Farm* and *BMW* were “correctly decided.”⁹⁸ In *Philip Morris*, however, Justice Stevens viewed the due process prohibition on punishment based on harm to others as “novel,”⁹⁹ and found the “distinction between taking third-party harm into account in order to assess the reprehensibility of the defendant’s conduct—which is permitted—from doing so in order to punish the defendant ‘directly’—which is forbidden,” to be an elusive nuance.¹⁰⁰ Justice Stevens, in seeming contrast to his position in *State Farm*¹⁰¹ and *BMW*,¹⁰² saw “no reason why an interest in punishing a wrongdoer for harming persons who are not before the court should not be taken into consideration when assessing the appropriate sanction for reprehensible conduct.”¹⁰³

Justice Stevens justified his position by focusing on the purposes of punitive damages: “retribution and deterrence.”¹⁰⁴ Justice Stevens noted that criminal sentencing permits consideration of prior crimes

96 See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 411 (2003) (majority opinion joined by Justice Stevens); *Cooper Indus., Inc. v. Leatherman Tool Group*, 532 U.S. 424, 426 (2001) (majority opinion authored by Justice Stevens); *BMW*, 517 U.S. at 562 (majority opinion authored by Justice Stevens); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 418 (1994) (majority opinion authored by Justice Stevens); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 446 (1993) (plurality opinion authored by Justice Stevens).

97 See *Philip Morris*, 127 S. Ct. at 1065–67 (Stevens, J., dissenting).

98 *Id.* at 1066. In both of those opinions, the Court hinted at what *Philip Morris* made clear. In *State Farm*, for example, the Court stated that “[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis.” *State Farm*, 538 U.S. at 423. See also *BMW*, 517 U.S. at 573–74 (rejecting reliance on defendant’s out-of-state conduct, which is necessarily directed at non-parties).

99 *Philip Morris*, 127 S. Ct. at 1066 (Stevens, J., dissenting). See also *id.* at 1067 (characterizing the Court’s decision as a “new rule of substantive law”).

100 *Id.* at 1066–67.

101 538 U.S. at 423.

102 517 U.S. at 574 n.21. In *BMW*, the Court found that a punitive damages award cannot be used to punish out-of-state conduct that was lawful where it occurred. *Id.* See also Franze & Scheuerman, *supra* note 7, at 455–56 (discussing out-of-state conduct ruling in *BMW*).

103 *Philip Morris*, 127 S. Ct. at 1066 (Stevens, J., dissenting) (internal quotation and citation omitted).

104 *Id.* See also *State Farm*, 538 U.S. at 409 (“[P]unitive damages should be awarded only if the defendant’s culpability is so reprehensible to warrant the imposition of further sanctions to achieve punishment or deterrence.”); *BMW*, 517 U.S. at 568 (“Punitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (“[P]unitive damages are imposed for purposes of retribution and deterrence.”).

(i.e., harm to others) “as an aggravating factor in penalizing the conduct before the court.”¹⁰⁵ By analogy,¹⁰⁶ Justice Stevens found it permissible “to enhance a penalty [of punitive damages] because the conduct before the court, which has never been punished, injured multiple victims.”¹⁰⁷

Finally, Justice Stevens commented on the practical difficulty of the Court’s opinion: “When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant’s conduct, the jury is by definition punishing the defendant—directly—for third-party harm.”¹⁰⁸

D. Justice Thomas’s Dissent

Justice Thomas wrote separately to reiterate his originalism-based view, exemplified by dissenting opinions in *BMW*¹⁰⁹ and *State Farm*,¹¹⁰ that the Due Process Clause does not constrain the size of a punitive

105 *Philip Morris*, 127 S. Ct. at 1067 n.2 (Stevens, J., dissenting). Justice Stevens explained: “A murderer who kills his victim by throwing a bomb that injures dozens of bystanders should be punished more severely than one who harms no one other than his intended victim.” *Id.* at 1067.

106 Justice Stevens recognized the weakness in his analogy: the Court has rejected treating punitive damages as a criminal sanction. *Id.* at 1066 n.1. In *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, the Court rejected an Excessive Fines Clause challenge to punitive damages awards. 492 U.S. 257, 262–76 (1989). However, Justice Stevens expressed his view that *Browning-Ferris* was wrongly decided and that the Excessive Fines Clause applies to punitive damages awards. *Philip Morris*, 127 S. Ct. at 1066 n.1 (Stevens, J., dissenting); see also Sheila B. Scheuerman, *The Road Not Taken: Would Application of the Excessive Fines Clause to Punitive Damages Have Made a Difference?*, 17 WIDENER L.J. 949 (2008) (concluding that applying the Excessive Fines Clause, as suggested by Justice Stevens, would not have materially changed the current state of punitive damages jurisprudence). Justice Stevens further found that Oregon’s split-recovery statute, authorizing partial payment of a punitive damages award to the State, supported his view that punitive damages awards should be treated as criminal sanctions. *Philip Morris*, 127 S. Ct. at 1066 (Stevens, J., dissenting). See also Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 375–80 (2003) (describing normative goals of split-recovery statutes).

107 *Philip Morris*, 127 S. Ct. at 1067 n.2 (Stevens, J., dissenting).

108 *Id.* at 1067.

109 In *BMW*, Justice Thomas joined Justice Scalia’s dissenting opinion. See *BMW*, 517 U.S. at 598 (Scalia, J., dissenting) (“[T]he Constitution does not make [the size of punitive damages awards] any of our business . . .”); cf. *Cooper Indus., Inc. v. Leatherman Tool Group*, 532 U.S. 424, 443 (2001) (Thomas, J., concurring) (“[T]he Constitution does not constrain the size of punitive damages awards.”).

110 *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (Thomas, J., dissenting) (“I continue to believe that the Constitution does not constrain the size of punitive damages awards.” (quoting *Cooper Indus.*, 532 U.S. at 443 (Thomas, J., concurring))).

damages award.¹¹¹ Notably, Justice Thomas recognized that the Court's procedural due process ruling was an "implementation of the substantive due process regime this Court has created for punitive damages."¹¹²

E. Justice Ginsburg's Dissent

Justice Ginsburg, joined by Justices Scalia¹¹³ and Thomas, also issued a separate dissenting opinion.¹¹⁴ Justice Ginsburg believed that the Oregon Supreme Court's decision was consistent with the majority's position.¹¹⁵ She viewed the majority's opinion as requiring a jury instruction explaining the proper use of harm-to-others evidence: "The Court thus conveys that, when punitive damages are at issue, a jury is *properly instructed* to consider the extent of harm suffered by others as a measure of reprehensibility, but not to mete out punishment for injuries in fact sustained by nonparties."¹¹⁶ In Justice Ginsburg's opinion, the Oregon judgment was consistent with that admonition.¹¹⁷

In addition, Justice Ginsburg found Philip Morris's proposed jury instruction to be confusing¹¹⁸ and noted that Philip Morris did not preserve any objection to the charges actually given—a conclusion shared by the Oregon Supreme Court on remand.¹¹⁹ Finally, Justice Ginsburg reiterated her views set forth in her dissenting opinions in

111 See *Philip Morris*, 127 S. Ct. at 1067–68 (Thomas, J., dissenting). Justice Thomas also joined in Justice Ginsburg's dissenting opinion. See *infra* text accompanying notes 113–20.

112 *Philip Morris*, 127 S. Ct. at 1067 (Thomas, J., dissenting).

113 For the first time in a punitive damages case, Justice Scalia did not write separately to express his disagreement with the substantive due process limits on punitive damages awards. Cf. *State Farm*, 538 U.S. at 429 (Scalia, J., dissenting); *Cooper Indus.*, 532 U.S. at 443 (Scalia, J., concurring in judgment); *BMW*, 517 U.S. at 598 (Scalia, J., dissenting); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 470 (1993) (Scalia, J., concurring in judgment). His failure to join Justice Thomas's dissenting opinion is curious, but perhaps reflects an acceptance of *stare decisis*.

114 *Philip Morris*, 127 S. Ct. at 1068–69 (Ginsburg, J., dissenting). Though he did not join Justice Ginsburg's opinion, Justice Stevens expressed his agreement "with Justice Ginsburg's explanation of why no procedural error even arguably justifying reversal occurred at the trial in this case." *Id.* at 1066 (Stevens, J., dissenting).

115 See *id.* at 1068 (Ginsburg, J., dissenting).

116 *Id.* (emphasis added).

117 See *id.* ("The Court identifies no evidence introduced and no charge delivered inconsistent with that inquiry.")

118 See *id.* at 1069 ("A judge seeking to enlighten rather than confuse surely would resist delivering the requested charge.")

119 See *id.*; see also *supra* note 95 discussing the remand decision.

BMW and *State Farm* that deference should be given to state court rulings on punitive damages.¹²⁰

III. HOW CURRENT TRIAL COURT PROCEDURES FAIL TO DIRECT JURIES TO THE “RIGHT QUESTION”

As noted, *Philip Morris* did not mandate that courts use specific jury instructions.¹²¹ Rather, “States have some flexibility to determine what *kind* of procedures they will implement.”¹²² At the same time, “it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one.”¹²³ As a practical matter, trying to get juries to ask the right question means either excluding potentially confusing evidence and argument, or expressly advising the jury on the right questions in the form of jury instructions.¹²⁴ Simply put, in any punitive damages case that reaches the jury, a court cannot escape the question of whether the instructions sufficiently protect against “an unreasonable and unnecessary risk of any such [jury] confusion occurring.”¹²⁵

Traditionally, courts have relied heavily on model instructions¹²⁶ and, for a variety of reasons, are reluctant to depart from these mod-

120 See *Philip Morris*, 127 S. Ct. at 1069 (Ginsburg, J., dissenting) (“I would accord more respectful treatment to the proceedings and dispositions of state courts that sought diligently to adhere to our changing, less than crystalline precedent.”); see also *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 430 (2003) (Ginsburg, J., dissenting); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 607 (1996) (Ginsburg, J., dissenting); Franze & Scheuerman, *supra* note 7, at 462 nn.330–33, 507 nn.586–91 (discussing Justice Ginsburg’s dissents in *BMW* and *State Farm*).

121 See *supra* text accompanying notes 90–94.

122 *Philip Morris*, 127 S. Ct. at 1065.

123 *Id.* at 1064.

124 Alternatively, states could remove the question of punitive damages from the jury’s consideration entirely. Indeed, Kansas and Ohio already have done so. See *infra* notes 130 & 136 (noting that under Kansas and Ohio law, the court assesses the amount of punitive damages); see also CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 242–58 (2002) (concluding that an optimal system would not involve a jury assessment of the amount of punitive damages). Assuming punitive damages remain a jury question, however, exclusion of confusing evidence or argument, or provision of proper instructions provide the principal procedural devices available to courts.

125 *Philip Morris*, 127 S. Ct. at 1065.

126 Both here and in our prior article, we discuss each jurisdiction’s “official” model instruction—those approved by the state courts or developed by state bar committees. See Franze & Scheuerman, *supra* note 7, at 469 n.379. Still, some jurisdictions do not have model punitive damages instructions. In those jurisdictions, parties often rely on “unofficial” model instructions published by lawyers in the state. Both this Article and our prior

els.¹²⁷ In 2004, we examined the model punitive damages instructions in all fifty states, the District of Columbia, and federal courts, and we grouped the instructions into three main categories:

- *Haslip*-minimum instructions: Instructions similar to the one approved by the Court in *Haslip* that merely advises the jury to consider three factors: (1) the purpose and nature of punitive damages; (2) the principle that punitive damages constitute punishment for civil wrongdoing; and (3) an explanation that the imposition of punitive damages is not compulsory.¹²⁸
- *Haslip*-plus-wealth instructions: Instructions that provide the *Haslip*-minimum but also advise the jury to consider the financial condition of the defendant when setting the amount of the award.¹²⁹
- Multi-factor instructions: Instructions that advise juries to consider a number of factors, typically based on state law. Some, but not all of the factors, are consistent with the federal guideposts.¹³⁰

article, *see id.*, discuss these “unofficial” pattern instructions and note when a discussed instruction is not “official.”

127 See discussion *infra* Part III.A.

128 See Franze & Scheuerman, *supra* note 7, at 470–73; *see also infra* Part III.A.1.

129 See Franze & Scheuerman, *supra* note 7, at 473–75; *see also infra* Part III.A.2.

130 See Franze & Scheuerman, *supra* note 7, at 476–85; *see also infra* Part III.A.3. In addition, as noted in our prior article, several states impose unique limits on punitive damages that are reflected in the model instructions, none of which have changed in light of *State Farm*. See Franze & Scheuerman, *supra* note 7, at 485–86. Connecticut limits the amount of punitive damages to the plaintiff’s trial costs. *See, e.g.,* DOUGLAS B. WRIGHT & WILLIAM L. ANKERMAN, 1 CONNECTICUT JURY INSTRUCTIONS (CIVIL) § 256(b) (4th ed. 1993) (“The measure of [punitive] damages is the reasonable expense which [the plaintiff] has incurred, including counsel fees, in prosecuting this action, less the taxable costs, which if he recovers, will be included in the judgment . . .”). Kansas does not allow the jury to assess the amount of punitive damages. *See* PATTERN INSTRUCTIONS KAN.: CIVIL § 171.44 (Kan. Judicial Council PIK-Civil Advisory Comm., 3d ed. 2005) (informing the jury that the court will conduct a hearing post-trial to determine the amount of punitive damages); *see, e.g.,* *Trendel v. Rogers*, 955 P.2d 150, 152 (Kan. Ct. App. 1998) (“The trier of fact determines if punitive damages should be awarded, and then the court, in a separate proceeding, establishes the amount of the award.”). New Hampshire generally prohibits punitive damages. *See* Franze & Scheuerman, *supra* note 7, at 486 n.448. Although New Hampshire allows “enhanced damages” or “liberal compensatory damages,” WALTER L. MURPHY & DANIEL C. POPE, NEW HAMPSHIRE CIVIL JURY INSTRUCTIONS § 9.14 (1994), these damages are not awarded to punish the defendant. *See Murray v. Dev. Servs. of Sullivan County, Inc.*, 818 A.2d 302, 308 (N.H. 2003) (“The reason behind awarding a verdict to the plaintiff is not to punish the defendant for any wrongdoing, but to compensate the plaintiff for the injuries incurred as a result of the defendant’s legal fault.”) (quoting the trial court’s jury instructions). Nebraska generally bars punitive damages and therefore does not have a model punitive damages instruction. *See* 1 NEB. JURY INSTRUCTIONS: CIVIL § 4 (Neb. Supreme Court Comm. on Practice & Procedure, 2d ed. 2008); *see also* Franze & Scheuerman, *supra* note 7, at 492 n.447. Oklahoma incorporates a statutory cap

We found that, without exception, the instructions used by state and federal courts pre-*State Farm* either failed to provide any meaningful guidance or were apt to direct juries to consider factors that conflicted with substantive due process limits on punitive damages.¹³¹ Little has changed since *State Farm*.

A. State Model Jury Instructions Post-*State Farm*

1. States Using Haslip-Minimum Instructions

Ten states continue to use model instructions comparable to the “skeletal guidance”¹³² approved by the Court seventeen years ago in *Haslip*.¹³³ Alabama’s model instruction, reviewed and approved by the Court in *Haslip*, remains virtually unchanged since *Haslip*.¹³⁴ Missouri,¹³⁵ Ohio,¹³⁶ Utah,¹³⁷ Vermont,¹³⁸ and Virginia¹³⁹ have not changed

on punitive damages into its jury instructions. See OKLA. UNIFORM JURY INSTRUCTIONS: CIVIL § 5.9 (Okla. Supreme Court Comm. for Uniform Jury Instructions, 2d ed. 2007).

¹³¹ See Franze & Scheuerman, *supra* note 7, at 470–88.

¹³² Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 63 (1991) (O’Connor, J., dissenting) (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan, J., concurring)).

¹³³ These *Haslip*-like jurisdictions include Alabama, Colorado, Louisiana, Michigan, Missouri, Ohio, Utah, Vermont, Virginia, and Washington.

¹³⁴ See 1 ALA. PATTERN JURY INSTRUCTIONS CIVIL § 11.03 (Ala. Pattern Jury Instructions Comm.—Civil, 2d ed. 2006), available at WL AL-APJICIV 11.03. This instruction provides in relevant part:

The purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiff by way of punishment to the defendant, and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future. The imposition of punitive damages is entirely discretionary with the jury. Should you award punitive damages, in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence in the case, and the necessity of preventing similar wrongs.

Id. As in 2004, the Alabama instruction for punitive damages in libel cases provides the same general information. *Id.* § 23.21. The Alabama instruction for fraud still does not even live up to the *Haslip* components. *Id.* § 18.01.

¹³⁵ See MO. APPROVED JURY INSTRUCTIONS (CIVIL) § 10.01 (Mo. Sup. Ct. Comm. on Civil Jury Instructions 2008), available at WL MAI 10.01 (instructing the jury in the context of intentional tort cases that “if you believe the conduct of defendant . . . was outrageous . . . you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct”); *id.* § 10.02, available at WL MAI 10.02 (providing similar instruction for conscious disregard negligence cases); *id.* § 10.04, available at WL MAI 10.04 (providing similar instruction for strict liability, product defect, or failure to warn cases); *id.* § 10.05, available at WL MAI 10.05 (providing similar instruction for product defect and failure to warn cases); *id.* § 10.06, available at WL MAI 10.06 (providing similar instruction for negligence and strict liability cases); *id.* § 10.07, available at WL MAI 10.07 (providing similar instruction for conscious disregard with specific acts/knowledge cases); *id.* § 4.15–4.16, available at WL

MAI 4.15–4.16 (providing similar instruction for defamation cases); *cf.* Franze & Scheuerman, *supra* note 7, at 471 n.394 (quoting the same).

- 136 See 1 OHIO JURY INSTRUCTIONS § 23.71 (Ohio Judicial Conference 2006), available at WL 1 OJI 23.71. This instruction provides in relevant part:

You will also decide whether the defendant shall be liable for punitive damages in addition to any other damages that you award to the plaintiff. The purposes of punitive damages are to punish the offending party and to make the offending party an example to discourage others from similar conduct. You may decide that the defendant is liable for punitive damages if you find by clear and convincing evidence that . . . the defendant's acts or failures to act demonstrated malice, aggravated or egregious fraud, oppression, or insult

Id. *Cf.* Franze & Scheuerman, *supra* note 7, at 472 n.398 (quoting a previous version of the jury instruction). Pursuant to a 2007 statute, the amount of damages in a products liability case is determined by the court. OHIO REV. STAT. § 2307.80(B) (2007). Notably, the court is required to consider multiple factors in determining the amount, including “[t]he total effect of other punishment imposed or likely to be imposed upon the manufacturer or supplier in question as a result of the misconduct, including awards of punitive or exemplary damages to persons similarly situated to the claimant.” *Id.* § 2307.80(B) (7).

- 137 See MODEL UTAH JURY INSTRUCTIONS—CIVIL § 27.20 (Utah State Bar 1993). This instruction provides in relevant part:

Punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the defendant were a result of willful and malicious conduct

If you find that punitive damages are proper in this case, you may award such sum as, in your judgment, would be reasonable and proper as a punishment to the defendant for such wrongs, and as a wholesome warning to others not to offend in like manner.

Id. *Cf.* Franze & Scheuerman, *supra* note 7, at 471 n.395 (quoting the same).

- 138 See JOHN M. DINES ET AL., VERMONT JURY INSTRUCTIONS, CIVIL AND CRIMINAL § 7.46 (1993). This instruction was drafted by private parties and is not official. The instruction provides in relevant part:

[P]unitive damages are awarded not to compensate (*plaintiff*) for any injury he (*she*) may have suffered, but instead to punish (*defendant*) for his (*her*) conduct and to deter (*defendant*) and others from acting in the same way.

As a general rule, punitive damages may be recovered in any action based on a defendant's tortious conduct. However, such damages are not recoverable as a matter of legal right. Punitive damages may be awarded only when liability of the defendant for actual damages has been established. Whether punitive damages will be allowed and, if so, in what amount, is entirely within the discretion of the jury.

Id. *Cf.* Franze & Scheuerman, *supra* note 7, at 473 n.400 (quoting the same). In addition, the Vermont Bar Association has prepared model jury instructions. PLAIN ENGLISH JURY INSTRUCTIONS No. 3.8 (Vt. Civil Jury Instruction Comm. 2005), available at <http://www.vtbar.org/Upload%20Files/WebPages/Attorney%20Resources/juryinstructions/civiljuryinstructions/Civiljury.htm>. The Bar Association's model instruction, however, falls into the *Haslip*-plus-wealth category:

Punitive damages do not compensate plaintiffs for losses, but instead are meant to punish for behavior and to stop others from acting similarly in the future.

....

In determining the amount of punitive damages, you should consider the character and standing of [Name of Defendant], [his/her/its] financial status, and the degree of bad motive or personal ill will in [his/her/its] acts.

their *Haslip*-like instructions since *State Farm*. Indeed, for corporate defendants, Vermont's (unofficial) model instruction still facially conflicts with the *BMW* guideposts, instructing the jury that the "award of punitive damages need not bear any relationship to the underlying compensatory damage award."¹⁴⁰

The models in Colorado,¹⁴¹ Louisiana,¹⁴² and Michigan¹⁴³ fail to meet the *Haslip*-minimum, though these states have unique limitations on punitive damages.

Id. (brackets in original). *But see id.* No. 1.4 (using *Haslip*-like instruction for consumer fraud cases), available at <http://www.vtbar.org/Upload%20Files/WebPages/Attorney%20Resources/juryinstructions/civiljuryinstructions/Civiljury.htm#CF14>.

139 See VA. MODEL JURY INSTRUCTIONS—CIVIL NO. 9–080 (Model Jury Instructions Comm. 2007). This instruction provides in relevant part:

If you find that the plaintiff is entitled to be compensated for his damages, and if you further believe by the greater weight of the evidence that the defendant acted with actual malice toward the plaintiff or acted under circumstances amounting to a willful and wanton disregard of the plaintiff's rights, then you may also award punitive damages to the plaintiff to punish the defendant for his actions and to serve as an example to prevent others from acting in a similar way.

Id. Cf. Franze & Scheuerman, *supra* note 7, at 472 n.396 (quoting the same). Since our last Article, the numbering of the Virginia Model Instructions has changed. An "unofficial" Virginia model provides no more guidance:

Punitive Damages . . . are something in addition to full compensation, not given as the plaintiff's due, but as a punishment to the defendant and as a warning and example to deter him and others from committing like wrongs.

. . . [Y]ou may award the plaintiff such additional sum as punitive damages as in your opinion are called for by the circumstances of the case.

RONALD J. BACIGAL & JOSEPH S. TATE, VIRGINIA PRACTICE SERIES § 23:17 (2007), available at WL VAPRAC JI § 23:17.

140 DINES ET AL., *supra* note 138, § 7.47 (quotation omitted).

141 In 2004, Colorado fell into the "unique" category because its punitive damages instruction reflected a statutory cap on punitive damages. See Franze & Scheuerman, *supra* note 7, at 485–86 & n.443. The current instruction, however, provides the following guidance:

If you find beyond a reasonable doubt that the defendant acted in a (fraudulent) (malicious) (willful and wanton) manner, in causing the plaintiff's (injuries) (damages) (losses), you shall determine the amount of punitive damages, if any, that the plaintiff should recover.

Punitive damages, if awarded, are to punish the defendant and to serve as an example to others.

COLO. JURY INSTRUCTIONS—CIVIL § 5:3 (Colo. Sup. Ct. Comm. on Civil Jury Instructions, 4th ed. 2006). Colorado's statutory cap remains in effect and limits the amount of punitive damages to an amount no greater than the compensatory award. COLO. REV. STAT. § 13–21–102(1)(a) (2005).

142 Johnson, *supra* note 48, § 18.11 (instructing the jury that Louisiana does not permit punitive damages); *id.* § 18.02 (providing minimal guidance in model punitive damages charge for hazardous substance cases). See also *Ross v. Conoco, Inc.*, 828 So. 2d 546, 555 (La. 2002) (noting that Louisiana generally prohibits punitive damages unless authorized by state statute).

143 See *Casey v. Auto Owners Ins. Co.*, 729 N.W.2d 277, 286 (Mich. Ct. App. 2006) (noting that Michigan generally prohibits punitive damages unless authorized by statute). Although Michigan allows "exemplary damages" in certain cases, these damages are considered an additional category of compensation rather than punishment. See *McPeak v.*

Although punitive damages generally are not allowed under its state law,¹⁴⁴ Washington revised its model punitive damages instruction after *State Farm*.¹⁴⁵ Nevertheless, Washington still uses a basic *Haslip*-minimum with the addition of a reasonable relationship component.¹⁴⁶

In short, the *Haslip*-minimum provides scant guidance, and while it does not affirmatively direct juries to the wrong question, it does not guide them to the right one.

2. States Using “*Haslip-plus-wealth*” Instructions Post-*State Farm*

Eight states plus the District of Columbia continue to use “*Haslip-plus-wealth*” instructions.¹⁴⁷ Arizona,¹⁴⁸ Florida,¹⁴⁹ Hawaii,¹⁵⁰ Missis-

McPeak, 593 N.W.2d 180, 184 (Mich. Ct. App. 1999). This concept of “exemplary damages” as compensatory damages is reflected in Michigan’s official model jury instructions. See 1 MICH. MODEL CIVIL JURY INSTRUCTIONS § 118.21 (Mich. Sup. Ct. Comm. on Model Civil Jury Instructions 2008), available at <http://courts.mi.gov/mcji/intentional-torts/printCh118.htm>. The unofficial model instructions, however, includes a charge on “punitive damages” in addition to the “exemplary damages”: “[Y]ou may add to the award of actual damages an amount you agree is proper as *punitive* and exemplary damages.” TIMOTHY BAUGHMAN ET AL, MICHIGAN NON-STANDARD JURY INSTRUCTIONS, CIVIL § 13.1 (2007), available at WL MI-NSJICV § 13:1 (emphasis added).

144 Washington generally prohibits punitive damages unless authorized by statute. WASH. REV. CODE ANN. § 64.34.100(1) (West 2005). Accordingly, the Washington Pattern Jury Instructions do not include a basic punitive damages instruction. WASH. PATTERN JURY INSTRUCTIONS—CIVIL § 35.01 (Wash. Sup. Ct. Comm. on Jury Instructions 2005), available at WL 6 WAPRAC WPI 35.01. The pattern instructions, however, include a model for civil rights actions. *Id.* § 348.02, available at WL 6 WAPRAC WPI 348.02.

145 See *id.* § 348.02 cmt.

146 See *id.* The pattern instruction provides:

If you find for (name of plaintiff), and if you award compensatory or nominal damages, you may award punitive damages. You are not required to do so. The purposes of punitive damages are not to compensate a plaintiff but rather to punish a defendant and to deter a defendant and others from committing similar acts in the future.

....

... If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes stated above, but should not reflect bias, prejudice, or sympathy toward any party. The amount of any punitive damages should also bear a reasonable relationship to any injury or harm actually or potentially suffered by (name of plaintiff).

Id. § 348.02. The committee believed that adding the reasonable relationship sentence “incorporate[d] holdings from *Campbell*, *Cooper Industries*, and *Gore* [sic].” *Id.* at 348.02 cmt.

147 “*Haslip-plus-wealth*” instructions include a consideration of the defendant’s wealth in addition to the *Haslip*-minimum. See *supra* text accompanying note 128 (explaining *Haslip*-minimum). These states include Arizona, Arkansas, Florida, Hawaii, Mississippi, Nevada, Oregon, and Texas.

issippi,¹⁵¹ Nevada,¹⁵² Oregon,¹⁵³ and Texas,¹⁵⁴ as well as the District of Columbia,¹⁵⁵ have not materially changed their instructions in light of

- 148 See REVISED ARIZ. JURY INSTRUCTIONS (CIVIL)—PERSONAL INJURY DAMAGES 4 (Ariz. Civil Jury Instructions Comm., 4th ed. 2005). The pattern instruction provides in relevant part:

If you find [*name of defendant*] liable to [*name of plaintiff*], you may consider assessing additional damages to punish [*name of defendant*] or to deter [*name of defendant*] and others from similar misconduct in the future.

.....

The law provides no fixed standard for the amount of punitive damages you may assess, if any, but leaves the amount to your discretion. [However, if you assess punitive damages, you may consider the character of [*name of defendant*]'s conduct or motive, the nature and extent of the harm to plaintiff that [*name of defendant*] caused, and the nature and extent of defendant's financial wealth.]

Id. (brackets in original) (footnote omitted). Cf. Franze & Scheuerman, *supra* note 7, at 474 n.407 (quoting the same). The Civil Jury Instructions Committee expressly declined to revise the instruction in light of *State Farm*. REVISED ARIZ. JURY INSTRUCTIONS (CIVIL)—PERSONAL INJURY DAMAGES 4 cmt. 3 (Ariz. Civil Jury Instructions Comm., 5th ed. 2005) ("Because of the developing constitutional law in this area, the Committee has elected not to make substantive modifications to the RAJI Instruction on Punitive Damages. The trial court should assess whether changes to the instruction are appropriate based on *Campbell* and other decisions addressing constitutional issues.") (citations omitted).

- 149 See FLA. STANDARD JURY INSTRUCTIONS IN CIVIL CASES § PD 2 (Fla. Sup. Ct. Comm. on Standard Jury Instructions 2004). This instruction provides in relevant part:

In determining the amount of punitive damages, if any, to be assessed as punishment and as a deterrent to others, you should consider the following:

(1) the nature, extent and degree of misconduct and the related circumstances;

[(2) [the] [each] defendant's financial resources; and]

[(3) any other circumstance which may affect the amount of punitive damages.]

Id. (brackets in original) (footnotes omitted). Cf. Franze & Scheuerman, *supra* note 7, at 474 n.409 (quoting the same). Although Florida amended its punitive damages instruction in 2004, the changes did not address *State Farm* or otherwise materially change the instruction. See FLA. STANDARD JURY INSTRUCTIONS IN CIVIL CASES § PD 2 (Fla. Sup. Ct. Comm. on Standard Jury Instructions 2004). The Committee is considering whether to revise the instruction further in light of *State Farm*. See *id.* § PD.

- 150 See HAW. JURY INSTRUCTIONS § 8.12 (Haw. Civil Pattern Jury Instructions Comm. 2008), available at WL HI R CIV JURY Instr. 8.12. This instruction provides in relevant part:

The purposes of punitive damages are to punish the wrongdoer and to serve as an example or warning to the wrongdoer and others not to engage in such conduct.

.....

The proper measure of punitive damages is (1) the degree of intentional, willful, wanton, oppressive, malicious or grossly negligent conduct that formed the basis for your prior award of damages against that defendant and (2) the amount of money required to punish that defendant considering his/her/its financial condition. In determining the degree of a particular defendant's conduct, you must analyze that defendant's state of mind at the time he/she/it committed the conduct which formed the basis for your prior award of damages against that defendant. Any punitive damages you award must be reasonable.

Id. Cf. Franze & Scheuerman, *supra* note 7, at 475 n.410 (quoting the same).

- 151 See MISS. MODEL JURY INSTRUCTIONS CIVIL § 11:15 (Miss. Judicial Coll. 2007), available at WL MSPRACJIC § 11:15. This instruction provides in relevant part:

In assessing the amount of punitive damages, if any, which are appropriate in this cause, you may consider:

1. The financial condition and net worth of the defendant;
2. The nature and reprehensibility of the defendant's wrongdoing, for example, the impact on the plaintiff, or the relationship of the plaintiff and defendant;
3. The defendant's awareness of the amount of harm being caused and the defendant's motivation for causing same;
4. The duration of the defendant's misconduct and whether the defendant attempted to conceal it;
5. Any other relevant factor shown by the evidence.

Id. Cf. Franze & Scheuerman, *supra* note 7, at 475 n.411 (quoting the same).

- 152 See NEV. PATTERN JURY INSTRUCTIONS, CIVIL, No. 10.20 (State Bar of Nev. 1986). This instruction provides in relevant part:

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

1. The reprehensibility of the conduct of the defendant;
2. The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition.

Id. Cf. Franze & Scheuerman, *supra* note 7, at 475 n.412 (quoting the same).

- 153 See OR. UNIF. CIVIL JURY INSTRUCTIONS § 75.02 (Or. State Bar Comm. on Unif. Civil Jury Instructions, Supp. 2006). This instruction provides in relevant part:

If you decide that the defendant has acted as claimed by the plaintiff, you have the discretion to award punitive damages. In the exercise of that discretion, you may consider the importance to society in deterring similar misconduct in the future.

If you decide to award punitive damages, you may consider the following items in fixing the amount:

1. The character of the defendant's conduct;
2. The defendant's motive;
3. The sum of money that would be required to discourage the defendant and others from engaging in such conduct in the future; and
4. The income and assets of the defendant.

The amount of punitive damages you award may not exceed \$ [amount of plaintiff's prayer].

Id. (brackets in original). The Oregon State Bar Committee on Uniform Civil Jury Instructions noted that "[i]t may be necessary to instruct the jury on certain federal constitutional limits on punitive damages," but did not provide any model language. *Id.* at cmt. (citing *Estate of Schwarz v. Philip Morris Inc.*, 135 P.3d 409 (Or. Ct. App. 2006)). In *Schwarz*, the Oregon Court of Appeals held that a state may not punish a defendant for out-of-state conduct that causes out-of-state harm. *Id.* In a concurring opinion, Judge Linder noted that due process required that such an out-of-state instruction must be given to the jury. *Id.* at 439 (Linder, J., concurring). Judge Linder reasoned that such a "limiting instruction [was] required by the Due Process Clause," and therefore, must be given regardless of whether the defendant requested an out-of-state conduct instruction or whether any requested instruction was even correct. *Id.* at 440.

- 154 See TEX. PATTERN JURY CHARGES § 8.6C (State Bar of Tex. Comm. on Pattern Jury Charges 2006). This instruction provides in relevant part:

"Exemplary damages" means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages includes punitive damages.

Factors to consider in awarding exemplary damages, if any, are—

- a. The nature of the wrong.
- b. The character of the conduct involved.
- c. The degree of culpability of the wrongdoer.
- d. The situation and sensibilities of the parties concerned.

State Farm. Although Arkansas amended its instruction to include an out-of-state conduct provision,¹⁵⁶ it retained an instruction that the jury should consider the defendant's financial position.¹⁵⁷

e. The extent to which such conduct offends a public sense of justice and propriety.

f. The net worth of [the defendant].

Id. (applying to actions filed on or after September 1, 2003). *See also id.* § 8.6B (Comm. on Pattern Jury Charges of the State Bar of Tex. 2006) (providing similar instruction for actions accruing on or after September 1, 1995, and filed before September 1, 2003); *id.* § 8.6A (providing similar instruction for actions accruing before September 1, 1995); *cf.* Franze & Scheuerman, *supra* note 7, at 476 n.415 (quoting the 2002 version with identical text). Over time, the definition of "exemplary damages" has changed somewhat in Texas. Compare TEX. PATTERN JURY CHARGES: GEN. NEGLIGENCE, INTENTIONAL PERSONAL TORTS § 8.6C (State Bar of Tex. Comm. on Pattern Jury Charges 2006) (defining exemplary damages as "any damages awarded as a penalty or by way of punishment but not for compensatory purposes"), with *id.* § 8.6B (defining exemplary damages as "damages awarded as a penalty or by way of punishment"), and *id.* § 8.6A (defining exemplary damages as "an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages").

- 155 1 STANDARDIZED CIVIL JURY INSTRUCTIONS FOR D.C. § 16.03 (Young Lawyers Section of the Bar Ass'n of the D.C. 2006), available at LEXIS 1-16 Civil Jury Instructions for DC § 16.03. This instruction provides:

If you find that the plaintiff is entitled to an award of punitive damages, then you must decide the amount of the award. To determine the amount of the award you may consider the [net worth] relative wealth of the defendant at the time of trial, the nature of the wrong committed, the state of mind of the defendant when the wrong was committed, the cost and duration of the litigation, and any attorney's fees that the plaintiff has incurred in this case. Your award should be sufficient to punish the defendant for his or her conduct and to serve as an example to prevent others from acting in a similar way.

Id. (brackets in original). *Cf.* Franze & Scheuerman, *supra* note 7, at 474 n.408 (quoting the same).

- 156 *See infra* notes 226-27 and accompanying text (discussing Arkansas' extraterritoriality instruction).

- 157 *See* ARK. MODEL JURY INSTRUCTIONS—CIVIL § 2218 (Ark. Sup. Ct. Comm. on Jury Instructions—Civil 2008), available at WL AR-JICIV AMI 2218. This instruction provides in relevant part:

Punitive damages may be imposed to punish a wrongdoer and to deter the wrongdoer and others from similar conduct. In order to recover punitive damages from (defendant), (plaintiff) has the burden of proving [malice or intentional conduct].

.....

[In arriving at the amount of punitive damages you may consider the financial condition of (defendant), as shown by the evidence.]

.....

You are not required to assess punitive damages against (defendant) but you may do so if justified by the evidence.

Id. (second set of brackets in original). *Cf.* Franze & Scheuerman, *supra* note 7, at 474 n.405 (quoting the same). In *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603-04 (8th Cir. 2005), the court concluded that the Arkansas instruction passed muster under *State Farm*. *But see id.* at 606 (Bye, J., concurring) (concluding that Section 2218 did not satisfy *State Farm*).

The *Haslip*-plus-wealth instructions are problematic because they may direct juries to consider unconstitutional factors.¹⁵⁸ For instance, if a jury considers a corporate defendant's profits from the alleged wrongdoing in setting the award, it could be considering both harm to non-parties and extraterritorial conduct of the defendant. In *Romo v. Ford Motor Co.*,¹⁵⁹ for instance, the California Court of Appeal found that California's model jury instruction regarding wealth violated due process under *State Farm*.¹⁶⁰ *Romo* was a products liability suit that arose from the fatal rollover of a 1978 Ford Bronco.¹⁶¹ The jury was instructed under Book of Approved Jury Instructions (BAJI) No. 14.71 that in arriving at a punitive damages award, it should consider "[t]he amount of punitive damages which will have a deterrent effect on the defendant in the [sic] light of defendant's financial

158 *But see Boerner*, 394 F.3d at 603–04 (upholding Arkansas's *Haslip*-plus-wealth instruction under *State Farm*); *Seltzer v. Morton*, 154 P.3d 561, 596–98 (Mont. 2007) (upholding a jury instruction to consider the defendant's financial condition in determining punitive damages); *Gilbert v. Sec. Fin. Corp. of Okla.*, 152 P.3d 165, 178 (Okla. 2006) (concluding that the factors in Oklahoma's model instruction "do not run afoul of *Gore* and *Campbell*"); *see also Acevedo-Luis v. Pagán*, 478 F.3d 35, 39–40 (1st Cir. 2007) (upholding jury instruction to consider defendant's financial worth in assessing punitive damages in light of state law challenge).

159 6 Cal. Rptr. 3d 793 (Cal. Ct. App. 2003), *abrogated by Johnson v. Ford Motor Co.*, 113 P.3d 82, 97 (Cal. 2005). *See also Valente v. UnumProvident Corp.*, No. A110056, 2006 WL 2512507, at *4 (Cal. Ct. App. Aug. 31, 2006) (noting that *Johnson* effectively overruled *Romo*). The California courts appear to be in a state of confusion over the proper use of a defendant's wealth. *See Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29, 74 (Cal. Ct. App. 2004) ("Defendant correctly notes that the constitutional soundness of the third consideration has been rendered uncertain by [*State Farm's*] seemingly categorical rejection of the Utah Supreme Court's reliance on the defendant's 'massive wealth' as one justification for the award there."); *accord Century Sur. Co. v. Polisso*, 43 Cal. Rptr. 3d 468, 495–97 (Cal. Ct. App. 2006) (upholding CAL. CIVIL JURY INSTRUCTIONS (BAJI) § 14.72.6 (Comm. on Cal. Civil Jury Instructions 2007) in face of challenge that instruction improperly permits consideration of wealth); *Alberts v. Franklin*, No. D040310, 2004 WL 1345078, at *29 (Cal. Ct. App. June 16, 2004) (upholding CAL. CIVIL JURY INSTRUCTIONS (BAJI) § 14.72.2 (Comm. on Cal. Civil Jury Instructions 2007) because consideration of a defendant's wealth "does not render the overall instruction on punitive damages constitutionally infirm"); *Bettelman Recreation Enters. v. City of S. El Monte*, No. B155511, 2004 WL 1545404, at *9 (Cal. Ct. App. July 12, 2004) (upholding CAL. CIVIL JURY INSTRUCTIONS (BAJI) § 14.71 (Comm. on Cal. Civil Jury Instructions 2007), in the face of a challenge that the instruction improperly permitted consideration of wealth). *But see infra* note 166. The *Johnson* Court further stated that "due process does not prohibit state courts, in awarding or reviewing punitive damages, from considering the defendant's illegal or wrongful conduct toward others that was similar to the tortious conduct that injured the plaintiff or plaintiffs." 113 P.3d at 90–91; *see also id.* at 92 (concluding that *State Farm* "did not limit the concept to punishment and deterrence purely on behalf of the plaintiff"). Accordingly, *Johnson* is itself suspect after *Philip Morris*.

160 *Romo*, 6 Cal. Rptr. 3d at 802.

161 *Id.* at 797–98.

condition.”¹⁶² The jury awarded the plaintiffs \$5 million in compensatory damages and \$290 million in punitive damages.¹⁶³ The California Court of Appeal concluded that consideration of the defendant’s financial condition “fail[ed] to restrict the jury to punishment and deterrence based solely on the harm to the plaintiffs, as apparently required by federal due process.”¹⁶⁴ The court found that the defendant’s wealth was an appropriate factor under *State Farm*, but concluded that the jury’s use of wealth must be limited “only to determine the appropriate punishment for the present malicious conduct, not as a gauge for the imposition of a penalty that will actually deter the entire type or course of conduct that affected these plaintiffs.”¹⁶⁵

Romo, although later implicitly abrogated by the California Supreme Court,¹⁶⁶ is instructive. The case reflects the link between arguments, such as those in *Philip Morris*, expressly focused on harms to non-parties, and other factors that may likewise direct the jury to punish a defendant based on this improper consideration.¹⁶⁷ Thus, in-

162 *Id.* at 805 (alteration in original) (quoting the trial court’s instruction).

163 *Id.* at 798.

164 *Id.* at 805. By contrast, in *Century Surety* the California Court of Appeal (Third District) upheld California’s model instruction against a *State Farm* challenge. 43 Cal. Rptr. 3d at 496. In *Century Surety*, the defendant argued that California’s model instruction, CAL. CIVIL JURY INSTRUCTIONS (BAJI) § 14.72.6 (Comm. on Cal. Civil Jury Instructions 2007), violated *BMW* and *State Farm* “because it direct[ed] the jury to consider the defendant’s financial condition in order to determine the amount of punitive damages that will have a deterrent effect on the defendant.” *Id.* at 495. The court noted that a defendant’s financial condition has long been recognized as an essential factor in determining a punitive damage award. *Id.* (citing *Adams v. Murakami*, 813 P.2d 1348, 1350–52 (Cal. 1991)). Relying on *Simon v. San Paolo U.S. Holding Co., Inc.*, 113 P.3d 63 (Cal. 2005), the court determined that “the defendant’s financial condition remains a legitimate consideration in setting punitive damages.” *Century Surety*, 43 Cal. Rptr. 3d at 496. See also cases cited *supra* note 159.

165 *Romo*, 6 Cal. Rptr. 3d at 805 n.7.

166 See *Johnson*, 113 P.3d at 97 (criticizing *Romo* as “incorrectly suggest[ing] that due process requires appellate review that is blind to the state’s interest in punishing and deterring a wrongful corporate practice”); see also *Valente v. UnumProvident Corp.*, No. A110056, 2006 WL 2512507, at *4 (Cal. Ct. App. Aug. 31, 2006) (noting that *Johnson* effectively overruled *Romo*).

167 *Philip Morris* implicitly rejected the view, adopted by *Romo*, that though “the jury was fundamentally misinstructed concerning the amount of punitive damages it could award,” a court can remedy the due process violation by remitting the punitive damages award to “a level of punitive damages below which . . . no properly instructed jury was reasonably likely to go.” *Romo*, 6 Cal. Rptr. 3d at 804–05. *Philip Morris* did not seek to read the jury’s mind and instead remanded for reconsideration. The California Court of Appeal in *Romo* reduced the punitive damages award to about \$23.7 million. *Id.* at 812–13. Plaintiffs were given the option of consenting to the reduced award or a new trial on the amount of punitive damages. *Id.*; cf. *White v. Ford Motor Co.*, 312 F.3d 998, 1016 (9th

structing a jury to consider a defendant's wealth can create "an unreasonable and unnecessary risk of . . . [jury] confusion occurring."¹⁶⁸ Yet, with the sole exception of Arkansas,¹⁶⁹ no *Haslip*-plus-wealth jurisdiction also includes a harm-to-others instruction to prevent juries from misapplying the wealth instruction.

3. Multi-factor Instructions Post-State Farm

Twenty-seven states instruct the jury to consider multiple factors¹⁷⁰ in setting the amount of punitive damages.¹⁷¹ Delaware,¹⁷² Idaho,¹⁷³

Cir. 2002) (finding that no amount of post-verdict remittitur could remedy punitive damages award based on out-of-state conduct), *amended on denial of reh'g*, 335 F.3d 833 (9th Cir. 2003).

168 Philip Morris USA v. Williams, 127 S. Ct. 1057, 1060 (2007).

169 See *supra* note 156.

170 As used both here and in our prior article, multi-factor instructions "typically inform the jury to consider the reprehensibility of the defendant's conduct, the financial condition of the defendant, and, most importantly, the relationship (or proportionality) of the punitive damages to the plaintiff's harm." Franze & Scheuerman, *supra* note 7, at 477.

171 These states include Alaska, California, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, West Virginia, Wisconsin, and Wyoming.

172 See DEL. ONLINE CIVIL PATTERN JURY INSTRUCTIONS § 22.27 (Del. Super. Ct. 2000), available at WL DE-JICIV 22.27. This instruction provides in relevant part:

The law provides no fixed standards for the amount of punitive damages but leaves the amount to your sound discretion, exercised without passion or prejudice. In determining any award of punitive damages, you must consider the following: the reprehensibility or outrageousness of [defendant's name]'s conduct and the amount of punitive damages that will deter [defendant's name] and others like [him/her] from similar conduct in the future. You may consider [defendant's name]'s financial condition for this purpose only. [Defendant's name]'s financial condition must not be considered in assessing compensatory damages. Any award of punitive damages must bear a reasonable relation to [plaintiff's name]'s compensatory or nominal damages.

Id. (brackets in original). Cf. Franze & Scheuerman, *supra* note 7, at 478 n.420 (quoting the same).

173 See IDAHO JURY INSTRUCTIONS No. 9.20 (Idaho Civil Jury Instructions Comm. 2003), available at http://www.isc.idaho.gov/juryinst_cov.htm. This instruction provides in relevant part:

Punitive damages are not a matter of right, but may be awarded in the jury's sound discretion, which is to be exercised without passion or prejudice. The law provides no mathematical formula by which such damages are to be calculated, other than any award of punitive damages must bear a reasonable relation to the actual harm done, to the cause thereof, to the conduct of the defendant, and to the primary objective of deterrence.

Id. For cases where evidence of the defendant's wealth was presented to the jury, an alternative instruction includes the language above, but adds the following:

(You have been permitted to hear evidence pertaining to defendant's wealth and financial condition. This evidence was admitted for your consideration only with reference to the question of punitive damages in light of all other evidence before you if you determine that such an award should be made in this case.)

Iowa,¹⁷⁴ Maryland,¹⁷⁵ Massachusetts,¹⁷⁶ Montana,¹⁷⁷ New Jersey,¹⁷⁸ New Mexico,¹⁷⁹ New York,¹⁸⁰ North Carolina,¹⁸¹ Rhode Island,¹⁸² Tennes-

Id. No. 9.20.5. *Cf.* Franze & Scheuerman, *supra* note 7, at 478, n.421 (quoting the same).

- 174 See IOWA CIVIL JURY INSTRUCTIONS No. 210.1 (Iowa State Bar Ass'n 2004). This instruction provides in relevant part:

There is no exact rule to determine the amount of punitive damages, if any, you should award. In fixing the amount of punitive damages, you may consider all the evidence including:

1. The nature of defendant's conduct.
2. The amount of punitive damages which will punish and discourage like conduct by the defendant in view of [his] [her] [its] financial condition.
3. The plaintiff's actual damages.

Id. (brackets in original). *Cf.* Franze & Scheuerman, *supra* note 7, at 478 n.422 (quoting the same).

- 175 See MD. CIVIL PATTERN JURY INSTRUCTIONS § 10:13 (Md. Pattern Jury Instructions Comm., 4th ed. 2006), available at WL MPJI MD-CLE S-10-1. This instruction provides in relevant part: "An award for punitive damages should be: (1) In an amount that will deter the defendant and others from similar conduct. (2) Proportionate to the wrongfulness of the defendant's conduct and the defendant's ability to pay. (3) But not designed to bankrupt or financially destroy a defendant." *Id.* *Cf.* Franze & Scheuerman, *supra* note 7, at 481 n.433 (quoting the same).

- 176 See 1 MASS. SUPER. CT. CIVIL PRACTICE JURY INSTRUCTIONS § 5.3.5 (Mass. Continuing Legal Educ., Inc. 2001), available at WL CIVJII MA-CLE 5-1 (providing a punitive damages instruction for discrimination actions). This instruction provides in relevant part:

In determining the amount of a punitive damage award, if any, you should consider:

1. the character and nature of the defendant's conduct;
2. the defendant's wealth, in order to determine what amount of money is needed to punish the defendant's conduct and to deter any future acts of discrimination;
3. the actual harm suffered by the plaintiff; and
4. the magnitude of any potential harm to other victims if similar future behavior is not deterred.

If you do award punitive damages, you should fix the amount by using calm discretion and sound reason.

Id. *Cf.* Franze & Scheuerman, *supra* note 7, at 479 n.424 (quoting the same). Because Massachusetts generally prohibits punitive damages unless authorized by statute, it does not have a general model instruction for punitive damages. See MASS. GEN. LAWS ch. 106, § 1-106 (2007).

- 177 See MONT. PATTERN INSTRUCTIONS (CIVIL) No. 25.66 (Mont. Sup. Ct. Comm. on Civil Jury Instructions 2003). This instruction provides in relevant part:

In determining the amount of punitive damages, you should consider all of the attendant circumstances, including the nature, extent and enormity of the wrong, the intent of the party committing it, the amount allowed as actual damages, and, generally, all of the circumstances attending the particular act involved, including any circumstances which may operate to reduce without wholly defeating punitive damages.

Punitive damages should be of such an amount as will deter the defendant from and warn others against similar acts of misconduct. Thus, the wealth of the defendant is a fact to be considered by you in determining the amount of punitive damages.

Id. *Cf.* Franze & Scheuerman, *supra* note 7, at 479 n.425.

- 178 See N.J. MODEL CIVIL CHARGES § 8.62 (Model Civil Jury Charge Comm. 2007), available at <http://www.judiciary.state.nj.us/civil/civindx.htm>. For actions after October 1995, this instruction provides in relevant part:

In determining [the] amount of punitive damages you must consider all relevant evidence, including but not limited to, evidence of the four factors that I previously mentioned to you in connection with your determination as to whether punitive damages should be awarded at all. As you may recall, these factors are (1) the likelihood, at the relevant time, that serious harm would arise from the defendant's conduct; (2) the defendant's awareness or reckless disregard of the likelihood that such serious harm would arise from the defendant's conduct; (3) the conduct of the defendant upon learning that its initial conduct would likely cause harm; and (4) the duration of the conduct [or] any concealment of it by the defendant.

In addition to these factors, you should also consider the profitability of the misconduct to the defendant; consider when the misconduct was terminated; and consider the financial condition of the defendant or the defendant's ability to pay the punitive damages award.

Finally you should make sure that there is a reasonable relationship between the actual injury and the punitive damages.

Id. (footnote omitted). Cf. Franze & Scheuerman, *supra* note 7, at 484 n.439 (quoting an older version of the instruction with identical text). New Jersey imposes a statutory cap on punitive damages of "five times the liability of [the] defendant for compensatory damages or \$350,000, whichever is greater," but provides that the jury cannot be informed of the cap. N.J. STAT. ANN. § 2A:15-5.14 & 5.16 (West 2006).

- 179 See 3 MITCHIE'S ANNOTATED RULES OF NEW MEXICO § 13-1827 (2008). This instruction provides in relevant part:

Punitive damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses. The amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature of the wrong and such aggravating and mitigating circumstances as may be shown. The amount awarded, if any, must be reasonably related to the injury and to any damages given as compensation and not disproportionate to the circumstances.

Id. See also 3 MITCHIE'S ANNOTATED RULES OF NEW MEXICO § 13-861 (2008) (punitive damages instruction for contracts and UCC sales cases unchanged); *id.* § 13-1718 (punitive damages instruction for bad faith cases unchanged); *id.* § 13-1011 (punitive damages instruction for defamation cases unchanged); cf. Franze & Scheuerman, *supra* note 7, at 479 n.426 (quoting the same).

- 180 See N.Y. PATTERN JURY INSTRUCTIONS—CIVIL § 2:278 (Comm. on Pattern Jury Instructions Ass'n of Sup. Ct. Justices 2007), available at WL NY PJI 2:278. For negligence actions, this instruction provides in relevant part:

In arriving at your decision as to the amount of punitive damages you should consider the nature and reprehensibility of what [the defendant] did. That would include the character of the wrongdoing ([and any of the following factors where applicable, such as:] whether [the defendant]'s conduct demonstrated an indifference to, or a reckless disregard of, the health, safety or rights of others, whether the act(s) (was, were) done with an improper motive or vindictiveness, whether the act or acts constituted outrageous or oppressive intentional misconduct, how long the conduct went on, [the defendant]'s awareness of what harm the conduct caused or was likely to cause, any concealment or covering up of the wrongdoing, how often [the defendant] had committed similar acts of this type in the past and the actual and potential harm created by [the defendant]'s conduct [and if appropriate,] (including the harm to individuals or entities other than [the plaintiff]). However, although you may consider the harm to individuals or entities other than [the plaintiff] in determining the extent to which [the defendant's]

conduct was reprehensible, you may not add a specific amount to your punitive damages award to punish [the defendant] for the harm [it] caused to others.)

The amount of punitive damages that you award must be both reasonable and proportionate to the actual and potential harm suffered by [the plaintiff], and to the compensatory damages you awarded [the plaintiff]. The reprehensibility of [the defendant's] conduct is an important factor in deciding the amount of punitive damages that would be reasonable and proportionate in view of the harm suffered by [the plaintiff] and the compensatory damages you have awarded [the plaintiff].

You may also consider [the defendant]'s financial condition and the impact your punitive damages award will have on [the defendant].

Id. Cf. Franze & Scheuerman, *supra* note 7, at 479–80 n.427 (quoting the 2003 version with similar text); N.Y. PATTERN JURY INSTRUCTIONS—CIVIL § 3:30 (Comm. on Pattern Jury Instructions Ass'n of Sup. Ct. Justices 2007) (punitive damages instruction for defamation cases unchanged); *id.* § 3:50 (punitive damages instruction for malicious prosecution cases unchanged).

- 181 See N.C. PATTERN JURY INSTRUCTIONS FOR CIVIL CASES § 810.98 (N.J. Conference of Super. Ct. Judges 1988). This instruction provides in relevant part:

Whether to award punitive damages is a matter within the sound discretion of the jury. Punitive damages are not awarded for the purpose of compensating the plaintiff for *his* [injury] [damage], nor are they awarded as a matter of right.

If you decide, in your discretion, to award punitive damages, any amount you award must bear a rational relationship to the sum reasonably needed to punish the defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts. In making this determination, you may consider only that evidence which relates to

[the reprehensibility of the defendant's motives and conduct]

[the likelihood, at the relevant time, of serious harm (to the plaintiff or others similarly situated)]

[the degree of the defendant's awareness of the probable consequences of *his* conduct]

[the duration of the defendant's conduct]

[the actual damages suffered by the plaintiff]

[any concealment by the defendant of the facts or consequences of *his* conduct]

[the existence and frequency of any similar past conduct by the defendant]

[whether the defendant profited by the conduct]

[the defendant's ability to pay punitive damages, as evidenced by *his* revenues or net worth].

Id. (brackets in original) (footnotes omitted) (emphasis in original). Cf. Franze & Scheuerman, *supra* note 7, at 480 n.428 (quoting the same).

- 182 See MODEL CIVIL JURY INSTRUCTIONS FOR R.I. § 10403 (R.I. Bar Ass'n 2003). This instruction provides:

You may consider a defendant's wealth in determining the appropriate amount of punitive damages. Nevertheless, the amount of punitive damages you award must reasonably relate to:

- a) the character and degree of defendant's wrongful conduct;
- b) the amount of compensatory damages which you award;
- c) the impact of the punitive damages on third parties; [and
- d) the severity of any civil penalties which the state government could impose on defendant for such wrongdoing.]

Id. (brackets in original). Cf. Franze & Scheuerman, *supra* note 7, at 480 n.429 (quoting 2002 version with identical text).

see,¹⁸³ West Virginia,¹⁸⁴ and Wisconsin¹⁸⁵ have not revised their multi-factor instructions since *State Farm*. Likewise, the North Dakota in-

183 See TENN. PATTERN JURY INSTRUCTIONS—CIVIL § 14.56 (Comm. on Pattern Jury Instructions (CiviI) of the Tenn. Judicial Conference 2007), available at WL TNPRACJIC 14.56. This instruction provides in relevant part:

In making your decision [regarding the amount of punitive damages] you must consider the instructions I have already given you and also the following:

1. The defendant's net worth and financial condition;
2. The objectionable nature of defendant's wrongdoing, the impact of the defendant's conduct on the plaintiff, and the relationship of the parties;
3. The defendant's awareness of the amount of harm being caused and the defendant's motivation in causing the harm;
4. The duration of the defendant's misconduct and whether the defendant attempted to conceal the conduct;
5. The amount of money the plaintiff has spent in the attempt to recover the losses;
6. Whether defendant profited from the activity, and if so, whether the punitive award should be in excess of the profit in order to deter similar future behavior;
7. The number and amount of previous punitive damages awards against the defendant based upon the same wrongful act;
8. Whether, once the misconduct became known to the defendant, the defendant tried to remedy the situation or offered a prompt and fair settlement for the actual harm caused; and
9. Any other circumstances shown by the evidence that bears on determining the proper amount of the punitive award.

Id. Cf. Franze & Scheuerman, *supra* note 7, at 484–85 n.441 (quoting 2002 version with identical text).

184 See W. VA. PROPOSED JURY INSTRUCTIONS FOR AUTO. & ROAD LAW PERSONAL INJURY DAMAGE No. VIII (W. Va. State Bar 2000), at <http://www.state.wv.us/wvsc/jury/auto.htm#VIII> (last visited Apr. 12, 2008). This instruction provides in relevant part:

In awarding punitive damages you may consider the following factors:

- (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from defendant _____'s conduct as well as to the harm that actually has occurred. If defendant _____'s actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
- (2) You may consider whether defendant _____s [sic] conduct was reprehensible, and in doing so you should take into account how long defendant _____ continued in his actions, whether defendant _____ was aware that its actions were causing or were likely to cause harm, whether defendant _____ attempted to conceal or cover up his actions or the harm caused by such actions, whether/how often defendant _____ engaged in similar conduct in the past.
- (3) You may consider whether defendant _____ profited from' [sic] his wrongful conduct, and if you find defendant _____ did profit from his conduct you may remove the profit and your award should be in excess of the profit, so that the award discourages future bad acts by defendant _____.
- (4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.
- (5) In determining the amount of punitive damages, the financial position of defendant _____ is relevant.

Id. Cf. Franze & Scheuerman, *supra* note 7, at 485 n.442 (quoting the same). An "unofficial" model charge suggests using the factors approved by the West Virginia Supreme Court in *Garnes v. Fleming Landfill, Inc.*, 413 S.E. 2d 897, 909 (W. Va. 1991). MICHE'S

struction, while revised after *Philip Morris* to incorporate a harm-to-nonparties instruction, did not otherwise change after *State Farm*.¹⁸⁶

INSTRUCTIONS FOR VIRGINIA AND WEST VIRGINIA § 26–132 (5th ed. 2001). Accordingly, the unofficial model instruction states in relevant part:

- (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
- (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.
- (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.
- (4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.
- (5) The financial position of the defendant is relevant.

Id. For a discussion of *Garnes*, see Franze & Scheuerman, *supra* note 7, at 494–95 nn.486–92.

185 See 2 WIS. JURY INSTRUCTIONS—CIVIL § 1707.2 (Wis. Civil Jury Instructions Comm. 2007). For products liability actions after May 1995, this instruction provides in relevant part:

If you determine that punitive damages should be awarded, you may then award such sum as will accomplish the purpose of punishing or deterring wrongful conduct. Factors you should consider in answering [this question] include:

1. the seriousness of the hazard to the public;
2. the profitability of the misconduct;
3. the attitude and conduct on discovery of the misconduct;
4. the degree of the manufacturer's awareness of the hazard and of its excessiveness;
5. the employees involved in causing or concealing the misconduct;
6. the duration of both the improper behavior and its concealment;
7. the financial condition of the manufacturer and the probable effect on the manufacturer of a particular judgment; and
8. the total punishment the manufacturer will probably receive from other sources.

Id. Cf. Franze & Scheuerman, *supra* note 7, at 481–82 n.434 (quoting the 2002 version with identical text).

186 See N.D. PATTERN JURY INSTRUCTIONS § C–72.00 (State Bar Ass'n of N.D. 2006). This instruction provides in relevant part:

If you decide to use your discretion to award a reasonable sum as exemplary or punitive damages, then you must also find by clear and convincing evidence that:

- 1) the amount awarded bears a reasonable relationship to any harm that is likely to result from the Defendant's conduct and any harm that actually has occurred; and
- 2) the amount awarded is consistent with the degree of reprehensibility of the Defendant's conduct and its duration.

[Further, in considering an award of exemplary or punitive damages, you must also consider:

Seven states, however, substantively revised their multi-factor punitive damages instruction after *State Farm*.¹⁸⁷ Traditionally a trendsetter in the model jury instructions movement,¹⁸⁸ California's revised punitive damages instruction adds a provision on potential harm that allows broad consideration of harm-to-others, adds factors to assess the reprehensibility of the defendant's conduct, and limits consideration of a defendant's wealth:

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following in determining the amount:

(a) How reprehensible was [name of defendant]'s conduct? In deciding how reprehensible [name of defendant]'s conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;
2. Whether [name of defendant] disregarded the health or safety of others;
3. Whether [name of plaintiff] was financially weak or vulnerable and [name of defendant] knew [name of plaintiff] was financially weak or vulnerable and took advantage of [him/her/it];
4. Whether [name of defendant]'s conduct involved a pattern or practice; and
5. Whether [name of defendant] acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [name of plaintiff]'s harm [or between the amount of punitive damages and potential harm to [name of plaintiff] that [name of defendant] knew was likely to occur because of [his/her/its] con-

- 1) the extent to which the Defendant was aware of the conduct or concealed it;
- 2) the extent to which the Defendant profited from the conduct and whether or not it would be desirable to remove that profit or have the Defendant also sustain a loss;
- 3) the extent to which the Defendant already has been punished for the same conduct by criminal sanctions.]

Id. (brackets in original). After *Philip Morris*, the North Dakota Pattern Jury Commission approved an additional instruction based on *Philip Morris* that provides:

In considering an award of exemplary or punitive damages, you may, in determining the reprehensibility of the Defendant's conduct, consider the harm the Defendant's conduct has caused others. You may not, however, punish the Defendant for harm caused to others whose cases are not before you. You may punish the Defendant only for harm done to the Plaintiff.

N.D. PATTERN JURY INSTRUCTIONS § C—72.07 (State Bar Ass'n of N.D. 2007), available at <https://www.ndcourts.com/court/committees/patternjury/Instructions/March2007drafts.htm#p7207>.

187 These states include Alaska, California, Kentucky, Maine, Minnesota, Pennsylvania, and South Dakota.

188 See Franze & Scheuerman, *supra* note 7, at 477 & n.418 (noting California is a "leader in the model jury instruction movement").

duct]? [Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]

(c) In view of [*name of defendant*]'s financial condition, what amount is necessary to punish [him/her] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [*name of defendant*] has substantial financial resources. [Any award you impose may not exceed [*name of defendant*]'s ability to pay.]¹⁸⁹

189 JUDICIAL COUNCIL OF CAL. CIVIL JURY INSTRUCTIONS § 3940 (Judicial Council of Cal. 2007) (brackets in original) [hereinafter CACI]. See also *id.* § 3942 (providing same instruction for individual defendant in bifurcated trial); *id.* § 3943 (providing same instruction for principal liable for conduct of agent in non-bifurcated trial); *id.* § 3945 (providing same instruction for entity defendant in non-bifurcated trial); *id.* § 3947 (providing same instruction for individual and entity defendant in non-bifurcated trial); *id.* § 3949 (providing same instruction for individual and corporate defendant in bifurcated trial). For text of pre-*State Farm* CACI § 3940, see Franze & Scheuerman, *supra* note 7, at 477–78. California continues to operate under two model instructions: Judicial Council of California Civil Jury Instructions (“CACI”) and the Book of Approved Jury Instructions (“BAJI”). While the CACI and BAJI used to be essentially the same, recent revisions have made the two models substantively different. Specifically, BAJI’s main punitive damages instruction has not been revised to include consideration of potential harm, nor does it limit use of a defendant’s financial condition:

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury’s sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, consider the following factors:

- (1) The reprehensibility of the conduct of the defendant;
- (2) The amount of punitive damages which will have a deterrent effect on the defendant in the [sic] light of defendant’s financial condition;
- (3) That the punitive damages must bear a reasonable relation to the injury, harm, or damage [actually] suffered by the plaintiff.

CAL. CIVIL JURY INSTRUCTIONS (BAJI) § 14.71 (Comm. on Cal. Civil Jury Instructions 2007) (brackets in original). See also *id.* § 14.72.2 (providing same instruction for bifurcated trial). A separate BAJI instruction provides the detailed reprehensibility guidance contained in the revised CACI—arguably with more precision and adherence to *State Farm*:

In determining whether the conduct upon which you have based your finding of liability is reprehensible, and if so, the degree of that reprehensibility, you should consider whether:

- 1) The harm caused was physical as opposed to economic;
- 2) The wrongful conduct demonstrated an indifference to or a reckless disregard of the [rights,] health or safety of others;
- 3) The plaintiff[s] [was] [were] financially vulnerable;
- 4) The conduct involved repeated actions or was an isolated incident; and
- 5) The harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Id. § 14.71.2 (brackets in original). Moreover, only BAJI has added an out-of-state conduct instruction, although CACI includes a similar point in its directions for use. See *infra* note 219.

Kentucky likewise has expanded the factors given to a jury when assessing reprehensibility.¹⁹⁰ Maine has added consideration of “harm to the general public,” and a new reasonable relationship instruction.¹⁹¹ Minnesota has added a harm-to-others instruction to its multi-

190 JOHN S. PALMORE & DONALD P. CETRULO, *KENTUCKY INSTRUCTIONS TO JURIES (CIVIL)* § 39.15 (5th ed. 2006). This instruction provides in relevant part:

Your discretion to determine and award an amount, if any, of punitive damages is limited to the following factors:

- (a) the harm to P as measured by the damages you have awarded under Instruction [and the potential of further harm to P] caused by D’s [failure to comply with his duties] [conduct toward P];
- (b) the degree, if any, to which you have found from the evidence that D’s [conduct toward P] [failure to comply with his duties] was reprehensible, considering:
 - (i) [the harm caused was physical as opposed to economic] [the degree to which D’s conduct evinced an indifference to or a reckless disregard of the health or safety of others] [the degree to which P had financial vulnerability] [the degree to which D’s conduct involved repeated actions as opposed to an isolated incident] [the degree to which the harm to P was the result of intentional malice, trickery, or deceit, or mere accident]
 - (ii) evidence of D’s conduct occurring outside Kentucky may be considered only in determining whether D’s conduct occurring in Kentucky was reprehensible, and if so, the degree of reprehensibility. However, you must not use out-of-state evidence to award P damages against D for conduct that occurred outside Kentucky [sic].]

Id. (brackets in original). Oddly, Kentucky’s model instruction does not incorporate factors statutorily required by KY. REV. STAT. ANN. § 411.186 (West 1988). Pursuant to this statute, the jury is required to consider:

- (a) The likelihood at the relevant time that serious harm would arise from the defendant’s misconduct;
- (b) The degree of the defendant’s awareness of that likelihood;
- (c) The profitability of the misconduct to the defendant;
- (d) The duration of the misconduct and any concealment of it by the defendant; and
- (e) Any actions by the defendant to remedy the misconduct once it became known to the defendant.

Id. See also *Snyder v. McCarley*, No. 2002-CA-001282-MR, 2003 WL 22025843, at *2–3 (Ky. Ct. App. Sept. 19, 2003) (Knopf, J., concurring) (agreeing with court’s remand for a new trial on the assessment of punitive damages, but noting that failure to provide more detailed instructions may violate due process as suggested in *State Farm* and other Supreme Court cases).

191 DONALD G. ALEXANDER, *MAINE JURY INSTRUCTION MANUAL* § 7–114 (4th ed. 2001). The instruction provides in relevant part:

In deciding whether to award punitive damages and in determining the amount of any such damages, you may consider [the following:]

- [1.] All aggravating and mitigating factors indicated by the evidence, including the reprehensibility of the defendant’s conduct toward the plaintiff. In evaluating reprehensibility, you may consider the extent to which, if at all, the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public. [And]
- 2. [Any criminal punishment that may have been imposed for the conduct in question. When a criminal punishment has been imposed, it may be considered as mitigating the amount of damages].

factor instruction.¹⁹² South Dakota has expanded its instructions and added a reasonable relationship instruction.¹⁹³

The amount of punitive damages that you award must be reasonably related to the harm to the plaintiff, including the harm caused by the reprehensibility of the defendant's conduct [and the ability of the defendant to pay such an award]

Id. (brackets in original). Even though revised post-*Philip Morris*, the Maine instruction does not expressly limit consideration of out-of-state conduct, though "harm to the general public" is included only in "evaluating reprehensibility." *Id.*

¹⁹² Apart from this harm-to-others addition, the Minnesota model instruction remains unchanged since *State Farm*. See MINN. PRACTICE SERIES JURY INSTRUCTIONS GUIDES—CIVIL § 94.10 (Minn. Dist. Judges Ass'n, Comm. on Civil Jury Instruction Guides 2007), available at WL 4A MNPRAC CIVJIG 94.10. This instruction provides in relevant part:

If you decide to award punitive damages, consider, among other things, the following factors:

- [1. The seriousness of the hazard to the public that may have been or was caused by (defendant)'s misconduct] [You may not consider any harm to persons who are not parties to this case that was the result of lawful conduct in another state]
- [2. The profit (defendant) made as a result of the misconduct]
- [3. The length of time of the misconduct and if (defendant) hid it]
- [4. The amount (defendant) knew about the hazard and of its danger]
- [5. The attitude and conduct of (defendant) when the misconduct was discovered]
- [6. The number and level of employees involved in causing or hiding the misconduct]
- [7. The financial state of (defendant)]
- [8. The total effect of other punishment likely to be imposed on (defendant) as a result of the misconduct. This includes compensatory and punitive awards to (plaintiff) and other persons]
- [9. The severity of any criminal penalty (defendant) may get.]

Id. (brackets in original) (footnote omitted). Cf. Franze & Scheuerman, *supra* note 7, at 483–84 n.438 (quoting the 2003 version with identical text). See *infra* note 223 for a discussion of Minnesota's harm to others instruction.

¹⁹³ See S.D. PATTERN JURY INSTRUCTIONS (CIVIL) No. 35–01 (State Bar of S.D., Civil Instructions Comm. 2004). This instruction provides in relevant part:

If you find that punitive damages should be awarded, then in determining the amount, you must consider the following five factors:

1. The intent of the defendant.
 - In considering the defendant's intent, you should examine the degree of reprehensibility of the defendant's misconduct, including, but not limited to, the following factors:
 - a. Whether the harm caused was physical as opposed to economic;
 - b. Whether the tortious conduct evinced an indifference to, or reckless disregard of, the health or safety of others;
 - c. Whether the target of the conduct was vulnerable financially;
 - d. Whether the conduct involved repeated actions or was an isolated incident; and
 - e. Whether the harm was the result of intentional malice, trickery or deceit, or mere accident.
2. The amount awarded in actual damages.

In considering this factor, you should consider:

- a. whether the plaintiff has been completely compensated for the economic harm caused by the defendant;
- b. the relationship between the harm (or potential harm) suffered by the plaintiff and the punitive damages award;

Since *State Farm*, Georgia, Illinois, Indiana, South Carolina,¹⁹⁴ and Wyoming are new additions to this category. Georgia¹⁹⁵ moved from a *Haslip*-like instruction to a multi-factor charge.¹⁹⁶ In addition, Geor-

- c. the magnitude of the potential harm, if any, that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded; and
- d. the possible harm to other victims that might have resulted if similar future behavior were not deterred.

The amount of punitive damages must bear a reasonable relationship to the actual damages.

- 3. The nature and enormity of the wrong.
- 4. The defendant's financial condition.
- 5. All of the circumstances concerning the defendant's actions, including any mitigating circumstances which may operate to reduce, without wholly defeating, punitive damages.

Id.

- 194 South Carolina's "official" model punitive damages instruction, authored by the Civil Jury Charge Committee of the South Carolina Bar, has not changed since *State Farm*. See S.C. RECOMMENDED CIVIL JURY CHARGES No. 14.01 & 14.04 (State Bar of S.C., Civil Instructions Comm. 1989). Judge Ralph King Anderson, Jr., however, publishes an "unofficial" set of model jury instructions, which reflect a multi-factor approach:

There is no formula or standard that can be used as a measure for assessing punitive damages. However, factors relevant to your consideration of punitive damages are:

- (1) the character of the defendant's acts;
- (2) the nature and extent of the harm to plaintiff which defendant caused or intended to cause;
- (3) defendant's degree of culpability;
- (4) the punishment that should be imposed;
- (5) duration of the conduct;
- (6) defendant's awareness or concealment;
- (7) the existence of similar past conduct;
- (8) likelihood the award will deter the defendant or others from like conduct;
- (9) whether the award is reasonably related to the harm likely to result from such conduct; and
- (10) defendant's wealth or ability to pay.

RALPH KING ANDERSON, JR., ANDERSON'S SOUTH CAROLINA REQUESTS TO CHARGE—CIVIL § 13–21 (2002). Judge Anderson, Jr., also acknowledges that the post-verdict guideposts "can be submitted to the jury to assist in its determination of the award of punitive damages." *Id.* at note.

- 195 Given the evolving law of punitive damages, Georgia added a caveat to the revised punitive damages instructions, stating: "The entire subject of punitive damages seems to be in a state of flux and is hotly disputed. . . . The main benefit of what follows [in these pattern instructions] is to acquaint the judge with likely issues and possible, not necessarily approved, charges." 1 GA. SUGGESTED PATTERN JURY INSTRUCTIONS § 66.740 note (Council of Super. Ct. Judges of Ga. 2007), available at WL GA–JICIV 66.740.
- 196 1 GA. SUGGESTED PATTERN JURY INSTRUCTIONS § 66.750 (Council of Super. Ct. Judges of Ga. 2007), available at WL GA–JICIV 66.750. This instruction provides in relevant part:
- In considering the amount of punitive damages, you may consider the following factors:
- a. the nature and egregiousness (reprehensibility) of the defendant's conduct
 - b. the extent and duration of the defendant's wrongdoing and the (possibility) (likelihood) of its recurrence (*the word 'possibility' is from the opinion; substitution of 'likelihood' may avoid a burden of proof conflict.*)
 - c. the intent of the defendant in committing the wrong

gia includes an “amplified” reprehensibility instruction,¹⁹⁷ which permits consideration of harm-to-others: “In assessing reprehensibility, you may consider whether . . . the conduct showed an indifference to or a reckless disregard of the health or safety of others”¹⁹⁸ Illinois¹⁹⁹ and Indiana²⁰⁰ also moved from a *Haslip*-like instruction to a

- d. the profitability of the defendant’s wrongdoing (*give only if supported by evidence*)
- e. the amount of actual damages awarded
- f. the previous awards of punitive damages against the defendant (for the same or similar conduct) (*parenthetical qualifier added due to language of State Farm v. Campbell; give only if supported by evidence*)
- g. potential or prior criminal (civil) sanctions against the defendant based upon the same wrongful acts (*give only if supported by evidence*)
- h. the financial circumstances, that is, the financial condition and or the net worth of the defendant (*give only if supported by evidence*)
- i. any other pertinent circumstances

Id. (citation omitted). The Council of Superior Court Judges of Georgia, the authors of these pattern instructions, expressly recognize that the final factor—“other pertinent circumstances”—“may violate due process and *State Farm v. Campbell*.” *Id.* at note.

197 *Id.* at § 66.760. This instruction provides:

In making your award, you should consider the degree of reprehensibility of the defendant’s wrongdoing. You should consider all the evidence, both aggravating and mitigating, to decide how much punishment the defendant’s conduct deserves. In assessing reprehensibility, you may consider whether

- a. the harm caused was physical, as opposed to economic;
- b. the conduct showed an indifference to or a reckless disregard of the health or safety of others;
- c. the target of the conduct had financial vulnerability;
- d. the conduct involved repeated actions or was an isolated incident;
- e. the harm was the result of intentional malice, trickery, or deceit (or mere accident)

Id.

198 *Id.*

199 See ILL. PATTERN JURY INSTRUCTIONS—CIVIL § 35.01 (Ill. Sup. Ct. Comm. on Pattern Jury Instructions in Civil Cases 2007), available at <http://www.state.il.us/court/CircuitCourt/JuryInstructions/35.01.pdf>. The instruction provides in relevant part:

In arriving at your decision as to the amount of punitive damages, you should consider the following three questions. The first question is the most important to determine the amount of punitive damages:

1. How reprehensible was (defendant’s name) conduct?

On this subject, you should consider the following:

- a) The facts and circumstances of defendant’s conduct;
- b) The [financial] vulnerability of the plaintiff;
- c) The duration of the misconduct;
- d) The frequency of defendant’s misconduct;
- e) Whether the harm was physical as opposed to economic;
- f) Whether defendant tried to conceal the misconduct;
- [g) other]

2. What actual and potential harm did defendant’s conduct cause to the plaintiff in this case?

3. What amount of money is necessary to punish defendant and discourage defendant and others from future wrongful conduct [in light of defendant’s financial condition]?

Id. (brackets in original).

multi-factor instruction. Wyoming shifted from a *Haslip*-plus-wealth style instruction to the multi-factor approach.²⁰¹

200 See 1 IND. PATTERN JURY INSTRUCTIONS—CIVIL No 11.105 (Ind. Civil Instructions Comm., 2d ed. 2007). This instruction provides in relevant part:

You should consider the following factors to decide the amount of punitive damages:

1. The degree of reprehensibility of the defendant's misconduct that caused the plaintiff's harm.
2. The magnitude of the harm suffered by the plaintiff as a result of the defendant's misconduct.
3. Evidence of [fines] [penalties] applicable to conduct similar to that which you have found the defendant to have committed.
4. The defendant's financial condition.

Id. (brackets in original). Like Georgia, *see supra* note 197, Indiana has also added an expanded reprehensibility instruction:

To determine the degree of reprehensibility of the defendant's misconduct you should consider the following:

1. Whether the harm caused was physical as opposed to economic;
2. Whether the misconduct showed an indifference to or a reckless disregard of the health or safety of others;
3. Whether the [target of the misconduct] [plaintiff] had financially vulnerability;
4. Whether the misconduct involved repeated actions or was an isolated incident;
5. Whether the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. § 11.107 (brackets in original).

201 See WYO. CIVIL PATTERN JURY INSTRUCTIONS § 4.06A (Wyo. State Bar 2003). This instruction provides in relevant part:

The law provides no fixed standard as to the amount of such punitive damages, but leaves the amount to [the jury's] sound discretion to be exercised without passion or prejudice. In determining the punitive damage award, you should consider the following factors:

1. Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater;
2. The degree of reprehensibility of a defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard that [he][she] has caused or is likely to cause, and any concealment or "cover up" of that hazard, and the existence and frequency of similar past conduct are all relevant in determining this degree of reprehensibility;
3. If wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss;
4. The financial position of the defendant;
5. All of the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial;
6. If criminal sanctions have been imposed on the defendant for [his][her][its] conduct, this should be taken into account in mitigation of the punitive damage award;
7. If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive award.

States continue to differ in their approach to a reasonable relationship instruction.²⁰² Illinois, for example, includes a reasonable relationship charge, but it is optional.²⁰³ Indeed, many states do not expressly instruct the jury that the punitive damages award must bear a “reasonable relationship” to the plaintiff’s harm, but rather direct the jury to consider the amount of actual damages or harm to plaintiff when determining the amount of punitive damages.²⁰⁴ Moreover, Maryland²⁰⁵ and Wisconsin²⁰⁶ still do not provide any guidance on the proportionality of a punitive damages award. Despite language suggesting a reasonable relationship inquiry,²⁰⁷ Georgia disclaims any reasonable relationship instruction:

In addition to reprehensibility, *State Farm* also identifies two²⁰⁸ other main concerns. The committee can suggest no pattern charge on the other two broad *State Farm* issues. Proportionality is marginally addressed by [instructing the jury to consider the amount of actual damages awarded and by a general reasonableness charge]. There are simply too many

Id. (all brackets in the original except the first set); see also *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040, 1052–53 (Wyo. 1998) (holding jury should be instructed on factors incorporated into model instruction).

202 See Franze & Scheuerman, *supra* note 7, at 481–82.

203 Illinois includes a specific reasonable relationship charge: “The amount of punitive damages must be reasonable [and in proportion to the actual and potential harm suffered by the plaintiff.]” ILL. PATTERN JURY INSTRUCTIONS—CIVIL § 35.01 (Ill. Sup. Ct. Comm. on Pattern Jury Instructions in Civil Cases 2007), available at WL IL–IPICIV 35.01 (brackets in original). Illinois, however, makes the bracketed text optional: “Instructing a jury concerning ‘proportionality’ was not mandated or prohibited by *State Farm* or by Illinois case law. Whether the bracketed language concerning ‘proportionality’ should be included in the instruction should be decided on a case by case basis.” *Id.* at notes.

204 These states include Alaska, California, Idaho, Illinois, Iowa, Kentucky, Maine, Massachusetts, Montana, North Carolina, Pennsylvania, Rhode Island, and Tennessee.

205 See *supra* note 175. Indeed, the Maryland comments remain unchanged post-*State Farm*:

While the committee realizes that an award for punitive damages must bear a reasonable ratio to the actual harm suffered by the plaintiff, under current procedure the trial judge is required to review the jury award to make sure that such a ratio is present. Because of this, and the inherent complexity of the concept, no modification of the instruction is made to reflect this constitutional requirement.

MD. CIVIL PATTERN JURY INSTRUCTIONS § 10:12 cmt. (Md. Inst. for Continuing Prof’l. Educ. of Lawyers, Inc., 4th ed. 2006), available at WL MPJI MD–CLE 10–313.

206 See *supra* note 185.

207 See 1 GA. SUGGESTED PATTERN JURY INSTRUCTIONS § 66.780 (Council of Super. Ct. Judges of Ga. 2007), available at WL GA–JICIV 66.780. This instruction appears designed to address the reasonable relationship requirement, although the language is far from clear: “Any award you make should be both reasonable and just in light of your previous award of damages, the conduct and circumstances of the defendant, and the purpose of punitive damages.” *Id.*

208 The other issue identified by the Council of Superior Court Judges of Georgia was the presentation of the comparable penalties guidepost to the jury. 1 GA. SUGGESTED PATTERN JURY INSTRUCTIONS § 66.760 note (Council of Super. Ct. Judges of Ga. 2007), available at WL GA–JICIV 66.760.

variables and unanswered questions for this issue to be addressed by a pattern charge. The supreme court [sic] declined to adopt a “bright line ratio” and conceded that there is no rigid benchmark. Without more guidance, the use of the word “proportional” in a charge may provoke or raise more questions than it answers.²⁰⁹

But some progress has been made. Since *State Farm*, Alaska now has added consideration of the “amount of compensatory damages awarded to the plaintiff.”²¹⁰ Similarly, Pennsylvania requires the jury to consider “the nature and extent of the harm to the plaintiff,” and has now eliminated its facially improper statement that a punitive damages award need not bear any relationship to the compensatory damages award.²¹¹

²⁰⁹ *Id.*

²¹⁰ ALASKA CIVIL PATTERN JURY INSTRUCTIONS § 20.20B (Alaska Sup. Ct. Civil Pattern Jury Instructions Comm. 2003), available at <http://www.state.ak.us/courts/juryins.htm>. For “Actions Accrning on or after August 7, 1997,” this instruction provides:

The law provides no fixed measure as to the amount of punitive damages, but leaves it to you to decide an amount that will fairly accomplish the purposes of punishing the defendant and deterring the defendant and others from repeating similar acts. In determining the amount of punitive damages to be awarded, you may consider:

- the likelihood at the time of the conduct that serious harm would result from the defendant’s conduct;
- the degree of the defendant’s awareness of the likelihood at the time of the conduct that serious harm would result from the defendant’s conduct;
- the amount of financial gain that the defendant gained or expected to gain as a result of the defendant’s conduct;
- the duration of the defendant’s conduct and any intentional concealment of the conduct;
- the attitude and conduct of the defendant upon discovery of the conduct;
- the amount of compensatory damages awarded to the plaintiff;
- the financial condition of the defendant; and
- the total deterrence of other damages and punishment imposed on the defendant as a result of the conduct, including compensatory and punitive damages awarded to other persons in situations similar to that of the plaintiff, and any criminal penalties to which the defendant has been or may be subjected.

Id. The instruction for “Actions Accruing on or after June 11, 1986 and before August 7, 1997” has not changed. See *id.* § 20.20 (1999).

²¹¹ 2 PA. SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS § 14.02 (Pa. Bar Inst., 3d ed. 2005). This instruction provides in relevant part:

If you decide that the plaintiff is entitled to an award of punitive damages, it is your job to fix the amount of such damages. In doing so, you may consider any or all of the following factors:

1. the character of the defendant’s act,
2. the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause [; in this regard you may include the plaintiff’s trouble and expense in seeking to protect [his] [her] interests in legal proceedings and in this suit],
3. the wealth of the defendant insofar as it is relevant in fixing an amount that will punish [him] [her] [it], and deter [him] [her] [it] and others from like conduct in the future.

Notably, Georgia and Kentucky have added ratio charges—instructions that go beyond advising of a reasonable relationship and add a specific ratio of punitive to compensatory damages. Georgia, for example, instructs the jury: “The measure of such damages is your enlightened conscience as an impartial jury . . . (but not more than (insert ratio range) to your compensatory award).”²¹² Kentucky includes a similar instruction.²¹³ Finally, Wyoming likewise provides concrete guidance, directing the jury that “slight” harm should translate to a “relatively small” punitive damages award, and conversely that “[i]f [harm is] grievous, the damages should be much greater.”²¹⁴

Multi-factor instructions thus exemplify both the best and worst aspects of current model instructions. Viewed in the best light, the multi-factor instructions exhibit a slight trend toward incorporating some substantive due process limits, such as the “reasonable relationship” requirement.²¹⁵ On the other hand, many multi-factor instructions direct juries to consider the wrong question, such as by giving the jury a specific dollar figure to consider that may unduly influence the calibration of any award.²¹⁶

It is not necessary that you award compensatory damages to the plaintiff in order to assess punitive damages

....

The amount of punitive damages awarded must not be the result of passion or prejudice against the defendant on the part of the jury. The sole purpose of punitive damages is to punish the defendant's outrageous conduct and to deter the defendant and others from similar acts.

Id. (brackets in original). The Committee recognized that the prior anti-reasonable relationship instruction “can no longer be considered an accurate statement of the law in the wake of *Campbell*.” *Id.* at subcomm. note. For the text of the prior instruction, see Franze & Scheuerman, *supra* note 7, at 482 n.436.

212 1 GA. SUGGESTED PATTERN JURY INSTRUCTIONS § 66.741 (Council of Super. Ct. Judges of Ga. 2003) (citation omitted), available at WL GA-J1CIV 77.741. The Council of Superior Court Judges of Georgia, authors of the pattern jury instructions, suggest that the trial court “insist, to the degree practicable, on a ‘high-low’ agreement from counsel and/or a stipulated range of proportion between actual and punitive damages.” *Id.* at note. See also *id.* § 66.741 at note (suggesting that the trial judge “obtain a range of ratios from a stipulation in a pretrial order”).

213 PALMORE & CETRULO, *supra* note 190, § 39.15 cmt. Where “the trial court [can] determine at the conclusion of the evidence the degree to which the defendant’s conduct might be regarded as reprehensible,” the following instruction is suggested: “Your award of punitive damages, if any, shall not exceed a sum equal to [seven] times the total sum awarded” *Id.*

214 WYO. CIVIL PATTERN JURY INSTRUCTIONS § 4.06A (Wyo. State Bar 2003).

215 See *supra* text accompanying notes 210–14.

216 See *supra* note 153.

4. *Out-of-State Conduct/Harm To Others Post-State Farm*

Perhaps because *State Farm* more clearly required it, model jury instruction committees were receptive to revising instructions to add limits on punishing defendants for harm to non-parties or for extra-territorial conduct. Courts too found such instructions required,²¹⁷ and ten jurisdictions have added extraterritoriality or other instructions,²¹⁸ which explicitly or implicitly limit punitive damages for harms to non-parties.

California, for example, has included a new extraterritoriality instruction in its Book of Approved Jury Instructions:

Evidence has been received of defendant's conduct occurring outside California. This evidence may be considered only in determining whether defendant's conduct occurring in California was reprehensible, and if so, the degree of reprehensibility. The evidence is relevant to that issue, if it bears a reasonable relationship to the California conduct which is directed at or acts upon plaintiff, and demonstrates a deliberateness or culpability by the defendant in the conduct upon which you have based your finding of liability. Further, acts or conduct wherever occurring, that are not similar to the conduct upon which you found liability cannot be a basis for finding reprehensibility.

However, you must not use out-of-state evidence to award plaintiff punitive damages²¹⁹ against the defendant for conduct that occurred outside California.

²¹⁷ See, e.g., *Diesel Mach., Inc. v. B.R. Lee Indus.*, 418 F.3d 820, 838 (8th Cir. 2005) (“[T]he punitive damage instruction should have limited the jury’s consideration of . . . out-of-state conduct.”); *Barnes v. Koppers, Inc.*, No. 3:03CV60-P-D, 2006 WL 940279, at *2 (N.D. Miss. Apr. 11, 2006) (requiring parties to submit jury instructions limiting use of out-of-state evidence under *State Farm*); *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 164–65 (Ky. 2004) (holding that jury should have been instructed on limited use of out-of-state conduct evidence); see also *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 606 (8th Cir. 2005) (Bye, J., concurring in the result) (concluding that the Arkansas model instruction failed constitutional scrutiny because it allowed punishment to be based on harm to non-parties); *Buell-Wilson v. Ford Motor Co.*, 46 Cal. Rptr. 3d 147, 180–81 (Cal. Ct. App. 2006) (upholding jury instruction that the jury could not consider Ford’s out-of-state conduct in imposing punitive damages), *vacated* *Ford Motor Co. v. Buell-Wilson*, 127 S. Ct. 2250 (2007) (vacating and remanding for further consideration in light of *Philip Morris*). But see *Valente v. UnumProvident Corp.*, No. A110056, 2006 WL 2512507, at *4–8 (Cal. Ct. App. Aug. 31, 2006) (finding reversible error where jury was instructed to base its punitive damages award only on defendant’s conduct toward the plaintiff).

²¹⁸ These out-of-state conduct states include Arkansas, California, Georgia, Illinois, Indiana, Kentucky, Minnesota, New York, North Dakota, and Texas.

²¹⁹ CAL. CIVIL JURY INSTRUCTIONS (BAJI) § 14.7I.1 (Comm. on Cal. Civil Jury Instructions 2007). The comments further provide that if evidence of the defendant’s out-of-state conduct was admitted, “the jury *must* be instructed that it may not use this type of evidence to punish a defendant for conduct that was lawful in the jurisdiction where it oc-

Georgia also added an extraterritoriality instruction:

You may have heard evidence of conduct and procedures of the defendant in other states that you may properly consider on the issue of intent and reprehensibility. You may not, however, consider for the issue of punitive damages any conduct that was lawful where and when it occurred, nor in other states even though unlawful and which had no impact on (the victim).²²⁰

Several states have included an extraterritoriality instruction focused on *State Farm's* lawful/unlawful distinction.²²¹ The model instruction in Illinois, for example, provides: "In assessing the amount of punitive damages, you may not consider defendant's similar conduct in jurisdictions where such conduct was lawful when it was committed."²²² Minnesota²²³ and Indiana²²⁴ include a similar instruction.

occurred." *Id.* at note. CACI also requires an out-of-state conduct instruction in its directions for use: "A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." . . . An instruction on this point should be included within this instruction if appropriate to the facts." CACI, *supra* note 189, § 3940 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003)). In addition, CACI has added a harm-to-others instruction: "Punitive damages may not be used to punish [name of defendant] for the impact of [his/her/its] alleged misconduct on persons other than [name of plaintiff]." CACI § 3940. Pursuant to the directions for use, courts should provide the harm to others charge where "there is a possibility that the jury might consider harm that the defendant's conduct might have caused to nonparties in arriving at an amount of punitive damages." *Id.* at cmt.

220 1 GA. SUGGESTED PATTERN JURY INSTRUCTIONS § 66.771 (Council of Super. Ct. Judges of Ga. 2003), available at WL GA-JICIV 66.771. Georgia has a second limiting instruction based on the similar/dissimilar distinction in *State Farm*:

You may have heard evidence of other conduct and procedures of the defendant. For the purpose of aggravation of punitive damages, you may not consider evidence of any conduct of the defendant that is dissimilar to that which resulted in the plaintiff's injury, unless such dissimilar conduct was related to the specific harm suffered by the plaintiff in this case."

Id. § 66.772 (footnote omitted). See also *State Farm*, 538 U.S. at 422–23 ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.").

221 See *State Farm*, 538 U.S. at 422 ("A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.").

222 ILL. PATTERN JURY INSTRUCTIONS—CIVIL § 35.01 (Ill. Sup. Ct. Comm. on Pattern Jury Instructions in Civil Cases 2007).

223 See MINN. PRACTICE SERIES JURY INSTRUCTIONS GUIDES—CIVIL § 94.10 (Minn. Dist. Judges Ass'n, Comm. on Civil Jury Instruction Guides 2006). Minnesota added the following language to its multi-factor instruction: "You may not consider any harm to persons who are not parties to this case that was the result of lawful conduct in another state." *Id.*

224 1 IND. PATTERN JURY INSTRUCTIONS—CIVIL No. 11.103 (Ind. Civil Instructions Comm., 2d ed. 2007). Indiana added the following language to its instructions: "You may not use

Kentucky has added an out-of-state conduct instruction to its multi-factor instruction, explaining that:

[The jury's] discretion . . . is limited to the following factors:

. . . .

- (ii) evidence of D's conduct occurring outside Kentucky may be considered only in determining whether D's conduct occurring in Kentucky was reprehensible, and if so, the degree of reprehensibility. However, you must not use out-of-state evidence to award P damages against D for conduct that occurred outside Kentucky.²²⁵

As noted, Arkansas also added an out-of-state conduct instruction to its *Haslip*-plus-wealth model.²²⁶

You have heard evidence regarding [defendant's] conduct outside the state of Arkansas. This evidence may be considered by you only for the purpose of determining the blameworthiness of the conduct by [defendant] that occurred in Arkansas. You may not use evidence of [defendant's] conduct outside of Arkansas to punish [defendant] for conduct that was lawful in the state where it occurred and that has had no impact on Arkansas or its residents.²²⁷

In addition, New York²²⁸ and Texas²²⁹ have added comments on an out-of-state conduct instruction, but have failed to propose model

evidence of out-of-state conduct to punish the defendant for action that was lawful in the jurisdiction where it occurred." *Id.*

225 PALMORE & CETRULO, *supra* note 190, § 39.15.

226 See *supra* text accompanying note 156.

227 ARK. MODEL JURY INSTRUCTIONS—CIVIL § 2218A (Ark. Sup. Ct. Comm. on Jury Instructions—Civil 2007) (brackets in original). The Committee intended this instruction "to respond to the constitutional concerns" articulated in *BMW* and *State Farm*. *Id.* at cmt.

228 See N.Y. PATTERN JURY INSTRUCTIONS—CIVIL § 2:278 cmt. (Ass'n of Sup. Ct. Justices 2006). "Caveat 4" of New York's Pattern Instruction notes that "[w]hen relevant, a jury must be instructed that it may not use evidence of out of state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *Id.* (citation omitted).

229 See TEX. PATTERN JURY CHARGES: GEN. NEGLIGENCE, INTENTIONAL PERSONAL TORTS § 8.6 cmt. (Comm. on Pattern Jury Charges of the State Bar of Tex. 2006). Citing *State Farm*, the Committee on Pattern Jury Charges of the State Bar of Texas recognized that "lawful out-of-state conduct may be probative" in a punitive damages case, and noted that "[w]hen such evidence is admitted, '[a] jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.'" *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003)). The Committee further noted, "*Campbell* does not specify whether the requirement of an instruction means a limiting instruction at the time the evidence is offered, an instruction in the jury charge, or both." *Id.*

language.²³⁰ Finally, North Dakota (a multi-factor state) added a harm-to-others instruction in response to the *Philip Morris* decision.²³¹

In sum, the pre- and post-*State Farm* landscape breaks down as follows:

Case Category	Pre- <i>State Farm</i> Landscape	Post- <i>State Farm</i> Landscape
Haslip Instruction	Ala., Ga., Ill., Ind., La., Mich., Mo., Ohio, Utah, Vt., Va., and Wash.	Ala., Colo., La., Mich., Mo., Ohio, Utah, Vt., Va., and Wash.
Haslip-Plus-Wealth	Ariz., Ark., D.C., Fla., Haw., Miss., Nev., Or., S.C., Tex., and Wyo.	Ariz., Ark., D.C., Fla., Haw., Miss., Nev., Or., and Tex.
Multi-Factor	Alaska, Cal., Del., Idaho, Iowa, Ky., Me., Md., Mass., Minn., Mo., N.J., N.M., N.Y., N.C., N.D., Pa., R.I., S.D., Tenn., W. Va., and Wis.	Alaska, Cal., Del., Ga., Idaho, Ill., Ind., Iowa, Ky., Me., Md., Mass., Minn., Mont., N.J., N.M., N.Y., N.C., N.D., Pa., R.I., S.C., S.D., Tenn., W. Va., Wis., and Wyo.
Out-of-State Conduct/Harm to Others	None	Ark., Cal., Ga., Ill., Ind., Ky., Minn., N.Y., and Tex.
Other	Conn., Colo., Kan., Neb., N.H., and Okla.	Conn., Kan., Neb., N.H., and Okla.

²³⁰ Cf. COLO. JURY INSTRUCTIONS FOR CIVIL TRIALS § 5:3 cmt. 5 (Colo. Sup. Ct. Comm. on Civil Jury Instructions, 4th ed. 2006) (noting that where evidence of out-of-state conduct is admitted, the court should provide “such cautionary instructions as the court deems necessary”).

²³¹ N.D. PATTERN JURY INSTRUCTIONS § C-72.07 (N.D. State Bar Ass’n 2007), available at http://www.sband.org/pattern_jury_instructions/results.asp?parent_category=civil&child_category=%25&keywords=&prefix_num=c&cinumber=72.07&Submit=Search (“In considering an award of exemplary or punitive damages, you may, in determining the reprehensibility of the Defendant’s conduct, consider the harm the Defendant’s conduct has caused to others. You may not, however, punish the Defendant for harm caused to others whose cases are not before you. You may punish the Defendant only for harm done to the Plaintiff. . . . Note: The Court should give this instruction when there has been evidence or argument about the harm the Defendant’s conduct has caused to others.”).

B. Federal Model Jury Instructions Post-State Farm

Like state model jury instructions, the federal approach remains largely unchanged since *State Farm*. While adding a comment concerning *State Farm*,²³² the leading federal practice handbook continues to use a *Haslip*-like instruction:

In addition to actual damages, the law permits a jury, under certain circumstances, to award the injured person punitive and exemplary damages in order to punish the wrongdoer for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

. . . .

Whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury

. . . You should also bear in mind, not only the conditions under which, and the purposes for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case.²³³

Likewise, the Fifth Circuit's *Haslip*-plus-wealth instruction remains unchanged since *State Farm*.²³⁴ The Ninth Circuit similarly has not

232 KEVIN F. O'MALLEY, JAY E. GREINIG & WILLIAM C. LEE, 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS § 128.81 note (5th ed. Supp. 2007), available at WL FED-JI § 128.81. The comment notes that the *State Farm* Court "also found that juries must be instructed that they 'may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.'" *Id.* (quoting *State Farm*, 538 U.S. at 422). Notably, the comment seems to suggest that the jury should be instructed on the *BMW* guideposts:

According to the Supreme Court, a jury should take into account the following considerations: (1) degree of reprehensibility of the defendant's conduct, (2) the ratio between harm or potential harm to the plaintiff and the punitive damages award, and (3) the relationship between the punitive damages award and civil penalties authorized or imposed in comparable cases.

Id. (emphasis added).

233 *Id.* § 128.81. Cf. Franze & Scheuerman, *supra* note 7, at 487 (quoting the same).

234 See PATTERN JURY INSTRUCTIONS: FIFTH CIRCUIT, CIVIL CASES § 15.13 (Comm. on Pattern Jury Instructions Dist. Judges Ass'n Fifth Circuit 2006). This instruction provides in relevant part:

In making any award of punitive damages, you should consider that the purpose of punitive damages is to punish a defendant for shocking conduct, and to deter the defendant and others from engaging in similar conduct in the future. The law does not require you to award punitive damages, however, if you decide to award punitive damages, you must use sound reason in setting the amount of the damages. The amount of an award of punitive damages must not reflect bias, prejudice, or sympathy toward any party. . . . [P]unitive damages should be awarded only if the defendant's misconduct, after having paid compensatory damages, is so

changed its multi-factor instruction.²³⁵ The Seventh Circuit, which issued model instructions in 2004, uses language very similar to that of the Ninth Circuit.²³⁶ While the Eleventh Circuit has added some additional guidance focusing the jury on the defendant's conduct only in the immediate case, the basic *Haslip*-plus-wealth instruction remains unaltered.²³⁷ Similarly, the Third Circuit uses a *Haslip*-plus-wealth instruction.²³⁸

reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. You may consider the financial resources of the defendant in fixing the amount of punitive damages

Id. Cf. Franze & Scheuerman, *supra* note 7, at 488 n.452 (quoting the 1999 version with identical text).

- 235 MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DIST. COURTS OF THE NINTH CIRCUIT § 5.5 (Comm. on Model Civil Jury Instructions Within the Ninth Circuit 2007). The instruction provides in relevant part:

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.

Id. Cf. Franze & Scheuerman, *supra* note 7, at 488 (quoting the 2001 version with identical text).

- 236 FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 7.23 (Comm. on Pattern Civil Jury Instructions of the Seventh Circuit, Draft 2004), available at <http://www.wisbar.org/AM/Template.cfm?Section=Home&CONTENTID=52272&TEMP LATE=/CM/ContentDisplay.cfm>. The instruction provides in relevant part:

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward either/any party. In determining the amount of any punitive damages, you should consider the following factors:

- the reprehensibility of Defendant's conduct;
- the impact of Defendant's conduct on Plaintiff;
- the relationship between Plaintiff and Defendant;
- the likelihood that Defendant would repeat the conduct if an award of punitive damages is not made;
- [• Defendant's financial condition;]
- the relationship of any award of punitive damages to the amount of actual harm the Plaintiff suffered.

Id. (brackets in original).

- 237 PATTERN JURY INSTRUCTIONS: ELEVENTH CIRCUIT, CIVIL CASES § 2.1 (Comm. on Pattern Jury Instructions Dist. Judges Ass'n of the Eleventh Circuit 2005). This instruction provides in relevant part:

[I]f you further find that the Defendant did act with malice or reckless indifference to the Plaintiff's [federally protected] rights, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

When assessing punitive damages, you must be mindful that punitive damages are meant to punish the Defendant for the specific conduct that harmed the Plaintiff in the case and *for only that conduct*. For example, you cannot assess punitive damages for the Defendant being a distasteful individual or business. Punitive

One exception to the general lack of change in federal instructions is the Eighth Circuit, which modified its instruction in light of *Philip Morris*.²³⁹ The Eighth Circuit recommends that the following multi-factor language be added to the *Haslip*-like base “if supported by the evidence”:

[T]he law permits the jury under certain circumstances to award punitive damages.

....

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. how [reprehensible] [bad] [offensive] the defendant’s conduct was. In this regard, you may consider whether the harm suffered by the plaintiff was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether others were harmed by the same conduct of the defendant that harmed the plaintiff; and whether

damages are meant to punish the Defendant for this conduct only and not for conduct that occurred at another time. Your only task is to punish the Defendant for the actions [it] [he] [she] took in this particular case.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages

Id. (brackets in original). Cf. Franze & Scheuerman, *supra* note 7, at 488 n.453 (quoting the 2000 version of instruction).

- 238 MODEL CIVIL JURY INSTRUCTIONS FOR THE DIST. COURTS OF THE THIRD CIRCUIT § 6.4.2 (Comm. on Model Civil Jury Instructions Third Circuit 2007). This instruction provides in relevant part:

If you decide to award punitive damages, then you should also consider the purposes of punitive damages in deciding the amount of punitive damages to award. That is, in deciding the amount of punitive damages, you should consider the degree to which [defendant(s)] should be punished for the wrongful conduct at issue in this case, and the degree to which an award of one sum or another will deter [defendant(s)] or others from committing similar wrongful acts in the future.

[The extent to which a particular amount of money will adequately punish a defendant, and the extent to which a particular amount will adequately deter or prevent future misconduct, may depend upon a defendant’s financial resources. Therefore, if you find that punitive damages should be awarded against [defendant(s)], you may consider the financial resources of [defendant(s)] in fixing the amount of those damages.]

Id. (brackets in original).

- 239 MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DIST. COURTS OF THE EIGHTH CIRCUIT § 4.50C (Comm. on Model Civil Jury Instructions Within the Eighth Circuit, Supp. 2007). In the commentary, the Committee states:

This instruction attempts to incorporate the constitutionally relevant principles set forth by the Supreme Court in *Philip Morris USA v. Williams*, . . . 127 S. Ct. 1057 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459-62 (1993).

Id.

- there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff;
2. how much harm actually resulted to the plaintiff, [but not to others,] from the defendant's wrongful conduct [and not from the defendant's general conduct];
 3. what amount of punitive damages, in addition to the other damages already awarded, is needed, considering the defendant's financial condition, to punish the defendant for [his, her, its] wrongful conduct toward the plaintiff and to deter the defendant and others from similar wrongful conduct in the future;
 4. in order to achieve the purposes of punitive damages set forth above, the amount of any punitive damages award should bear a reasonable relationship to the amount of compensatory damages you awarded, if any;
 5. [the amount of possible harm the defendant's conduct could cause the plaintiff in the future;]
 6. [in order to achieve the purposes of punitive damages set forth above, the amount of any punitive damages award should bear a reasonable relationship to the harm likely to be caused in a similar situation by conduct similar to the defendant's wrongful conduct;] [and]
 7. [The amount of fines and civil penalties applicable to similar conduct].²⁴⁰

IV. GETTING TO THE "RIGHT QUESTION": A PROPOSAL FOR INSTRUCTIONAL REFORM

Philip Morris confirmed what *State Farm* only suggested: Due process requires that the jury be provided with more detailed guidance on punitive damages.²⁴¹ Courts must now evaluate whether their procedures, including model jury instructions, cause juries to ask "the right question," or instead, "create an unreasonable and unnecessary risk of any [jury] confusion occurring."²⁴²

So what are the "right questions"? In *State Farm*, the Court stated that an instruction preventing a jury from punishing a defendant for

²⁴⁰ *Id.* (brackets in original) (footnotes omitted).

²⁴¹ As early as *Haslip*, Justice O'Connor criticized state punitive damages procedures for allowing juries to base their decisions on arbitrary reasons. Commenting on Alabama's skeletal jury instructions, Justice O'Connor stated: "Alabama's common-law scheme . . . provides a jury with 'such skeletal guidance' that it invites—even requires—arbitrary results. It gives free reign to the biases and prejudices of individual jurors, allowing them to target unpopular defendants and punish selectively. In short, it is the antithesis of due process." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 63 (1991) (O'Connor, J., dissenting) (citation omitted).

²⁴² *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064, 1065 (2007).

harms that occurred out-of-state—a substantive due process limit imposed in *BMW*—was required.²⁴³ In *Philip Morris*, while giving the states flexibility to devise procedural constraints, the Court found that the trial court erred in failing to instruct the jury that it should not punish the defendant for harms to non-parties,²⁴⁴ a substantive due process limit.²⁴⁵

Following the logic of *State Farm* and *Philip Morris*, the next step in framing the “right questions” is to assess whether the other substantive due process limits are, or are not, appropriate for consideration by the jury. The obvious starting points for procedures that protect against “an unreasonable and unnecessary risk of [jury] confusion”²⁴⁶ are the *BMW* guideposts, which guide the courts post-verdict in assessing whether a punitive damages award comports with due process.²⁴⁷

True, the Supreme Court has yet to hold that due process requires the jury to be instructed on the guideposts.²⁴⁸ But over the past decade, the Supreme Court slowly has correlated the procedural and substantive due process requirements,²⁴⁹ something confirmed in *Philip Morris*, where the Court reiterated that protections are required to ensure the substantive limits are not violated. Moreover, refuting the premise that the guideposts are solely post-verdict considerations,²⁵⁰ the *Philip Morris* Court found that the risk that a jury would punish for harms to non-parties was present because the plaintiff was permitted to submit evidence at trial of harm to others to establish the defendant’s “reprehensibility.”²⁵¹ In other words, one of the guideposts—reprehensibility—was considered by the jury at trial,²⁵²

243 See *State Farm*, 538 U.S. at 422.

244 *Philip Morris*, 127 S. Ct. at 1063.

245 See *State Farm*, 538 U.S. at 424.

246 *Philip Morris*, 127 S. Ct. at 1065.

247 For the text of the guideposts, see *supra* text accompanying note 35.

248 See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 602 (1996) (Scalia, J., dissenting) (“[I]f those ‘interests’ are the most fundamental determinant of an award, one would think that due process would require the assessing jury to be *instructed* about them.”); cf. 2 PA. SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS § 14.02 cmt. (Pa. Bar Inst. 2005) (“*Campbell* addressed the standards under which a reviewing court should measure the constitutionality of a punitive damages award where a due process challenge has been raised, not the standards a jury should apply in determining punitive damages in the first instance.”).

249 See Franze & Scheuerman, *supra* note 7, at 427–32.

250 As Professor Anthony Sebok has noted, the *Philip Morris* Court’s “concern for the jury’s adjudication of hypothetical cases was in conflict with the Court’s earlier confidence that juries should be given broad discretion in the assessment of punitive-damages cases.” Sebok, *supra* note 2, at 999.

251 *Philip Morris*, 127 S. Ct. at 1064.

252 See *id.* at 1061–62.

and procedural protections were constitutionally required to protect the defendant's substantive due process rights.

The guideposts are thus the starting point. First, the jury should be advised to consider the "reprehensibility" of the defendant's conduct. In *State Farm*, the Supreme Court identified a five-factor scale of reprehensible conduct,²⁵³ and many state model instructions already include comparable instructions concerning the nature of a defendant's conduct.²⁵⁴ The substantive limit is now sufficiently defined and understandable to craft an instruction.²⁵⁵

Next, the jury should be instructed on the second *BMW* guidepost: that any punitive damages award must bear a reasonable relationship to the compensatory damages.²⁵⁶ A reasonable relationship instruction provides an inherent constraint on the jury's discretion—an anchor by which the jury can calibrate the punitive damages award under the same constitutional standard considered by courts in post-verdict review. A jury informed that its punitive award must be anchored to the compensatory award²⁵⁷ is less likely to assess the award based on impermissible considerations, such as out-of-state conduct or harm to others.

After *State Farm*, some instruction committees considered whether to impose a reasonable relationship instruction. Kentucky, for in-

253 *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003). The Court explained that reprehensibility should be determined by considering "whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id.* See also Franze & Scheuerman, *supra* note 7, at 456 (discussing Court's "sliding scale of reprehensible conduct").

254 See *supra* Part III.

255 Professor Neil Vidmar and Mr. Matthew W. Wolfe have proposed a set of model punitive damages jury instructions that incorporate a detailed reprehensibility charge based on *BMW*, *State Farm*, and *Philip Morris*. Neil Vidmar & Matthew W. Wolfe, *Fairness Through Guidance: Jury Instruction on Punitive Damages After Philip Morris v. Williams*, 2 CHARLESTON L. REV. 307, 322-23 (2008).

256 See *id.* at 324 (proposing text of model reasonableness relationship instruction).

257 Practically speaking, a plaintiff's harm is measured by the compensatory award. See *State Farm*, 538 U.S. at 426 ("In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."). As Professor Anthony Sebok has noted, a compensatory damages award "serves as a proxy for the damage caused by the defendant's tortious act, thus anchoring punishment to harm." Sebok, *supra* note 2, at 973-74. Indeed, Professor Sebok notes that "rather than being the engine of punitive damages' incoherence, the anchoring effect of compensatory damages validates a defensible theory of punitive damages." *Id.* at 987. That said, it should be noted that Professor Sebok believes that the reasonable relationship requirement "lacks any principled foundation." *Id.* at 1029.

stance, has come the closest to recognizing the overlap between the substantive guideposts and the procedural due process limits on punitive damages: "To the extent possible, the guideposts should be used by the jury to set punitive damages in the first instance."²⁵⁸ Louisiana, on the other hand, determined that it is an "open question as to whether the jury should be told that there may be constraints on their assessment of punitive damages, i.e., told that such damages might have to bear a 'reasonable relationship' to compensatory damages in order to pass constitutional muster," and ultimately concluded that "[t]he better view is probably that this is a legal issue for post-verdict motions or appeal, if the punitive damages are claimed to exceed that relationship."²⁵⁹

States like Louisiana have it wrong.²⁶⁰ Where the procedural due process standard is preventing the risk of jury confusion, a reasonable relationship instruction provides definite guidance on how to set a punitive damages award within substantive limits. Such an instruction does not have the conceptual difficulties Justice Stevens saw in a harm-to-others instruction. Indeed, it is a simple concept: the amount of a punitive damages award must be correlated to the compensatory award. While informing the jury of a specific ratio²⁶¹ could

258 PALMORE & CETRULO, *supra* note 190, § 39.15 cmt. See also ILL. PATTERN JURY INSTRUCTIONS CIVIL § 35.01 (Ill. Sup. Ct. Comm. on Pattern Jury Instructions in Civil Cases 2007), available at <http://www.state.il.us/court/CircuitCourt/JuryInstructions/35.01.pdf> (stating that Illinois's revision "sought to honor the three constitutional 'guideposts' established by U.S. Supreme Court [sic] while simultaneously emphasizing that the ultimate determination as to the size of the penalty imposed must be dictated by the circumstances of each particular case"). Kentucky further recognized that the comparable civil/criminal penalties guidepost "will not be a jury question in a typical case," PALMORE & CETRULO, *supra* note 190 § 39.15 cmt., but where the trial court admits evidence of comparable penalties, the following addition to the main instruction is suggested: "The (fines) (penalties) that may be imposed for conduct comparable to D's conduct toward P." *Id.* See also *infra* text accompanying notes 262–65 (discussing whether to instruct on third guidepost).

259 Johnson, *supra* note 48, § 18.02. Accord 2 PA. SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS § 14.02 cmt. (Pa. Bar Inst. 2005) ("Campbell addressed the standards under which a reviewing court should measure the constitutionality of a punitive damages award where a due process challenge has been raised, not the standards a jury should apply in determining punitive damages in the first instance.").

260 See text accompanying *supra* note 259.

261 See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("Single-digit multipliers are more likely to comport with due process . . . When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."). But see Anthony J. Sebok, *After Philip Morris v. Williams: What Is Left of the "Single Digit" Ratio?*, 2 CHARLESTON L. REV. 287, 293 (2008) (concluding that "it is very likely that the ratio rule will be abandoned by the courts"). As Dean Thomas C. Galligan has noted, assuming punitive damages serve

go even further to prevent “confusion,” procedural due process sets a floor, not a ceiling, on procedural guarantees. The floor here means that the jury should, at minimum, be told that compensatory awards serve as a guide—rather than financial condition evidence, or harm-to-others arguments, or random figures suggested during closing argument.

While the first two guideposts should be provided to juries, the remaining guidepost presents unique considerations. The “third guidepost”—comparable civil or criminal penalties²⁶²—invites jury confusion and should be limited to post-verdict review. As the Supreme Court noted in *Cooper Industries*, this factor “calls for a broad legal comparison,”²⁶³ and is better suited to application by judges, not juries.²⁶⁴ Even courts advocating the use of more detailed instructions have determined that “there are too many complicating and prejudicial factors in asking a lay jury to consider the third element.”²⁶⁵

Having considered whether procedural due process requires courts to instruct juries on the *BMW* guideposts, the question then becomes whether additional factors in model instructions²⁶⁶ are consistent or conflict with the substantive due process limitations on punitive damages. The aim here is to prevent juries from asking the “wrong question” more than it is getting them to the “right one.”

an efficient deterrence purpose, “compensatory damages alone will be enough to promote an adequate cost-benefit analysis” in some circumstances. Thomas C. Galligan, Jr., *Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 TENN. L. REV. 117, 135 (2003) (quoting *Ciraolo v. City of New York*, 216 F.3d 236, 243 (2d Cir. 2000) (Calabresi, J., concurring)).

262 *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583–85 (1996).

263 *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 (2001).

264 *See id.*

265 *Geressy v. Digital Equip. Corp.*, 950 F. Supp. 519, 521 (E.D.N.Y. 1997). Accordingly, the court approved a modification of the New York model instruction to include an instruction on the first two guideposts:

In fixing the amount, if any, you may consider the assets of defendant, what is reasonably required to vindicate New York State’s legitimate interests in punishment and deterrence, if any, above the amount of civil damages awarded, the degree of reprehensibility, if any, the disparity between the harm or potential harm suffered by plaintiffs and the difference between punitive damages and the civil awards in this case, and how egregious the conduct of defendant was compared to that of others in its position.

Id. “This language adequately expresses the law as set out in [*BMW*] without requiring the jury to make complex determinations and calculations involving civil and criminal law.” *Id.* (citation omitted). *See also* PALMORE & CETRULO, *supra* note 190, § 39.15 cmt. (recognizing that the comparable civil/criminal penalties guidepost “will not be a jury question in a typical case”).

266 Most states with multi-factor instructions include additional, and potentially non-constitutional, factors. *See supra* discussion in Part III.A.3.

The issue presented by these instructions is how to balance the use of evidence or argument that may be relevant for one purpose, such as establishing the “reprehensibility” of a defendant’s conduct,²⁶⁷ while also ensuring that evidence or argument is not misused for an improper purpose²⁶⁸—the classic context for a “limiting instruction.”²⁶⁹ Examples include the two instructions specifically discussed by the Supreme Court: the out-of-state conduct instruction discussed in *State Farm*²⁷⁰ and the harm-to-others instructions discussed in *Philip Morris*.²⁷¹ Where warranted by the evidence, both a harm-to-others and an out-of-state conduct instruction must be given.²⁷² Although Justice Stevens considered these concepts “elusive nuances,”²⁷³ courts ask juries to perform such tasks anytime that they give a limiting instruction on the use of certain evidence.²⁷⁴ While it is far from clear that juries always understand or follow the instructions they are given, and much may depend on the way the instructions are written, it is a basic principle that our jury system is “[b]ased on faith that the jury will endeavor to follow the court’s instructions.”²⁷⁵

267 See *supra* text accompanying notes 84–88.

268 See *supra* discussion in Part III.A.3; see also Franze & Scheuerman, *supra* note 7, at 508–11.

269 E.g., Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 676 (2003) (“Indeed, it is a familiar principle that, when evidence is admitted for one purpose, but it would violate the Constitution for the jury to consider it for a different purpose, the court should instruct the jury not to consider the evidence for the impermissible purpose.”); see also 21A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL RULES OF EVIDENCE § 5066 (2d ed. 2007).

270 See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) (“A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.”).

271 127 S. Ct. 1057, 1064 (2007) (“We therefore conclude that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.”).

272 In an article that foreshadowed the Court’s holding in *Philip Morris*, in 2003 Professor Thomas Colby advocated the use of a harm-to-others instruction. See Colby, *supra* note 269, at 675–76.

273 See *supra* Part II.B; see also Hylton, *supra* note 59, at 16 (finding the use of harm-to-others evidence in assessing reprehensibility, but not punishment to be “a distinction that many will find confusing”).

274 See WRIGHT & GRAHAM, *supra* note 269, § 5066; see also Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83, 128 (2007) (suggesting the jury be given limiting instruction on use of “harm to natural resources” evidence as permissible for reprehensibility analysis, but not punishment).

275 *Delli Paoli v. United States*, 352 U.S. 232, 242 (1957), *overruled on other grounds by United States v. Bruton*, 391 U.S. 123 (1968). To be sure, scholars dispute the efficacy of the jury system. E.g., SUNSTEIN ET AL., *supra* note 124, at 223–24 (concluding that juries do not follow instructions). That debate, however, is beyond the scope of this Article.

Besides out-of-state conduct and extraterritoriality, the principal area of contention remains how to address evidence or argument concerning a defendant's wealth or financial condition.²⁷⁶ In *State Farm*, the Supreme Court recognized that evidence of a defendant's wealth may improperly influence the jury,²⁷⁷ but did not take the step of stating that wealth evidence should be kept from the jury. Unlike out-of-state conduct or harm-to-others evidence that may be relevant to proving "reprehensibility," it is unclear whether and how financial condition evidence fits into the constitutional framework.

Financial condition, however, has long been integrated into state punitive damages law.²⁷⁸ While some states preclude wealth evidence,²⁷⁹ other states permit, or even require,²⁸⁰ evidence of a defendant's financial condition. The majority of model instructions advise the jury to consider the defendant's "financial condition" or "wealth" when determining the amount of the award²⁸¹ without also providing any instructions on *how* the jury should do so. Similarly, a few jurisdictions instruct the jury to consider the defendant's "ability to pay" the award.²⁸² Related to a defendant's wealth, several states' model

276 See Michael L. Rustad, *The Uncert-Worthiness of the Court's Unmaking of Punitive Damages*, 2 CHARLESTON L. REV. 459, 502–05 (2008) (predicting that the role of the defendant's wealth may be the next question addressed by the Supreme Court).

277 See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427–28 (2003). The Court's concerns about the improper use of wealth evidence are supported by empirical studies:

The wealth of the defendant matters a great deal to dollar awards. *People will impose significantly higher punitive damages awards on significantly wealthier defendants*—even though people do not see misconduct by wealthy defendants as more outrageous than equivalent misconduct by less-wealthy defendants. The lesson—perhaps not surprising, but highly relevant to legal practice—is that jury awards will be greatly affected by knowledge of wealth [sic] of the defendant.

SUNSTEIN ET AL., *supra* note 124, at 32.

278 See *Belknap v. Boston & Maine R.R.*, 49 N.H. 358, 358 (1870); *Flaacke v. Stratford*, 64 A. 146, 147 (N.J. 1906); *Harman v. Cundiff*, 82 Va. 239, 246 (1886). For a discussion of the history of using wealth in determining the amount of punitive damages, see Leila C. Orr, *Making a Case for Wealth-Calibrated Punitive Damages*, 37 LOY. L.A. L. REV. 1739, 1741–43 (2004).

279 *E.g.*, COLO. REV. STAT. § 13–21–102(6).

280 *E.g.*, *Adams v. Murakami*, 813 P.2d 1348 (Cal. 1991) (holding that evidence of a defendant's financial condition is a prerequisite to an award of punitive damages); see also *Baxter v. Peterson*, 58 Cal. Rptr. 3d 686 (Cal. Ct. App. 2007) (holding that an award of punitive damages cannot be sustained on appeal unless the trial record contains meaningful evidence of the defendant's financial condition).

281 See discussion *supra* Part III.

282 See sources cited *supra* notes 175 (Maryland), 178 (New Jersey), 181 (North Carolina), 189 (California), 194 (South Carolina), and 201 (Wyoming).

instructions advise the jury to consider a defendant's "profits" from the wrongdoing in setting the punitive award.²⁸³

Without additional guidance, these wealth-related instructions are constitutionally suspect. As *Philip Morris* suggests, without clarification that the "profits" or "wealth" must be specifically tied to the conduct that harmed the plaintiff,²⁸⁴ and that profits or wealth must relate to in-state activities,²⁸⁵ these instructions invite the jury to base its award on unconstitutional grounds. Moreover, basing an award on a defendant's financial condition or profits risks punishing a defendant for harm to non-parties, a practice barred by *Philip Morris*,²⁸⁶ and further risks punishing a defendant for lawful conduct, a practice barred by *BMW*.²⁸⁷ Consider the use of profits in *Philip Morris*. The Oregon Court of Appeals expressly upheld the punitive damages award based on the company's profits: "[Philip Morris's] profits for the year closest to the trial were over \$1.6 billion, or approximately \$30.7 million per week. The jury's award of \$79.5 million, thus, is equal to a little more than two and a half weeks' profit."²⁸⁸ First, that calculation of profits was based on national sales, not just sales in Oregon.²⁸⁹ Moreover, even focusing on Oregon profits alone, some of the other Oregon smokers may not have been entitled to any damages because they did not rely on Philip Morris's statements regarding the health effects of smoking.²⁹⁰ As Professor Keith Hylton has noted, it would be "inappropriate" to use these lawful sales as the basis of a punitive dam-

283 See sources cited *supra* notes 178 (New Jersey), 181 (North Carolina), 183 (Tennessee), 184 (West Virginia), 185 (Wisconsin), 186 (North Dakota), 190 (Kentucky), 192 (Minnesota), 196 (Georgia), and 201 (Wyoming).

284 See *supra* text accompanying notes 86–89; see also *Johnson v. Ford Motor Co.*, 113 P.3d 82, 95 (Cal. 2005) ("[G]ains made over some period of time and the harm or potential harm to an individual plaintiff are not necessarily related . . .").

285 See *supra* text accompanying note 92.

286 See *supra* text accompanying notes 159–65 (discussing *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 805 (Cal. Ct. App. 2003)); see also Hylton, *supra* note 59, at 10–11 (recognizing that basing punitive damages on a defendant's profits necessarily includes transactions not before the court); Colby, *supra* note 269, at 675–76 (arguing that plaintiff's counsel should not be permitted to ask jury to take away profits from defendant's entire course of conduct and that jury should be instructed that it cannot remove profits based on victims not before the court).

287 See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996).

288 *Philip Morris I*, 48 P.3d 824, 841 (Or. Ct. App. 2002). See also discussion *supra* note 59.

289 Brief for Respondent, *supra* note 67, at 15 (noting that the \$1.6 billion figure was net profits for 1997). See also *id.* at 32 ("The \$79.5 million awarded represented just two-and-a-half weeks' domestic profit to Philip Morris in 1997."). Certainly, under *State Farm* and *BMW*, if a court admits evidence of a defendant's wealth, it must be limited to in-state profits.

290 *Philip Morris*, 127 S. Ct. at 1063; see also *supra* Part II (discussing *Philip Morris*).

ages award.²⁹¹ In short, unless a limiting instruction is provided,²⁹² the wealth-based instructions in most jurisdictions raise serious constitutional concerns and should be scrutinized to assess whether and in what form the instructions should be retained after *State Farm*.

Finally, we conclude where the Court began: whether states should instruct on the *Haslip*-minimum. The three *Haslip* factors do little to guide the jury or prevent jury confusion. Standing alone, the *Haslip*-minimum instructions are inherently constitutionally flawed. As Justice O'Connor argued over fifteen years ago:

In my view, such instructions are so fraught with uncertainty that they defy rational implementation. Instead, they encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections. Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth. Multimillion dollar losses are inflicted on a whim. While I do not question the general legitimacy of punitive damages, I see a strong need to provide juries with standards to constrain their discretion so that they may exercise their power wisely, not capriciously or maliciously. The Constitution requires as much.²⁹³

On the other hand, the *Haslip*-minimum instructions identify the purposes of punitive damages,²⁹⁴ and importantly, that such awards

291 See Hylton, *supra* note 59, at 6. To the extent that evidence of a company's profits, wealth or financial condition are admitted, it may be impossible for the jury to segregate lawful from unlawful transactions. Professor Hylton proposes an interesting solution: using statistical estimates of unlawful sales. See *id.* at 10 & n.30; *id.* at 12. A statistical solution, however, would have to overcome *Philip Morris*'s holding that "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" *Philip Morris*, 127 S. Ct. at 1063 (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). At the end of the day, asking the jury to segregate unlawful transactions might "create an unreasonable and unnecessary risk of any such [jury] confusion occurring." *Id.* at 1065. At that point, the question becomes whether evidence of a defendant's wealth or profits should be excluded.

292 See text accompanying *supra* notes 226–27 (noting that only Arkansas currently couples its wealth instruction with a harm-to-others instruction).

293 *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting). Justice Scalia similarly criticized the Alabama jury instruction approved by the majority as "not guidance but platitude." *Id.* at 37 (Scalia, J. concurring).

294 See text accompanying *supra* note 128. Professor Sebok, however, notes that "[j]uries may have many ways of interpreting the deterrence prong" of *Haslip*-minimum instructions. Sebok, *supra* note 2, at 984. Using an efficient or optimal deterrence theory as a guide, Professor Sebok notes that "research suggests that juries are producing awards that are neither certain nor likely to bear a reasonable relationship to the amount of money that, ex ante, would produce the correct incentives to invest in safety." *Id.* But this argument presupposes that the goal of punitive damages is efficient deterrence, as opposed to general deterrence. See generally Galligan, *supra* note 261, at 147 (discussing general deterrence purpose of punitive damages). Indeed, as Dean Galligan notes, while an efficient deterrence theory of punitive damages may be "attractive," "juries do not normally engage in such a finely tuned exercise of deterrence calibration when awarding punitive

are not compulsory.²⁹⁵ Thus, so long as the *Haslip*-minimum instructions are combined with more detailed instructions as discussed above, states may permissibly choose to retain these common law-based factors.

To be sure, we acknowledge that *Philip Morris* did not mandate jury instructions as opposed to other procedures,²⁹⁶ and indeed, some have argued that it is equivocal on the validity of defendant Philip Morris's proposed instruction.²⁹⁷ Theoretically, a state could solve potential jury confusion caused by harm-to-others evidence by denying admission of the evidence, or, for that matter, removing the punitive damages decision from the jury's domain, as some states have done.²⁹⁸ Because the evidence remains relevant to reprehensibility,²⁹⁹ however, courts are unlikely to exclude evidence that is permissible for some, but not all, purposes. And few states will be inclined to remove the decision on punitive damages from the jury or to engage in untraditional procedural mechanisms.³⁰⁰

The reality, then, is that most states will turn to jury instructions as the principal means of enforcing the mandate of *Philip Morris*. Our proposal is so simple it should not be controversial: juries should be told of the constitutional limits by which their awards will be judged.

damages." *Id.* (quoting *Cooper Indus., Inc. v. Leatherman Tool Group*, 532 U.S. 424, 438–40 (2001)).

295 See *supra* text accompanying note 128.

296 See *supra* text accompanying notes 86–94.

297 See *supra* text accompanying note 118; see also Allen, *supra* note 22, at 37–42 (arguing *Philip Morris* requires "more than traditional approaches" such as jury instructions).

298 See *supra* notes 130, 136. Whether the jury should decide the question of punitive damages has been a subject of heated debate. See SUNSTEIN ET AL., *supra* note 124, at 242–58 (arguing decision-making on punitive damages should be removed from jury); Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-Examination of the American Jury*, 36 U.S.F. L. REV. 411 (2002) (arguing that the Supreme Court has sounded the "death knell" of juries' assessment of punitive damages); Ryan Fowler, *Why Punitive Damages Should Be A Jury's Decision in Kansas: A Historical Perspective*, 52 KAN. L. REV. 631 (2004) (arguing jury should be retained as punitive damages decision-maker).

299 See *supra* text accompanying note 85.

300 Cf. Allen, *supra* note 22, at 41 ("[S]tates will need to be creative in carrying out the Court's mandate [in *Philip Morris*].").

CONCLUSION

Four years ago, when we first wrote about the need for punitive damages instructional reform, we began the article with the example of a troubling case in which a jury awarded a single individual \$28 billion in punitive damages.³⁰¹ That case provides a fitting conclusion to the present article: the appeals court recently remanded the case for a new trial on the amount of punitive damages. The basis for the reversal? An erroneous and prejudicial jury instruction.³⁰²

State Farm was the first step in what likely will be a long walk in creating constitutional “guideposts” for trial-level procedures. The *Philip Morris* decision certainly paved the road by clearly showing that substantive limits on punitive damages, traditionally employed post-verdict, must be considered in adopting trial-level procedures. While *Philip Morris* left states with flexibility to devise procedures to protect these substantive rights, that task inevitably will require a reassessment of jury instructions concerning punitive damages. The substantive guideposts and limits are sufficiently defined and understandable to provide to the jury. Absent some other constraint on the jury, due process demands that the jury be advised of the factors that determine the constitutionality of their punitive damages award. Until there is meaningful procedural reform, the only certainty in the punitive damages process will be continued appeals, reversals, and remands, many of which could be avoided by providing juries and courts with the guidance they need to reach principled verdicts based on proper considerations.

301 Franze & Scheuerman, *supra* note 7, at 423–24.

302 *Bullock v. Philip Morris USA, Inc.*, 71 Cal. Rptr. 3d 775, 806–07 (Cal. App. 2008) (“Proposed instruction V-1 expressed the rule of law later confirmed in *Williams*, that the jury could not award punitive damages for the purpose of punishing Philip Morris for harming nonparties to the litigation. . . . The \$28 billion in punitive damages awarded by the jury was equivalent to \$1 million for each of the purported 28,000 deaths. In light of this record, and absent any instruction providing adequate guidance concerning evidence of harm caused to others, we conclude that the refusal of Philip Morris’s proposed instruction V-1 was prejudicial [and reverse for a new trial concerning the amount of punitive damages].”).