

ARTICLES

INSTRUCTING JURIES ON PUNITIVE DAMAGES: DUE PROCESS REVISITED AFTER *STATE FARM*

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INTRODUCTION

A jury recently awarded a single plaintiff \$28 billion in punitive damages.¹ That's *billion*, as in nine zeros—all to one person. Given the frequent reports of multimillion dollar verdicts,² it is easy to become desensitized to “skyrocketing”³ punitive damages awards. But

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¹ *Bullock v. Philip Morris Inc.*, No. BC249171, 2002 WL 31833905 (Cal. Super. Ct. Dec. 18, 2002), *appeal docketed*, No. B164398 (Cal. Ct. App. Jan. 24, 2003). The \$28 billion award, later reduced by the trial court to \$28 million, was more than four times the combined total of all reported punitive damages jury awards in California from 1991 to 2000. See J. Clark Kelso & Kari C. Kelso, *An Analysis of Punitive Damages in California Courts, 1991-2000*, at 6, available at <http://www.cjac.org/research/> (reviewing punitive damages jury awards reported in Westlaw's *California Jury Verdict Reporter* database) (last visited Feb. 5, 2004).

² See, e.g., Tresa Baldas, *Verdicts Swelling from Big to Bigger*, NAT'L L.J., Nov. 25, 2002, at A1 (reporting recent punitive damages verdicts of \$28 billion, \$3 billion, \$290 million, and \$271 million); David Hechler, *Tenfold Rise in Punitives*, NAT'L L.J., Feb. 3, 2003, at C3 (“There were five verdicts of at least \$500 million and 22 of at least \$100 million [in 2002] In 1991, 38 verdicts topped \$20 million; in 1996, it was 66.”).

³ *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) (“Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was \$250,000. Since then, awards more than 30 times as high have been sustained on appeal.” (citation omitted)); accord, e.g., CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 1 (2002) (“Over the past two decades, our country has experienced a dramatic increase in the incidence and magnitude of punitive damages verdicts rendered by juries in civil litigation.”). Others are quick to counter, however, that research on the overall patterns of awards indicate that juries impose punitive damages infrequently and rarely in headline-grabbing amounts. See Brief Amici Curiae of Certain Leading Social Scientists and Legal Scholars in Support of Respondents at 1, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) (No. 01-1289) [hereinafter Research Amici Brief] (“A broad social science consensus exists that juries perform rationally in punitive damages cases. Juries award such damages infrequently and in comparatively modest amounts.”); see also Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 159 (2002) (“Archival research examining overall patterns of awards find that punitive damages are infrequently awarded, moderate in size, awarded in response to

when a jury awards one person nearly double NASA's annual budget⁴—an amount larger than the GDP of more than 100 nations⁵—it does not take a constitutional scholar to recognize that something is awry with juries and punitive damages.⁶

Although the debate over the existence and extent of a punitive damages “crisis” rages on, courts,⁷ scholars,⁸ and even some opponents of punitive damages reform⁹ have recognized that the vague

outrageous conduct, and often reduced post-trial.”). Even if rare, however, headline-grabbing awards, like the \$28 billion award noted above, provide insight into jury decision making:

That juries account for over 98 percent of these blockbuster awards is a striking statistic. Jury trials account for about 68 percent of all civil cases The difference between the observed 98 percent share of blockbuster awards by juries and the expected share of 68 percent jury awards is statistically significant, indicating that juries awarded a disproportionate share of the blockbuster awards.

Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, The Harvard John M. Olin Discussion Paper Series, Discussion Paper No. 362, at 8 (May 2002), at http://www.law.harvard.edu/programs/olin_center/ (identifying fifty-three punitive damages awards of at least \$100 million from 1985 to 2002).

⁴ See OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2004, at 8 (2003) (reflecting NASA's \$15 billion budget in 2003), available at <http://w3.access.gpo.gov/usbudget/fy2004/pdf/budget.pdf>.

⁵ See The World Bank, *World Development Indicators Database: Total GDP 2002*, at <http://www.worldbank.org/data/datatopic/GDP.pdf> (July 2003) (listing at least 124 nations with a GDP less than \$28 billion in 2002).

⁶ That said, scholars have published a wealth of studies that suggest juries are ill-equipped to arrive at fair and consistent punitive damages awards. See generally SUNSTEIN ET AL., *supra* note 3 (integrating and synthesizing independent lines of research). The issue, however, continues to be hotly debated. See generally Research Amici Brief, *supra* note 3 (amici brief of university professors and researchers criticizing research in SUNSTEIN ET AL., *supra* note 3 and summarizing competing research); Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497, 1515-22 (2003) (discussing debate over punitive damages jury research); see also Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002) (comparing judge and jury performance in awarding punitive damages and arguing that concerns about juries are unwarranted).

⁷ See, e.g., *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (“Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.”); *TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413, 428 (S.D.N.Y. 2003) (providing a detailed overview of current punitive damages issues, including jury instructions, and noting that “[w]ith juries guided by such expansive latitude and minimal instructions confining the exercise of their discretion, erratic or unpredictable punitive awards are bound to result”).

⁸ See SUNSTEIN ET AL., *supra* note 3, at 3, 11-14, 142-70 (suggesting that vague instructions permit juries to use inconsistent or improper considerations in setting the amount of punitive damages awards, but also questioning whether more detailed instructions would result in more consistent and rational jury decision making); see also Andrew L. Frey, *No More Blind Man's Bluff on Punitive Damages: A Plea to the Drafters of Pattern Jury Instructions*, LITIGATION, Summer 2003, at 24 (“[I]t is crystal clear that the current vague and incomplete instructions given to juries in many states virtually ensure capricious outcomes.”).

⁹ The Association of Trial Lawyers of America (“ATLA”) generally has opposed punitive damages reform. See, e.g., ATLA, Fact Sheet: *Punitive Damages Are Rarely Awarded, The Amounts Are Small, and Judges, Not Juries, Are More Apt To Give Them*, http://www.atla.org/ConsumerMediaResources/Tier3/press_room/FACTS/pundam/judges.punitives.bjs.aspx (last

and incomplete instructions juries typically receive all but invite arbitrary results.¹⁰

In 1991, however, the U.S. Supreme Court approved the use of skeletal jury instructions, so long as the jurisdiction affords comprehensive post-verdict review. In *Pacific Mutual Life Insurance Co. v. Haslip*,¹¹ the Court recognized that procedural due process requires “adequate guidance from the court”¹² and “reasonable constraints”¹³ on the jury’s discretion. At the same time, the Court upheld punitive damages instructions that Justice O’Connor found “scarcely better than no guidance at all,”¹⁴ and that Justice Scalia characterized as “not guidance but platitude.”¹⁵

After *Haslip*, the Court spent the next decade addressing the constitutional standards for post-verdict review, including the “guideposts” courts should use to determine whether an award violates substantive due process.¹⁶ As for jury instructions, the Court either

visited Feb. 5, 2004) (“While tort ‘reform’ advocates claim that punitive awards are out of control The truth about punitive damages is that the current system works fairly.”). In a Supreme Court amicus brief in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003), however, ATLA urged the Court to overrule prior decisions upholding substantive due process post-verdict limits on punitive damages, in part, because “[p]rotection against arbitrary and excessive punitive awards is best accomplished by requiring that the factors that are relevant to assessing an appropriate amount of damages be submitted to juries, accompanied by clear and specific instructions.” Amicus Curiae Brief of the Association of Trial Lawyers of America in Support of the Respondents at 3, *State Farm* (No. 01-1289).

¹⁰ Jury instructions typically provide guidance on the standards for both imposing punitive damages and calculating the amount of an award. See generally SUNSTEIN ET AL., *supra* note 3, at 11-13. This Article analyzes only the sufficiency of instructions regarding the calculation of the amount of an award.

¹¹ 499 U.S. 1 (1991).

¹² *Id.* at 18.

¹³ *Id.* at 20.

¹⁴ *Id.* at 48 (O’Connor, J., dissenting) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring)).

¹⁵ *Id.* at 37 (Scalia, J., concurring).

¹⁶ See discussion *infra* Part I.C-F. For an explanation of the distinction between procedural and substantive due process, see ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (1997), which provides:

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 [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 assure the reasonableness of the awards. Substantive due process prevents excessive punitive damages awards, regardless of the procedures followed.

Id. at 419-20.

expressly avoided the issue¹⁷ or implicitly adhered to a core premise in *Haslip*: instructional deficiencies can be remedied through post-verdict protections.¹⁸

Following the Supreme Court's lead, most courts have upheld scant jury instructions as constitutionally sufficient.¹⁹ These courts rarely considered whether the challenged instructions provided meaningful constraints on the jury's discretion, but simply measured the instructions against those approved in *Haslip*.²⁰ Although several state legislatures have enacted various limits on punitive damages,²¹ most jurisdictions continue to use model jury instructions that provide little more than the "*Haslip*-minimum."²² Jurisdictions using model instructions that go beyond *Haslip* often add factors that are more likely to promote improper awards than constrain unbridled jury discretion.²³

After years of neglect, the jury instruction issue recently resurfaced in *State Farm Mutual Automobile Insurance Co. v. Campbell*.²⁴ Although *State Farm* focused principally on refining the post-verdict "guideposts," the decision also signaled that it is time to reevaluate how courts instruct juries on assessing punitive damages. In *State Farm*, the Supreme Court noted increasing "concerns over the imprecise manner in which punitive damages systems are administered."²⁵ And for the first time, the Court stated that a specific punitive damages instruction must be given to the jury; the "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."²⁶

In so doing, the *State Farm* Court rejected *Haslip*'s premise that minimal jury instructions necessarily can be remedied by post-verdict review. Simply stated, if post-verdict review was always a sufficient check on jury discretion, there would be no need to require

¹⁷ See discussion *infra* Part I.C.

¹⁸ See discussion *infra* Part I.D-F.

¹⁹ See discussion *infra* Part II.B.1.

²⁰ See discussion *infra* Part II.B.1.

²¹ See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 615 (1996) (Ginsburg, J., dissenting) (providing an appendix listing state legislative limits on punitive damages, including statutory caps); see also *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 n.6 (2001) (updating Justice Ginsburg's list of states that have added punitive damages caps). For a recent overview of various state legislative limits on punitive damages, see Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment,"* 54 S.C. L. REV. 47, 56-58 (2002).

²² See discussion *infra* Part II.A.

²³ See discussion *infra* Part II.A.

²⁴ 123 S. Ct. 1513 (2003).

²⁵ *Id.* at 1520.

²⁶ *Id.* at 1522-23.

instructions on constitutional limits. More importantly, by requiring courts to instruct the jury on a substantive punitive damages limitation, the Court linked substantive due process with procedural due process requirements. This 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.

Part I of this Article traces the pre-*State Farm* evolution of the Supreme Court's jurisprudence applying due process limitations to punitive damages awards. This part discusses the Court's approach to both procedural and substantive due process, as well as the issues that emerged as the Court struggled to find its voice on whether and how the Constitution imposes limits on punitive damages. It also highlights the shift in the Court's focus from analyzing primarily just the amount of a punitive damages award to also considering whether an award is based upon improper considerations. Part II explores how the Court's punitive damages decisions have influenced jury instructions. This part offers an overview of the model punitive damages instructions used in each state and by the federal courts, and of *Haslip's* legacy on due process challenges to jury instructions.

Part III analyzes *State Farm* in depth, emphasizing how the Court resolved several battleground issues regarding judicial application of substantive due process limits on punitive damages and thereby provided workable standards that can be conveyed to the jury. Building on this foundation, Part IV examines *State Farm's* impact on jury instructions. This part argues that the Court's instructional mandate and heightened concern about punitive damages procedures requires courts to revisit the concepts of "adequate guidance" and "reasonableness" under *Haslip*. It also argues that there is no sound reason to instruct juries on only one substantive due process protection and not on others. Part V concludes with an overview of the information juries should now be given after *State Farm* so that they can better meet their difficult task of translating moral outrage into dollar figures.

I. DUE PROCESS AND PUNITIVE DAMAGES BEFORE *STATE FARM*

The Supreme Court's consideration of the due process limits on punitive damages is of recent vintage. From 1991 to 2001, the Court issued five key decisions²⁷ that attempted to provide a constitutional

²⁷ *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993) (plurality opinion); *Pac. Mut. Life Ins.*

framework for an area that has been the subject of “long-enduring debate.”²⁸ By most accounts, that effort failed.²⁹

The Court initially addressed procedural due process in 1991, concluding in *Haslip* that states must employ procedures that place reasonable constraints on a jury’s discretion in awarding punitive damages.³⁰ The Court determined that no “bright-line” test should be used to evaluate the sufficiency of a jurisdiction’s procedures for all cases.³¹ Instead, it held “that general concerns of reasonableness and adequate guidance from the court . . . properly enter into the constitutional calculus.”³²

Just two years later, in *TXO Production Corp. v. Alliance Resources Corp.*,³³ a plurality of the Court recognized substantive due process

Co. v. Haslip, 499 U.S. 1 (1991). Additionally, cases in the 1980s laid the groundwork for the Court’s recognition of due process limitations on punitive damages. See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989) (“[D]ue process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness.”); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988) (declining to address due process claim that punitive damages were clearly excessive because the issue was not raised in state court proceedings); see also discussion *infra* Part I.A.

²⁸ *Haslip*, 499 U.S. at 8. A New York district court recently discussed in detail the “still unresolved” debate over the propriety, functions, and limits of punitive damages, noting that “[t]he questions yet unsettled in this dispute continue to vex litigants, courts, legislators and members of the general public, and thus present formidable challenges to our legal system.” *TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413, 418 (S.D.N.Y. 2003).

²⁹ Courts, practitioners, and scholars alike have criticized the lack of guidance imparted by this decade of opinions. The Wyoming Supreme Court, for instance, has described the Supreme Court’s punitive damages jurisprudence as “tortured.” *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040, 1043 (Wyo. 1998). One state trial court judge commented that “it has become clear that the Supreme Court will not provide definitive rules to guide trial courts in assessing and reviewing punitive damage awards.” Douglas G. Harkin, *BMW of North America, Inc. v. Gore: A Trial Judge’s Guide to Jury Instructions and Judicial Review of Punitive Damages Awards*, 60 MONT. L. REV. 367, 370 (1999). Practitioners likewise have concluded that the Court’s decisions “‘established no real standard at all.’” Bruce J. McKee, *The Implications of BMW v. Gore for Future Punitive Damages Litigation: Observations from a Participant*, 48 ALA. L. REV. 175, 224 (1996) (quoting Arthur Bryant, Of Trial Lawyers for Public Justice, in John W.R. Murray, *U.S. Supreme Court Rules on 10 Punitive Damages Awards*, LAW. WKLY. USA, at 1 (June 3, 1996)). Other practitioners have described the decisions as an “indecisive mish-mash.” Oliver S. Howard, *Symposium Transcript: Punitive Damages*, 24 PEPP. L. REV. 937, 942 (1997); accord Mark A. Klugheit, “Where the Rubber Meets the Road”: *Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation*, 52 SYRACUSE L. REV. 803, 804 (2002) (“[B]oth the trial juries which are asked to consider punitive damages and the courts which are expected to review those awards still do so without standards they can meaningfully apply.”). Scholars, too, have noted that the Court’s pre-*State Farm* jurisprudence left courts “puzzled” and the “[d]ecisions of lower courts . . . in disarray.” SUNSTEIN ET AL., *supra* note 3, at 244.

³⁰ *Haslip*, 499 U.S. at 18; see also discussion *infra* Part I.B.

³¹ *Haslip*, 499 U.S. at 18 (“We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.”).

³² *Id.*

³³ 509 U.S. 443 (1993).

limits on punitive damages, including the prohibition against “grossly excessive” punitive awards.³⁴ As with procedural due process, the Court disavowed any bright-line rule³⁵ for reviewing whether an award is constitutionally excessive, relying again on a general reasonableness test to be applied on a case-by-case basis.³⁶ Without concrete standards, courts cobbled together the fact-specific determinations in *Haslip* and *TXO* into de facto tests for procedural and substantive due process review.³⁷

In 1996, however, the Court attempted to give further guidance for post-verdict substantive due process (excessiveness) review. In *BMW of North America, Inc. v. Gore*,³⁸ the Court identified three “guideposts” that courts should use to determine whether a punitive damages award comports with substantive due process: (1) the reprehensibility of the defendant’s conduct; (2) the relationship between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages award and the civil penalties authorized or imposed in comparable cases.³⁹ The “*BMW* guideposts” quickly became part of the punitive damages vernacular. But the guideposts left plenty of room for interpretation, leaving lower court decisions in a state of disarray.⁴⁰ Aside from the problems with the guideposts, courts practically ignored a separate constitutional limitation announced in *BMW*: an award may violate due process not only if its size is grossly excessive, but also if the award is based on improper considerations.⁴¹

Finally, with all the attention on the *BMW* guideposts, pre-verdict procedural protections were left by the wayside. Although the guideposts provided criteria to assist post-verdict review for substantive due process violations, the Court never identified similar constitutional benchmarks to assess instructions under procedural due process. Moreover, the Court never addressed whether the *BMW* guideposts had any effect on procedural due process requirements at trial, such

³⁴ *Id.* at 458; see also discussion *infra* Part I.C.

³⁵ *TXO*, 509 U.S. at 458.

³⁶ *Id.*

³⁷ See, e.g., *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 658 (8th Cir. 1995) (using various factors from *TXO* and *Haslip* such as harm to the plaintiff, reprehensibility of the defendant’s conduct, and “potential harm to others” to assess the constitutionality of the punitive damages award).

³⁸ 517 U.S. 559 (1996); see also discussion *infra* Part I.E.

³⁹ *BMW*, 517 U.S. at 575.

⁴⁰ See sources cited *supra* note 29.

⁴¹ See *In re Exxon Valdez*, No. A89-0095-CV, 2004 WL 170354, at *14 (D. Alaska Jan. 28, 2004) (“Most of the courts considering the constitutionality of punitive damages awards have ignored this first step in the analysis.”); see also *White v. Ford Motor Co.*, 312 F.3d 998, 1013 n.56 (9th Cir. 2002) (holding the “first step” should be analysis of state’s interest and rejecting argument that analysis of punitive damages awards begins with guideposts), *amended on denial of reh’g*, 335 F.3d 833 (9th Cir. 2003).

as whether juries should be instructed on the guideposts or other constitutional limits on punitive damages. Complicating matters, the Court's 2001 decision in *Cooper Industries, Inc. v. Leatherman Tool Group*⁴² held that appellate courts should conduct de novo review of punitive awards under the guideposts. As a result, trial and appellate courts independently review punitive damages awards using factors that in most cases the jury never considered.

All of this set the stage for the Court's recent decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*.⁴³ There, the Court suggested that substantive due process limits on punitive damages influence procedural due process constraints on jury discretion, such as the adequacy of jury instructions.⁴⁴ *State Farm* also resolved many of the ambiguities surrounding the substantive limits, thereby providing clearer standards to develop complete and accurate jury instructions.

To understand where *State Farm* has taken us, we first must understand where we've been. The following section reviews in detail the cluster of decisions leading up to *State Farm*.

A. *Leaving Due Process Issues for "Another Day"*:
Bankers Life & Casualty Co. v. Crenshaw and Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.

In the 1980s, the Supreme Court had several opportunities to address whether due process places limits on punitive damages awards.⁴⁵ Yet each time, the Court declined to address the issue as either not properly raised below⁴⁶ or unnecessary to resolve the appeal.⁴⁷

⁴² 532 U.S. 424 (2001); see also discussion *infra* Part I.F.

⁴³ 123 S. Ct. 1513 (2003).

⁴⁴ See discussion *infra* Part III.

⁴⁵ See, e.g., *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); see also *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 9-12 (1991) (discussing *Browning-Ferris*, *Bankers Life*, *Aetna*, and other cases where the "Court and individual Justices thereof on a number of occasions . . . expressed doubts about the constitutionality of certain punitive damages awards"). For a discussion of the Supreme Court's treatment of punitive damages before the 1980s, see generally Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983).

⁴⁶ See, e.g., *Browning-Ferris*, 492 U.S. at 277 ("[The Due Process argument] must await another day. Because petitioners failed to raise their due process argument before either the District Court or the Court of Appeals, and made no specific mention of it in their petition for certiorari in this Court, we shall not consider its effect on this award."); *Bankers Life*, 486 U.S. at 76 ("[T]hese claims were not raised and passed upon in state court, and we decline to reach them here.").

⁴⁷ See *Aetna*, 475 U.S. at 828-29 ("These [due process and Eighth Amendment] arguments raise important issues which, in an appropriate setting, must be resolved; however, our disposition of the recusal-for-bias issue makes it unnecessary to reach them.").

While the Court refused to tackle the issue head-on, several Justices expressed due process concerns regarding punitive damages. In *Bankers Life & Casualty Co. v. Crenshaw*,⁴⁸ Justice O'Connor⁴⁹ wrote separately to express her concern that Mississippi's "standardless" punitive damages system may violate due process:

Under Mississippi law, the jury may award punitive damages for any common law tort committed with a certain mental state Although this standard may describe the required mental state with sufficient precision, the amount of the penalty that may ensue is left completely indeterminate. As the Mississippi Supreme Court said, "the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury." This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process.⁵⁰

A year later, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,⁵¹ the Court recognized that "[t]here is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme," but did not reach the due process issue.⁵² Justice Brennan, joined by Justice Marshall, wrote separately to clarify his willingness to hear a due process challenge.⁵³ Justice Brennan was particularly troubled by the punitive damages jury instruction used at trial. The Vermont district court had instructed the jury that in assessing the amount of punitive damages it need only consider "the character of the defendants, their financial standing, and the nature of their acts."⁵⁴ Justice Brennan criticized this instruction as providing "scarcely better than no guidance at all."⁵⁵ He acknowledged that

⁴⁸ 486 U.S. 71 (1988).

⁴⁹ Although Justice Scalia joined Justice O'Connor's concurrence, he did not agree with her due process analysis. In a separate concurrence, Justice Scalia explained that he agreed with Justice O'Connor only in that the Court should not exercise discretion to hear the due process claims presented by the defendant. *Id.* at 89 (Scalia, J., concurring).

⁵⁰ *Id.* at 88 (O'Connor, J., concurring in part and concurring in the judgment) (citations omitted). Despite her concerns, Justice O'Connor agreed with the *Bankers Life* majority that the due process question had not been properly presented for review. *Id.* ("This due process question, serious as it is, should not be decided today. The argument was not appellant's principal submission to this Court.")

⁵¹ 492 U.S. 257 (1989).

⁵² *Id.* at 276-77 (citation omitted). In *Browning-Ferris*, the Court rejected an Eighth Amendment Excessive Fines Clause challenge to punitive damages awards. *Id.* at 262-76. The Court held that the Excessive Fines Clause does not apply "when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." *Id.* at 264.

⁵³ *Id.* at 280 (Brennan, J., concurring) ("I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties.")

⁵⁴ *Id.* at 261-62 (citation omitted).

⁵⁵ *Id.* at 281 (Brennan, J., concurring).

the instruction correctly stated Vermont law,⁵⁶ but concluded that “the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best.”⁵⁷

Justice O’Connor, joined by Justice Stevens, agreed with Justice Brennan’s concerns about the procedures used by the trial court regarding punitive damages, and reiterated the views she expressed in *Bankers Life*.⁵⁸ Because the issue had not been properly raised below, however, all members of the Court agreed that the due process “inquiry must await another day.”⁵⁹ That day came two years later.

*B. Procedural Due Process and the General “Reasonableness” Test:
Pacific Mutual Life Insurance Co. v. Haslip*

In *Pacific Mutual Life Insurance Co. v. Haslip*,⁶⁰ the Court faced a properly presented due process challenge to a punitive damages award. In an opinion authored by Justice Blackmun, joined by Chief Justice Rehnquist and Justices White, Marshall, and Stevens, the Court held that punitive damages are constrained by procedural due process but that the “common law method” for assessing punitive damages used in Alabama was constitutionally sufficient.⁶¹ *Haslip* laid the foundation for all future punitive damages cases by the Supreme Court. First, the majority’s approval of Alabama’s minimal jury instructions on punitive damages established a benchmark against

⁵⁶ The Court determined that Vermont law governed the propriety of the punitive damages claim because the award was based on a state law tort claim. *Id.* at 261; *see also id.* at 278 (“In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.”).

⁵⁷ *Id.* at 281 (Brennan, J., concurring).

⁵⁸ *Id.* at 282 (O’Connor, J., concurring in part and dissenting in part). Justice O’Connor explained:

I share Justice Brennan’s view that nothing in the Court’s opinion forecloses a due process challenge to awards of punitive damages or the method by which they are imposed, and I adhere to my comments in [*Bankers Life*], regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages.

Id. at 283 (citation omitted).

⁵⁹ *Id.* at 276-77; *see also id.* at 281-82 (Brennan, J., concurring) (“Since the Court correctly concludes that Browning-Ferris’ challenge based on the Due Process Clause is not properly before us, however, I leave fuller discussion of these matters for another day.”); *id.* at 283 (O’Connor, J., concurring in part and dissenting in part) (“I do, however, agree with the Court that no due process claims—either procedural or substantive—are properly presented in this case . . .”).

⁶⁰ 499 U.S. 1 (1991).

⁶¹ *Id.* at 16-17 (“[W]e cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional.”). Justice Souter did not participate in the decision.

which future procedural due process challenges would be measured. Second, in addition to finding procedural limits on punitive damages, the decision hinted that substantive due process also places limits on the appropriate size of an award. Finally, the concerns raised by Justice O'Connor's dissent and Justice Kennedy's concurrence influenced the Court's later approach to due process limits on punitive damages.

1. *The Majority Opinion*

In *Haslip*, the plaintiffs brought a fraud claim in Alabama state court against their insurance company after the company's agent misappropriated the plaintiffs' insurance premiums and then concealed that the plaintiffs had lost coverage.⁶² The jury returned a verdict for the plaintiffs⁶³ and awarded the lead plaintiff \$200,000 in compensatory damages and \$840,000 in punitive damages.⁶⁴ The Alabama Supreme Court upheld the award.⁶⁵

In the U.S. Supreme Court, the defendant challenged the punitive damages award "as the product of unbridled jury discretion and as violative of its due process rights."⁶⁶ The Court began by discussing the well-established "common-law method for assessing punitive awards"⁶⁷ that was used by Alabama and many other states.⁶⁸ The common law method is a three-tiered approach under which "the amount of the punitive award is initially determined by [1] a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then [2] reviewed by trial and [3] appellate courts to ensure that it is reasonable."⁶⁹ Given its long pedigree, the Court held that the common law approach, as a general matter, was not unconstitutional.⁷⁰

That said, the Court noted its concern "about punitive damages that 'run wild'"⁷¹ and recognized that, even when the common law method is employed, a defendant nevertheless may be deprived due

⁶² *Id.* at 4-7.

⁶³ *Id.* at 6.

⁶⁴ *Id.* at 7 n.2. The jury returned a general verdict for the lead plaintiff in the amount of \$1,040,000. *Id.* The Supreme Court assumed that "not less than \$840,000" was for punitive damages. *Id.* The other plaintiffs were awarded total sums ranging from \$10,288 to \$15,290. *Id.* at 7.

⁶⁵ *Id.* (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 553 So. 2d 537 (Ala. 1989)).

⁶⁶ *Id.*

⁶⁷ *Id.* at 15.

⁶⁸ *Id.* at 42 (O'Connor, J., dissenting); see also *infra* text accompanying notes 388-401.

⁶⁹ *Haslip*, 499 U.S. at 15.

⁷⁰ *Id.* at 17 ("[W]e cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional.").

⁷¹ *Id.* at 18.

process.⁷² The Court declined, however, to create specific constitutional standards for all cases, choosing instead to adopt a general “reasonableness” and “adequate guidance” test to be applied on a case-by-case basis:

We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.⁷³

With this standard in mind, the Court analyzed the Alabama common law procedures that resulted in the \$840,000 punitive award.

a. *Jury Instructions*

The Court first assessed the adequacy of the jury instructions. The trial court’s instructions told the jury little more than the punishment and deterrence purposes of punitive damages.⁷⁴ While acknowledging that the instruction provided the jury with wide discretion in setting the amount of punitive damages,⁷⁵ the Court concluded that the instruction provided reasonable constraints on the jury’s discretion.⁷⁶ The instruction did so, the Court determined, in three ways: (1) it “enlightened the jury as to the punitive damages’ nature and

⁷² See *id.* (“One must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one’s constitutional sensibilities.”).

⁷³ *Id.*

⁷⁴ *Id.* at 19. In its entirety, the challenged jury instruction provided:

Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don’t have to even find fraud, you wouldn’t have to, but you may, the law says you may award an amount of money known as punitive damages.

This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award punitive damages.

Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, it does to the plaintiff, by way of punishment to the defendant and for the added purpose of protecting the public by deterring [*sic*] the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury, that means you don’t have to award it unless this jury feels that you should do so.

Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.

Id. at 6 n.1 (alteration in original).

⁷⁵ *Id.* at 19.

⁷⁶ *Id.* at 20.

purpose”; (2) it “identified the damages as punishment for civil wrongdoing of the kind involved”; and (3) it “explained that their imposition was not compulsory.”⁷⁷ These three components, referred to in this Article as the “*Haslip*-minimum,” later were used by courts as the constitutional benchmark for punitive damages instructions.

The Court justified its approval of these minimal instructions on two main grounds. First, the Court explained that juries often exercise discretion based on amorphous legal concepts.⁷⁸ Under Alabama’s system, the jury’s discretion in determining punitive damages was no greater than the discretion typically given to juries in other areas of the law.⁷⁹ Second, the Alabama system provided a post-verdict check on the jury’s discretion by requiring courts to apply detailed factors in assessing the validity of punitive damages awards.⁸⁰ The instruction thus reasonably accommodated the defendant’s interest in “rational decisionmaking” and the state’s interest in deterrence and retribution.⁸¹

b. *Trial Court Review*

The Court next assessed the second tier of Alabama’s common law system—review of a punitive award by the trial court.⁸² The Court noted that the Alabama Supreme Court established a procedure to evaluate the excessiveness of a punitive damages award. The Alabama multifactor test allowed trial courts to consider: (1) the “culpability of the defendant’s conduct”; (2) the “desirability of discouraging others from similar conduct”; (3) “the impact upon the parties”; and (4) the “impact on innocent third parties.”⁸³ The Court

⁷⁷ *Id.* at 19.

⁷⁸ *Id.* at 20 (“The discretion allowed under Alabama law in determining punitive damages is no greater than that pursued in many familiar areas of the law as, for example, deciding ‘the best interests of the child,’ or ‘reasonable care,’ or ‘due diligence,’ or appropriate compensation for pain and suffering or mental anguish.”).

⁷⁹ *Id.*

⁸⁰ *Id.* at 20-24. The Court noted that Alabama’s post-verdict standards for evaluating punitive awards “distinguish[e] Alabama’s system from the Vermont and Mississippi schemes about which Justices expressed concern in [*Browning-Ferris* and *Bankers Life*].” *Id.* at 21 n.10. In both *Browning-Ferris* and *Bankers Life*, the Justices’ core criticism was the vague jury instructions used by the trial courts in each case. See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) (O’Connor, J., concurring in part and concurring in the judgment); see also *supra* notes 48-59 and accompanying text (discussing *Browning-Ferris* and *Bankers Life*).

⁸¹ *Haslip*, 499 U.S. at 20. This language suggests that the Court implicitly applied part of the *Mathews v. Eldridge* procedural due process test. See *Mathews v. Eldridge*, 424 U.S. 319, 332-35 (1976) (explaining the test for procedural due process claims); see also *infra* note 117. In her dissent, Justice O’Connor argued that Alabama’s system failed the *Mathews* test. *Haslip*, 499 U.S. at 53 (O’Connor, J., dissenting); see also *infra* notes 119-21 and accompanying text.

⁸² *Haslip*, 499 U.S. at 20.

⁸³ *Id.*

found that the Alabama test “ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages.”⁸⁴

c. *Appellate Review*

The Court further considered Alabama’s system for appellate review of punitive damages awards.⁸⁵ The Court noted that the Alabama Supreme Court undertook both a “comparative analysis”⁸⁶ and a “substantive”⁸⁷ review to ensure that the award did not exceed an amount that met the goals of punishment and deterrence.⁸⁸ The Court favorably recited seven factors that the Alabama Supreme Court had adopted in *Green Oil Co. v. Hornsby*⁸⁹ to determine whether a punitive award was excessive.⁹⁰ These “*Green Oil* factors” played an influential role in later punitive damages cases.

Based on this analysis, the Court held that Alabama’s punitive damages system “impose[d] a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages.”⁹¹

d. *Wealth and Ratio*

Finally, the Court touched on two other issues that would take on significance in later cases. First, the Court noted that in determining the amount of a punitive damages award, “the factfinder must be guided by more than the defendant’s net worth.”⁹² Second, the Court acknowledged that substantive due process may also limit the size of a

⁸⁴ *Id.*

⁸⁵ *Id.* at 20-21.

⁸⁶ *Id.* at 21 (citing *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050 (Ala. 1987)).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 539 So. 2d 218 (Ala. 1989).

⁹⁰ The “*Green Oil* factors” are as follows:

(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant’s conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant’s conduct, the duration of that conduct, the defendant’s awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the “financial position” of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Haslip, 499 U.S. at 21-22.

⁹¹ *Id.* at 22.

⁹² *Id.*

punitive damages award.⁹³ Specifically, the Court suggested that regardless of the procedures used, the sheer size of a punitive damages award might “cross the line into the area of constitutional impropriety.”⁹⁴ But the award in question—which constituted a 4 to 1 ratio of punitive to compensatory damages—while “close to the line,” did not cross it.⁹⁵

2. Justice Scalia’s Concurrence

Justice Scalia argued that the common law method for assessing punitive damages, which grants the jury vast discretion, is too firmly rooted in history and practice to violate due process.⁹⁶ According to Justice Scalia, as long as a jurisdiction uses the traditional common law method and does not violate the Bill of Rights, procedural due process is satisfied.⁹⁷ At the same time, Justice Scalia criticized the majority’s case-by-case “reasonableness test,” finding that it “perpetuates the uncertainty that our grant of certiorari in this case was intended to resolve.”⁹⁸ Further, Justice Scalia criticized the Alabama jury instruction approved by the majority as “not guidance but platitude,”⁹⁹ and found that no discernable standards governed Alabama’s system of post-verdict review.¹⁰⁰ Nevertheless, Justice Scalia concurred in the judgment because it comported with the historical practice of leaving the determination of punitive damages to the jury.¹⁰¹

3. Justice Kennedy’s Concurrence

Justice Kennedy agreed with Justice Scalia that the historical acceptance of the common law method for assessing punitive damages foreclosed a due process challenge in the case.¹⁰² But he did not agree that conformity with historical practice always barred a due

⁹³ *Id.* at 24. A plurality of the Court recognized a substantive due process right two years later in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). See discussion *infra* Part I.C.

⁹⁴ See *Haslip*, 499 U.S. at 24.

⁹⁵ *Id.* at 22-23.

⁹⁶ *Id.* at 25 (Scalia, J., concurring). The majority rejected Justice Scalia’s approach: “It would be just as inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional.” *Id.* at 18. Justice O’Connor also took issue with Justice Scalia’s “static notion of due process,” finding that “[d]ue process is not a fixed notion.” *Id.* at 60 (O’Connor, J., dissenting).

⁹⁷ *Id.* at 24-25 (Scalia, J., concurring).

⁹⁸ *Id.* at 24.

⁹⁹ *Id.* at 37.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 24-25.

¹⁰² *Id.* at 40 (Kennedy, J., concurring).

process challenge.¹⁰³ Rather, in some circumstances, an award of punitive damages assessed under the common law method could violate due process if the award was “returned by a biased or prejudiced jury.”¹⁰⁴ He also disagreed with the majority’s reasonableness test, stating that a “bias or prejudice” inquiry would provide firmer guidance.¹⁰⁵

4. Justice O’Connor’s Dissent

Justice O’Connor issued a vehement dissent, arguing that the jury instructions used by the Alabama trial court violated procedural due process. Addressing the common law method for instructing juries, Justice O’Connor noted that states typically provide only vague instructions on how to determine the amount of punitive damages.¹⁰⁶ Such instructions, Justice O’Connor said, are inherently and constitutionally flawed:

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.¹⁰⁷

Justice O’Connor concluded that these perils materialized in *Haslip*.¹⁰⁸ She reasoned that the instructions violated due process under two separate theories.¹⁰⁹

First, Justice O’Connor opined that the punitive damages instruction¹¹⁰ failed the void-for-vagueness doctrine.¹¹¹ The trial court’s

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 41.

¹⁰⁵ *Id.* at 41-42.

¹⁰⁶ *Id.* at 42 (O’Connor, J., dissenting) (“States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so. Rarely is a jury told anything more specific than ‘do what you think best.’”).

¹⁰⁷ *Id.* at 43.

¹⁰⁸ *Id.* (“As is typical, the trial court’s instructions in this case provided no meaningful standards to guide the jury’s decision to impose punitive damages or to fix the amount.”).

¹⁰⁹ *Id.*

¹¹⁰ Justice O’Connor criticized the instruction’s lack of guidance regarding the imposition of punitive damages as well as the calculation of the amount of the award. *Id.* at 44-48. As to the imposition of punitive damages, the jury had been instructed that “[i]mposition of punitive damages is entirely discretionary with the jury, that means you don’t have to award it unless this jury feels that you should do so.” *Id.* at 44 (emphasis removed). Justice O’Connor commented that this instruction was “as vague as any I can imagine. It speaks of discretion, but suggests *no*

instruction, which directed the jury to consider the defendant's wrongful conduct and the goal of deterrence in determining the amount of the award, was "scarcely better than no guidance at all."¹¹² In contrast, Justice O'Connor contended that there existed objective criteria—the post-verdict *Green Oil* factors—that could be used to help guide juries in making rational punitive damages awards.¹¹³ Justice O'Connor stressed that post hoc application of these factors could not cure the vagueness of the jury instructions:¹¹⁴ "After-the-fact review of the amount in no way diminishes the fact that the State entrusts its juries with standardless discretion."¹¹⁵

Second, Justice O'Connor noted that even if the Court rejected the vagueness rationale,¹¹⁶ the Alabama instructions failed the *Mathews v. Eldridge*¹¹⁷ due process test.¹¹⁸ Under the *Mathews* balancing

criteria on which to base the exercise of that discretion. . . . [T]he instruction suggests that the jury may do whatever it 'feels' like." *Id.* at 44-45.

¹¹¹ *Id.* at 43. Under the void-for-vagueness doctrine:

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

Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966); *see also Hill v. Colorado*, 530 U.S. 703, 732 (2000) ("A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.").

¹¹² *Haslip*, 499 U.S. at 48 (O'Connor, J., dissenting) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring)). Justice O'Connor readily acknowledged that the instruction was correct as a matter of state law. *Id.* at 47. But, she argued, merely stating the objectives of punishment and deterrence without providing any information on how to achieve those goals prevented rational decision making: "[T]he trial court's instruction identified the ultimate destination, but did not tell the jury how to get there. Due process may not require a detailed roadmap, but it certainly requires directions of some sort." *Id.* at 49. *See supra* note 74 for the full text of the instruction.

¹¹³ *See Haslip*, 499 U.S. at 51-52 ("This is not a case where more precise standards are either impossible or impractical. . . . In my view . . . the '*Green Oil* factors' . . . could assist juries to make fair, rational decisions.").

¹¹⁴ *Id.* at 52.

¹¹⁵ *Id.*

¹¹⁶ The majority rejected the application of the void-for-vagueness doctrine to the case: "Decisions about the appropriate consequences of violating a law are significantly different from decisions as to whether a violation has occurred." *Id.* at 24 n.12.

¹¹⁷ 424 U.S. 319 (1976). In *Mathews*, the Supreme Court established a three-part balancing test for assessing procedural due process challenges:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. For a pre-*Haslip* argument that the punitive damages procedures used in most jurisdictions violated due process under *Mathews*, *see Wheeler, supra* note 45, at 278-322; *see also Haslip*, 499 U.S. at 56 (O'Connor, J., dissenting) (citing same).

¹¹⁸ *Haslip*, 499 U.S. at 53 (O'Connor, J., dissenting).

test, Justice O'Connor found that (1) the private interests involved were enormous, ranging up to millions of dollars;¹¹⁹ (2) the existing procedures produced unfair and inconsistent awards, and these problems could be easily remedied by instructing juries on the *Green Oil* factors rather than by post hoc judicial review;¹²⁰ and (3) the state had absolutely no interest in "standardless jury discretion."¹²¹

Justice O'Connor forcefully concluded her dissent by stating: "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."¹²²

C. *Substantive Due Process and the General "Reasonableness" Test:* *TXO Production Corp. v. Alliance Resources Corp.*

Just two years after *Haslip*, the Court returned to the due process implications of punitive damages.¹²³ *Haslip* had answered the issue of whether *procedural* due process places limits on punitive awards.¹²⁴ *TXO Production Corp. v. Alliance Resources Corp.*,¹²⁵ a plurality opinion authored by Justice Stevens, and joined by Chief Justice Rehnquist, Justice Blackmun, and Justice Kennedy (in part),¹²⁶ expressly stated what *Haslip* had only hinted: punitive damages may be so large as to constitute an arbitrary deprivation of property in violation of substantive due process.¹²⁷

The decision, however, fueled uncertainty in punitive damages jurisprudence. The plurality again refused to establish a bright-line constitutional test and instead adopted *Haslip's* procedural due process reasonableness test as the standard for whether the size of an

¹¹⁹ *Id.* at 54.

¹²⁰ *Id.* at 54-58. Analyzing the fairness of Alabama's existing procedures, Justice O'Connor thus challenged one of the core premises used by the majority to justify approval of Alabama's minimal instructions: "Post hoc review tests only the amount of the award, not the procedures by which that amount was determined. . . . Any award of punitive damages rendered under these procedures, no matter how small the amount, is constitutionally infirm." *Id.* at 43-44; *see also id.* at 55-56 (discouraging further the use of post hoc review).

¹²¹ *Id.* at 58. Justice O'Connor recognized that the states have a substantial interest in deterrence and punishment, but have no interest in arbitrary punitive damages awards. States cannot object to "procedural measures that merely ensure that punitive damages awards are based on some factual or legal predicate, rather than the personal predilections and whims of individuals jurors." *Id.* at 59-60.

¹²² *Id.* at 63 (citation omitted).

¹²³ *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993) (plurality opinion).

¹²⁴ *See supra* text accompanying notes 66-73.

¹²⁵ 509 U.S. 443 (1993).

¹²⁶ *Id.* at 446.

¹²⁷ *Id.* at 454.

award violates substantive due process.¹²⁸ In addition, the plurality's approach to reasonableness opened the door for future punitive damages battles. Specifically, the plurality suggested that evidence of a defendant's wealth and out-of-state conduct could support a punitive damages award.¹²⁹ Similarly, the plurality's approval of a punitive award 526 times the amount of compensatory damages conflicted with *Haslip's* suggestion that a 4 to 1 ratio was close to the constitutional line.¹³⁰

Although *TXO* created confusion, the separate opinions by Justices O'Connor and Kennedy helped shape the Court's future approach to punitive damages. Justice Kennedy adhered to his view expressed in *Haslip* that the appropriate measure of the constitutionality of a punitive damages award was not the size of the award, but whether the jury based its award on permissible considerations.¹³¹ Justice O'Connor likewise believed that due process required the jury to base a punitive damages award on permissible considerations, but further urged the adoption of objective criteria to measure the constitutionality of an award.¹³²

1. *The Plurality Opinion*

TXO Production Corporation brought a declaratory judgment action in West Virginia state court to clear a cloud on the title to an interest in oil and gas development rights.¹³³ The defendant, Alliance Resources Corporation, counterclaimed for slander of title, claiming that *TXO* had filed a frivolous suit in a bad faith effort to renegotiate a royalty agreement with Alliance.¹³⁴ The jury awarded Alliance \$19,000 in compensatory damages and \$10 million in punitive damages.¹³⁵ The West Virginia Supreme Court affirmed the award.¹³⁶

In the United States Supreme Court, *TXO* raised a substantive due process challenge, arguing that "an award 526 times greater than the actual damages awarded by the jury—is so excessive that it must be deemed an arbitrary deprivation of property without due process of law."¹³⁷ *TXO* also argued that the jury instructions gave the jury

¹²⁸ *Id.* at 456-58.

¹²⁹ *Id.* at 462 n.28, 464.

¹³⁰ *Id.* at 459.

¹³¹ *Id.* at 467-69 (Kennedy, J., concurring in part and concurring in the judgment).

¹³² *Id.* at 475-501 (O'Connor, J., dissenting).

¹³³ *Id.* at 449.

¹³⁴ *Id.* at 450.

¹³⁵ *Id.* at 451.

¹³⁶ *Id.* at 453.

¹³⁷ *Id.*

unbridled discretion and violated procedural due process, even under the lenient standard set forth in *Haslip*.¹³⁸

a. *Substantive Due Process*

The plurality first addressed the substantive due process claim. The opinion acknowledged prior decisions stating that the Due Process Clause of the Fourteenth Amendment imposed “substantive limits ‘beyond which penalties may not go.’”¹³⁹ While the parties agreed that due process imposed limits on the amount of punitive damages, they urged the Court to adopt standards for determining whether a particular award violated due process.¹⁴⁰ Alliance favored a deferential “rational-basis” test,¹⁴¹ whereas TXO urged the Court to adopt objective criteria for substantive due process review.¹⁴² The plurality, however, declined to adopt any definitive test or factors to assess the excessiveness of awards under substantive due process principles.¹⁴³ Instead, the plurality adopted the same amorphous reasonableness standard used in *Haslip* to assess procedural due process claims:

In the end, then, in determining whether a particular award is so “grossly excessive” as to violate the Due Process Clause of the Fourteenth Amendment, we return to what we said two Terms ago in *Haslip*: “We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concern[n] of reasonableness . . . properly enter[s] into the constitutional calculus.”¹⁴⁴

Using reasonableness as a guide, the plurality first addressed TXO’s primary argument that the punitive award was 526 times the amount of compensatory damages and, therefore, contrary to the

¹³⁸ *Id.* at 462-63.

¹³⁹ *Id.* at 453-54 (citations omitted).

¹⁴⁰ *Id.* at 455.

¹⁴¹ *Id.*

¹⁴² *Id.* TXO proposed a test that would gauge a punitive award against: “(1) awards of punitive damages upheld against other defendants in the same jurisdiction, (2) awards upheld for similar conduct in other jurisdictions, (3) legislative penalty decisions with respect to similar conduct, and (4) the relationship of prior punitive awards to the associated compensatory awards.” *Id.* at 455-56 (citing Brief for Petitioner at 16, *TXO* (No. 02-215)).

¹⁴³ *Id.* at 456. The plurality found flaws with the tests proposed by both Alliance and TXO. Alliance’s rational basis standard was flawed because “any award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large, would be acceptable.” *Id.* TXO’s standard, on the other hand, disregarded protections provided by the judicial process. *Id.* at 456-57. Moreover, the opinion questioned the validity of a test based on a comparison to other cases where “no two cases are truly identical, [and thus] meaningful comparisons of such awards are difficult to make.” *Id.* at 457 (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 41-42 (1991) (Kennedy, J., concurring)).

¹⁴⁴ *Id.* at 458 (alterations in original) (citations omitted). For Justice Scalia’s criticism of the reasonableness text, see *infra* notes 180-85 and accompanying text.

general rule that punitive damages should bear a “reasonable relationship” to compensatory damages.¹⁴⁵ The plurality recognized that *Haslip* indicated that a 4 to 1 ratio “‘may be close to the line’ of constitutional impropriety.”¹⁴⁶ The plurality, however, rejected TXO’s argument that the high ratio rendered the award unreasonable. The plurality determined that the “dramatic disparity between the actual damages and the punitive award”¹⁴⁷ was justified on two grounds: (1) “the magnitude of the *potential harm* that the defendant’s conduct would have caused to its intended victim if the wrongful plan had succeeded”;¹⁴⁸ and (2) “the possible harm to other victims that might have resulted if similar future behavior were not deterred.”¹⁴⁹ Based on this potential harm analysis, the plurality implicitly suggested that the ratio should not be considered 526 to 1, but rather not more than 10 to 1.¹⁵⁰ Accordingly, the plurality concluded that the large award did not “‘jar one’s constitutional sensibilities.”¹⁵¹

The plurality’s approach played a key role in future conflicts over the appropriate criteria used in any ratio analysis. Some courts justified multiple-digit ratios with unrealistic assumptions about the “potential harm” to the plaintiff that could have resulted from the misconduct.¹⁵² Further, several courts interpreted *TXO* as allowing consideration of harm to nonparties in the ratio calculation.¹⁵³

b. *Wealth and Out-of-state Conduct*

Retreating from *Haslip*’s skepticism about the misuse of a defendant’s wealth in setting a punitive award,¹⁵⁴ the plurality determined that the award could be justified in part based on TXO’s wealth and out-of-state conduct.¹⁵⁵ TXO argued that the evidence of its wealth

¹⁴⁵ *TXO*, 509 U.S. at 459-61.

¹⁴⁶ *Id.* at 459 (citation omitted).

¹⁴⁷ *Id.* at 462.

¹⁴⁸ *Id.* at 460. For Justice O’Connor’s criticism of the potential harm analysis, see *infra* note 202.

¹⁴⁹ *TXO*, 509 U.S. at 460.

¹⁵⁰ *Cf. id.* at 462. The plurality did not explicitly characterize the award as a 10 to 1 ratio. Rather, it explained that if TXO’s fraud had succeeded, Alliance could have lost anywhere from \$1 million to \$8.3 million in royalties, effectively resulting in a ratio of not more than ten times the \$10 million punitive award. *Id.* at 462. The Court later expressly characterized the ratio in *TXO* as “not more than 10 to 1.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996).

¹⁵¹ *TXO*, 509 U.S. at 462 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 409 U.S. 1, 18 (1991)).

¹⁵² See, e.g., *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 442 (2001) (discussing the lower court’s reliance on “unrealistic” potential harm analysis to justify punitive damages award).

¹⁵³ See sources cited *infra* note 374.

¹⁵⁴ See *supra* discussion accompanying note 92.

¹⁵⁵ *TXO*, 509 U.S. at 461-62.

and out-of-state conduct¹⁵⁶ allowed the jury to base its punitive damages award on improper considerations, such as prejudice against large out-of-state corporations.¹⁵⁷ Although recognizing that this evidence increased the risk that the jury might act out of bias,¹⁵⁸ the plurality stated that “factors such as these are typically considered in assessing punitive damages.”¹⁵⁹

c. *Procedural Due Process*

The plurality then turned to TXO’s procedural due process challenge.¹⁶⁰ TXO challenged the punitive damages instruction given to the jury because it was different from the skeletal *Haslip* instruction in two respects.¹⁶¹ First, the instruction allowed the jury to consider “the wealth of the perpetrator.”¹⁶² Second, it stated that one of the purposes of punitive damages is “to provide additional compensation for the conduct to which the injured parties have been subjected.”¹⁶³ The plurality recognized the risks posed by these aspects of the jury

¹⁵⁶ *Id.* at 462 n.28.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 464 (noting that “emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations”).

¹⁵⁹ *Id.* at 462 n.28. Justices White, O’Connor, and Souter disagreed with the plurality’s wealth determination. See discussion *infra* accompanying notes 204-07.

¹⁶⁰ *TXO*, 509 U.S. at 462-66.

¹⁶¹ *Id.*

¹⁶² *Id.* at 463. In its entirety, the challenged instruction provided:

In addition to actual or compensatory damages, the law permits the jury, under certain circumstances, to make an award of punitive damages, in order to punish the wrongdoer for his misconduct, to serve as an example or warning to others not to engage in such conduct and to provide additional compensation for the conduct to which the injured parties have been subjected.

If you find from a preponderance of the evidence that TXO Production Corp. is guilty of wanton, wilful, malicious or reckless conduct which shows an indifference to the right of others, then you may make an award of punitive damages in this case.

In assessing punitive damages, if any, you should take into consideration all of the circumstances surrounding the particular occurrence, including the nature of the wrongdoing, the extent of the harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances which may operate to reduce the amount of the damages. The object of such punishment is to deter TXO Production Corp. and others from committing like offenses in the future. Therefore the law recognizes that to in fact deter such conduct may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances.

Id. at 463 n.29.

¹⁶³ *Id.* at 463-64.

instruction,¹⁶⁴ but declined to address TXO's procedural due process challenge because the issue "was not properly presented."¹⁶⁵

2. Justice Kennedy's Concurrence

Justice Kennedy wrote separately to express his view on the requirements of substantive due process.¹⁶⁶ Justice Kennedy concluded that *Haslip's* general reasonableness test was not significantly better than the tests proposed by the parties: "To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what?"¹⁶⁷ Justice Kennedy explained that the reasonableness standard failed to impose meaningful restraints on a jury, and instead gave "the illusion of judicial certainty where none in fact exists."¹⁶⁸

In his view, the proper constitutional inquiry "focuses not on the amount of money a jury awards in a particular case but on its reasons for doing so."¹⁶⁹ Specifically, Justice Kennedy reiterated his *Haslip* position that the proper constitutional inquiry considers whether the jury based its award on improper considerations, such as "bias, passion or prejudice."¹⁷⁰ Thus, Justice Kennedy observed that it is possible for a punitive damages award to violate substantive due process regardless of the amount of the award.¹⁷¹

Consequently, Justice Kennedy looked for any indication that the jury based its award on improper considerations. He conceded that there was a "plausible argument"¹⁷² that the jury based its award on

¹⁶⁴ See *id.* at 464 (noting that the plurality did "not understand the reference in the instruction to 'additional compensation'"); see also *supra* notes 155-59 and accompanying text (discussing consideration of wealth).

¹⁶⁵ TXO, 509 U.S. at 464. The plurality also rejected TXO's argument that the trial judge's failure to articulate his reasons for upholding the award violated procedural due process. *Id.* at 464-65. Finally, the plurality rejected TXO's claim that it lacked "notice of the possibility that the award of punitive damages might be divorced from an award of compensatory damages." *Id.* at 465. The plurality noted that TXO had notice that punitive damages had been upheld in West Virginia even in the absence of any compensatory damages and, in any event, "the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct." *Id.* at 465-66.

¹⁶⁶ *Id.* at 466 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy concurred only in the plurality's discussion of the facts and procedural due process.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 467. Justice Kennedy viewed the general reasonableness test as giving a reviewing court virtually "nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution." *Id.* at 466-67.

¹⁶⁹ *Id.* at 467.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* ("When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award.")

¹⁷² *Id.* at 468.

bias against a large, out-of-state corporation.¹⁷³ Nevertheless, Justice Kennedy found a more probable explanation for the jury's award: a legitimate decision to harshly punish TXO because of the willful and malicious nature of its conduct.¹⁷⁴ While noting that the case was "close and difficult,"¹⁷⁵ Justice Kennedy concluded that "the jury's punitive damages award did not amount to an unfair, arbitrary, or irrational seizure of TXO's property."¹⁷⁶

3. Justice Scalia's Concurrence

Justice Scalia, joined by Justice Thomas, disagreed with the plurality's substantive due process holding.¹⁷⁷ Justice Scalia began his concurrence by restating his *Haslip* view that due process requires only the assessment of punitive damages under the common law method.¹⁷⁸ Because the punitive damages award resulted from this common law method, Justice Scalia believed due process was satisfied.¹⁷⁹

Justice Scalia, however, wrote separately to challenge the plurality's determination that the Due Process Clause provides a substantive right to a reasonable punitive damages award.¹⁸⁰ To say that "'procedural due process' requires judicial review of punitive damages awards for reasonableness," he explained, "is not to say that there is a federal constitutional right to a substantively correct 'reasonableness' determination."¹⁸¹ Justice Scalia argued that a substantive due process right to a reasonable amount of punitive damages rendered the Excessive Fines Clause superfluous.¹⁸²

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 469.

¹⁷⁵ *Id.* at 468.

¹⁷⁶ *Id.* at 469.

¹⁷⁷ *Id.* at 470 (Scalia, J., concurring in the judgment).

¹⁷⁸ *Id.* Justice Scalia noted that the jury was instructed on the purpose of punitive damages, and the award was reviewed by the trial court and appellate courts. In his view, "[t]raditional American practice governing the imposition of punitive damages requires no more." *Id.*

¹⁷⁹ *Id.* Accordingly, Justice Scalia joined in the judgment, rejecting TXO's claims.

¹⁸⁰ *Id.* at 471 ("judicial assessment of their reasonableness is a federal right, but a correct assessment of their reasonableness is not."). The plurality took issue with Justice Scalia's characterization of its holding:

Justice Scalia's assertion notwithstanding, we do not suggest that a defendant has a substantive due process right to a correct determination of the "reasonableness" of a punitive damages award. . . . A violation of a state law "reasonableness" requirement would not, however, necessarily establish that the award is so "grossly excessive" as to violate the Federal Constitution.

Id. at 458 n.24 (plurality opinion) (citation omitted).

¹⁸¹ *Id.* at 471 (Scalia, J., concurring in the judgment).

¹⁸² *Id.* (arguing that if the Due Process Clause "contains the substantive right not to be subjected to excessive punitive damages, . . . it would surely also contain the substantive right not to

Tongue-in-cheek, Justice Scalia purported to find the plurality opinion “valuable”¹⁸³ because its lack of meaningful standards did nothing to change “the traditional ones that ought to govern.”¹⁸⁴ He observed that future cases would “be disposed of simply with the observation that ‘this is no worse than *TXO*.’”¹⁸⁵

4. Justice O'Connor's Dissent

Consistent with her *Haslip* dissent, Justice O'Connor, joined by Justice White and Justice Souter (in part),¹⁸⁶ concluded that “neither this award’s size nor the procedures that produced it are consistent with the principles this Court articulated in *Haslip*.”¹⁸⁷

First, Justice O'Connor emphasized her *Haslip* position that due process requires adequate jury instructions.¹⁸⁸ Justice O'Connor found that the “vague and amorphous guidance”¹⁸⁹ provided to juries on punitive damages heightens the risk of “prejudice, bias, and caprice.”¹⁹⁰ For example, Justice O'Connor noted that while jurors may be instructed that the goal of punitive damages is punishment and deterrence, courts rarely educate juries on how to reach these goals.¹⁹¹ While conceding that such instructions may satisfy *Haslip*, Justice O'Connor concluded that “the lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury’s verdict.”¹⁹² Justice O'Connor noted the difficulty of determining whether a punitive damages award is the result of passion or prejudice,¹⁹³ but indicated

be subjected to excessive fines, which would make the Excessive Fines Clause of the Eighth Amendment superfluous in light of the Due Process Clause of the Fifth Amendment”).

¹⁸³ *Id.* at 472.

¹⁸⁴ *Id.* at 471.

¹⁸⁵ *Id.* at 472.

¹⁸⁶ Justice Souter joined only in Justice O'Connor's discussion on “permissible considerations” (Part II-B-2), the jury's consideration of TXO's wealth (Part II-C), the insufficiency of the post-verdict review (Part III), and the conclusion (Part IV). *Id.* at 472. In the end, Justice Souter took no position on whether substantive due process imposes any limits on the amount of punitive damages awards.

¹⁸⁷ *Id.* at 473 (O'Connor, J., dissenting).

¹⁸⁸ *Id.* at 473-75.

¹⁸⁹ *Id.* at 474.

¹⁹⁰ *Id.* Later in her dissent, Justice O'Connor further criticized the lack of reform by the lower courts after *Haslip*: “[A]lthough some courts have made genuine efforts at reform, many courts continue to provide jurors with skeletal guidance that permits the traditional guarantor of fairness—the jury itself—to be converted into a source of caprice and bias.” *Id.* at 500-01.

¹⁹¹ *Id.* at 474-75.

¹⁹² *Id.* at 475. Justice O'Connor went on to state that “[i]f there is a fixture of due process, it is that a verdict based on such influences cannot stand.” *Id.* at 475-76.

¹⁹³ *Id.* at 476.

that the award's lack of proportionality may provide one measure of bias.¹⁹⁴

Second, while Justice O'Connor agreed that substantive due process imposes limits on punitive damages,¹⁹⁵ she criticized the plurality for adopting the *Haslip* general reasonableness test instead of more objective criteria for assessing the constitutionality of punitive awards.¹⁹⁶ Instead, Justice O'Connor concluded that TXO's proposed test¹⁹⁷ was probative of whether the award violated due process.¹⁹⁸ Applying the proposed test,¹⁹⁹ Justice O'Connor concluded that relationship of the punitive to the compensatory award was "dramatically irregular, if not shocking" and "[a]t the very least it should raise a suspicious judicial eyebrow."²⁰⁰ Justice O'Connor acknowledged that, in some cases, a disproportionate award may be justified by "unrealized harm to the victim" or the "defendant's anticipated gain."²⁰¹ However, she concluded that the record in *TXO* did not support these justifications.²⁰²

Third, Justice O'Connor analyzed whether the jury relied on impermissible factors in calculating the punitive damages award: "After all, due process does not simply require that a particular result be substantively acceptable; it also requires that it be reached on the

¹⁹⁴ *Id.* at 478-79 ("[C]ourts historically have required that punitive damages awards bear a reasonable relationship to the actual harm imposed.").

¹⁹⁵ *Id.* at 479-80.

¹⁹⁶ *Id.* at 479 ("The plurality opinion erects not a single guidepost to help other courts find their way through this area. Rather, . . . the plurality abandons all pretense of providing instruction and moves directly into the specifics of this case.").

¹⁹⁷ TXO suggested that to assess whether an award is grossly excessive in violation of due process, courts should evaluate "various objective indicators, including the relationship between the punitive damages award and compensatory damages, awards of punitive damages upheld against other defendants in the same jurisdiction, awards upheld for similar torts in other jurisdictions, and legislatively designated penalties for similar misconduct." *Id.* at 481. See also *supra* note 142 for the plurality's characterization of TXO's proposed factors.

¹⁹⁸ *TXO*, 509 U.S. at 481 (O'Connor, J., dissenting).

¹⁹⁹ *Id.* at 481-84. Justice O'Connor went through each one of TXO's proposed factors. First, she found that the disparity between the \$10 million punitive award—"over 500 times actual damages—surely must cross" the line of "constitutional impropriety." *Id.* at 482 (citations omitted). Next, she compared the award against other punitive damages awards in West Virginia: "It is 20 times larger than the highest punitive damages award ever upheld in West Virginia history for any misconduct." *Id.* She further noted that the award was 10 times greater than any punitive damages awards for slander in other jurisdictions. *Id.* She did not consider TXO's final factor, comparable statutory penalties in West Virginia.

²⁰⁰ *Id.* at 481.

²⁰¹ *Id.* at 484.

²⁰² *Id.* Justice O'Connor criticized the plurality's reliance on "potential harm" ratio analysis as unsupported by the record: "The record demonstrates that the potential harm theory is little more than an after-the-fact rationalization invented by counsel to defend this startling award on appeal." *Id.* at 484-85. Likewise, based on the evidence in the record, Justice O'Connor concluded that the jury did not have evidence of TXO's "potential gain." *Id.* at 488-89.

basis of permissible considerations.”²⁰³ Justice O’Connor determined that TXO’s status as a wealthy, out-of-state corporation exerted an improper influence on the jury.²⁰⁴ Unlike the instruction in *Haslip*, the TXO instruction directed the jury to consider TXO’s wealth and to “provide additional compensation.”²⁰⁵ These factors, she concluded, “encouraged the jury to transfer some of TXO’s impressive wealth to the smaller and more sympathetic respondents [T]he instructions practically ensured that this would occur.”²⁰⁶ Justice O’Connor recognized that consideration of a defendant’s wealth itself was not unconstitutional, but seemed to suggest that wealth should be considered only by the courts during appellate review.²⁰⁷

Finally, Justice O’Connor disagreed with the plurality’s procedural due process ruling,²⁰⁸ concluding that TXO’s challenge was both adequately preserved²⁰⁹ and meritorious.²⁰⁹ Although the instructions were similar to those approved in *Haslip*, Justice O’Connor found the post-verdict review lacking and unable to cure the instructional deficiencies.²¹⁰

D. Procedural Due Process Requires Post-verdict Review: Honda Motor Co. v. Oberg

One year after *TXO*, the Court revisited procedural due process in *Honda Motor Co. v. Oberg*.²¹¹ In an opinion authored by Justice Stevens, joined by Justices Blackmun, O’Connor, Scalia, Kennedy, Souter, and Thomas, the Court held that procedural due process requires post-verdict review of punitive damages awards by trial and appellate courts.²¹² While addressing procedural due process, the decision did not alter *Haslip*’s reasonableness test, but simply determined that a state generally cannot take away historical procedural checks on punitive awards.²¹⁵

²⁰³ *Id.* at 486.

²⁰⁴ *Id.* at 489 (“[I]t seems quite likely that the jury in fact was unduly influenced by the fact that TXO is a very large, out-of-state corporation.”).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 490.

²⁰⁷ *Id.* at 492 (“*Haslip* itself suggests that the defendant’s wealth is a permissible consideration, although it does so only in the context of *appellate* review.” (citation omitted)).

²⁰⁸ *Id.* at 495.

²⁰⁹ *Id.* at 495-96.

²¹⁰ *Id.* at 496-97.

²¹¹ 512 U.S. 415 (1994).

²¹² *Id.* at 432.

²¹⁵ The unusual nature of the issue allowed several Justices to join the decision. Oregon’s elimination of procedural constraints on punitive damages brought Justices Kennedy and O’Connor, both of whom were critical of the lack of constraints on jury discretion, into the majority. Similarly, Oregon’s departure from historic common law practices likely prompted Justices Scalia and Thomas to join the majority.

1. *The Majority Opinion*

In *Oberg*, the plaintiff brought a products liability action against an all-terrain vehicle manufacturer for injuries sustained when the plaintiff's vehicle overturned.²¹⁴ The jury awarded the plaintiff \$735,512.31²¹⁵ in compensatory damages and \$5 million in punitive damages.²¹⁶ On appeal, the defendant challenged both the award's excessiveness and Oregon's prohibition against post-verdict review of the amount of a punitive damages award.²¹⁷ The Oregon Supreme Court affirmed the verdict.²¹⁸

Although the defendant challenged the size of the award,²¹⁹ the United States Supreme Court limited its opinion to deciding whether Oregon's prohibition of judicial review violated procedural due process under *Haslip*. Starting with *Haslip*'s premise that the common law method for assessing punitive damages provides the benchmark for constitutional analysis, the Court focused on Oregon's departure from traditional procedures.²²⁰

Finding that Oregon's ban on post-verdict review drastically departed²²¹ from the three-tiered common law method for reviewing punitive damages, the Court considered whether the departure was justified.²²² There had been no social changes²²³ nor technological improvements that would justify reducing judicial checks on punitive damages.²²⁴ To the contrary, the Court determined that "the rise of large, interstate and multinational corporations has aggravated the

²¹⁴ *Oberg*, 512 U.S. at 418.

²¹⁵ *Id.* The jury originally awarded \$919,390.39 in compensatory damages, but this amount was reduced by twenty percent because of the plaintiff's contributory fault. *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* At the time of *Oberg*, Oregon courts could not reduce the amount of a punitive damages award on the ground of excessiveness. *Id.* Rather, a court could vacate the judgment only if there was "no evidence to support the jury's decision." *Id.* at 419 (quoting *Honda Motor Co. v. Oberg*, 851 P.2d 1084, 1096 (Or. 1993)).

²¹⁸ *Oberg*, 851 P.2d 1084.

²¹⁹ *Oberg*, 512 U.S. at 418. The Court adopted the plurality view in *TXO* that "the Constitution imposes a substantive limit on the size of punitive damages awards." *Id.* at 420. The Court further recognized that *TXO* failed to provide any "standard that will identify unconstitutionally excessive awards," but decided that *Oberg* did not present this issue for review. *Id.*

²²⁰ *Id.* at 421 (stating that the opinions in *Haslip* and *TXO* suggest the Court's analysis in *Oberg* "should focus on Oregon's departure from traditional procedures").

²²¹ *Id.* at 426 ("There is a dramatic difference between the judicial review of punitive damages awards under the common law and the scope of review available in Oregon.").

²²² *Id.* at 430. The Court noted that the abrogation of a common law protection presumptively violated due process. *Id.* "When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Id.* (citations omitted).

²²³ *Id.* at 431.

²²⁴ *Id.*

problem of arbitrary awards and potentially biased juries.”²²⁵ For instance, the Court recognized that juries often have wide latitude in setting the amounts of awards and the presentation of evidence of a defendant’s wealth creates the risk that juries will improperly use their verdicts to express bias against big business.²²⁶ The Court held that judicial review is one of the few procedural safeguards the common law provided against such dangers, and Oregon could not properly remove that restraint absent a valid justification or adoption of substitute procedural protections.²²⁷

Finally, the Court rejected the plaintiff’s (and the dissent’s) argument that other safeguards rendered Oregon’s system constitutionally sufficient.²²⁸ The plaintiff pointed to four safeguards: (1) the limitation of a punitive damages award to the amount pled in the complaint; (2) the clear and convincing standard of proof; (3) the availability of a pre-verdict determination by the court of a maximum amount of punitive damages; and (4) Oregon’s detailed jury instructions.²²⁹ The Court found that none of these safeguards could replace the need for post-verdict review.²³⁰ Regarding Oregon’s detailed jury instructions, the Court recognized that proper jury instructions are an “important check against excessive awards,” but expressed concern that the jury would disregard the instructions and return an improperly biased or arbitrary verdict.²³¹ Accordingly, the Court concluded that Oregon’s denial of judicial review violated procedural due process.²³²

²²⁵ *Id.*

²²⁶ *Id.* at 432. The Court noted that “[p]unitive damages pose an acute danger of arbitrary deprivation of property,” and explained that jury instructions often provide no real check on the jury’s discretion:

Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant’s net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences. Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger.

Id.

²²⁷ *See id.* (“Oregon has removed that safeguard without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time.”).

²²⁸ *Id.* at 432-35.

²²⁹ *Id.* at 433.

²³⁰ The Court reasoned that the cap was no constraint at all since “there is no limit to the amount the plaintiff can request” in punitive damages in the complaint. *Id.* While the clear and convincing standard “is an important check,” the Court determined that it only provided a limit on the imposition of punitive damages, not protection against an excessive amount. *Id.* The Court rejected the third safeguard since there was no support for the proposition that Oregon courts set maximum punitive damages awards in advance of the verdict. *Id.*

²³¹ *Id.*

²³² *Id.* at 435.

2. Justice Scalia's Concurrence

Although Justice Scalia joined the majority, he wrote separately to elaborate on the history of Oregon's departure from the common law method.²³³ Consistent with his adherence to the historical approach to punitive damages procedures, Justice Scalia concluded that Oregon's departure from the common law method violated due process.²³⁴

3. Justice Ginsburg's Dissent

Justice Ginsburg, joined by Chief Justice Rehnquist, dissented.²³⁵ Justice Ginsburg noted that neither *Haslip* nor *TXO* "declared any specific procedures or substantive criteria essential to satisfy due process," but instead referred to general concerns of reasonableness.²³⁶ The dissent argued that four pre-verdict mechanisms adequately constrained the jury's discretion, eliminating the need for post-verdict review.²³⁷

In particular, Justice Ginsburg focused on (1) the limit of a punitive damages award to the amount pled in the complaint;²³⁸ (2) the plaintiff's inability to introduce evidence regarding the defendant's wealth until after presenting a prima facie claim of punitive damages;²³⁹ (3) the application of the clear and convincing evidence standard;²⁴⁰ and (4) Oregon's multifactor jury instructions.²⁴¹ With regard to jury instructions, Justice Ginsburg noted that Oregon's multifactor instructions resembled the seven *Green Oil* factors that Alabama courts used to test punitive awards.²⁴² She noted that *Haslip* looked to

²³³ *Id.* (Scalia, J., concurring). Justice Scalia explained that Oregon originally had provided a state-law "reasonableness" limit on the amount of punitive damages, but amended its procedures in 1910 to prevent a court from ordering a remittitur. *Id.* at 435-36.

²³⁴ *Id.* at 436 ("The deprivation of property without observing (or providing a reasonable substitute for) an important traditional procedure for enforcing state-prescribed limits upon such deprivation violates the Due Process Clause.").

²³⁵ *Id.* at 436 (Ginsburg, J., dissenting).

²³⁶ *Id.* at 437.

²³⁷ *Id.* at 438-41.

²³⁸ *Id.* at 438. Justice Ginsburg pointed out that Oregon law did not preclude a defendant "from seeking an instruction setting a lower cap, if the evidence at trial cannot support an award in the amount demanded." *Id.* at 439.

²³⁹ *Id.* Justice Ginsburg found that this limitation was "designed to lessen the risk 'that juries will use their verdicts to express biases against big businesses.'" *Id.* (quoting *id.* at 432 (majority opinion)).

²⁴⁰ *Id.* at 439-40. In Justice Ginsburg's view, the "clear and convincing evidence" standard "constrain[s] the jury's discretion, limiting punitive damages to the more egregious cases." *Id.* at 440 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 58 (1991) (O'Connor, J., dissenting)).

²⁴¹ *Id.* at 440-41.

²⁴² *Id.* at 443.

the “procedure, as a whole and in its net effect.”²⁴³ Justice Ginsburg argued that the case presented the flip side of *Haslip*. Unlike *Haslip*, where stronger post-verdict review compensated for minimal instructions, in *Oberg* the detailed jury instructions²⁴⁴ made up for the limited²⁴⁵ post-verdict review²⁴⁶ by providing adequate constitutional guidance to the jury in its assessment of punitive damages.²⁴⁷

E. Defining Reasonableness for Substantive Due Process Through the “Guideposts”: BMW of North America, Inc. v. Gore

In 1996, the Court shifted its focus back to the substantive due process limits on punitive damages. In *BMW of North America, Inc. v. Gore*,²⁴⁸ an opinion by Justice Stevens, joined by Justices O’Connor, Kennedy, Souter, and Breyer, the Court did two firsts: it articulated specific post-verdict standards for punitive damages review and it struck down an award as “unconstitutionally excessive.”²⁴⁹

While announcing “guideposts” to assist the lower courts, the Court still disclaimed any bright-line test and adhered to its prior reasonableness standard. The lower courts, however, treated the guideposts as the definitive constitutional test. Importantly, *BMW* also recognized—as Justices O’Connor and Kennedy previously had urged—that a proper due process inquiry does not just focus on the amount of the award, but also considers whether it is based on improper considerations. Although establishing a framework for the constitutionality of punitive damages awards, the decision prompted divergent lower court interpretations and widespread criticism that the Court had provided no real standards at all.²⁵⁰

²⁴³ *Id.* at 444 (quoting *Honda Motor Co. v. Oberg*, 851 P.2d 1084, 1096 (Or. 1993)).

²⁴⁴ *Id.* at 441. Justice Ginsburg observed that jury instructions “are perhaps more likely to prompt rational and fair punitive damage decisions than are the *post hoc* checks employed in jurisdictions following Alabama’s pattern.” *Id.* at 444.

²⁴⁵ Although Oregon did not allow post-verdict review for excessiveness, Justice Ginsburg pointed out that Oregon law did allow limited post-verdict review for lack of evidence to support the verdict or for instructional error. *Id.* at 445-46.

²⁴⁶ *Id.* at 443-44 (noting that unlike Alabama, Oregon does not allow excessiveness review by the trial court or appellate review to test the award against certain specific criteria).

²⁴⁷ *Id.* at 450. Finally, Justice Ginsburg disagreed with the majority’s view that the common law provided judicial remittitur of the size of a punitive damages award. *Id.* at 443-44. In her view, early American common law suggested that juries were given vast discretion, even to determine the law. An assessment of damages was “exclusively a jury function.” *Id.* at 447. She also noted that common law did not require Oregon’s multifactor instructions. *Id.* at 448.

²⁴⁸ 517 U.S. 559 (1996).

²⁴⁹ *Id.* at 568 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994)).

²⁵⁰ See *infra* notes 372-77 and accompanying text.

1: *The Majority Opinion*

The plaintiff sued BMW, a car manufacturer, for fraud based on BMW's failure to disclose that the plaintiff's new car had been repainted to cover pre-delivery damage to the vehicle from acid rain.²⁵¹ The plaintiff sought \$4000 in compensatory damages,²⁵² and \$4 million in punitive damages. The plaintiff justified the \$4 million punitive request by multiplying the \$4000 actual damages by the thousand similar violations BMW had committed nationwide.²⁵³ The jury apparently applied this calculation, awarding the full amount of compensatory and punitive damages requested by the plaintiff.²⁵⁴

In post-verdict motions, BMW showed that its nondisclosure policy was consistent with the laws of roughly twenty-five states and argued that the jury's \$4 million punitive award therefore was improperly based on lawful conduct.²⁵⁵ BMW further contended that the award was unconstitutionally excessive.²⁵⁶ Applying the *Green Oil* factors discussed in *Haslip*, the Alabama Supreme Court affirmed.²⁵⁷ The Alabama Supreme Court, however, agreed that the jury improperly calculated the \$4 million punitive award by multiplying the plaintiff's compensatory damages by the number of similar sales in other jurisdictions.²⁵⁸ To remedy this error, the Alabama Supreme Court reduced the award to \$2 million, disclaiming that any portion of the reduced award had been based on sales that occurred in other jurisdictions.²⁵⁹

In a 5-4 decision, the United States Supreme Court held that the \$2 million award was grossly excessive.²⁶⁰ The Court began by answering the question posed by Justice Kennedy in *TXO*: "grossly excessive in relation to what?"²⁶¹ The Court determined that the excessiveness of a punitive damages award must be measured by reference to "the

²⁵¹ *BMW*, 517 U.S. at 563 & n.1.

²⁵² See *id.* at 564 (basing compensatory damage on expert testimony claiming that the value of a repainted BMW is approximately ten percent less than the value of an undamaged new car).

²⁵³ *Id.*

²⁵⁴ *Id.* at 565.

²⁵⁵ *Id.* (stating none of the twenty-five states mandated disclosure of repairs costing less than three percent of the suggested retail price of a car).

²⁵⁶ *Id.* at 566.

²⁵⁷ See *id.* at 566-67 (articulating the factors in *Green Oil v. Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1989), and approved in *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991)).

²⁵⁸ *Id.* at 567.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 575.

²⁶¹ See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 466 (1993) (Kennedy, J., concurring) ("To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what?"); see also *supra* text accompanying notes 166-76.

State's legitimate interests in punishment and deterrence,"²⁶² and set forth a two-step process for excessiveness review.

a. *Identifying the State Interest*

Because substantive due process prohibits awards that are grossly excessive in relation to a state's punitive damages interests, "the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve."²⁶³ In essence, the Court determined that a punitive damages award based on considerations that a state has no interest in punishing or deterring necessarily is grossly excessive. The Court held that Alabama had a legitimate interest in punishing and deterring BMW for fraud.²⁶⁴ As a matter of federalism and state sovereignty, however, the Court determined that Alabama had no legitimate interest in imposing punitive damages with the intent of changing a "tortfeasors' lawful conduct in other States."²⁶⁵ Consequently, the Court determined that Alabama could not alter a defendant's nationwide policies, when those policies were lawful elsewhere,²⁶⁶ and a punitive damages award imposed to do so was improper.

Finally, the Court discussed two issues that would become pertinent in later cases. First, while recognizing that an award cannot be used to punish out-of-state conduct that was lawful where it occurred, the Court reaffirmed *TXO's* recognition that a defendant's out-of-state transactions may be admissible evidence relevant to assessing the reprehensibility of the defendant's conduct.²⁶⁷ The Court, however, stated that the Alabama Supreme Court "properly eschewed reliance

²⁶² *BMW*, 517 U.S. at 568 ("Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.").

²⁶³ *Id.*

²⁶⁴ *Id.* at 568, 568-74 ("No one doubts that a state may protect its citizens by prohibiting deceptive trade practices and by requiring automobile distributors to disclose presale repairs that affect the value of a new car.").

²⁶⁵ *Id.* at 572.

²⁶⁶ *Id.* at 572-73 ("Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW . . . to deter conduct that is lawful in other jurisdictions." (citation omitted)).

²⁶⁷ *Id.* at 574 n.21. The Court explained:

[T]he fact that the Alabama Supreme Court correctly concluded that it was error for the jury to use the number of sales in other States as a multiplier in computing the amount of its punitive sanction does not mean that evidence describing out-of-state transactions is irrelevant in a case of this kind. To the contrary, as we stated in [*TXO*], such evidence may be relevant to the determination of the degree of reprehensibility of the defendant's conduct.

Id.; see also *id.* at 573 n.19 (noting that extraterritorial conduct remains relevant to assessing the "defendant's character and prospects for rehabilitation").

on BMW's out-of-state conduct, and based its remitted award solely on conduct that occurred within Alabama."²⁶⁸ Second, the Court left open whether a state could punish out-of-state conduct that was *unlawful* in the state where the conduct occurred.²⁶⁹

b. *Excessiveness Standards*

The Court then turned to whether the award was grossly excessive in relation to Alabama's interest in punishing unlawful conduct within its borders.²⁷⁰ Implicitly responding to Justice O'Connor's dissent in *TXO* criticizing the lack of objective due process standards,²⁷¹ the Court identified three "guideposts" in determining whether an award is unconstitutionally excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual harm or potential harm to the plaintiff and the punitive damages award; and (3) the difference between the punitive damages award and civil or criminal penalties imposed in comparable cases.²⁷²

The Court characterized reprehensibility as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award,"²⁷³ and described a sliding scale of reprehensible conduct: violent crimes more reprehensible than nonviolent crimes;²⁷⁴ trickery and deceit more reprehensible than negligence;²⁷⁵ conduct causing physical harm more reprehensible than conduct causing purely economic harm;²⁷⁶ deliberate false statements more reprehensible than omissions of material facts;²⁷⁷ and repeated conduct more reprehensible than an isolated incident.²⁷⁸ The Court cited Justice Kennedy's

²⁶⁸ *Id.* at 573-74 (citation omitted).

²⁶⁹ *See id.* at 573 n.20 ("Given that the verdict was based in part on out-of-state conduct that was lawful where it occurred, we need not consider whether one State may properly attempt to change a tortfeasor's *unlawful* conduct in another state.").

²⁷⁰ *Id.* at 574. The Court began its analysis by explaining that a defendant is entitled to "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.*

²⁷¹ *Cf.* *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 480 (1993) (O'Connor, J., dissenting) ("But the course the plurality chooses is, in fact, no course at all. The plurality opinion erects not a single *guidepost* to help other courts find their way through this area." (emphasis added)); *see supra* text accompanying notes 196-98.

²⁷² *BMW*, 517 U.S. at 574-75.

²⁷³ *Id.* at 575.

²⁷⁴ *See id.* at 576 (quoting *Solem v. Helm*, 463 U.S. 277, 292-93 (1983)).

²⁷⁵ *Id.* (quoting *TXO*, 509 U.S. at 462).

²⁷⁶ *See id.* (finding that BMW inflicted only economic harm and did not endanger the health or safety of others). The Court noted that purely economic harm may be more serious when done intentionally or when the target is financially vulnerable. *Id.*

²⁷⁷ *Id.* at 580.

²⁷⁸ *Id.* at 576-77. The Court noted that a recidivist may be punished more severely: "Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing

TXO concurrence wherein Kennedy found that the defendant's "intentional malice was the decisive element in a 'close and difficult' case."²⁷⁹

Applying these factors, the Court concluded that BMW's conduct was not sufficiently reprehensible to justify a \$2 million punitive damages award.²⁸⁰ The Court reasoned that the injury to the plaintiff was purely economic,²⁸¹ BMW's nondisclosure did not affect the car's performance or safety,²⁸² BMW did not act maliciously,²⁸³ and the company was not a recidivist.²⁸⁴

The Court then turned to the second guidepost: the relationship of the punitive damages award to the plaintiff's harm.²⁸⁵ While rejecting a "simple mathematical formula,"²⁸⁶ the Court referenced the common law history of double, treble, and quadruple damages,²⁸⁷ and discussed the ratios of punitive to compensatory damages in *Haslip* and *TXO*.²⁸⁸ *Haslip*, with its 4 to 1 ratio, fit comfortably within the historical framework, and therefore, did not "cross the line into the area of constitutional impropriety."²⁸⁹ Although the ratio of punitive to compensatory damages in *TXO* was 526 to 1, the *BMW* Court used *TXO*'s potential harm analysis and characterized the true *TXO* ratio as no more than 10 to 1.²⁹⁰ The Court then reasoned that the 500 to 1 ratio in *BMW* was "breathtaking"²⁹¹ and, quoting Justice O'Connor's dissent in *TXO*, "raise[d] a suspicious judicial eyebrow."²⁹²

or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law." *Id.*

²⁷⁹ *Id.* at 576 (quoting *TXO*, 509 U.S. at 468 (Kennedy, J., concurring)).

²⁸⁰ *Id.* at 580.

²⁸¹ *Id.* at 576.

²⁸² *Id.*

²⁸³ *Id.* The Court found that this absence of malice distinguished *BMW* from the conduct in *Haslip* and *TXO*. *Id.* at 579.

²⁸⁴ *Id.* at 576-79. The Court rejected the plaintiff's argument that BMW should be treated as a recidivist because the nondisclosure of the car repairs was part of a "nationwide pattern of tortious conduct." *Id.* at 576.

²⁸⁵ *Id.* at 580. The Court explained that its "decisions in both *Haslip* and *TXO* endorsed the proposition that a comparison between the compensatory award and the punitive award is significant." *Id.* at 581.

²⁸⁶ *Id.* at 582.

²⁸⁷ *Id.* at 580-81 & n.33.

²⁸⁸ *Id.* at 581.

²⁸⁹ *Id.* (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991)).

²⁹⁰ *Id.* The Court explained that "*TXO*, following dicta in *Haslip*, refined this analysis by confirming that the proper inquiry is "whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.'" *Id.* (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993) (plurality opinion) (quoting *Haslip*, 499 U.S. at 21)). See generally discussion *supra* notes 145-51 and accompanying text.

²⁹¹ *BMW*, 517 U.S. at 583.

²⁹² *Id.* (quoting *TXO*, 509 U.S. at 481 (O'Connor, J., dissenting)).

Within these traditional common law standards, the Court further refined the ratio guidepost to discuss circumstances that may justify a higher ratio. The Court noted that a higher ratio may be justified where “a particularly egregious act has resulted in only a small amount of economic damages,”²⁹³ where the “injury is hard to detect,”²⁹⁴ or where “the monetary value of noneconomic harm might have been difficult to determine.”²⁹⁵

Finally, the Court turned to the third guidepost, which compares civil or criminal penalties for comparable misconduct.²⁹⁶ The Court explained that this factor, as noted by Justice O’Connor in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, reflected a state’s legislative judgments for appropriate sanctions for the conduct at issue.²⁹⁷ The Court also reasoned that comparable statutory penalties and prior judicial decisions should provide a defendant fair notice of the severity of potential punishment.²⁹⁸ It also noted that in *Haslip* the Court had justified the size of the award in part because it was less severe than the criminal penalty of incarceration available for comparable conduct.²⁹⁹ While not comparing BMW’s conduct to criminal violations, the Court evaluated the punitive damages award in light of statutory fines for unfair trade practices, concluding that none of the statutes gave BMW fair notice that its conduct would result in a multimillion dollar penalty.³⁰⁰

In sum, the Court concluded that “[a]s in *Haslip*, we are not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award. Unlike that case, however, we are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit.”³⁰¹

²⁹³ *Id.* at 582.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 583.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 584.

²⁹⁹ *Id.* at 583.

³⁰⁰ *Id.* at 584 & n.40 (citing the caps on civil fines for violations of Arkansas, Florida, Georgia, Indiana, New Hampshire, and New York statutes).

³⁰¹ *Id.* at 585-86 (internal citation omitted). The Court left open the appropriate remedy: “Whether the appropriate remedy requires a new trial or merely an independent determination by the Alabama Supreme Court of the award necessary to vindicate the economic interests of Alabama consumers is a matter that should be addressed by the state court in the first instance.” *Id.* at 586.

2. Justice Breyer's Concurrence

Justice Breyer, joined by Justices O'Connor and Souter, agreed that the award violated substantive due process³⁰² but wrote separately to explain why Alabama's punitive damages standards failed to provide significant protection against arbitrary awards.³⁰³

Justice Breyer returned to *Haslip's* emphasis on constraining the jury's discretion,³⁰⁴ noting that meaningful legal standards not only give parties notice of potential punishment but also help "to assure the uniform general treatment of similarly situated persons that is the essence of law itself."³⁰⁵ Although legal standards do not have to be rigid to satisfy due process, they must provide a real limit on the jury's discretion.³⁰⁶ Justice Breyer concluded that the standards the Alabama courts applied were "vague and open ended to the point where they risk[ed] arbitrary results."³⁰⁷ Although finding that the vagueness of those standards alone did not violate due process,³⁰⁸ Justice Breyer determined that it warranted the Court's heightened scrutiny of the award.³⁰⁹

Justice Breyer then analyzed the Alabama procedures, concluding that the Alabama system "provided no significant constraints or protection against arbitrary results."³¹⁰ First, the Alabama statute permitting punitive damages failed to distinguish between conduct that may warrant small awards and conduct deserving large awards.³¹¹ Second, Alabama courts applied the *Green Oil* factors so expansively that the factors provided no constraint on punitive damages.³¹² Third, the

³⁰² *Id.* at 586 (Breyer, J., concurring) (concluding that the award was "'grossly excessive' in relation to legitimate punitive damages objectives, and hence an arbitrary deprivation of life, liberty, or property in violation of the Due Process Clause" (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993) (plurality opinion))).

³⁰³ *Id.* at 588.

³⁰⁴ *Id.* at 587 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20-21 (1991)).

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 588 ("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." (citation omitted)).

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 587 ("[T]he Court also has found that punitive damages procedures very similar to those followed here were not, by themselves, fundamentally unfair.")

³⁰⁹ *Id.* at 588; *see also id.* at 596 ("[W]here legal standards offer virtually no constraint, I believe that this lack of constraining standards warrants this Court's detailed examination of the award.")

³¹⁰ *Id.* at 588.

³¹¹ *Id.* at 588-89.

³¹² *Id.* at 589 (citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989)). Justice Breyer criticized the Alabama Supreme Court's expansive application of the *Green Oil* factors. *Id.* Justice Breyer noted that the Alabama court's application of the ratio factor—considering \$2 million reasonably related to the potential economic harm in Alabama of \$56,000—provided no legal standard that "could have significantly constrained the discretion of Alabama factfinders."

state courts made no effort to identify any other constraining force that *Green Oil* and the statute lacked, such as any economic theory or basis for the award.³¹³ Fourth, Justice Breyer noted that the award was not supported by historic practice or understanding and was in fact “extraordinary by historical standards.”³¹⁴ Finally, Justice Breyer remarked that, unlike other states that cap punitive damages, Alabama lacked any statutory limits that could help constrain unbounded jury discretion.³¹⁵

3. Justice Scalia's Dissent

Justice Scalia, joined by Justice Thomas, stayed true to his view that the Due Process Clause does not provide any substantive limits on the amount of punitive awards.³¹⁶ Justice Scalia described the majority's opinion as “an unjustified incursion into the province of state governments.”³¹⁷ In Justice Scalia's view, “a state trial procedure that commits the decision whether to impose punitive damages, and the amount, to the discretion of the jury, subject to some judicial review for ‘reasonableness,’ furnishes a defendant with all the process that is ‘due.’”³¹⁸ Although he recognized his view of due process had not prevailed, Justice Scalia did not feel bound by *stare decisis* because he

Id. at 590. Likewise, the state court's broad view of the reprehensibility factor made “‘reprehensibility’ a concept without constraining force.” *Id.* Further, Justice Breyer found that the Alabama courts disregarded the “removal of profit” factor since nothing limited the award to BMW's \$56,000 in profits. *Id.* at 591. Justice Breyer then addressed the state court's application of the fourth *Green Oil* factor, the “financial position” of the defendant. *Id.* Justice Breyer noted the relevance of this factor for retribution “[s]ince a fixed dollar award will punish a poor person more than a wealthy one,” but less so for deterrence, “given the more distant relation between a defendant's wealth and its responses to economic incentives.” *Id.* Justice Breyer concluded, however, that a defendant's wealth does not act as a “significant constraint” on punitive damages:

[Wealth] is not necessarily intended to act as a significant *constraint* on punitive awards. Rather, it provides an open-ended basis for inflating awards when the defendant is wealthy, as this case may illustrate. That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as “reprehensibility,” to constrain significantly an award that purports to punish a defendant's conduct.

Id. Justice Breyer also found the remaining factors provided no restraint or were inapplicable to the circumstances of the case. *Id.* at 591-92.

³¹³ *Id.* at 592-94.

³¹⁴ *Id.* at 594.

³¹⁵ *Id.* at 595 (contrasting Alabama's lack of a statutory cap on punitive damages with the statutory limits in Connecticut, Florida, Georgia, and Texas).

³¹⁶ *Id.* at 598 (Scalia, J., dissenting).

³¹⁷ *Id.*

³¹⁸ *Id.*

believed the majority's approach was both mistaken and unsusceptible of principled application.³¹⁹

Justice Scalia also responded to the three sections of the majority's opinion. First, Justice Scalia took issue with the majority's assertion of a substantive due process right to a reasonable punitive damages award³²⁰ as lacking any precedential support.³²¹ Justice Scalia argued that the decisions relied upon by the majority "fabricated the 'substantive due process' right at issue."³²²

Second, because the Alabama Supreme Court limited the size of the award to the defendant's in-state conduct, Justice Scalia characterized the Court's discussion of out-of-state conduct as dicta.³²³ On the merits, Justice Scalia commented that Alabama courts should be able to "consider lawful (but disreputable) conduct, both inside and outside Alabama, for the purpose of assessing just how bad an actor BMW was."³²⁴

Third, Justice Scalia criticized the three guideposts,³²⁵ remarking that they created federal standards for the state law of punitive damages.³²⁶ Despite this effect, Justice Scalia found that the guideposts did not provide any substantive guidance: "[T]he 'guideposts' mark a road to nowhere; they provide no real guidance at all."³²⁷ Finally, Justice Scalia highlighted the tension between the guideposts and jury findings.³²⁸ Justice Scalia found no logical basis for reassessing the jury's determination on the degree of a defendant's reprehensibility and, in so doing, ignoring the jury's determination that the defendant's conduct was reprehensible enough to deserve punitive damages.³²⁹

³¹⁹ *Id.* at 599. Justice Scalia criticized the Court for "federalizing yet another aspect of our Nation's legal culture," and for creating a "new rule of constitutional law . . . constrained by no principle other than the Justices' subjective assessment of the 'reasonableness' of the award in relation to the conduct for which it was assessed." *Id.*

³²⁰ *Id.* at 599-602.

³²¹ *Id.* at 600-01.

³²² *Id.* at 601.

³²³ *Id.* at 604.

³²⁴ *Id.* at 603. The majority agreed and recognized that BMW's out-of-state conduct remained relevant to the assessment of reprehensibility. *Id.* at 574 n.21.

³²⁵ *Id.* at 604-07 (Scalia, J., dissenting).

³²⁶ *Id.* at 605.

³²⁷ *Id.* Additionally, Justice Scalia noted that the Court never said the three guideposts were exclusive, permitting them to be overridden by "unnamed considerations" in future cases. *Id.* at 606. He concluded that the Court's framework did "nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not 'fair.'" *Id.*

³²⁸ *Id.* at 606-07.

³²⁹ *Id.*

4. Justice Ginsburg's Dissent

Justice Ginsburg, joined by Chief Justice Rehnquist, dissented, starting and ending the dissent by arguing that the majority should leave the issue of punitive damages to the states.³³⁰ Like Justice Scalia, Justice Ginsburg deemed the majority's discussion of the defendant's extraterritorial conduct dicta,³³¹ and criticized the decision for its lack of guidance, saying it leaves lower courts only a "raised eyebrow" as their principal guide.³³² In short, Justice Ginsburg would leave the problem of excessive punitive damages awards to the states.³³³

F. Defining the Standard of Appellate Review: Cooper Industries, Inc. v. Leatherman Tool Group

After *BMW*, the Court waited five years before again grappling with punitive damages. In *Cooper Industries, Inc. v. Leatherman Tool Group*,³³⁴ an opinion authored by Justice Stevens, joined by Chief Justice Rehnquist, and Justices O'Connor, Kennedy, Souter, Thomas, and Breyer, the Court held that the constitutional excessiveness inquiry merits "a *de novo* standard of review."³³⁵ In the process of determining the standard of appellate review, the Court also (1) recognized that heightened protections were necessary given the Court's recent recognition of substantive due process limitations on punitive damages; (2) responded to Seventh Amendment issues concerning post-verdict review of punitive awards; and (3) provided further guidance on the *BMW* guideposts.

1. The Majority Opinion

In *Cooper Industries*, a tool manufacturer sued a competitor for unfair competition after the competitor used pictures of the plaintiff's product in advertising, marketing, and packaging its own similar product.³³⁶ The jury awarded the plaintiff \$50,000 in compensatory damages and \$4.5 million in punitive damages.³³⁷ The district court,

³³⁰ *Id.* at 607 (Ginsburg, J., dissenting); see also *id.* at 612 ("The decision leads us further into territory traditionally within the States' domain . . .").

³³¹ *Id.* at 607. In Justice Ginsburg's view, the Alabama Supreme Court had remedied the jury's improper consideration of defendant's out-of-state conduct, and further clarified state law to ensure that the problem "is not likely to occur again." *Id.* at 609.

³³² *Id.* at 613.

³³³ Justice Ginsburg provided an appendix detailing various state legislative constraints on punitive damages, including caps, bifurcated trials, and split recovery with states. *Id.* at 614-19.

³³⁴ 532 U.S. 424 (2001).

³³⁵ *Id.* at 436.

³³⁶ *Id.* at 427-28.

³³⁷ *Id.* at 429.

applying the *BMW* guideposts, held that the award did not violate substantive due process.³³⁸ On appeal, the Ninth Circuit concluded that the district court did not “abuse its discretion” in declining to reduce the punitive award.³³⁹ The Supreme Court granted certiorari to resolve confusion among the federal appellate courts on the appropriate standard of appellate review.³⁴⁰

a. *De Novo Review*

The Court first noted that punitive damages are “quasi-criminal” penalties, and a jury’s imposition of punitive damages is not a factual determination, but “an expression of its moral condemnation.”³⁴¹ The Court acknowledged that state legislatures have broad discretion to define or limit punishments for criminal offenses and punitive damages awards, and decisions within those state law guidelines typically are reviewed for abuse of discretion.³⁴² But, the Court reasoned, due process imposes additional substantive limits on governmental deprivations of life and property.³⁴³ The Eighth Amendment, applicable to the states through the Due Process Clause, prohibits excessive fines and cruel and unusual punishments.³⁴⁴ Similarly, the Due Process Clause prohibits the states from imposing “grossly excessive” punishments on tortfeasors.³⁴⁵

Because courts must apply a *de novo* standard of review in analogous cases involving deprivations of life³⁴⁶ and property,³⁴⁷ the Court held that review of a punitive damages award likewise should be *de novo*: “Our decisions in analogous cases, together with the reasoning that produced those decisions, thus convince us that courts of appeals should apply a *de novo* standard of review when passing on district courts’ determinations of the constitutionality of punitive damages awards.”³⁴⁸ The Court noted that its decision was consistent with

³³⁸ *Id.*

³³⁹ *Id.* at 431.

³⁴⁰ *Id.*

³⁴¹ *Id.* at 432.

³⁴² *Id.* at 432-33.

³⁴³ *Id.* at 433 (“If no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court’s ‘determination under an abuse-of-discretion standard.’” (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989))).

³⁴⁴ *Id.* at 433-34.

³⁴⁵ *Id.* (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453-55 (1993) (plurality opinion)).

³⁴⁶ *Id.* at 434.

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 436. The Court summarized the reasons courts apply *de novo* review in analogous cases, including: (1) the imposition of penalties are not questions of fact; (2) the legal concepts in these areas often are difficult to define and must be considered in the context of a particular

Haslip because there the Court had emphasized the importance of appellate review in ensuring that a jury's award comports with due process.³⁴⁹

b. *The Seventh Amendment*

The Court further held that because a punitive damages award does not constitute a finding of fact, de novo appellate review does not implicate the Seventh Amendment.³⁵⁰ While de novo review of compensatory damages may run afoul of the Seventh Amendment, the nonfactual nature of punitive damages permits an independent review of punitive awards.³⁵¹

c. *The Guideposts*

Finally, the Court applied the guideposts to illustrate that de novo review could provide a meaningful constraint on punitive damages.³⁵² With regard to the reprehensibility guidepost, the Court found that the jury may have based the award in part on the alleged copying of plaintiff's product, which the Ninth Circuit concluded had been a lawful act under the trademark laws.³⁵³ The Ninth Circuit, however, "did not consider whether that improper predicate might also have undermined the basis for the jury's large punitive damages award."³⁵⁴

Assessing the ratio guidepost, the Court advised that the trial court may have determined the ratio by an unrealistic assessment of the "potential harm" the plaintiff would have suffered had the defendant succeeded in its wrongful conduct.³⁵⁵ The trial court had calculated the potential harm by looking at all profits the defendant made from selling the competing product.³⁵⁶ The Court found this potential harm analysis improper because the trial court unrealistically assumed that all of the defendant's profits for a five-year period could be attributed solely to the misconduct at issue.³⁵⁷

Regarding the third guidepost, the comparable legislative penalties, the Court took issue with the plaintiff's position that the

case; (3) independent appellate review helps clarify the law; and (4) de novo review tends to unify precedent and stabilize the law. *Id.* at 435-36.

³⁴⁹ *Id.* at 436 n.9.

³⁵⁰ *Id.* at 437. The Court was responding to issues raised by amicus curiae. *Id.* The argument also addressed Seventh Amendment concerns raised in Justice Ginsburg's dissent.

³⁵¹ *Id.*

³⁵² *See id.* at 441.

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 441-42.

³⁵⁶ *Id.* at 442.

³⁵⁷ *Id.*

misconduct resulted in multiple violations of the Oregon Unlawful Trade Practices Act, each of which carried a maximum penalty of \$25,000. The Court noted that the Ninth Circuit expressed no opinion on whether the conduct at issue should be treated as separate violations or as a single violation, and that the record appeared more consistent with a “single-violation theory.”³⁵⁸

The Court’s analysis of the guideposts, however, was intended not to prejudice the Ninth Circuit’s review on remand, but rather to illustrate how the standard of review may impact the constitutional analysis.³⁵⁹

2. Justice Thomas’s Concurrence

Justice Thomas issued a one paragraph concurrence to note his continued belief that “the Constitution does not constrain the size of punitive damages awards.”³⁶⁰ Justice Thomas stated that, given the opportunity, he would overrule *BMW*.³⁶¹ On the narrow standard of review question, however, Justice Thomas agreed with the majority.³⁶²

3. Justice Scalia’s Concurrence

Justice Scalia likewise remained “of the view that excessive punitive damages do not violate the Due Process Clause.”³⁶³ But Justice Scalia agreed that, based on precedent, *de novo* review accorded with the Court’s jurisprudence.³⁶⁴

4. Justice Ginsburg’s Dissent

Justice Ginsburg was the sole dissenter. Relying on the Court’s prior determination that appellate review of a trial court’s reduction of compensatory damages must be governed by an abuse of discretion standard to comport with the Seventh Amendment, Justice Ginsburg found that the same reasoning should apply to punitive damages.³⁶⁵ Accordingly, Justice Ginsburg concluded that review should be for abuse of discretion.³⁶⁶

³⁵⁸ *Id.* at 442-43.

³⁵⁹ *Id.* On remand, the Ninth Circuit reduced the \$4.5 million punitive damages award to \$500,000. *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1147 (9th Cir. 2002).

³⁶⁰ *Cooper Indus.*, 532 U.S. at 443 (Thomas, J., concurring).

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.* (Scalia, J., concurring in the judgment).

³⁶⁴ *Id.* at 444.

³⁶⁵ *Id.* (Ginsburg, J., dissenting).

³⁶⁶ *Id.*

Justice Ginsburg recognized that the assessment of punitive damages involves more than the resolution of factual matters, but found that a jury's verdict requires factual determinations, such as the reprehensibility of the defendant's conduct and harm to the plaintiff.³⁶⁷

Apart from the Seventh Amendment, Justice Ginsburg found that an abuse of discretion standard made practical sense because trial courts have a superior vantage to assess evidence, particularly witness credibility.³⁶⁸ Moreover, Justice Ginsburg determined that the de novo standard is more complex because it "requires lower courts to distinguish between ordinary common-law excessiveness and constitutional excessiveness, and to separate out factfindings that qualify for 'clearly erroneous' review."³⁶⁹ In the end, however, Justice Ginsburg concluded, "Complex as it is, I suspect that approach and mine will yield different outcomes in few cases."³⁷⁰

II. THE AFTERMATH OF THE COURT'S PRE-*STATE FARM* DUE PROCESS DECISIONS AND THEIR IMPACT ON PUNITIVE DAMAGES JURY INSTRUCTIONS

The Supreme Court's pre-*State Farm* punitive damages cases raised as many questions as they answered. Courts and commentators repeatedly criticized the decisions as providing no workable standards for post-verdict review.³⁷¹ But the decisions also affected the development of jury instructions. First, the cases failed to provide clear and complete substantive due process limitations that could readily be translated into considerations for a jury. Specifically, until *BMW* the Court refused to identify any criteria to measure the substantive limitations on punitive damages. Although *BMW's* guideposts appeared promising, divergent court interpretations soon gave credence to Justice Scalia's assessment that "the 'guideposts' mark a road to nowhere."³⁷² For instance, some courts justified an expansive interpretation of the second guidepost by pointing to the 526 to 1 ratio

³⁶⁷ *Id.* at 444-45. Specifically, Justice Ginsburg pointed to the following factual findings determined by juries in assessing punitive damages: "[T]he extent of harm or potential harm caused by the defendant's misconduct, whether the defendant acted in good faith, whether the misconduct was an individual instance or part of a broader pattern, whether the defendant behaved negligently, recklessly, or maliciously." *Id.* at 446. She analogized the award of punitive damages to awards for pain and suffering: "One million dollars' worth of pain and suffering does not exist as a 'fact' in the world any more or less than one million dollars' worth of moral outrage." *Id.*

³⁶⁸ *Id.* at 445.

³⁶⁹ *Id.* at 450 (citations omitted).

³⁷⁰ *Id.*

³⁷¹ See generally discussion *supra* Part I.

³⁷² *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 605 (1996) (Scalia, J., dissenting). See sources cited *supra* note 29 for criticism of the lack of guidance provided by the Court's decisions.

of punitive to compensatory damages upheld in *TXO*.³⁷³ Alternatively, courts compared the punitive award not just to the harm to the plaintiff, but to everyone injured from the conduct at issue. This permitted courts to justify massive ratios and awards for certain types of actions, like product liability cases, where a defendant's single course of conduct could injure a large number of people.³⁷⁴ As a result, ratios varied widely, leaving many to conclude that the ratio analysis provided scant guidance in reviewing an award.³⁷⁵ With regard to the third guidepost, courts in personal injury tort cases often compared the conduct at issue to criminal penalties, justifying a virtually

³⁷³ See, e.g., *United States v. Big D Enters., Inc.*, 184 F.3d 924, 933 (8th Cir. 1999) (“[W]here the other [*BMW*] factors are strong, a 526 to 1 ratio may be appropriate.”); *United States v. Oak Manor Apartments*, 11 F. Supp. 2d 1047, 1054 (W.D. Ark. 1998) (“While this [100 to 1 ratio] is high, there is no simple mathematical formula that can be applied and the Supreme Court has upheld a punitive damages award of over 526 times the size of actual damages.”).

³⁷⁴ E.g., *In re Exxon Valdez*, No. A89-0095-CV, 2004 WL 170354, at *21-27 (D. Alaska Jan. 28, 2004); *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473, 489 (Or. 2001) (“Because defendant’s tortious conduct was a routine part of its business practice . . . we also consider the potential injury that its misconduct may have caused to past, present, and future customers.”); *Sweet v. Roy*, 801 A.2d 694, 715 (Vt. 2002) (“[C]ourts can consider ‘the possible harm to other victims’ that might result if similar behavior is not deterred.” (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993) (plurality opinion))). As one scholar aptly explained:

In many, and perhaps most, modern punitive damages cases—including those involving mass torts, product liability, consumer fraud, and insurance bad faith—the defendant stands accused of committing an act or engaging in a course of conduct that harmed a large number of people. In recent decades, as this type of litigation has grown more prevalent, a curious phenomenon has emerged. The plaintiff’s attorney, although she represents only one (or, at most, a few) of the many victims, will typically ask the jury to impose punitive damages in an amount sufficient to punish the defendant not only for harming the plaintiff, but also for the full scope of harm that its conduct caused to all victims and all of society. . . .

As this form of jury argument has grown commonplace, many courts—giving the matter little or no thought—have explicitly endorsed the principle that the defendant should be punished not only for the harm that it caused to the plaintiff, but also for the harm that it caused to others. . . .

Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 583-86 (2003) (arguing that punishing for “total harm” is unconstitutional and that punitive damages awards must be limited to punish the defendant for only the harm caused to the plaintiff) (footnotes omitted).

³⁷⁵ E.g., *In re Exxon Valdez*, 236 F. Supp. 2d 1043, 1052 (D. Alaska 2002), *vacated sub nom.*, *Sea Hawk Seafoods, Inc. v. Exxon Corp.*, No. 03-35166, 2003 U.S. App. LEXIS 18219, at *2 (9th Cir. Aug. 18, 2003) (remanding for reconsideration under *State Farm*); *accord Swinton v. Potomac Corp.*, 270 F.3d 794, 819 (9th Cir. 2001) (finding “little comfort” in application of ratio guidepost by other courts). In the first year after the Court decided *BMW*, a survey found that ratios approved by state courts ranged up to 500 to 1. Samuel A. Thumma, *In the Year Since the High Court’s Landmark Decision in ‘BMW,’ Federal Courts Have Reduced Punitive Damages Awards More Frequently Than Have State Courts*, NAT’L L.J., June 30, 1997, at B5; see also *Collins Entm’t Corp. v. Coats & Coats Rental Amusement*, 584 S.E.2d 120, 140 (S.C. Ct. App. 2003) (noting favorably one commentator’s view that “[a]lthough the ratio is a factor universally argued, there is no consistent pattern in its application” (quoting G. Ross Anderson, Jr., *Punitive Damages: A Funny Thing Happened on the Way to the Courthouse*, S.C. TRIAL LAW. BULL., Fall 2002, at 12, 13)).

limitless monetary award when weighed against incarceration.³⁷⁶ Apart from the guideposts, most courts ignored *BMW's* holding that a punitive award may violate due process not only if its size is grossly excessive, but also if the award is based on improper considerations.³⁷⁷

Second, and more fundamentally, the Court failed to address whether the substantive limitations, such as they were, had any effect on pre-verdict procedural requirements. The Court all but ignored the lack of standards for pre-verdict procedural due process and never resolved whether and how *BMW's* guideposts and prohibition on awards based on impermissible considerations affected jury instructions.

As a result, most jurisdictions continue to use jury instructions comparable to those upheld in *Haslip* or add state law factors more likely to promote improper awards than constrain unbridled jury discretion. A review of the instructions used in most jurisdictions—and judicial challenges to those instructions—bears this out.

A. Model Instructions on Punitive Damages

Most jurisdictions³⁷⁸ have developed model jury instructions—form jury charges drafted or approved by court or state bar-appointed

³⁷⁶ *E.g.*, *Romo v. Ford Motor Co.*, 99 Cal. App. 4th 1115, 1151 (Cal. Ct. App. 2002) (comparing a corporate defendant's conduct to manslaughter), *vacated*, 123 S. Ct. 2072 (2003) (re-mandating for reconsideration under *State Farm*); *see also* *Bielicki v. Terminix Int'l Co.*, 225 F.3d 1159, 1166 (10th Cir. 2000) ("Although the punitive damages award is exceptional when compared only to the applicable fines, the authorization of imprisonment in the criminal context can justify a higher award."). Courts have criticized the third guidepost as "ineffective and very difficult to employ." *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d 662, 671 (N.M. 2002). On remand in *BMW*, the Alabama Supreme Court concluded that "a consideration of the statutory penalty does little to aid in a meaningful review of the excessiveness of the punitive damages award." *BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507, 514 (Ala. 1997). For a discussion of these and other problems with judicial application of the third guidepost, *see generally* Victor E. Schwartz et al., *Selective Due Process: The United States Supreme Court Has Said That Punitive Damages Awards Must Be Reviewed for Excessiveness, but Many Courts Are Failing to Follow the Letter and Spirit of the Law*, 82 OR. L. REV. 33 (2003).

³⁷⁷ *See* cases cited *supra* note 41.

³⁷⁸ A 2002 survey found that all states except Texas and West Virginia have pattern jury instructions. Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 594 (2002) ("Our research indicates that forty-eight of the fifty states now have pattern or recommended jury instructions, leaving only Texas and West Virginia without pattern instructions."). Texas and West Virginia, however, recently began to fill this gap. In 2002, the Texas Bar published model instructions. *See* TEX. PATTERN JURY CHARGES, GENERAL NEGLIGENCE, INTENTIONAL PERSONAL TORTS (2002). Likewise, West Virginia published proposed instructions for a six-month provisional usage and comment period. *See* W. VA. PROPOSED JURY INSTRUCTIONS FOR CIVIL & CRIMINAL TRIALS, Introduction, at <http://www.state.wv.us/wvsc/jury/intro.htm> (last visited Feb. 5, 2004). In addition, many federal courts provide model jury instructions. *See* discussion *infra* Part IIA.2.

committees³⁷⁹—that cover matters arising in a typical lawsuit.³⁸⁰ Model instructions, sometimes called “pattern,” “recommended,” “approved,” or “uniform” instructions,³⁸¹ are “designed to save time for judges and lawyers by eliminating the need to write instructions separately for each case and also, theoretically at least, to ‘reduce the number of appeals for faulty instructions.’”³⁸² While litigants may propose their own instructions, many jurisdictions require or strongly encourage use of model instructions.³⁸³ Even when use is not mandated, courts often are reluctant to depart from the model.³⁸⁴

Model punitive damages instructions traditionally have provided juries only minimal guidance in determining the amount of an

³⁷⁹ Where available, this Article discusses each jurisdiction’s official model instructions—the instructions developed by court or bar-designated committees. Some jurisdictions, however, do not have model punitive damages instructions even though they may have model instructions covering other matters. In those jurisdictions, private parties often publish “unofficial” model instructions. Because litigants may rely on them, this Article discusses these unofficial instructions, but will note when the instruction is not the official model.

³⁸⁰ BLACK’S LAW DICTIONARY 856 (7th ed. 1999). Commentators trace the widespread development of model instructions to movements in California in the late 1930s and then Illinois in the 1950s. See ROBERT G. NIELAND, PATTERN JURY INSTRUCTIONS: A CRITICAL LOOK AT A MODERN MOVEMENT TO IMPROVE THE JURY SYSTEM 4-12 (1979); Kelley & Wendt, *supra* note 378, at 593-94. For a historical review of jury instructions, see generally Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1082-85 (2001).

³⁸¹ See NIELAND, *supra* note 380, at 2 (noting trends “designated by several different names—standard, model, uniform, approved and recommended”).

³⁸² Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701, 708 (2000) (quoting Peter M. Tiersma, *Jury Instructions in the New Millennium*, 36 CT. REV. 28 (1999) (internal citations omitted)).

³⁸³ See Tiersma, *supra* note 380, at 1086 (“[M]any states with pattern or standardized instructions either require or strongly recommend that they be used when available.”).

³⁸⁴ See *id.* (discussing reasons courts may be reluctant to depart from the model, including judicial suspicion that “instructions offered by the parties are almost always slanted in some way” and fear that departure from the model may open a floodgate of challenges from prior cases that used the model instruction). Despite reluctance to depart from model instructions, courts frequently still warn litigants that the model’s use will not create an “error free warranty.” W. VA. PROPOSED JURY INSTRUCTIONS FOR CIVIL AND CRIMINAL TRIALS, Introduction, at <http://www.state.wv.us/wvsca/jury/intro.htm> (“[T]here is no ‘error-free warranty’ that accompanies the use of the pattern jury instructions.”) (last visited Feb. 5, 2004); see also *In re Standard Jury Instructions-Civil Cases*, 797 So. 2d 1199, 1199 (Fla. 2001) (“We express no opinion on the correctness of these instructions and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of these instructions.”). Indeed, courts occasionally have reversed cases based on the trial court’s use of a model instruction. See *Wal-Mart Stores, Inc. v. Binns*, 15 S.W.3d 320 (Ark. 2000) (reversing case where jurisdiction’s model instruction on the imposition of punitive damages conflicted with legal requirements of claims at issue). More often, however, courts give weight to model instructions and caution against modifying the model. See *Schaefer v. Ready*, 3 P.3d 56, 59-60 (Idaho Ct. App. 2000) (“Use of the [model] is not mandatory, only recommended. However, any court that chooses to vary from a jury instruction previously approved by the Idaho Supreme Court, does so with the risk that the verdict rendered may be overturned on appeal.” (citations omitted)).

award.³⁸⁵ As Justice O'Connor recognized in *Haslip*, "States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so. Rarely is a jury told anything more than 'do what you think best.'"³⁸⁶ Despite calls for reform,³⁸⁷ many jurisdictions still use instructions comparable to the common law instructions approved in *Haslip*. Several jurisdictions, however, have taken efforts to provide additional guidance to the jury. The model instructions in these jurisdictions often incorporate state law considerations, many of which were developed before—and potentially conflict with—the Supreme Court's recent identification of constitutional limits on punitive damages.

1. State Model Punitive Damages Instructions

a. States Using *Haslip*-like Common Law Instructions

Twelve states use model instructions comparable to the Alabama instructions approved in *Haslip*.³⁸⁸ In *Haslip*, the Court upheld Alabama's instructions, which "[1] enlightened the jury as to the punitive damages' nature and purpose, [2] identified the damages as punishment for civil wrongdoing of the kind involved, and [3] explained that their imposition was not compulsory."³⁸⁹ Alabama's model instruction has not materially changed since *Haslip*.

The *purpose* of awarding punitive damages 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

³⁸⁵ Commentators repeatedly have noted that the complex or unclear language used in most model instructions often render the instructions incomprehensible to juries. See generally Dumas, *supra* note 382, at 708 (stating that instructions are "written in . . . dense, complex language"); Tiersma, *supra* note 380, at 1102-17 (discussing the problem of technical vocabulary). While many of the instructions discussed in this Article may suffer from similar deficiencies, this Article focuses principally on the substance of the instruction rather than the clarity of the instruction's language.

³⁸⁶ Pac. Mut. Life Ins. Co. v. *Haslip*, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting).

³⁸⁷ See, e.g., Thomas M. Melsheimer & Steven H. Stodghill, *Due Process and Punitive Damages: Providing Meaningful Guidance to the Jury*, 47 SMU L. REV. 329 (1994) (urging instructional reforms). In response to mounting concern regarding the frequency and size of punitive damages awards, the National Conference of Commissioners on Uniform State Law established a Drafting Committee on punitive damages. The Committee drafted the *Model Punitive Damages Act* ("MPDA"), a model statute to assist states in developing better procedures for assessing punitive damages. See MPDA (1996), available at <http://www.law.upenn.edu/bll/ulc/mpda/MPDAFNAL.pdf> (last visited Feb. 5, 2004). The MPDA proposes a multifactor jury instruction on punitive damages. See *infra* note 417. For a proposal of noninstructional punitive damages reforms, see Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003 (1999).

³⁸⁸ These *Haslip*-like jurisdictions include Alabama, Georgia, Illinois, Indiana, Louisiana, Michigan, Missouri, Ohio, Utah, Vermont, Virginia, and Washington.

³⁸⁹ *Haslip*, 499 U.S. at 19.

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.³⁹⁰

Model instructions in other jurisdictions likewise simply employ only the *Haslip*-minimum. For example, the model punitive damages instruction used in Illinois—one of the jurisdictions that led the model jury instruction movement³⁹¹—provides:

If you find that the defendant's conduct was willful and wanton . . . and if you believe that justice and the public good require it, you may, in addition to any other damages to which you find the plaintiff entitled, award an amount which will serve to punish the defendant and to deter the defendant and others from similar conduct.³⁹²

Indiana,³⁹³ Missouri,³⁹⁴ Utah,³⁹⁵ Virginia,³⁹⁶ and Washington³⁹⁷ use similar model instructions.

³⁹⁰ 1 ALA. PATTERN JURY INSTRUCTION CIVIL § 11.03 (2003), WL AL-APJICIV 11.03 (emphasis added); *see also id.* § 23.21, WL AL-APJICIV 23.21 (similar instruction for libel cases). The Alabama model instruction for fraud actions, however, fails to include all of the components approved in *Haslip*. *See id.* § 18.09, WL AL-APJICIV 18.09 (failing to instruct on the purpose of punitive damages). *Cf. supra* note 74 (quoting text of *Haslip* instruction).

³⁹¹ *See* NIELAND, *supra* note 380, at 4-12 (discussing the movement in favor of pattern jury instructions).

³⁹² ILL. PATTERN JURY INSTRUCTIONS, CIVIL § 35.01 (2000), WL IL-IPICIV 35.01.

³⁹³ *See* 1 IND. PATTERN JURY INSTRUCTIONS, CIVIL § 11.100 (2d ed. 1989) ("You may award punitive damages in any amount you believe will serve to punish the defendant and will deter the defendant and others from like conduct in the future.").

³⁹⁴ *See* MO. APPROVED JURY INSTRUCTIONS § 10.01 (6th ed. 2002), WL MAI 10.01 ("[I]f 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.") (intentional tort cases); *id.* § 10.02, WL MAI 10.02 (providing similar instruction for conscious disregard negligence cases); *id.* § 10.04, WL MAI 10.04 (providing similar instruction for strict liability, product defect or failure to warn cases); *id.* § 10.05, WL MAI 10.05 (providing similar instruction for product defect and failure to warn cases); *id.* § 10.06, WL MAI 10.06 (providing similar instruction for negligence and strict liability cases); *id.* § 10.07, WL MAI 10.07 (providing similar instruction for conscious disregard with specific acts/knowledge cases); *id.* §§ 4.15-4.16, WL MAI 4.15-4.16 (providing similar instruction for defamation cases).

³⁹⁵ *See* MODEL UTAH JURY INSTRUCTIONS, CIVIL § 27.20 (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.; *accord id.* § 10.12 (providing same instruction for defamation cases). The Utah model instruction for federal civil rights actions, however, instructs the jury to consider the nature of the misconduct and that "the amount to be awarded must be fixed with calm discretion and sound reason, and must not be awarded because of sympathy, bias or prejudice." *Id.* § 15.18.

A few jurisdictions provide the *Haslip*-minimum with minor—albeit equally vague—additions. The Ohio model jury instruction, for instance, uses the *Haslip*-minimum, but also instructs the jury not to act out of passion or prejudice: “If you award punitive damages, the amount should be fair and reasonable under all the facts and circumstances. It should not be excessive, nor influenced by passion, sympathy, or prejudice.”³⁹⁸ Georgia’s instruction adds that the “measure of such damages is your enlightened conscience as an impartial jury.”³⁹⁹ Vermont’s (unofficial) model⁴⁰⁰ employs the *Haslip*-

³⁹⁶ See VA. MODEL JURY INSTRUCTION 2D § 9.080 (2003). 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.

³⁹⁷ Washington generally bars punitive damages unless authorized by statute. WASH. REV. CODE. ANN. § 64.34.100(1) (West 1994). Accordingly, Washington has no general model instruction for punitive damages. See WASH. PATTERN JURY INSTRUCTIONS—CIVIL § 35.01 (4th ed. 2002), WL 6 WAPRAC WPI 35.01 (noting lack of general punitive damages instruction). It does, however, have a punitive damages instruction for civil rights actions, which provides a *Haslip*-style instruction:

If you find for the 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 (1) to punish a defendant, and (2) to deter a defendant and others from committing similar acts in the future.

... You may award punitive damages only if you find that defendant’s conduct (1) was motivated by evil motive or intent, or (2) involved reckless or callous indifference to the rights of others.

... [Y]ou 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.

Id. § 348.02, WL 6A WAPRAC WPI 348.02.

³⁹⁸ 1 OHIO JURY INSTRUCTIONS § 23.70, pt. 7 (2002). Consistent with *Haslip*, this instruction also provides in relevant part:

Punitive damages may be awarded against the defendant as a punishment to discourage others from committing similar wrongful acts. You are not required to award punitive damages to the plaintiff, and you may not do so unless you find by the greater weight of the evidence that the defendant acted with [fraud, insult or actual malice].

Id. pt. 2; see also *id.* § 23.71, pt. 1 (providing similar instruction for tort cases).

³⁹⁹ 1 GA. SUGGESTED PATTERN JURY INSTRUCTIONS, No. 15 (3d ed. 1996). This instruction provides in relevant part:

In tort actions there may be aggravating circumstances which may warrant the awarding of additional damages called punitive damages.

In order for punitive damages to be awarded, the plaintiff must prove by clear and convincing evidence that the defendant’s actions showed willful misconduct

....

Punitive damages, when authorized, are awarded not as compensation to a plaintiff, but solely to punish, penalize, or deter a defendant.

The measure of such damages is your enlightened conscience as an impartial jury.

Id.

minimum approach, but adds an instruction that the punitive award “need not bear any relationship to the underlying compensatory damage award,”⁴⁰¹ which facially conflicts with one of the *BMW* guideposts.

Finally, a couple of jurisdictions fail to meet even the *Haslip*-minimum. Louisiana⁴⁰² and Michigan⁴⁰³—which generally bar punitive damages except when permitted by statute—provide model instructions that merely direct the jury to consider the nature of the defendant’s conduct when setting the amount of the award.

b. States Using “*Haslip-plus-wealth*” Instructions

Ten states plus the District of Columbia use model instructions that provide the “*Haslip*-minimum” but add one other principal

⁴⁰⁰ VT. JURY INSTRUCTIONS, CIVIL AND CRIMINAL § 7.46 (John M. Dinse et al. 1993). For a non-corporate defendant, this 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. For corporate defendants, Section 7.47 provides in relevant part:

If you determine that an award of punitive damages is appropriate, then I instruct that your award of punitive damages “need not bear any relationship to the underlying compensatory damage award.” The underlying premise of punitive damages is to punish (*defendant*) and send a message to other businesses in this industry, while compensatory damages are designed to make (*plaintiff*) whole for the injuries he (*she*) suffered.

Id. § 7.47. These instructions were drafted by private parties and are not official.

⁴⁰¹ *Id.* § 7.47.

⁴⁰² Louisiana generally bars punitive damages unless authorized by statute. *Int’l Harvester Credit Corp. v. Seale*, 518 So. 2d 1039, 1041 (La. 1988). Louisiana’s unofficial model jury instructions reflect this limitation and provide no general punitive damages instruction. *See* LA. CIVIL LAW TREATISE, CIVIL JURY INSTRUCTIONS § 18.11 (H. Alston Johnson, III, 2d ed. 2001), WL 18 LACIVL § 18.11 (providing no general instruction). The unofficial instructions, however, include a model charge for certain statutory claims. These instructions, however, fail to meet even the *Haslip*-minimum. *See id.* § 18.02, WL 18 LACIVL § 18.02 (governing hazardous substance cases).

⁴⁰³ Michigan generally bars punitive damages unless authorized by statute. *See McAuley v. Gen. Motors Corp.*, 578 N.W.2d 282, 285 (Mich. 1998). The state allows “exemplary damages” as compensation to the plaintiff, not as punishment of a defendant. *See Peisner v. Detroit Free Press, Inc.*, 364 N.W.2d 600, 605 (Mich. 1984). Michigan’s official model jury instructions reflect this limitation, and include instructions only for “exemplary damages” for certain claims. *See* 1 MICH. MODEL CIVIL JURY INSTRUCTIONS § 118.21, cmt., available at <http://www.courts.michigan.gov/mcji/MCJI.htm> (last visited Feb. 5, 2004). The unofficial model instructions, however, include a punitive damages charge. *See* MICH. NON-STANDARD JURY INSTRUCTIONS, CIVIL § 11:01 (2002), WL MI-NSJICV §11:01 (“[Y]ou may add to the award of actual damages an amount you agree is proper as punitive and exemplary damages.”).

consideration for the jury: the defendant's wealth.⁴⁰⁴ Consistent with *Haslip*, for instance, Arkansas's model instruction advises the jury to consider the purpose of punitive damages, the nature of the wrongdoing, and makes clear that punitive damages are not compulsory.⁴⁰⁵ When discussing computation of the award, the instruction adds: "In arriving at the amount of punitive damages you may consider the financial condition of [the defendant], as shown by the evidence."⁴⁰⁶ The model instructions in Arizona,⁴⁰⁷ the District of Columbia,⁴⁰⁸ Florida,⁴⁰⁹ Hawaii,⁴¹⁰ Mississippi,⁴¹¹ Nevada,⁴¹² Oregon,⁴¹³ South Carolina,⁴¹⁴ Texas,⁴¹⁵ and Wyoming⁴¹⁶ provide similar guidance.

⁴⁰⁴ These *Haslip*-plus-wealth jurisdictions include Arizona, Arkansas, District of Columbia, Florida, Hawaii, Mississippi, Nevada, Oregon, South Carolina, Texas, and Wyoming.

⁴⁰⁵ See ARK. MODEL JURY INSTRUCTIONS, CIVIL § 2218 (1999). This instruction provides in relevant part:

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

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

Id.

⁴⁰⁶ *Id.*

⁴⁰⁷ See REVISED ARIZ. JURY INSTRUCTIONS (CIVIL)—Personal Injury Damages 4 (3d ed. 1997). This instruction provides in relevant part:

If you find defendant liable to plaintiff, you may consider assessing additional damages to punish defendant or to deter 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 defendant's conduct or motive, the nature and extent of the harm to plaintiff that defendant caused, and the nature and extent of defendant's financial wealth.]

Id.

⁴⁰⁸ See 1 STANDARDIZED CIVIL JURY INSTRUCTIONS FOR D.C. § 16.03 (2002), 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.

⁴⁰⁹ See FLA. STANDARD JURY INSTRUCTIONS IN CIVIL CASES, § PD2 (2003 Supp.), WL FLPRAC APP. A PD. 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 . . . [y]ou should consider the following:

(1) the nature, extent and degree of misconduct and the related circumstances, including the following: whether the wrongful conduct was motivated solely by unreasonable financial gain; whether the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by [defendant] . . . ; whether, at the time of [loss] [injury] [or] [damage], [defendant] . . . had a specific intent to harm (claimant) and the conduct of [defendant] . . . did in fact harm (claimant), [and]

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

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

. . . You may in your discretion decline to assess punitive damages.

Id. § PD2(d)(2) (internal notes omitted); *see also id.* § PD2(d)(1) (providing similar instruction for actions arising before October 1999); *id.* § PD1 (providing same instructions for bifurcated cases).

⁴¹⁰ *See* HAW. JURY INSTRUCTIONS § 8.12 (2003), 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.

⁴¹¹ *See* MISS. MODEL JURY INSTRUCTIONS CIVIL § 11.13 (2002), WL MSPRACJIC §11.14. 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 the 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.

⁴¹² *See* NEV. PATTERN JURY INSTRUCTIONS, CIVIL, No. 10.20 (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.

⁴¹³ *See* OR. UNIFORM CIVIL JURY INSTRUCTION § 75.02 (1997). This instruction provides in relevant part:

Punitive damages may be awarded to the plaintiff in addition to economic and/or non-economic damages to punish the wrongdoer and to discourage the defendant and others from engaging in wanton misconduct.

. . . [Y]ou may award punitive damages, although you are not required to do so because punitive damages are discretionary.

If you decide to award punitive damages, you may properly 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 may not exceed the sum of \$_____.

c. Multifactor Instructions

Twenty-two states instruct the jury to consider multiple factors in setting the amount of punitive damages.⁴¹⁷ In addition to the *Haslip*

Id. (for claims arising on or after Sept. 27, 1987 and before Sept. 9, 1995); *id.* § 75.02A (providing similar instruction for actions accruing on or after Sept. 9, 1995).

⁴¹⁴ See S.C. RECOMMENDED CIVIL JURY CHARGES No. 14.01 (1989) ("Punitive damages are awarded to punish the person causing the injury, to vindicate the injured person's rights, and to make an example of the person causing the harm so that he will not do it again nor will other people engage in similar conduct."); *id.* No. 14.04 ("In assessing punitive damages, consideration should be given to the character of the (wrong) committed, the punishment which should be meted out and the ability of the wrongdoer to pay.").

⁴¹⁵ See TEX. PATTERN JURY CHARGES 8.6B (2002). This instruction provides in relevant part: "Exemplary damages" means any damages awarded as a penalty or by way of punishment. Exemplary damages include punitive damages.

In determining the amount of exemplary damages you should consider evidence, if any, relating to:

- 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.
- e. The extent to which such conduct offends a public sense of justice and propriety.
- f. The net worth of [the defendant].

Id.; see also *id.* § 8.6A (providing similar instruction for actions accruing before 1995).

⁴¹⁶ See WYO. CIVIL PATTERN JURY INSTRUCTIONS, REVISED ED. No. 4.06 (1994) ("Punitive damages are allowable, in a proper case, to punish the defendant and to deter the defendant and others similarly situated from engaging in similar conduct in the future."). No. 4.06A 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. The financial condition of the defendant, and therefore [his] [her] [its] ability to pay, may be considered in fixing the amount of punitive damages.

Id. No. 4.06A. In 1998, the Wyoming Supreme Court set forth factors that must be given to the jury, rendering this instruction insufficient under state law. See *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040, 1052 (Wyo. 1998); see also discussion *infra* accompanying notes 495-501.

⁴¹⁷ The following states use a multifactor approach: Alaska, California, Delaware, Idaho, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Dakota, Tennessee, West Virginia, and Wisconsin. The MPDA likewise proposes a multifactor approach. Section 7 provides:

(a) If a defendant is found liable for punitive damages, a fair and reasonable amount of damages may be awarded for the purposes stated in Section 5(a)(3). The court shall instruct the jury in determining what constitutes a fair and reasonable amount of punitive damages to consider any evidence that has been admitted regarding the following factors:

- (1) the nature of defendant's wrongful conduct and its effect on the claimant and others;
- (2) the amount of compensatory damages;
- (3) any fines, penalties, damages, or restitution paid or to be paid by the defendant arising from the wrongful conduct;
- (4) the defendant's present and future financial condition and the effect of an award on each condition;
- (5) any profit or gain, obtained by the defendant through the wrongful conduct, in excess of that likely to be divested by this and any other actions against the defendant for compensatory damages or restitution;

minimum, these 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.

California, another leader in the model jury instruction movement,⁴¹⁸ uses a model instruction that provides:

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. In deciding the amount of punitive damages, if any, you should consider all of the following:

(a) How reprehensible was [*name of defendant*]'s conduct?

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm?

(c) In view of [*name of defendant*]'s financial condition, what amount is necessary to punish [him/her] and discourage future wrongful conduct?⁴¹⁹

(6) any adverse effect of the award on innocent persons;

(7) any remedial measures taken or not taken by the defendant since the wrongful conduct;

(8) compliance or noncompliance with any applicable standard promulgated by a governmental or other generally recognized agency or organization whose function is to establish standards; and

(9) any other aggravating or mitigating factors relevant to the amount of the award.

(b) If an award of punitive damages is authorized or governed by another statute of this State, any requirement as to amount or method of calculation established by that statute governs the award.

(c) If the amount of punitive damages is decided by the court, the court upon motion of a party shall make findings showing the basis for the amount awarded against each defendant and enter its findings in the record.

MPDA, *supra* note 387, § 7.

⁴¹⁸ See NIELAND, *supra* note 380, at 6-8.

⁴¹⁹ See JUDICIAL COUNCIL OF CAL., CIVIL JURY INSTRUCTION No. 3940 (2003) [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 defendants in bifurcated trial). The CACI were the result of a six-year project by the Judicial Council of California to translate California's longstanding model instructions, the Book of Approved Jury Instructions ("BAJI"), into "plain, straightforward language." Press Release, Judicial Council of California, New Plain-English Jury Instructions Adopted to Assist Jurors in California Courts (July 16, 2003), available at <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR42-03.htm>. The CACI are not mandatory or a replacement to the BAJI, but simply offer an alternative to the BAJI. *See* Stuart T. Waldrip, *Could You Repeat That, Please?*, 43 ORANGE COUNTY LAW., Sept. 2001, at 46. Reflecting the project's "plain language" goals, the CACI instruction concerning the calculation of the amount of punitive damages is essentially the same as its BAJI counterpart:

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:

Several states, including Delaware,⁴²⁰ Idaho,⁴²¹ Iowa,⁴²² Kentucky,⁴²³ Massachusetts,⁴²⁴ Montana,⁴²⁵ New Mexico,⁴²⁶ New York,⁴²⁷ North

(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 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 (2004), WL CA BAJI 14.71; *see also id.* § 14.72.2, WL CA BAJI 14.72.2 (providing same instruction for bifurcated trial). As this Article went to press, however, the BAJI Committee on Standard Jury Instructions published supplemental punitive damages instructions that attempt to address *State Farm*. *See id.* § 14.71.1, WL CA BAJI 14.71.1 (instructing jury not to award punitive damages for conduct that occurred outside of California); *id.* § 14.71.2, WL CA BAJI 14.71.2 (instructing jury of factors to consider in determining the degree of reprehensibility of the defendant's conduct). For a discussion of these and other recent changes to instructions prompted by *State Farm*, *see infra* note 636.

⁴²⁰ *See* DEL. CIVIL PATTERN JURY INSTRUCTIONS § 22.27 (2000), 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.; *see also id.* § 22.15, WL DE-JICIV 22.15 (providing similar instructions for defamation cases).

⁴²¹ *See* IDAHO JURY INSTRUCTIONS No. 9.20 (2003), available at http://www2.state.id.us/judicial/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.)

Id. No. 9.20.5.

⁴²² *See* IOWA CIVIL JURY INSTRUCTIONS No. 210.1 (1998). 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.

⁴²³ *See* 2 KY. INSTRUCTIONS TO JURIES—CIVIL § 39.15 (Cum. Supp. 2003). This instruction provides in relevant part:

In determining the amount, if any, of punitive damages you shall consider the following:

(a) the harm to P as measured by the damages you have awarded under Instruction _____ and the potential of further harm to P created by D's [failure to comply with his duties] [conduct to P],

AND;

(b) The degree, if any, to which you find D's [conduct toward P] [failure to comply with his duties] to have been reprehensible.

Id.; see also *City of Middlesboro v. Brown*, 63 S.W.3d 179, 180 n.1 (Ky. 2001) (advocating use of § 39.15).

⁴²⁴ Massachusetts generally bars punitive damages unless authorized by statute. MASS. GEN. LAWS ANN. ch. 106, § 1-106 (West 1998). Accordingly, Massachusetts has no general model instruction for punitive damages. It does, however, have a punitive damages instruction for discrimination actions, which directs the jury to consider multiple factors when setting the amount of the award:

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.

1 MASS. SUPERIOR COURT CIVIL PRACTICE JURY INSTRUCTIONS § 5.3.5 (2001), WL CIVJII MA-CLE 5-1. Massachusetts also has a less descriptive model instruction for civil rights actions. See 2 MASS. SUPERIOR COURT CIVIL PRACTICE JURY INSTRUCTIONS § 19.2.6 (2001), WL CIVJII MA-CLE Forms 157 ("[Y]ou may award in addition to actual damages an amount you agree to be proper as punitive damages in order to punish the defendant for extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.").

⁴²⁵ See MONT. PATTERN INSTRUCTIONS (CIVIL) No. 25.66 (Jan. 2003 ed.). 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. For a discussion of this instruction from the perspective of a Montana trial judge, see Harkin, *supra* note 29, at 395-99.

⁴²⁶ See N.M. STAT. ANN., UNIFORM JURY INSTRUCTIONS—CIVIL § 13-1827 (Michie 1999). 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 *id.* § 13-861 (providing same instruction for contracts and UCC sales cases); *id.* § 13-1718 (providing same instruction for bad faith cases); *id.* § 13-1011 (providing same instruction for defamation cases).

⁴²⁷ See N.Y. PATTERN JURY INSTRUCTIONS—CIVIL § 2:278 (Dec. 2003), 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 following factors:

Carolina,⁴²⁸ Rhode Island,⁴²⁹ and South Dakota⁴³⁰ have adopted instructions comparable in many respects to the California model.

1. The nature and reprehensibility of what the defendant did. That would include the character of the wrongdoing (*[state the factors that are applicable, such as:]* whether the defendant's conduct demonstrated an indifference to, or a reckless disregard of, the health or safety of others, whether the plaintiff was financially vulnerable, 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). In considering the amount of punitive damages to award, you should weigh this factor heavily.

2. The actual and potential harm created by defendant's conduct. 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.

3. The defendant's financial condition and the impact your punitive damages award will have on the defendant.

Id.; see also *id.* § 3:30, WL NY PJI 3:30 (providing similar instruction for defamation cases); *id.* § 3:50, WL NY PJI 3:50 (providing similar instruction for malicious prosecution cases).

⁴²⁸ See N.C. PATTERN JURY INSTRUCTIONS FOR CIVIL CASES No. 810.98 (1996). 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. (footnotes omitted). North Carolina imposes a statutory cap on punitive damages, but provides that the jury cannot be informed of the cap. N.C. GEN. STAT. § 1D-25(c) (1996).

⁴²⁹ See MODEL CIVIL JURY INSTRUCTIONS FOR R.I. No. 10403 (2002 ed.). 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.
⁴³⁰ See S.D. PATTERN INSTRUCTIONS (CIVIL) No. 35-01 (1995). This instruction provides in relevant part:

These states differ, however, in their approach to a reasonable relationship instruction. Unlike California, many states do not expressly instruct the jury that punitive damages must bear a “reasonable relationship” to the plaintiff’s harm, but instead simply direct the jury to consider the amount of the plaintiff’s actual damages when assessing the punitive award.⁴³¹ Conversely, a few states—Maine,⁴³² Maryland,⁴³³ and Wisconsin⁴³⁴—use multifactor instructions

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

- (1) The amount allowed in actual damages;
- (2) The nature and enormity of the wrong;
- (3) The intent of the defendant;
- (4) The defendant’s financial condition; and
- (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.

⁴³¹ See *supra* notes 422-25, 428, 430 (providing instructions for Iowa, Kentucky, Massachusetts, Montana, North Carolina, and South Dakota).

⁴³² See ME. JURY INSTRUCTION MANUAL § 7-114 (4th ed. 2003), LEXIS, 1-7 Maine Jury Instruction Manual § 8. This 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 present by the evidence, including the outrageousness of the defendant’s conduct;
2. The amount of damages that will have a deterrent effect [and the ability of the defendant to pay such an award]; and
3. [Any criminal punishment that may have already been imposed for the conduct in question which may be considered as mitigating the amount of damages.]

Id.

⁴³³ See MD. CIVIL PATTERN JURY INSTRUCTIONS § 10:12 (4th ed. 2002), WL MPJI MD-CLE 10-313. 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.

⁴³⁴ See 2 WIS. JURY INSTRUCTIONS—CIVIL No. 1707.2 (2002 Supp.). 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. Interestingly, the instructions for non-products liability actions provide different instructions that advise the jury to consider the amount of actual and potential damages. For non-products liability actions after May 1995, Section 1707.1 provides in relevant part:

that do not provide any guidance on the proportionality of the award. Indeed, the comments to the Maryland model expressly acknowledge this omission:

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.⁴³⁵

The Pennsylvania model instruction—providing a clear illustration of how state law-based instructions often conflict with constitutional limits on punitives—expressly advises the jury that it need not consider the relationship of the punitive damages to compensatory damages.⁴³⁶

Despite similarities to the California model, many of these and other multifactor jurisdictions often add factors not included in California's instruction. In addition to elements comparable to the

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 grievousness of the defendant's acts,
2. the degree of malice involved,
3. the potential damage which might have been done by such acts as well as the actual damage, and
4. the defendant's ability to pay. You may consider the defendant's wealth in determining what sum of punitive damages will be enough to punish the defendant and deter the defendant and others from the same conduct in the future.

Id. § 1707.1.

⁴³⁵ MD. CIVIL PATTERN JURY INSTRUCTIONS § 10:12 cmt. A.1 (4th ed. 2002), WL MPJI MD-CLE 10-313.

⁴³⁶ See 2 PA. SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS § 14.00 (Jan. 2003 ed.), WL PA-JICIV 14.00 (“[Y]ou may award punitive damages, as well as any compensatory damages, in order to punish the defendant for [his] [her] conduct and to deter the defendant and others from committing similar acts”). Section 14.02 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:

- the character of the defendant's act,
- 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], and
- 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. [The amount you assess as punitive damages need not bear any relationship to the amount you choose to award as compensatory damages, and it] [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. § 14.02, WL PA-JICIV 14.02.

California model, Alaska,⁴³⁷ Minnesota,⁴³⁸ New Jersey,⁴³⁹ North Dakota,⁴⁴⁰ Tennessee,⁴⁴¹ and West Virginia⁴⁴² also instruct the jury to

⁴³⁷ See ALA. CIVIL PATTERN JURY INSTRUCTIONS No. 20.20B (1999), <http://www.state.ak.us/courts/art20.htm> (last visited Feb. 5, 2004). For "actions accruing 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 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 damage awards that have been made 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.

The amount that you award for punitive damages may not exceed [insert the greater of \$500,000 or three times the amount of compensatory damages], unless you decide that the conduct that formed the basis for your award of punitive damages was motivated by financial gain, and the adverse consequences of the conduct were actually known to the defendant, or to the person responsible for making policy decisions on behalf of the defendant. If you decide that the conduct that formed the basis for your award of punitive damages was motivated by financial gain, and that the adverse consequences of the conduct were actually known to the defendant, or to the person responsible for making policy decisions on behalf of the defendant, the award of punitive damages may not exceed the greater of [insert the greater of \$7,000,000 or four times compensatory damages] or four times the financial gain that the defendant received as a result of the defendant's misconduct.

Id. For "actions accruing on or after June 11, 1986 and before August 7, 1997," Instruction No. 20.20 provides in relevant part:

The law provides no fixed measure as to the amount of such damages, but leaves it to you to decide an amount that will fairly accomplish the purposes of punishment and deterrence. In assessing such damages you may consider the magnitude and flagrancy of the defendant's offense, the importance of the policy violated, the wealth of the defendant, and the amount of compensatory damages.

Id.

⁴³⁸ See MINN. PRACTICE SERIES JURY INSTRUCTIONS GUIDES—CIVIL § 94.10 (2003), 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]
- [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.

⁴³⁹ See N.J. MODEL CIVIL CHARGES No. 6.20A (2000), WL NJJICIV 6.20A. 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.; see also *id.* No. 5.34], WL NJJICIV 5.34] (providing similar instruction for products liability actions). New Jersey has a statutory cap on punitive damages of "five times the amount of 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 2000).

⁴⁴⁰ See N.D. PATTERN JURY INSTRUCTIONS C-72.00 (2002). This instruction provides in relevant part:

[Y]ou must find by clear and convincing evidence that the amount of exemplary damages awarded is consistent with the following:

- 1) Whether there is a reasonable relationship between the exemplary damage award claimed and the harm likely to result from the Defendant's conduct as well as the harm that actually has occurred; and
- 2) The degree of reprehensibility of the Defendant's conduct and the duration of that conduct.

[The Court has determined that there has been evidence presented which permits you to also consider the following factors:

- 1) Defendant's awareness of and any concealment of the conduct;
- 2) Profitability to the Defendant of the wrongful conduct and the desirability of removing that profit and of having the Defendant also sustain a loss;
- 3) Criminal sanctions imposed on the Defendant for the same conduct that is the basis for the exemplary damage claim are to be taken into account if offered in mitigation of the exemplary damage award.]

Id.

⁴⁴¹ See TENN. PATTERN JURY INSTRUCTION—CIVIL No. 14.56 (2002), WL 8 TNPRAC CIV 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 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;

consider the “profitability” of the defendant’s conduct and/or advise the jury to consider prior civil or criminal punishments against the defendant when determining the amount of the punitive award.

d. *Unique Instructions for States That Place Limits on Punitive Damages*

The model instructions in several states reflect state law limits on punitive damages. Colorado⁴⁴³ and Oklahoma,⁴⁴⁴ for instance,

7. The number and amount of previous punitive damages awards 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 bear on determining the proper amount of the punitive award.

Id.

⁴⁴² See W. VA. PROPOSED JURY INSTRUCTIONS FOR AUTOMOBILE AND ROAD LAW PERSONAL INJURY DAMAGE No. VIII (2000), at <http://www.state.wv.us/wvsc/jury/auto.htm> (last visited Feb. 5, 2004). 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 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. This instruction has not been adopted, but only proposed for a six-month provisional usage and comment period. See W. VA. PROPOSED JURY INSTRUCTIONS FOR CIVIL & CRIMINAL TRIALS, Introduction, at <http://www.state.wv.us/wvsc/jury/intro.htm> (last visited Feb. 5, 2004).

⁴⁴³ See COLO. JURY INSTRUCTIONS—CIVIL § 5:3 (4th ed. 2001) (“If you find beyond a reasonable doubt that the defendant acted in a (fraudulent) (malicious) (willful and wanton) manner, you may award a reasonable sum as punitive damages that may not be more than the amount awarded as actual damages.”). By statute, Colorado limits the amount of punitive damages to no more than the amount of the compensatory award. COLO. REV. STAT. § 13-21-102(1)(a) (2002). Under certain circumstances, the court may increase the award to no more than three times the amount of actual damages. *Id.* § 13-21-102(3). Conversely, the court “may reduce or disallow an award of punitive damages.” *Id.* § 13-21-102(2). Some states prohibit courts from informing the jury about a statutory cap. See *supra* notes 428, 439 (discussing the North Carolina and New Jersey approaches respectively).

⁴⁴⁴ See OKLA. UNIFORM JURY INSTRUCTIONS—CIVIL § 5.9 (Vernon 2003), WL VRN-OKFORM OUJI-CIV INSTR. 5.9. This instruction provides in relevant part:

incorporate a statutory cap on punitive awards into their model instructions. The Connecticut instruction, consistent with state law, limits the amount of punitive damages to the plaintiff's cost of trial.⁴⁴⁵ The instructions in Kansas reflect that state's practice of permitting only the court to determine the amount of a punitive damages award.⁴⁴⁶

Finally, Nebraska⁴⁴⁷ and New Hampshire,⁴⁴⁸ which generally bar punitive damages, understandably have no model instructions.

In determining the amount of punitive damages, you may consider the following factors:

1. The seriousness of the hazard to the public arising from [Defendant]'s misconduct;
2. The profitability of the misconduct to [Defendant];
3. How long the conduct lasted and whether it is likely to continue;
4. Whether there were attempts to conceal the misconduct;
5. How aware [Defendant] was of the conduct and its consequences and how aware [Defendant] was of the hazard and of its excessiveness;
6. The attitude and conduct of [Defendant] upon finding out about the misconduct/hazard;
7. The financial condition of [Defendant];
8. (If the defendant is a corporation or other entity) The number and level of employees involved in causing or concealing the misconduct.

In no event should the punitive damages exceed the greater of: (Select One)
[\$100,000.00 or the amount of actual damages you have previously awarded].

OR

[\$500,000.00, or twice the amount of actual damages you have previously awarded, or the increased financial benefit derived by the defendant as a direct result of the conduct causing the injury to the plaintiff and other persons or entities].

Id.; *id.* § 22.7, WL VRN-OKFORM OUJI-CIV INSTR. 22.7 (providing similar instruction for claims against insurers); *id.* § 12.12, WL VRN-OKFORM OUJI-CIV INSTR. 12.12 (providing similar instruction for products liability cases).

⁴⁴⁵ See 1 CONN. JURY INSTRUCTIONS (CIVIL) § 256(b) (4th ed. 1993) ("The measure of these damages is the reasonable expense which he has incurred, including counsel fees, in prosecuting this action, less the taxable costs . . ."); *see also id.* § 256(c) (providing similar instruction for violent conduct but includes that the purpose of exemplary damages is to punish and deter).

⁴⁴⁶ See PATTERN INSTRUCTIONS KAN. CIVIL No. 171.44 (3rd ed. 2001) ("If you determine punitive damages should be allowed, your finding should be entered in the verdict form. After the trial the court will conduct a separate hearing to determine the amount of punitive damages to be allowed."); *see also* *Trendel v. Rogers*, 955 P.2d 150, 152 (Kan. Ct. App. 1998) (noting that Kansas does not permit the jury to assess the amount of punitive damages).

⁴⁴⁷ See 1 NEB. JURY INSTRUCTIONS—CIVIL 2D, ch. 4, pt. 4 (2002) (noting absence of instruction). *See generally* *Distinctive Printing & Packaging Co. v. Cox*, 443 N.W.2d 566, 574 (Neb. 1989) (stating that punitive damages are prohibited by state constitution).

⁴⁴⁸ New Hampshire does not have punitive damages, but instead has "enhanced damages," which may be awarded for certain types of malicious conduct. *See* N.H. CIVIL JURY INSTRUCTIONS § 9.14 (4th ed. 2001); N.H. REV. STAT. ANN. § 507:16 (1997) ("No punitive damages shall be awarded in any action, unless otherwise provided by statute."). The model instruction for these enhanced damages provides only that they are not compulsory. *See* N.H. CIVIL JURY INSTRUCTIONS § 9.14 (4th ed. 2001).

2. Federal Model Jury Instructions

The federal courts' approaches to model jury instructions on punitive damages mirror those taken by the states. The leading federal jury instruction handbook, for instance, provides a *Haslip*-like common law 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.⁴⁴⁹

The Eighth Circuit's model instruction for civil rights claims provides equally minimal guidance.⁴⁵⁰ The Eighth Circuit's model instructions committee noted that it "believes that this punitive damages instruction meets the requirements of *Haslip*."⁴⁵¹ The Fifth⁴⁵² and Eleventh⁴⁵³ Circuits, on the other hand, use *Haslip*-plus-wealth instructions.

⁴⁴⁹ 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS § 128.81 (Kevin F. O'Malley et al. eds., 5th ed. 2000) (concerning instructions for diversity cases). In *Smith v. Wade*, 461 U.S. 30 (1983), the Supreme Court upheld the portion of this instruction dealing with the imposition of punitive damages, but did not address the validity of the portions advising on how to determine the amount of the award. See *id.* at 51 (holding that imposition of punitive damages in a civil rights action under 42 U.S.C. § 1983 did not require proof of actual malicious intent); see also FEDERAL JURY PRACTICE AND INSTRUCTIONS, *supra*, § 128.81 notes.

⁴⁵⁰ EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 4.53 (West 1999). This instruction provides in relevant part:

[T]he law permits the jury under certain circumstances to award the injured person punitive damages in order to punish the defendant for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

. . . [[I]f you find the conduct of that defendant . . . was recklessly and callously indifferent . . .] then, in addition to any other damages to which you find plaintiff entitled, you may, but are not required to, award plaintiff an additional amount as punitive damages if you find it is appropriate to punish the defendant or deter the defendant and others from like conduct in the future. Whether to award plaintiff punitive damages and the amount of those damages are within your sound discretion.

Id. (internal notes omitted).

⁴⁵¹ *Id.* § 4.53 cmt.

Finally, the Ninth Circuit takes the multifactor approach, which includes the *Haslip*-minimum, as well as an instruction to consider the relationship of the punitive damages to the plaintiff's harm:

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.⁴⁵⁴

B. Due Process Challenges to Jury Instructions

1. Blind Adherence to the *Haslip*-minimum

Not surprisingly, given the *Haslip* procedural due process regime, most challenges to the constitutional sufficiency of punitive damages instructions have failed. After *Haslip*, most courts bypassed whether a challenged instruction provided meaningful guidance to the jury and instead merely analyzed whether the instruction contained the three minimal factors approved in *Haslip*. Hence, both federal⁴⁵⁵ and

⁴⁵² See FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 15.13 (West 1999). 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. However, the amount can be as large as you believe necessary to fulfill the purposes of punitive damages. You may consider the financial resources of the defendant in fixing the amount of punitive damages

Id.

⁴⁵³ See ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 2.1 (West 2000). 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.

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.

⁴⁵⁴ NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 7.5 (West 2001).

⁴⁵⁵ See, e.g., *Dunn v. Hovic*, 1 F.3d 1371, 1380 (3d Cir. 1993) (relying on *Haslip*); *A.R. Braswell v. Conagra, Inc.*, 936 F.2d 1169, 1176 (11th Cir. 1991) ("The district court's jury instructions are similar to those approved by the Supreme Court in [*Haslip*]."); *Am. Employers Ins. Co. v. S. Seeding Servs., Inc.*, 931 F.2d 1453, 1458 (11th Cir. 1991) (upholding an instruction that told the jury to consider punishment purpose, but otherwise left the amount to "best judgment and good discretion" because the instruction was "substantially similar to the one in *Haslip*").

state⁴⁵⁶ courts repeatedly have upheld vague *Haslip*-like instructions. The Third Circuit, for example, “acknowledge[d] that the district court could have given the jury more guidance on the issue of punitive damages,”⁴⁵⁷ but upheld a vague punitive damages instruction because “it contained all of the elements identified by the Court in *Haslip*.”⁴⁵⁸ Likewise, the Kentucky Supreme Court upheld its former *Haslip*-like instruction touting the jurisdiction’s “venerated practice” of providing “bare-bones” jury instructions.⁴⁵⁹

⁴⁵⁶ See, e.g., *S. Life & Health Ins. Co. v. Turner*, 586 So. 2d 854, 857 (Ala. 1991) (“This instruction makes clear that the purpose of punitive damages is punishment of the wrongdoer and deterrence of similar wrongful conduct. . . . In *Haslip*, a similar instruction was held [sufficient].”); *Spence v. Howell*, 890 P.2d 714, 724 (Idaho 1995) (“[A]lthough the jury instruction given by the trial court did not include the entire [language of Idaho model instruction regarding consideration of defendant’s financial condition], the instruction approved of in *Haslip* did not include this language either.”); *Kochan v. Owens-Corning Fiberglass Corp.*, 610 N.E.2d 683, 695 (Ill. App. Ct. 1993) (addressing instruction comparable to Illinois model instruction and finding “that the discretion exercised here was within reasonable constraints and due process was satisfied” under *Haslip*); *Bennett v. Owens-Corning Fiberglass Corp.*, 896 S.W.2d 464, 465 (Mo. 1995) (noting language of Missouri model instruction “very similar to language found in the approved exemplary damages instructions” in *Haslip*); *Wolf v. Goodyear Tire & Rubber Co.*, 808 S.W.2d 868, 874 (Mo. Ct. App. 1991) (finding instruction virtually verbatim to Missouri model instruction “address[ed] the same matters which the instruction in *Haslip* addressed,” and upheld instruction which “for all intents and purposes [was] the same as the instruction in *Haslip*.”); *Markowitz v. Re/Max Preferred Props.*, No. 143782, 1997 WL 1070600, at *4 (Va. Cir. Ct. May 21, 1997) (finding Virginia Model Instruction No. 9.080 sufficient under *Haslip* because the instruction “enlighten[s] the jury as to the nature and purpose, identifie[s] the damages as punishment for civil wrongdoing . . . and explain[s] that their imposition was not compulsory” (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19(1991))); *Sintra, Inc. v. City of Seattle*, 935 P.2d 555, 566-67 (Wash. 1997) (upholding instruction as sufficient under *Haslip*); cf. *Jacobs Mfg. Co. v. Sam Brown Co.*, 19 F.3d 1259, 1265 (8th Cir. 1994) (finding Missouri’s model instruction met *Haslip* criteria and rejecting district court’s conclusion that jury should also have been instructed that punitive damages should be reasonably related to compensatory damages).

⁴⁵⁷ *Dunn*, 1 F.3d at 1380.

⁴⁵⁸ *Id.*

⁴⁵⁹ *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 493 (Ky. 2002), *vacated sub nom.*, *Ford Motor Co. v. Estate of Smith*, 123 S. Ct. 2072 (2003) (remanding for reconsideration under *State Farm*). The Kentucky Supreme Court explained:

A practice of long-standing in this Court’s jurisprudence, indeed a venerated practice, is the giving of “bare-bones” instructions. The instructions given here were taken from *Palmore’s Kentucky Instructions to Juries* and included the language of [the statute governing the assessment of punitive damages]. Moreover, counsel for the [plaintiff] reminded the jury time and again that the purpose of punitive damages was to punish wrongdoing. We discern no shortcoming in the instructions given that violates the standards set forth in *Hanson [v. American National Bank & Trust Co.]*, 865 S.W.2d 302, 310 (Ky. 1993), which upheld the model instruction as “adequate under *Haslip*”

Id. (footnotes omitted). Kentucky, however, recently amended its model punitive damages instruction to add “the *BMW* criteria.” 2 PALMORE’S KENTUCKY INSTRUCTIONS TO JURIES § 39.15, cmt. (Cum. Supp. 2003). The revision was based in part on the determination that “[i]t would be nonsensical for the jury to fix the amount of punitive damages using criteria substantially different than those used by appellate courts in determining *de novo* whether the award was ‘grossly excessive.’” *Id.*

Courts also have upheld multifactor instructions because they meet the *Haslip*-minimum.⁴⁶⁰ In some cases, the courts simply assumed that providing factors in addition to the *Haslip*-minimum—regardless of the content of those factors—affords defendants greater constitutional protection.⁴⁶¹

2. Looking Beyond the *Haslip*-minimum

Despite the majority of cases treating the *Haslip*-minimum as the de facto constitutional test, a few courts determined that juries should be given more detailed instructions concerning the constitutional limits on punitive damages. Some decisions voiced concern

⁴⁶⁰ See, e.g., *Hilao v. Estate of Marcos*, 103 F.3d 767, 781 (9th Cir. 1996) (“The district court’s instructions here provided the same information to the jury [as the *Haslip* instructions].”); *Cont’l Trend Res., Inc. v. Oxy USA Inc.*, 44 F.3d 1465, 1475 (10th Cir. 1995) (finding instructions that advised the jury of the purpose of punitive damages, the discretionary nature of punitive damages, and that the award must bear relationship to the injury (but not necessarily actual damages) “were similar to those approved in *Haslip*” and constitutional); *Morgan v. Woessner*, 997 F.2d 1244, 1256 n.13 (9th Cir. 1993) (approving a multifactor instruction under *Haslip*); *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342, 1347 (8th Cir. 1991) (holding the issue was waived but concluding the Arkansas model jury instruction “was comparable to that approved in *Haslip*”); *Guzman v. Tower Dev., Inc.*, Civ. No. 93-00005A, 1994 WL 549860, at *4 (D. Guam App. Div. Oct. 3, 1994) (“The court finds that in comparison with the instructions upheld by the Supreme Court in *Haslip* and [TXO] . . . the instructions given in this case were constitutionally adequate.”); *Viking Ins. Co. v. Jester*, 836 S.W.2d 371, 379 (Ark. 1992) (“Both [the proposed instruction and the instruction given] identify the damages as punishment for civil wrongdoing, and both provide that it was within the discretion of the jury to award such damages. Under the *Haslip* examination, there is no material difference between the instruction given and the proposed instruction.” (citation omitted)); *McClure v. Walgreen Co.*, 613 N.W.2d 225, 233 (Iowa 2000) (holding that the defendant “has demonstrated no violation of the *Haslip* holding and therefore has demonstrated no constitutional or legal error”); *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d 662, 667 (N.M. 2002) (“The jury instructions employed in the instant case meet the standard of *Haslip*.”); *Suffolk Sports Ctr., Inc. v. Belli Constr. Corp.*, 664 N.Y.S.2d 724, 725 (N.Y. App. Div. 1997) (noting that instruction “properly instructed [the jury] on the assessment of punitive damages” under *Haslip*); *Rodebush v. Okla. Nursing Homes, Ltd.*, 867 P.2d 1241, 1251 (Okla. 1993) (comparing instructions to those given in *Haslip* and concluding that “the instructions clearly did not leave the jury unbridled to award punitive damages without guidance”); *Heideman v. Am. Family Ins. Group*, 473 N.W.2d 14, 23 (Wis. Ct. App. 1991) (upholding an instruction as similar to the *Haslip* charge); see also *Marlen C. Robb & Son Boatyard & Marina, Inc. v. The Vessel Bristol*, 893 F. Supp. 526, 544 & n.13 (E.D.N.C. 1994) (implicitly finding pattern instruction consistent with *Haslip*).

⁴⁶¹ *Hilgedick v. Koehring Fin. Corp.*, 8 Cal. Rptr. 2d 76, 89 (Cal. Ct. App. 1992) (finding that California’s multifactor instruction provided “greater constraints on the jury’s discretion than the instructions in *Haslip* and, in so doing, did more to ensure due process in the initial instance”); accord *Boyle v. Lorimar Prods. Inc.*, 13 F.3d 1357, 1360 (9th Cir. 1994) (“[BAJI 14.71] go[es] somewhat beyond the Alabama instructions approved in *Haslip* by explicitly (rather than implicitly) directing the jury to fashion an award bearing a relationship to the actual harm and to consider the defendant’s financial condition in determining whether the award is sufficient to punish and deter.”); see also *Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 1 Cal. Rptr. 2d 301, 323 (Cal. Ct. App. 1991) (“We think these instructions offer the same degree of protection against arbitrary jury decisions as found constitutionally acceptable in *Haslip*.”).

that post-verdict review of punitive awards under factors not provided to juries might run afoul of the Seventh Amendment. Others took a more practical approach, anticipating future instructional mandates by the Supreme Court. And still others found more instructional guidance necessary to avoid punitive awards based on improper considerations. None of these decisions directly confronted *Haslip*.

a. *Respect for the Jury*

The Fourth Circuit was one of the first courts to address *Haslip*'s implications for jury instructions. In *Mattison v. Dallas Carrier Corp.*,⁴⁶² the plaintiffs brought a diversity action under South Carolina law for injuries resulting from a collision with the defendant's tractor trailer.⁴⁶³ Following South Carolina law, the trial court provided a *Haslip*-plus-wealth⁴⁶⁴ instruction.⁴⁶⁵ The Fourth Circuit ruled that the instruction failed to provide the jury meaningful standards to determine the amount of the award.⁴⁶⁶ Implicitly following *Haslip*,⁴⁶⁷ the court found that only sufficient post-verdict review could permit the use of such vague instructions.⁴⁶⁸

At the time of trial, neither state nor federal procedures afforded searching post-verdict review.⁴⁶⁹ While the *Mattison* appeal was pending, however, the South Carolina Supreme Court revised the state's

⁴⁶² 947 F.2d 95 (4th Cir. 1991).

⁴⁶³ *Id.*

⁴⁶⁴ See *supra* Part II.A.1.b.

⁴⁶⁵ The trial court gave the following instruction on punitive damages: "The amount of punitive damages assessed against any defendant may be such sum as you believe will serve to punish that defendant and deter it and others from like conduct." *Mattison*, 947 F.2d at 100. The court also instructed the jury to consider the defendant's "ability to pay." *Id.* at 101.

⁴⁶⁶ *Id.* at 105-06. The court explained:

When a jury is left to its own devices to take property or mete out punishment to whatever extent it feels is best in the course of the process, our sensibilities about that process are offended. It is just this aspect about the South Carolina process that leads us to conclude that the scheme violates the first principle of due process The court instructed the jury to enter punitive damages in such "sum as you believe" will punish and deter. Because no guidance is required by South Carolina law, a reviewing court could not rationally decide that the amount was excessive without simply substituting its notion of excessiveness for that of the jury. . . .

. . . [A]n award of punitive damages which is entered without a legal standard is unacceptable, regardless of the amount.

Id.

⁴⁶⁷ Earlier in the decision, the court criticized *Haslip*, noting that the Supreme Court "pass[ed] lightly" over the minimal Alabama instructions. *Id.* at 99. The *Mattison* court found that *Haslip*'s "unusual approach of emphasizing post-verdict review to the extent of perhaps slighting a review of the pre-verdict process" raised special concerns for federal diversity cases where district courts reviewing punitive verdicts were required (at that time) to review the verdict under the deferential standards of the Federal Rules of Civil Procedure. *Id.*

⁴⁶⁸ *Id.* at 106.

⁴⁶⁹ *Id.*

post-verdict standards in light of *Haslip*.⁴⁷⁰ In *Gamble v. Stevenson*,⁴⁷¹ the court adopted several factors for state post-verdict review based on the Alabama *Green Oil* factors discussed in *Haslip*.⁴⁷²

The *Mattison* court concluded that in light of this change, "it would appear that state courts in South Carolina will hereafter operate under the same process held constitutional in *Haslip*."⁴⁷³ Still, the Fourth Circuit held that in federal diversity actions, *Gamble*'s new state law post-verdict standards did not cure the constitutional deficiencies created by vague jury instructions.⁴⁷⁴ Specifically, the court determined that federal district courts could not apply *Gamble* as part of any post-verdict review.⁴⁷⁵ Rather, the court reasoned that post-verdict review in diversity actions would be governed by the Federal Rules of Civil Procedure, which provided a more lenient standard than *Gamble*.⁴⁷⁶ In any event, the court also found that post-verdict application of the *Gamble* factors by a federal district court, without presenting the same standards to the jury, would violate the Seventh Amendment.⁴⁷⁷ Accordingly, to reconcile the special problems raised by diversity actions,⁴⁷⁸ the *Mattison* court required district courts to

⁴⁷⁰ *Id.*

⁴⁷¹ 406 S.E.2d 350 (S.C. 1991).

⁴⁷² See *Mattison*, 947 F.2d at 106-07 (discussing *Gamble* and its effects on South Carolina punitive damages law).

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 109.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.* at 99. The court explained:

Because the reviews under Rules 50(b) and 59 are more deferential to jury verdicts than appears to be the process under the state law of Alabama and because the Seventh Amendment does not permit a federal court to substitute its judgment for that of a jury, as long as the jury operates within the constraints of the law and the evidence, the guidance provided by the holding in *Haslip* is of limited assistance.

Id. As one commentator summarized:

[T]he Fourth Circuit was left with an unworkable constitutional catch-22. If the trial and appellate courts on remand applied the common-law scheme as it is applied in South Carolina, they would violate the Seventh Amendment and the Federal Rules of Civil Procedure. If they disregarded South Carolina's substantive posttrial review factors in favor of the Seventh Amendment and the Federal Rules of Civil Procedure, they might violate the *Erie* doctrine and the defendant's right to due process.

Charles Jared Knight, *State-Law Punitive Damage Schemes and the Seventh Amendment Right to Jury Trial in the Federal Courts*, 14 REV. LITIGATION 657, 691 (1995).

⁴⁷⁷ *Mattison*, 947 F.2d at 108 ("A *Haslip*-type post-trial review, insofar as it is a quasi de novo review by which the court reviews facts, some of which may not have been presented to the jury, would be inconsistent with the restrictions of the Seventh Amendment.")

⁴⁷⁸ After *Mattison*, most courts ignored this problem:

The complexity of application of state punitive damage schemes by federal diversity courts has resulted in a line of inconsistent cases that, for the most part, ignore the *Mattison* dilemma. Apparently, the courts have either yet to realize the Seventh Amendment problem addressed in *Mattison* or have chosen to ignore it.

Knight, *supra* note 476, at 695. The Fourth Circuit followed *Mattison* in addressing Virginia's punitive damages system. See *Johnson v. Hugo's Skateway*, 974 F.2d 1408 (4th Cir. 1992) (following *Mattison* and holding that federal juries in diversity actions applying Virginia law must be

include jury instructions on four factors derived from *Gamble* and *Haslip*.⁴⁷⁹

Similar Seventh Amendment concerns were expressed years later in *Geressy v. Digital Equipment Corp.*,⁴⁸⁰ a products liability federal diversity action brought in the Eastern District of New York. Like *Mattison*, the court believed that post-verdict review of considerations not given to the jury implicated the Seventh Amendment. Unlike *Mattison*, the post-verdict factors at issue were now substantive due process requirements (the *BMW* guideposts), not just state law criteria. The court determined that “[i]f the jury is to accomplish its task under the Seventh Amendment, it is entitled to be informed of its role.”⁴⁸¹ As such, the court held that the jury should be instructed on the first two guideposts: reprehensibility and the reasonable relationship between punitive damages and the plaintiff’s harm.⁴⁸² The court decided, however, that the jury should not be instructed on the third *BMW* guidepost because “there are too many complicating and prejudicial factors in asking a lay jury to consider the third element.”⁴⁸³

The legal foundation of *Mattison* and *Geressy* has since been called into question by the Supreme Court’s decision in *Cooper Industries*,

provided more detailed instructions than are used in Virginia state courts). But that case later was deemed inapplicable to state court actions. See *Markowitz v. Re/Max Preferred Props.*, No. 143782, 1997 WL 1070600, at *4-5 (Va. Cir. Ct. May 21, 1997) (distinguishing *Johnson* and finding Virginia’s model instruction sufficient under *Haslip* for state court actions).

⁴⁷⁹ *Mattison*, 947 F.2d at 109-10. These four factors included instructions that (1) “any penalty imposed should bear a relationship to the nature and extent of the conduct and the harm caused, including the compensatory damage award made by the jury”; (2) “[a]ny penalty imposed should take into account as a mitigating factor any other penalty that may have been imposed or which may be imposed for the conduct involved”; (3) “[t]he amount of any penalty may focus on depriving the defendant of profits derived from the improper conduct”; and (4) “[a]ny penalty must be limited to punishment and thus may not effect economic bankruptcy. To this end, the ability of the defendant to pay any punitive award entered should be considered.” *Id.* at 110.

⁴⁸⁰ 950 F. Supp. 519 (E.D.N.Y. 1997).

⁴⁸¹ *Id.* at 521.

⁴⁸² *Id.*

⁴⁸³ *Id.* Accordingly, the court approved a modification of the New York model instruction to incorporate the first two *BMW* 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.* Additionally, the *Geressy* court concluded that an out-of-state conduct instruction was required in light of *BMW*’s concerns regarding state sovereignty. *Id.* at 521-22. Accordingly, the district court in *Geressy* instructed the jury that it was “not authorized to impose punitive damages to protect people outside of the State of New York.” *Id.* at 522.

which held that punitive awards are not factual determinations implicating the Seventh Amendment.⁴⁸⁴ The decisions, however, reflect still-valid concerns over allowing post-verdict excessiveness review of factors never considered by the jury in the first instance.⁴⁸⁵

b. *The Spirit of Haslip Requires More*

A few state courts determined that the spirit, if not the letter, of *Haslip* required greater constraints on jury discretion and held that trial courts must provide detailed instructions regarding the assessment of punitive damages.⁴⁸⁶ In the leading case, *Garnes v. Fleming Landfill, Inc.*,⁴⁸⁷ the West Virginia Supreme Court of Appeals reassessed its punitive damages system after the United States Supreme Court remanded for reconsideration in light of *Haslip*. The court noted that “although *Haslip* may not have created the clear, bright-line rules that we would all like, it is the beginning of national common law development in this area and not the end.”⁴⁸⁸

Accordingly, the court set forth standards to provide “a reasonable constraint on jury discretion.”⁴⁸⁹ Relying on factors derived from *Green Oil* and *Haslip*, the West Virginia Supreme Court of Appeals directed lower courts to instruct juries to consider the relationship of punitive damages to the plaintiff’s harm, the reprehensibility of the defendant’s conduct, the defendant’s profit from the wrongdoing, and the financial position of the defendant.⁴⁹⁰ Conversely, the court determined that other factors derived from *Haslip* and *Green Oil*—such as the costs of the litigation, any criminal sanctions imposed on the defendant, and the mitigating effect of other civil actions against the defendant for the same conduct—should be considered only by

⁴⁸⁴ See discussion *supra* Part I.F. As noted, the *Mattison* court also found that more detailed jury instructions were necessary in federal diversity actions because federal courts would not be required to apply state law factors for post-verdict review, but instead would apply more lenient standards under federal procedural rules. That is no longer an issue in light of the Supreme Court’s recognition that punitive damages are matters of federal due process, not just state law, and *BMW*’s requirement that courts review punitive damages awards under the “guideposts.”

⁴⁸⁵ See *infra* text accompanying notes 624-29.

⁴⁸⁶ *E.g.*, *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 908 (W. Va. 1991) (requiring jury to be instructed on factors regarding punitive damages); see also *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901-02 (Tenn. 1992) (requiring jury to be instructed on nine factors, including the defendant’s financial condition, prior punitive awards, and remedial measures taken by defendant).

⁴⁸⁷ 413 S.E.2d 897 (W. Va. 1991).

⁴⁸⁸ *Id.* at 907.

⁴⁸⁹ *Id.* at 908.

⁴⁹⁰ *Cf. id.* at 900 n.1 (setting forth jury instruction). The court required these factors because “[d]ue process demands not only that penalties be abstractly fair, but also that a person not be penalized without reasonable warning of the consequences of his acts.” *Id.* at 909.

the courts during post-verdict review.⁴⁹¹ The court reasoned that juries lack the information necessary to apply these considerations or might be prejudiced if required to consider them.⁴⁹²

c. *The Spirit of BMW Requires More*

After *BMW*, several courts addressed whether jury instructions should incorporate the guideposts or other substantive due process limits on punitive damages. Most cases implicitly⁴⁹³ or explicitly⁴⁹⁴ determined that *BMW* addressed only post-verdict review, and did not affect instructional requirements. But just as *Garnes* required more detailed instructions to comport with the spirit of *Haslip*, a few cases interpreted *BMW* in a similar way. In *Farmers Insurance Exchange v. Shirley*,⁴⁹⁵ the Wyoming Supreme Court recognized that “in *BMW* the court articulated a majority opinion that permitted Justice O’Connor to shift from her previous dissenting positions and join in the majority opinion.”⁴⁹⁶ Presumably referring to Justice O’Connor’s prior arguments for more detailed jury instructions, the court viewed *BMW* as a signal for “a future requirement that for due process to be present those objective [*BMW*] standards should be given to the jury in the form of instructions.”⁴⁹⁷ Even though the jury instructions at issue satisfied state law, the court concluded that the *Green Oil* factors that influenced *Haslip* and *BMW*⁴⁹⁸ should be provided to Wyoming juries. The court reasoned that providing the instructions would avoid the

⁴⁹¹ *Id.*

⁴⁹² *Id.*

⁴⁹³ See, e.g., *Hilao v. Estate of Marcos*, 103 F.3d 767, 780-81 (9th Cir. 1996) (implicitly suggesting that *BMW* addresses only post-verdict review).

⁴⁹⁴ In *Brokerage Concepts, Inc. v. United States Healthcare, Inc.*, the court noted:

The Court, however, agrees with plaintiff that [*BMW*] does not suggest that a proportionality charge must be submitted to the jury, but rather that a federal court must review punitive damage amounts with due process considerations in mind. No authority cited by defendants requires this Court to charge the jury on due process considerations governing proportionality.

No. CIV.A. 95-1698, 1999 WL 200668, at *6 (E.D. Pa. Apr. 8, 1999); see also *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364, 380 (La. Ct. App. 2001) (“None of these three cases [*Haslip*, *TXO*, and *BMW*] holds that the ‘reasonable relationship’ factor must be considered by the jury.”).

⁴⁹⁵ 958 P.2d 1040 (Wyo. 1998).

⁴⁹⁶ *Id.* at 1043.

⁴⁹⁷ *Id.* at 1043-44. The court went on: “*BMW* demands that we articulate objective standards for the imposition of punitive damages that can be communicated to the jury in the form of instructions and against which the imposition of the punitive award can be weighed in the process of judicial review.” *Id.* at 1045.

⁴⁹⁸ In discussing the Supreme Court’s punitive damages jurisprudence, the court noted that in adopting the “guideposts” the *BMW* Court had “alluded to the application by the Supreme Court of Alabama of the factors articulated in *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1989), which had been approved by the Supreme Court of the United States in *Haslip*.” *Shirley*, 958 P.2d at 1044.

risk of future reversals⁴⁹⁹ and possible interference with the right to a jury trial.⁵⁰⁰

The *Shirley* court acknowledged that the U.S. Supreme Court did not expressly require these factors to be provided to the jury, but concluded “that the only sensible approach is to tell the arbiter of punitive damages what the rules are. Consequently such instructions should be given.”⁵⁰¹ The dissent disagreed that due process requires more detailed instructions, arguing that “the discussions in both *Haslip* and the *BMW* concurrence speak of objective factors being used by the court in the course of *reviewing* a jury verdict as a means of imposing a meaningful constraint on the jury’s decision, not as being included in instructions to the jury.”⁵⁰²

d. *Legitimate State Interests*

A few months before *State Farm* was decided, the Ninth Circuit held that due process requires instructions exceeding the *Haslip* minimum to avoid the risk that a jury might base its punitive damages award on improper considerations. In *White v. Ford Motor Co.*,⁵⁰³ the plaintiff in a products liability case argued extensively at trial about

⁴⁹⁹ *Id.* at 1045 (“Otherwise we hazard litigants in our courts to future reversal by the Supreme Court of the United States because of the denial of due process of law resulting from the application of our current process.”).

⁵⁰⁰ *Id.* at 1044 (“If the objective standards are not communicated to the jury, then the invocation of such standards only for the purposes of review would infringe upon the right of the parties to a jury trial.”).

⁵⁰¹ *Id.* at 1053. Other courts also have recognized the practical benefits of more detailed instructions. See *In re Exxon Valdez*, No. A89-0095-CV, 2004 WL 170354, at *15 (D. Alaska Jan. 28, 2004) (recognizing benefit of jury and court working from the same “script” for assessing punitive damages). In *Exxon*, a tort action stemming from the infamous Alaskan oil spill, the district court concluded that courts should instruct juries on the constitutional standards for imposing punitive damages: “[I]t strikes the court as important to know and be mindful in understanding the second phase of the constitutional analysis (the guideposts) that the trial jury in this case was working with the very same concepts embodied within the *BMW* guideposts Without proper instructions, jury verdicts are patently suspect.” *Id.* at *14-15. The court stated that it was important to note that the award in that case was “not a situation where the jury awarded \$5 billion in punitive damages based upon one script, with this court second-guessing the jury’s work using a different script.” *Id.* at *15; see also *Kunewa v. Joshua*, 924 P.2d 559, 568-71 (Haw. Ct. App. 1996) (analyzing concurring and dissenting views in *Haslip* and *Browning-Ferris* in support of permitting the jury to be instructed that it could consider amount of attorneys’ fees in assessing the award).

⁵⁰² *Shirley*, 958 P.2d at 1058 (Lehman, J., dissenting). The dissent argued that “[t]he majority in *BMW* does not mention the *Haslip* seven factors, much less mandate that those factors be incorporated into jury instructions in order to satisfy due process requirements.” *Id.* at 1057. The dissent concluded that “I do not disagree that it may be appropriate to provide the jury with the more specific instructions articulated by the majority. However, I do disagree insofar as such a requirement is imposed on this case to render the jury award invalid.” *Id.* at 1058.

⁵⁰³ 312 F.3d 998 (9th Cir. 2002), *amended on denial of reh’g*, 335 F.3d 833 (9th Cir. 2003).

Ford's alleged misconduct in other states.⁵⁰⁴ Ford, in turn, requested an instruction that "would have barred the jury from punishing Ford for impact other than on Nevadans."⁵⁰⁵ The district court refused, relying instead on Nevada's model instruction on punitive damages.⁵⁰⁶ The Ninth Circuit reversed.⁵⁰⁷ The Court of Appeals reasoned that *BMW* not only set forth guidelines for the size of the award (the guideposts), but also established that courts should consider whether a state has a legitimate interest in punishing or deterring the conduct upon which the award was based.⁵⁰⁸ The court explained that since states have no interest in punishing out-of-state conduct,⁵⁰⁹ the jury should have been instructed that it could not use its award to punish conduct that occurred in other states.⁵¹⁰ Finding that no amount of post-verdict remittitur could cure an award tainted by improper considerations,⁵¹¹ the Ninth Circuit remanded for a new trial, concluding that "[a] punitive damages award that encompasses a defendant's extraterritorial conduct may be unconstitutional even if the size of the award itself, as compared to the compensatory damages, is not outside the bounds of due process."⁵¹²

The dissent in *White* argued that because the instruction at issue adhered to the *Haslip*-minimum,⁵¹³ it satisfied procedural due process.⁵¹⁴ The dissent also took issue with the majority's claim that an award based on impermissible considerations could not be remedied by a post-verdict reduction.⁵¹⁵ Specifically, the dissent noted that *BMW* expressly allowed courts to remedy the jury's improper

⁵⁰⁴ *Id.* at 1015.

⁵⁰⁵ *Id.* at 1013.

⁵⁰⁶ *See id.* (refusing to punish Ford for impact on out-of-state residents based on federalism and state sovereignty concerns expressed in *BMW*).

⁵⁰⁷ *Id.* at 1020.

⁵⁰⁸ *Id.* at 1013 & n.56.

⁵⁰⁹ *Id.* at 1017-18.

⁵¹⁰ *Id.* at 1016 & n.69.

⁵¹¹ *Id.* at 1016.

⁵¹² *Id.*

⁵¹³ *Id.* at 1025-26 (Graber, J., concurring in part and dissenting in part). Judge Graber explained:

Read together, *Haslip* and *Honda* [*Motor Co. v. Oberg*] teach that, while due process imposes some requirements on how a jury must be instructed on punitive damages, those requirements are minimal and general. Instead, it is the availability of post-verdict review of punitive damages awards that provides the most substantial procedural check on punitive damages.

Id. at 1025.

⁵¹⁴ *Id.* at 1026 ("Nevada instructions meet the standards articulated in *Haslip*: they informed the jury that punitive damages were discretionary, that their purpose is to punish and to set an example, and that the amount must bear some relation to the blameworthiness of the defendant's conduct.").

⁵¹⁵ *Id.* at 1028-29.

consideration of out-of-state conduct by post-verdict review.⁵¹⁶ Accordingly, the dissent believed that the jury's reliance on Ford's extraterritorial conduct could be remedied by post-verdict review and that a jury instruction was not required.⁵¹⁷

In sum, while never articulating a unified approach to the issue, the decisions requiring more detailed jury instructions voiced legitimate concerns about whether courts should conduct post-verdict review of factors never considered by the jury and whether such review protects against arbitrary decision making.

III. *STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. V. CAMPBELL*

*State Farm Mutual Automobile Insurance Co. v. Campbell*⁵¹⁸ brought together the Court's procedural and substantive due process punitive damages rulings, and held that a \$145 million award against an insurance company was unconstitutionally excessive. The decision clarified many of the issues that had plagued consistent application of the *BMW* guideposts, leading many to conclude that the decision has the potential of "restoring order to the administration of punitive damages."⁵¹⁹ *State Farm* not only refined the standards for post-verdict review, it also signaled that juries must be instructed on these substantive due process limitations in the first instance.

First, *State Farm* provided courts more concrete guidance on the second *BMW* guidepost, the relationship between punitive damages and the plaintiff's harm or potential harm. Again disclaiming a

⁵¹⁶ *Id.* at 1028.

⁵¹⁷ *Id.* at 1031 ("Substantive due process does not necessarily require an instruction on non-extraterritoriality; rather, that is a factor to consider in excessiveness review."); *see also id.* at 1029 ("The district court's computation thereby cured the jury's erroneous 'bonus' for extraterritorial conduct."). Judge Graber believed, however, that the award was excessive under the *BMW* guideposts. *Id.* at 1030-31.

⁵¹⁸ 123 S. Ct. 1513 (2003).

⁵¹⁹ Evan M. Tager, *The Implications of State Farm v. Campbell for the Future of Punitive Damages in Bad Faith Litigation*, MEALEY'S LITIG. REP.: INSURANCE, Apr. 22, 2003, at 9 (providing an overview of *State Farm* and its potential impact on unclear pre-*State Farm* punitive damages issues); accord James Dabney Miller, *Ending the Punitives Riot*, N.J. L.J., June 2, 2003, at 27 (discussing *State Farm* and its potentially significant impact). *But see* Ned Miltenberg & Erwin Chemerinsky, *Punitive Damages After Campbell*, Smith, and Romo, TRIAL, Aug. 2003, at 18, WL 39-AUG JTLATRIAL 18 (questioning the extent of *State Farm's* influence on future of punitive damages). Although *State Farm* clarified many issues, commentators have argued that several remain unclear. *See, e.g.*, Elizabeth J. Cabraser & Michael G. Nast, *A Plaintiff's Perspective on the Effect of State Farm v. Campbell on Punitive Damages in Mass Torts*, MEALEY'S LITIG. REP.: CLASS ACTIONS, June 19, 2003, at 8 (discussing relevance of a defendant's wealth on punitive damages and other issues); Alan S. Rutkin, *Limiting the Punishment*, BEST'S REV., Aug. 2003, at 94 (identifying future issues under *State Farm* including what constitutes a "substantial" award justifying a 1 to 1 ratio); Don Willenburg, *Supreme Court Lays down the Law on Punitive Damages in One Case—But What About the Future?*, RECORDER (S.F.), July 2, 2003, at 4 (identifying numerous issues raised by *State Farm*, including the continued relevance of a defendant's wealth).

“bright-line ratio,”⁵²⁰ *State Farm* nevertheless strongly suggested that awards producing more than a single-digit ratio between punitive and compensatory damages will be viewed with a jaundiced eye.⁵²¹ By approving single-digit ratios and tying the ratio analysis to the harm to the plaintiff, the Court effectively eliminated judicial interpretations comparing punitive damages to speculative harm to nonparties.⁵²² The Court further suggested that when compensatory damages are “substantial,” punitive damages should be no more than the compensatory award.⁵²³

Second, completing *BMW*'s evolution of assessing both the size of an award and whether the award is based on impermissible considerations, *State Farm* made clear that while evidence of a defendant's misconduct in other jurisdictions may be admissible for the jury to gauge the reprehensibility of the defendant's conduct, neither a court nor a jury may base the amount of a punitive damages award on a defendant's out-of-state conduct. Additionally, the Court answered an issue left open in *BMW*, suggesting that this bar applies regardless of whether the out-of-state conduct is lawful or unlawful in other jurisdictions.⁵²⁴ But perhaps one of the most important aspects of *State Farm*'s focus on the bases of punitive damages was the Court's clarification that the punitive damages analysis should focus on the

⁵²⁰ *State Farm*, 123 S. Ct. at 1524.

⁵²¹ *Id.* (“[F]ew [punitive damages] awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”). To date, courts appear to be following the single-digit ratio except where the compensatory damages are low. *See, e.g.,* Bogle v. McClure, 332 F.3d 1347, 1362 (11th Cir. 2003) (4 to 1 ratio); Motherway, Glenn & Napleton v. Tehin, No. 02C3693, 2003 WL 21501952, at *8 (N.D. Ill. June 26, 2003) (4.7 to 1 ratio); DeNofio v. Soto, No. Civ.A. 00-5866, 2003 WL 21488668, at *3 (E.D. Pa. June 24, 2003) (2 to 1 ratio); Waits v. City of Chicago, No. 01C4010, 2003 WL 21310277, at *7 (N.D. Ill. June 6, 2003) (3 to 1 ratio and approximately 1 to 1 ratio); Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co., No. CIV.A. 00-5481, 2003 WL 21321370, at *3 (E.D. Pa. May 30, 2003) (1 to 1 ratio); McHugh v. Check Investors, Inc., No. Civ.A. 5:02CV00106, 2003 WL 21283288, at *5 (W.D. Va. May 21, 2003) (less than 1 to 1 ratio); McClain v. Metabolife Int'l, Inc., 259 F. Supp. 2d 1225, 1231 (N.D. Ala. 2003) (multiplaintiff case with ratios ranging from 2 to 1 to 9 to 1); Eden Elec., Ltd. v. Amana Co., 258 F. Supp. 2d 958, 975 (N.D. Iowa 2003) (4.7 to 1 ratio); Parrish v. Sollecito, 257 F. Supp. 2d 700, 701 (S.D.N.Y. 2003) (proposing remittitur with 9 to 1 ratio); Advocat, Inc. v. Sauer, 111 S.W.3d 346, 361 (Ark. 2003) (4.2 to 1 ratio); Hudson v. Cook, 105 S.W.3d 821, 832 (Ark. Ct. App. 2003) (7 to 1 ratio); Roth v. Farmer-Bocken Co. 667 N.W.2d 651, 688-70 (S.D. 2003) (new trial granted on 20 to 1 ratio). In contrast, thirty-nine percent of the top 100 verdicts in 2002 had double-digit ratios between the punitive and compensatory award. Marcia Coyle, *New Battles To Come over Punitives Ruling: High Court's Guides Include Ratios*, NAT'L L.J., Apr. 14, 2003, at A1 (citing National Law Journal “Top 100” Verdict study for 2002).

⁵²² *State Farm*, 123 S. Ct. at 1522-23; *see also supra* text accompanying notes 373-75 (discussing expansive interpretations of the ratio guidepost).

⁵²³ *State Farm*, 123 S. Ct. at 1524 (“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.”).

⁵²⁴ *Id.* at 1521-23.

plaintiff.⁵²⁵ Contrary to the common practice of looking to the “total harm” of a defendant’s conduct in determining the appropriate amount of punitive damages, the Court determined that punitive damages should be awarded only to vindicate the rights of the plaintiff, not nonparties who also may have been injured by the defendant’s conduct.⁵²⁶

Third, with regard to the comparable penalties guidepost, the Court retreated from its prior suggestion in *Haslip* that criminal penalties provide a meaningful comparison for the amount of a punitive damages award, rejecting an interpretation of the guidepost that promoted limitless punitive awards for personal injury torts.⁵²⁷

Fourth, the Court again did not adopt a defendant’s wealth as one of the measures of an award’s excessiveness. Instead, *State Farm* stated that “[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award”⁵²⁸ and that wealth “bear[s] no relation to the award’s reasonableness or proportionality to the harm.”⁵²⁹

Finally, and most notable for this Article, the Court dedicated an entire section of the opinion to voice its increased “concerns over the imprecise manner in which punitive damages systems are administered.”⁵³⁰ The Court acted on this concern by requiring that juries be instructed on one of the substantive due process limits on punitive awards discussed in *BMW*: “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.”⁵³¹ The Court thus connected its procedural due process holdings with its substantive due process refinement of the guideposts.

A. *The Facts*

State Farm involved a suit by Curtis Campbell against his insurer, State Farm, for its refusal to pay claims resulting from a car accident

⁵²⁵ *Id.* at 1523.

⁵²⁶ See *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 801 (Cal. Ct. App. 2003) (“[T]he court in *State Farm* went beyond the ‘guideposts’ . . . and articulated a constitutional due process limitation on both the goal and the measure of punitive damages. Further, the result is a punitive damages analysis that focuses primarily on what defendant did to the present plaintiff . . .”).

⁵²⁷ *State Farm*, 123 S. Ct. at 1526 (“The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility.”); accord *Romo*, 6 Cal. Rptr. 3d at 804 (recognizing that *State Farm* “fundamentally altered” the third guidepost).

⁵²⁸ *State Farm*, 123 S. Ct. at 1525.

⁵²⁹ *Id.*

⁵³⁰ *Id.* at 1520.

⁵³¹ *Id.* at 1522-23.

caused by Campbell.⁵³² While driving on a two-lane highway, Campbell passed six vans and began driving on the wrong side of the road. To avoid a collision with Campbell, an oncoming car swerved and collided with another vehicle. Campbell was not injured in the incident, but one motorist was killed and another injured.⁵³³ The victims brought a wrongful death action against Campbell, who was insured for \$50,000 by State Farm. Despite evidence that the accident was caused entirely by Campbell's unsafe driving, State Farm contested liability.⁵³⁴ State Farm assured Campbell that he had nothing to worry about by going to trial and that his assets were safe. State Farm was wrong. The jury returned a verdict in favor of the plaintiffs, and awarded compensatory damages of \$185,849, more than \$135,000 over Campbell's policy limit.⁵³⁵

State Farm refused to cover the excess liability or to post a bond allowing Campbell to appeal. State Farm's counsel even told Campbell "to put for sale signs on your property."⁵³⁶ Campbell thereafter retained his own counsel to appeal the judgment. The judgment against Campbell was affirmed, and State Farm ultimately paid the entire amount, including the portion that exceeded Campbell's policy limits.⁵³⁷

Campbell and his wife then filed suit against State Farm, bringing claims for bad faith, fraud, and intentional infliction of emotional distress. The trial court granted State Farm's request to bifurcate the trial into two phases, which were conducted before different juries.⁵³⁸ In the first phase of the trial, the jury found State Farm's refusal to settle unreasonable. In the second phase, the jury considered State Farm's liability for fraud and intentional infliction of emotional distress, as well as punitive damages. At this stage, the trial court permitted the plaintiffs to introduce evidence spanning a twenty-year period regarding "fraudulent practices by State Farm in its nationwide operations."⁵³⁹ The jury found in favor of the Campbells, awarding \$2.6 million in compensatory damages and \$145 million in punitive damages. The trial court reduced the compensatory award to \$1 million and reduced the punitive damages award to \$25 million.⁵⁴⁰ The Utah

⁵³² *Id.* at 1517-18.

⁵³³ *Id.* at 1517.

⁵³⁴ *Id.* at 1517-18.

⁵³⁵ *Id.* at 1518.

⁵³⁶ *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 65 P.3d 1134, 1142 (Utah 2001)).

⁵³⁷ *Id.*

⁵³⁸ *Id.*

⁵³⁹ *Id.* at 1519.

⁵⁴⁰ *Id.*

Supreme Court reinstated the \$145 million punitive damages award based on State Farm's "massive wealth" and nationwide practices.⁵⁴¹

B. The Majority Opinion

Justice Kennedy delivered the 6–3 majority opinion, joined by Chief Justice Rehnquist, and Justices Stevens, O'Connor, Souter, and Breyer. The decision found a more unified Court with Chief Justice Rehnquist shifting from his *BMW* dissent to the majority opinion.⁵⁴² Likewise, Justices O'Connor, Souter, and Breyer felt no need to file separate concurring opinions as they did in *BMW*.⁵⁴³ Describing the case as "neither close nor difficult,"⁵⁴⁴ the Court held that the \$145 million punitive damages award was "an irrational and arbitrary deprivation of the property of the defendant."⁵⁴⁵

1. Punitive Damages Procedures

The Court dedicated the first section of its analysis to expressing concerns about punitive damages procedures. As a threshold matter, the Court reaffirmed that "it is well established that there are procedural and substantive constitutional limitations on these awards."⁵⁴⁶ In light of due process and the quasi-criminal nature of punitive damages, the Court expressed increasing "concerns over the imprecise manner in which punitive damages systems are administered."⁵⁴⁷ Quoting *Honda Motor Co. v. Oberg*, the Court noted that jury instructions typically provide only vague guidance to the jury, and the evidence often submitted in support of punitive claims, such as the defendant's wealth, increases the risk of biased decision making. "Vague instructions . . . do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory."⁵⁴⁸ The Court explained that these concerns about punitive damages procedures prompted its holdings in both *BMW*⁵⁴⁹ and *Cooper Industries*,

⁵⁴¹ *Id.*

⁵⁴² See discussion *supra* Part I.E.4 (noting Chief Justice Rehnquist's dissenting vote in *BMW*).

⁵⁴³ See discussion *supra* Part I.E.2.

⁵⁴⁴ *State Farm*, 123 S. Ct. at 1521. Justice Kennedy's language was reminiscent of his assessment of *TXO*, which he characterized as a "close and difficult" case. *TXO Production Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 468 (1993) (Kennedy, J., concurring); see also *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576 (1996) (quoting Justice Kennedy's "close and difficult" language from *TXO*).

⁵⁴⁵ *State Farm*, 123 S. Ct. at 1526.

⁵⁴⁶ *Id.* at 1519.

⁵⁴⁷ *Id.* at 1520.

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.* The Court explained:

mandating heightened post-verdict protections:⁵⁵⁰ “Exacting appellate review ensures that an award of punitive damages is based upon an ‘application of law, rather than a decisionmaker’s caprice.’”⁵⁵¹ The Court then reviewed the case in light of the guideposts.

2. *The Reprehensibility Guidepost and Punishing Out-of-state Conduct*

The Court emphasized that reprehensibility remains “the most important indicium of the reasonableness of a punitive damages award,”⁵⁵² and reiterated the reprehensibility factors discussed in *BMW*.⁵⁵³ Notably, the Court announced that the existence of only one reprehensibility factor may be insufficient to sustain a punitive damages award,⁵⁵⁴ and that the absence of all of the factors renders an award suspect.⁵⁵⁵ While acknowledging that State Farm’s conduct merited no praise, the Court concluded that “a more modest punishment for this reprehensible conduct could have satisfied the State’s legitimate objectives, and the Utah courts should have gone no further.”⁵⁵⁶

As part of its reprehensibility analysis, the Court focused on whether evidence relevant to the assessment of the reprehensibility of State Farm’s conduct resulted in the company being punished based on improper considerations. First, the Court determined that the \$145 million punitive award improperly was assessed in an effort to punish State Farm for out-of-state conduct committed against non-parties. The Court reaffirmed *BMW*’s determination that a state has no legitimate interest or power to punish out-of-state conduct that may have been lawful where it occurred.⁵⁵⁷ But resolving an issue left open in *BMW*,⁵⁵⁸ the Court further stated that a state likewise

In light of these concerns, in *Gore* we instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Id. (citation omitted).

⁵⁵⁰ *Id.*

⁵⁵¹ *Id.* at 1520-21 (quoting *Cooper Indus., Inc. v. Leatherman Tool Group*, 532 U.S. 424, 436 (2001) (Breyer, J., concurring)).

⁵⁵² *Id.* at 1521 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

⁵⁵³ *Id.*; see also *supra* text accompanying notes 273-78.

⁵⁵⁴ *State Farm*, 123 S. Ct. at 1521.

⁵⁵⁵ *Id.*

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.* at 1522 (“A State cannot punish a defendant for conduct that may have been lawful where it occurred.”).

⁵⁵⁸ See *White v. Ford Motor Co.*, 312 F.3d 998, 1013-14 (9th Cir. 2002) (recognizing the lawful versus unlawful conduct issue left open in *BMW* and finding that a state has no legitimate interest in punishing either), *amended on denial of reh’g*, 335 F.3d 833 (9th Cir. 2003).

generally has no legitimate interest in punishing a defendant for out-of-state conduct that is *unlawful* where it occurred.⁵⁵⁹ To avoid the misuse of out-of-state conduct evidence, “[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.”⁵⁶⁰ More broadly, the Court explained that the states have no interest in punishing a defendant for harm to nonparties: “Due 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”⁵⁶¹ Doing so, the Court reasoned, unfairly subjects a defendant to the risk of multiple punishments for the same wrongdoing.⁵⁶²

Second, although the Court recognized that out-of-state conduct remains relevant to a jury’s assessment of reprehensibility,⁵⁶³ the Court announced an important limitation: such “conduct must have a nexus to the specific harm suffered by the plaintiff.”⁵⁶⁴ The Court determined that punitive damages cannot be based on “[a] defendant’s dissimilar acts.”⁵⁶⁵ The Court explained that punishing a defendant for prior wrongdoing unrelated to a plaintiff’s harm risks penalizing a defendant merely for being “an unsavory individual or business.”⁵⁶⁶ Because the Utah courts justified the punitive award based on misconduct completely unrelated to the Campbells’ harm, the Court concluded that the award was based on improper considerations.⁵⁶⁷ In sum, “[t]he reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended a 20-year

⁵⁵⁹ *State Farm*, 123 S. Ct. at 1522 (“Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.”).

⁵⁶⁰ *Id.* at 1522-23.

⁵⁶¹ *Id.* at 1523.

⁵⁶² *See id.* (“Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.”).

⁵⁶³ *Id.* at 1522. The Court noted that evidence of prior misconduct remains relevant under the five-factor reprehensibility scale to assessing the defendant’s deliberateness and culpability, as well as to whether the misconduct was an isolated incident or repeated behavior. *Id.*

⁵⁶⁴ *Id.*

⁵⁶⁵ *Id.* at 1523. The Court stated that “[a] defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.” *Id.* But, at the same time, “evidence of other acts need not be identical to have relevance in the calculation of punitive damages.” *Id.* Some practitioners have criticized this standard as “so vague as to be virtually no standard at all.” Cabraser & Nast, *supra* note 519, at 7.

⁵⁶⁶ *State Farm*, 123 S. Ct. at 1523.

⁵⁶⁷ *Id.* at 1523-24.

period.⁵⁶⁸ Having established no evidence of similar misconduct by State Farm, the Court concluded that the only conduct pertinent to the reprehensibility analysis was the conduct that harmed the Campbells.⁵⁶⁹

3. *The Ratio Guidepost*

Turning to the second guidepost, the Court reiterated its refusal since *Haslip*⁵⁷⁰ “to impose a bright-line ratio which a punitive damages award cannot exceed.”⁵⁷¹ At the same time, however, the Court announced that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”⁵⁷² The Court noted only one exception when a higher ratio may be appropriate: where particularly egregious conduct results in only a small amount of compensatory damages.⁵⁷³ Refining *BMW*, the Court announced that the converse also is true: “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.”⁵⁷⁴ The Court explained that compensatory damages often include a punitive element,⁵⁷⁵ and noted that the Campbells’ award included compensation for emotional distress, an amount likely duplicated in the punitive award.⁵⁷⁶ While “the precise award in any case . . . must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff,” the Court found that “[i]n the context of this case, we have

⁵⁶⁸ *Id.* at 1524.

⁵⁶⁹ *Id.*

⁵⁷⁰ See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996) (“[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula.”); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993) (plurality opinion) (“We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.” (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991))).

⁵⁷¹ *State Farm*, 123 S. Ct. at 1524.

⁵⁷² *Id.* Discussing *BMW*, the Court referenced the long legislative history of double, treble, or quadruple sanctions. The Court concluded that “[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1.” *Id.* (citation omitted). Some commentators have argued that *State Farm* leaves room for higher ratios in personal injury cases on the ground that the Supreme Court has not addressed punitive damages where the plaintiff suffered physical injury or death from the defendant’s wrongdoing. See Cabraser & Nast, *supra* note 519, at 6.

⁵⁷³ *State Farm*, 123 S. Ct. at 1524.

⁵⁷⁴ *Id.*

⁵⁷⁵ *Id.* at 1525.

⁵⁷⁶ *Id.*

no doubt that there is a presumption against an award that has a 145-to-1 ratio.”⁵⁷⁷

4. *The Comparable Penalties Guidepost*

The Court strongly suggested that future analysis of this guidepost should consider only civil penalties. The Court applied this guidepost solely in terms of civil penalties,⁵⁷⁸ and—retreating from approaches used in *Haslip* and *BMW*⁵⁷⁹—expressly noted that criminal penalties are of “less utility” as a reference point for determining the amount of a punitive damages award.⁵⁸⁰

5. *Defendant’s Wealth*

In addition to the guideposts, the Court touched on the recurring issue of what role a defendant’s wealth plays in the constitutional analysis. The Court noted that the Utah Supreme Court justified the \$145 million punitive award based on a number of factors, including State Farm’s wealth.⁵⁸¹ The Court determined that wealth and these other factors “bear no relation to the award’s reasonableness or proportionality,” but rather, are “arguments that seek to defend a departure from well-established constraints on punitive damages.”⁵⁸² Regarding wealth, the Court stated that “[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.”⁵⁸³ That said, the Court did not bar a jury’s consideration of a defendant’s wealth.

Ultimately, based on its application of the guideposts, the Court concluded that the “substantial” \$1 million compensatory award “likely would justify a punitive damages award at or near the amount

⁵⁷⁷ *Id.* at 1524.

⁵⁷⁸ *See id.* at 1526 (“The third guidepost in *Gore* is the disparity between the punitive damages award and the ‘civil penalties authorized or imposed in comparable cases.’” (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996))).

⁵⁷⁹ *See supra* text accompanying notes 296-300 (discussing the Court’s reference to the criminal penalty of incarceration in *Haslip* and the statutory fines for unfair trade practices in *BMW* in analyzing the third guidepost).

⁵⁸⁰ *See State Farm*, 123 S. Ct. at 1526. The Court explained:

The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof.

Id.

⁵⁸¹ *Id.* at 1525.

⁵⁸² *Id.*

⁵⁸³ *Id.*

of compensatory damages⁵⁸⁴ and remanded the case to the Utah courts for further proceedings.

C. Justice Scalia's and Justice Thomas's Separate Dissents

In separate, one-paragraph dissenting opinions, both Justices Scalia and Thomas maintained their prior positions that due process does not constrain the size of a punitive damages award and that the Court's jurisprudence on this issue was not entitled to stare decisis effect.⁵⁸⁵

D. Justice Ginsburg's Dissent

Justice Ginsburg also dissented, adhering to her view in *BMW* that punitive damages issues should be left to the states.⁵⁸⁶ She expressed concern that the majority had converted the flexible *BMW* guideposts into "marching orders."⁵⁸⁷ Mostly, however, she criticized the majority's evaluation of State Farm's reprehensibility, concluding that the record contained ample evidence⁵⁸⁸ that State Farm's "egregious and malicious" policies were responsible for the plaintiff's harm, as well as harm to many other Utah consumers.⁵⁸⁹ In her view, the majority simply substituted its view of State Farm's conduct for that of the Utah jury and courts.⁵⁹⁰ Reiterating her position in *BMW* that "this Court has no warrant to reform state law governing awards of punitive damages," she concluded that the \$145 million punitive award should stand.⁵⁹¹

IV. STATE FARM AND JURY INSTRUCTIONS: REASSESSING THE REQUIREMENTS OF DUE PROCESS

In *State Farm*, the Court expressed heightened concerns over the procedural safeguards used to constrain punitive damages, including the vague instructions often provided to juries.⁵⁹² Acting on these concerns, the Court for the first time expressly stated that a specific

⁵⁸⁴ *Id.* at 1526.

⁵⁸⁵ *Id.* (Scalia, J., dissenting); *id.* (Thomas, J., dissenting). Only the Scalia dissent mentions stare decisis.

⁵⁸⁶ *Id.* at 1527 (Ginsburg, J., dissenting).

⁵⁸⁷ *Id.* at 1531.

⁵⁸⁸ *Id.*

⁵⁸⁹ *Id.* at 1530-31.

⁵⁹⁰ See *id.* at 1527 ("Neither the amount of the award nor the trial record, however, justifies this Court's substitution of its judgment for that of Utah's competent decisionmakers.").

⁵⁹¹ *Id.* at 1531.

⁵⁹² See *id.* at 1522-23 (discussing the Court's concern with the jury's use of factors such as out-of-state conduct in determining awards).

punitive damages instruction must be given to the jury.⁵⁹³ The Court's requirement of an out-of-state conduct instruction represents a significant departure from *Haslip*. If nothing else, this change should prompt courts to abandon the pre-*State Farm* practice of rejecting instructional challenges with little more than a dismissive "this is no worse than *Haslip*."⁵⁹⁴ But more important than rejecting a rogue adherence to the *Haslip*-minimum, *State Farm*'s instructional mandate and concern about punitive damages procedures suggest that it is time to revisit the concepts of "adequate guidance" and "reasonableness" in a post-*Haslip* world. All told, after *State Farm* there is no sound reason to instruct juries on only one substantive due process protection and not others.

A. *State Farm Rejected Haslip's Principal Justification for the Use of Vague Jury Instructions*

In *Haslip*, the Court upheld the use of vague instructions largely because Alabama provided a detailed, post-verdict check on the jury's discretion.⁵⁹⁵ However, by requiring jury instructions on at least one substantive due process limitation on punitive damages, *State Farm* implicitly rejected this principle. Simply stated, if post-verdict review always provided an adequate constraint on the jury's discretion, there would be no need to require an instruction in the first instance.

State Farm's jury instruction requirement is consistent with the Court's gradual recognition that the reasonableness of a punitive damages award is not merely a question of the size of the award, but also an issue of whether the award was based upon unconstitutional considerations.⁵⁹⁶ In other contexts, the Supreme Court long ago recognized that post-verdict reduction of an award cannot cure a tainted verdict, such as where a jury acts out of passion or prejudice.⁵⁹⁷ For the same reasons, if a jury bases its punitive damages award on

⁵⁹³ *Id.*

⁵⁹⁴ *Cf.* *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 472 (1993) (Scalia, J., concurring) (finding the court's lack of guidance and approval of a large punitive award would permit future cases to "be disposed of simply with the observation that 'this is no worse than *TXO*'").

⁵⁹⁵ See discussion *supra* notes 78-81 and accompanying text.

⁵⁹⁶ See *supra* notes 170-71, 263-66 and accompanying text (discussing consideration of such factors as bias, passion or prejudice, state interests, and out-of-state conduct).

⁵⁹⁷ See *Minneapolis, St. P. & S.S.M. Ry. v. Moquin*, 283 U.S. 520, 521 (1931) (remitter verdict under federal statute that was the result of passion and prejudice). To be sure, courts occasionally have remitted awards because of "passion or prejudice." But in these instances, the passion or prejudice inquiry was usually just a legal fiction to challenge awards suspect in size alone. See *Honda Motor Co. v. Oberg*, 512 U.S. 415, 425 & n.4 (1994) (discussing early history of punitive damages review and noting that "because of the difficulty of probing juror reasoning, passion and prejudice review was, in fact, review of the amount of awards. Judges would infer passion, prejudice, or partiality from the size of the award.").

improper considerations—such as punishing the defendant for out-of-state conduct committed against individuals not parties to the case—post-verdict remittitur can do nothing to cure the award’s improper foundation. In other words, an award based on unconstitutional considerations is still improper even if reduced to one dollar.

Just a few months before *State Farm* was decided, the Ninth Circuit reached this conclusion in *White v. Ford Motor Co.*⁵⁹⁸ There, the court ordered a new trial on punitive damages because the district court refused to give an instruction prohibiting the jury from punishing the defendant for out-of-state conduct.⁵⁹⁹ The Ninth Circuit reasoned that post-verdict review of the size of the award could not cure a verdict based on improper grounds:

The jury was encouraged by argument to award damages for Ford’s wrongs to the entire country, and the court rejected an instruction that would have told the jury to vindicate only the wrongs done in Nevada. Possibly the jury would have chosen as large an award had it been told to vindicate only the rights of Nevadans, but possibly it would have chosen a substantially lower award. For all we know, the jury would have applied a much lower ratio than the thirty to one the court chose, or the sixty-six to one that the jury initially chose, had it been told that it should limit its scope to the interests of Nevadans. *A punitive damages award that encompasses a defendant’s extraterritorial conduct may be unconstitutional even if the size of the award itself, as compared to compensatory damages, is not outside the bounds of due process.*⁶⁰⁰

The *White* court thus determined that the only check on awards based on improper considerations is to send the case back to the jury and provide adequate procedural protections in the first instance.⁶⁰¹

Beyond the inability of post-verdict review to remedy a verdict tainted by improper considerations, *State Farm* warrants re-examination of a point made by Justice O’Connor in her *Haslip* dissent concerning the inability to remedy flawed procedures by reviewing the size of an award: “*Post hoc* review tests only the amount of the award, not the procedures by which that amount was determined. . . . Any award of punitive damages rendered under these procedures, no

⁵⁹⁸ 312 F.3d 998 (9th Cir. 2002), amended on denial of reh’g, 335 F.3d 833 (9th Cir. 2003). But see *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 805-06 (Cal. Ct. App. 2003) (finding instructional error under *State Farm*, but summarily concluding that reduction of award satisfied due process).

⁵⁹⁹ *White*, 312 F.3d at 1019-20.

⁶⁰⁰ *Id.* at 1016 (emphasis added).

⁶⁰¹ *Id.* at 1020. Although not cited in *State Farm*, the *White* decision was the subject of supplemental briefs and also was discussed during oral argument. See Supplemental Brief for Petitioner, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) (No. 01-1289); Transcript of Oral Argument at 49-52 (Dec. 11, 2002), *State Farm* (No. 01-1289), available at http://www.supremecourt.us.gov/oral_arguments/argument_transcripts/01-1289.pdf.

matter how small the amount, is constitutionally infirm.”⁶⁰² Put another way, post-verdict review of the size of an award addresses a different error; it cannot remedy the independent problem of trial procedures that foster improper decision making. In analogous contexts, the Supreme Court has acknowledged as much. In *Ward v. Village of Monroeville*,⁶⁰³ the Supreme Court addressed the constitutionality of a system that permitted a village mayor to act as the judge in adjudicating traffic offenses.⁶⁰⁴ The Court considered whether the system deprived the defendant of his due process right to a trial before an impartial decision maker. The defendant argued that because the mayor was responsible for revenue generating for the village, the mayor could not impose fines in an impartial manner.⁶⁰⁵ The village countered that any due process violation at the trial level could be corrected by an appeal or a trial de novo in the county state court.⁶⁰⁶ The Supreme Court concluded that the defendant was entitled to fair procedures in the first instance:

This “procedural safeguard” does not guarantee a fair trial in the mayor’s court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State’s trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.⁶⁰⁷

In short, *State Farm’s* jury instruction requirement comports with the Court’s due process focus on both the proper bases of punitive damages awards as well as the size of these awards. *State Farm* recognizes that a court cannot “subtract” improper considerations from a punitive damages award simply through a monetary reduction, and after-the-fact protections aimed at correcting substantive due process violations cannot replace fair procedures in the first instance.

⁶⁰² Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 43-44 (1991) (O’Connor, J., dissenting).

⁶⁰³ 409 U.S. 57 (1972).

⁶⁰⁴ *Id.* at 57-58.

⁶⁰⁵ *Id.* at 58.

⁶⁰⁶ *Id.* at 61.

⁶⁰⁷ *Id.* at 61-62. *Ward* was decided before *Haslip*, but is conspicuously absent from the decision. See Melsheimer & Stodghill, *supra* note 387, at 339 (discussing *Ward*). *Ward* can be read to conflict with *Haslip’s* position that vague instructions can be cured through post-verdict review. On the other hand, unlike the common law punitive damages system in *Haslip*, the mayor’s court system in *Ward* was inherently biased in that the risk of improper influences over the process existed in every case. In any event, *Ward* has current relevance given the post-*Haslip* recognition of substantive due process limits on punitive damages, the focus on whether an award is based on improper considerations, and the Court’s heightened concern of quasi-criminal punitive sanctions being awarded without comparable criminal procedural protections.

B. State Farm's Convergence of Substantive and Procedural Due Process Requires that Juries Receive More Guidance

By holding that a substantive due process limit must be provided to the jury, *State Farm* recognized that—in the context of punitive damages—substantive due process influences the requirements of procedural due process. At a minimum, the Court's recognition of a correlation between procedural and substantive due process indicates that the concept of "adequate guidance" to the jury has evolved since *Haslip*.

State Farm's convergence of substantive and procedural due process requirements again comports with the Court's evolving approach to punitive damages. First, the Court has used the same due process test for both substantive and procedural due process. Specifically, when *Haslip* was decided, the Court had not yet recognized substantive due process limits on punitive awards.⁶⁰⁸ Moreover, even though Alabama provided substantive standards in its post-verdict review (the *Green Oil* factors),⁶⁰⁹ those factors were only state limitations, not constitutional protections. But in *TXO*, the plurality opinion recognized that substantive due process imposes limits on the amount of a punitive damages award. In determining the standard for assessing a substantive due process violation, the *TXO* Court adopted *Haslip's* procedural due process reasonableness test. In *BMW*, the Court retained that test, but took the first step toward clarifying substantive due process reasonableness by announcing the guideposts. In the end, the Court adopted the same test for both aspects of due process, but refined the reasonableness standard only in the context of substantive due process.

Second, the Court's punitive damages decisions repeatedly have blended the concepts of substantive and procedural due process. For example, *BMW* framed the ostensibly substantive due process issue in terms of notice, a procedural due process concept.⁶¹⁰ In *Haslip*, a procedural due process case, the Court discussed the size of the award as part of the procedural review.⁶¹¹ The Court's mingling of these concepts has led one commentator to conclude that the distinction between substantive and procedural due process in the Court's punitive damages cases is a "false perception."⁶¹²

⁶⁰⁸ See *supra* notes 93-95, 139-44 and accompanying text.

⁶⁰⁹ See *supra* notes 89-91 and accompanying text.

⁶¹⁰ See *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996) (stating that a person should receive "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose").

⁶¹¹ See *supra* notes 93-95 and accompanying text.

⁶¹² Neil B. Stekloff, Note and Comment, *Raising Five Eyebrows: Substantive Due Process Review of Punitive Damages Awards After BMW v. Gore*, 29 CONN. L. REV. 1797, 1823-25 (1997).

In *State Farm*, the Court took the logical, if not inevitable, step of recognizing that the factors relevant to assessing reasonableness for post-verdict *substantive* due process review guide the concept of reasonableness for *procedural* due process. By mandating an out-of-state conduct instruction, the Court recognized that a defendant's substantive due process right to a nonexcessive/nonarbitrary award requires better constraints on the jury's discretion. That one step both countermanded the lower courts' standard practice of simply upholding instructions as adequate so long as they included the *Haslip*-minimum, and also addressed a post-*BMW* argument that additional instructions are not required because the guideposts and other limitations concerned only post-verdict review.⁶¹³

C. *Protecting Substantive Due Process Rights Requires Heightened Procedural Protections*

State Farm's recognition that due process requires more than the *Haslip*-minimum is consistent with the Court's acknowledgment that heightened protections, akin to criminal procedural protections, are required to protect the recently identified (post-*Haslip*) substantive due process limits on punitive damages. In *Cooper Industries*, the Court determined that while the "abuse of discretion" appellate standard of review was sufficient for considering whether a punitive award comported with state law, courts must apply a less deferential standard when assessing federal constitutional limits.⁶¹⁴ The Court adopted the *de novo* standard of review used in "analogous" cases "involving deprivations of life . . . and deprivations of property."⁶¹⁵ Building on *Cooper Industries*, the *State Farm* Court expressed concern that while punitive damages serve the same purposes as criminal penalties, "defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding."⁶¹⁶ Moreover, the Court stated that these concerns were "heightened when the decisionmaker is presented . . . with evidence that has little bearing as to the amount of punitive damages that should be awarded."⁶¹⁷ It was these concerns, the Court reiterated, that

⁶¹³ See cases cited *supra* notes 455-56, 460-61, 493-94.

⁶¹⁴ See *supra* notes 341-49 and accompanying text. Thus, *Haslip's* reliance on the state law post-verdict *Green Oil* factors as a sufficient check on the jury's discretion never addressed the fact that as a matter of substantive due process a jury's discretion is constrained. In other words, the process may have provided adequate procedural protections when considering the award in light of state substantive law, but that never addressed whether it adequately protected constitutional rights.

⁶¹⁵ *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434-36 (2001).

⁶¹⁶ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003).

⁶¹⁷ *Id.*

prompted its creation of post-verdict protections, including the “guideposts” and de novo appellate review.⁶¹⁸

The same reasoning warrants heightened pre-verdict procedural protections. For instance, the Supreme Court repeatedly has recognized that in capital cases—one of the “analogous” contexts *Cooper Industries* used to support the de novo appellate standard of review—the jury must be provided information that will permit it to make a rational punishment determination. Specifically, courts must instruct juries about a defendant’s ineligibility for parole where the state urges the jury to impose the death penalty based on the defendant’s “future dangerousness.”⁶¹⁹ The Court has reasoned that “[t]he trial court’s refusal to apprise the jury of information so crucial to its sentencing determination . . . cannot be reconciled with our well-established precedents interpreting the Due Process Clause.”⁶²⁰ The same could be said for punitive damages cases.⁶²¹ Similarly, “it is a familiar principle that, when evidence is admitted for one purpose, but 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.”⁶²² That risk is ever-present in punitive damages cases where evidence of a defendant’s prior similar misconduct may be admissible to establish the scope and “reprehensibility” of the defendant’s conduct, but could also be misused by the jury to punish the defendant for harm to nonparties who were injured by that conduct. Indeed, in *State Farm*, the Court recognized that “lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant’s action in the State where it was tortious,” but the “jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant.”⁶²³

⁶¹⁸ *Id.*

⁶¹⁹ See, e.g., *Kelly v. South Carolina*, 534 U.S. 246 (2002); *Shafer v. South Carolina*, 532 U.S. 36 (2001); *Simmons v. South Carolina*, 512 U.S. 154 (1994). Each of these cases held that due process requires that the sentencing juries in capital cases be informed that the defendant is parole ineligible where the state relies on future dangerousness in support of the death penalty.

⁶²⁰ *Simmons*, 512 U.S. at 164.

⁶²¹ Outside the death penalty context, the Court similarly has recognized that juries must be instructed on constitutional safeguards. See *Taylor v. Kentucky*, 436 U.S. 478 (1978) (mandating jury instruction in criminal cases regarding presumption of innocence); see also Brief of Ford Motor Company as Amicus Curiae in Support of Petitioner at 19-27, *State Farm*, 123 S. Ct. 1513 (2003) (No. 01-1289) (arguing that *Taylor* and other cases require jury instructions concerning the constitutional limits on punitive damages).

⁶²² Colby, *supra* note 374, at 676 (citing criminal instructional cases).

⁶²³ *State Farm*, 123 S. Ct. at 1522.

*D. Requiring Jury Instructions on the Constitutional Limits
on Punitive Damages Under State Farm Respects the Role of the Jury*

State Farm's instruction requirement also reconciles the post-*BMW/Cooper Industries* oddity of requiring post-verdict review, including *de novo* review by appellate courts, of punitive damages factors never considered by the jury.⁶²⁴ While unlikely rising to the level of a Seventh Amendment violation,⁶²⁵ courts (and some model jury instruction committees)⁶²⁶ understandably have been troubled by the idea that post-verdict application of the guideposts effectively substitutes the court's view of the defendant's reprehensibility for that of the jury.⁶²⁷ This concern is not unwarranted considering that empirical data suggests "that over half of punitive damages awards were appealed, and that more than half of those appealed resulted in reductions or reversals of the punitive damages."⁶²⁸

But these concerns aside, it just makes little sense to have courts conduct "searching" post-verdict review of punitive damages awards under principles juries were never told about. As one model jury instruction committee concluded, "It would be nonsensical for the jury to fix the amount of punitive damages using criteria substantially different than those used by appellate courts in determining *de novo* whether the award was 'grossly excessive.'"⁶²⁹

E. Some Counterarguments

Notwithstanding the above, one could argue that had the Court intended to require instructions across the board, it easily could have said so. Additionally, the Court's out-of-state conduct instruction requirement could be interpreted solely as a federalism constraint, independent of the due process limits on punitive damages. And finally, requiring specific instructions deviates from the common law method of providing juries minimal guidance.

The Court's jurisprudence provides a response to each of these points. First, the Court unquestionably could have noted that other instructions were required. But the issue presented on appeal focused primarily on whether the award improperly was based on

⁶²⁴ See *supra* text accompanying notes 341-49.

⁶²⁵ See *supra* text accompanying notes 350-51.

⁶²⁶ See discussion *supra* note 459.

⁶²⁷ See *supra* discussion accompanying notes 477-83.

⁶²⁸ *Honda Motor Co. v. Oberg*, 512 U.S. 415, 433 n.11 (1994). See generally Robbenolt, *supra* note 3, at 165-66 (discussing studies showing high rate of post-verdict reductions of punitive damages awards).

⁶²⁹ 2 PALMORE'S KENTUCKY INSTRUCTIONS TO JURIES § 39.15, cmt. (Cum. Supp. 2003).

dissimilar out-of-state conduct,⁶³⁰ not a general argument that better instructions were required by due process. The Court repeatedly has declined to address punitive issues not squarely or properly before it.⁶³¹ Accordingly, it is no surprise that the Court's opinion went only as far as it did.

Second, while informed by principles of federalism, comity, and state sovereignty, the Court's out-of-state conduct holding remains a due process ruling. As the Court explained in *BMW*, "the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve."⁶³² This inquiry is a matter of substantive due process, not a separate sovereignty or federalism analysis. This was confirmed in *Cooper Industries*, where the Court expressed concern that the jury may have based the punitive award on conduct that was lawful even though no federalism concerns were at stake.⁶³³ Accordingly, the Court's holding supports jury instructions on all the substantive due process limitations on punitive damages.

Finally, there is history. To be sure, the *Haslip* minimum reflects the common law approach to instructions.⁶³⁴ But if the last decade of Supreme Court jurisprudence reflects anything, it is that history is not determinative on the question of punitive damages.⁶³⁵ The majority of the Court repeatedly has rejected Justice Scalia's refrain that substantive and procedural due process requirements should be defined by history. To this end, the Court has not hesitated to change common law practices when necessary. In *Cooper Industries*, for instance, the Court held that due process required de novo review of punitive damages awards, a change from the common law standard. Indeed, *State Farm* itself implicitly rejected the idea that history controls the instructions applicable to punitive damages. The Court did

⁶³⁰ The petitioner in *State Farm* set forth the question presented as follows:

Whether the Utah Supreme Court, in direct contravention of this Court's decision in [*BMW*], and fundamental principles of due process, committed constitutional error by reinstating a \$145 million punitive damage award that punishes out-of-state conduct, is 145 times greater than the compensatory damages in the case, and is based upon the defendant's alleged business practices nationwide over a twenty-year period, which were unrelated and dissimilar to the conduct by the defendant that gave rise to the plaintiffs' claims?

Brief for Petitioner at i, *State Farm*, 123 S. Ct. 1513 (2003) (No. 01-1289), available at http://supreme.lp.findlaw.com/supreme_court/docket/2002/december.html#01-1289.

⁶³¹ See *supra* text accompanying notes 45-59, 164-65.

⁶³² *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996).

⁶³³ See *supra* text accompanying notes 353-54.

⁶³⁴ See *supra* text accompanying notes 67-70, 96-101.

⁶³⁵ The Court itself has recognized that twenty-first century punitive damages are not the same creature that they were at common law. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.11 (2001) ("Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries").

not even consider for a moment the fact that the common law did not require an instruction on the permissible use of evidence of a defendant's out-of-state conduct.

In sum, after *State Farm*, all signs point to the need to reassess procedural due process and to require jury instructions that inform the jury of the standards that should guide and limit their awards. Courts and litigants that fail to take notice do so at their peril.⁶³⁶

⁶³⁶ Courts do appear to be taking notice. See *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 805 (Cal. Ct. App. 2003) (finding model instruction directing jury to consider defendant's financial condition improper after *State Farm*); *Snyder v. McCarley*, No. 2002-CA-001282, 2003 WL 22025843, at *2 (Ky. Ct. App. Sept. 13, 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); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 671 (S.D. 2003) (remanding for a new trial on punitive damages and without analysis ordering that the jury should be instructed on the guideposts). Similarly, model instruction committees are reassessing punitive damages instructions in light of *State Farm*. See FLA. STANDARD JURY INSTRUCTIONS IN CIVIL CASES, PD cmt. (2003 Supp.), WL JICIV FL-CLE PD (stating that the "committee is considering whether these instructions need to be revised in light of *State Farm*"). New York and California already have revised their model instructions in an attempt to address *State Farm*. Specifically, the New York instruction modifies the prior reprehensibility factors and clarifies to some extent the focus on harm to the plaintiff, not third parties. See N.Y. PATTERN JURY INSTRUCTIONS—CIVIL § 2:278 (2003), WL NY PJI 2:278; see also *supra* note 427 (providing text of the instruction). Moreover, citing *State Farm*, the comments to the instruction note 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 conduct that was lawful in the jurisdiction where it occurred." *Id.* § 2:278 cmt., WL NY PJI 2:278. As this Article went to press, California published supplemental instructions, including an out-of-state conduct instruction and an instruction clarifying the factors juries should consider in determining the reprehensibility of the defendant's conduct. The out-of-state conduct instruction provides:

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 damages against the defendant for conduct that occurred outside California.

CAL. CIVIL JURY INSTRUCTIONS (BAJI) § 14.71.1 (2004), WL CA BAJI 14.71.1. The new reprehensibility instruction provides:

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

1. The harm caused was physical as opposed to economic;
2. The wrongful conduct demonstrated an indifference to or 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, WL CA BAJI 14.71.2. As discussed *infra* Part V, while the New York and California revisions should have gone much further, they are a step in the right direction.

V. WHAT GUIDANCE SHOULD BE PROVIDED TO THE JURY AFTER *STATE FARM*

State Farm suggested that factors considered in substantive due process review should be provided to the jury in the first instance. The decision also clarified those standards so that they can in fact be used to do so. By clarifying the *BMW* guideposts and the types of conduct upon which an award cannot be based, the Court in effect has reshaped the contours of “adequate guidance” under *Haslip*.

For jurisdictions using *Haslip*-like common law instructions, *State Farm* can be used to devise instructions that accurately reflect proper due process limitations on punitive awards. For *Haslip*-plus-wealth or multifactor jurisdictions, *State Farm*'s standards provide a baseline by which to measure and reevaluate existing instructions. Specifically, few jurisdictions appear to have analyzed whether the “extra” factors included in their model instructions really constrain juries from basing awards on improper considerations. This is understandable, given that many of these instructions merely incorporate state law punitive damages factors that were developed before the Supreme Court decided and clarified the constitutional considerations, such as the guideposts or the Court's discussion of the appropriate use of a defendant's wealth.⁶³⁷ Potential conflicts between state law and constitutional factors reflect a larger question the Court someday may have to address under Supremacy Clause principles. For jury instructions, it means that the model instructions used in some jurisdictions

⁶³⁷ Recently, the California Court of Appeal has determined that the California model instruction is improper after *State Farm*. See *Romo*, 6 Cal. Rptr. 3d at 805. The model instruction used at trial directed the jury to consider the defendant's “financial condition” in setting the amount of the award. *Id.* The court concluded that this instruction improperly permitted the jury to base the award on harm to nonparties. *Id.* at 805 n.7. Another district of the same court of appeal—based on another aspect of *State Farm*—concluded that the consideration of a defendant's financial condition is constitutionally suspect after *State Farm*. 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.” (citation omitted)). Other courts, however, have not addressed potential inconsistencies between the constitutional standards and state factors. A few courts, for instance, have recognized that the *BMW/State Farm* constitutional factors must be addressed during post-verdict review. But these courts simply have adopted a combined test incorporating both state and federal considerations without addressing whether the state factors, such as considering a defendant's wealth, may conflict with constitutional limits. See *Roth*, 667 N.W.2d at 666 (incorporating state's “five-factor test” with the guideposts “outlined by the Supreme Court”); see also *Trinity Evangelical Lutheran Church & Sch.-Freistadt v. Tower Ins. Co.*, 661 N.W.2d 789, 800 (Wis. 2003) (equating the Wisconsin court's test, including defendant's wealth, to be “virtually identical” to Supreme Court's constitutional test).

may affirmatively misguide the jury and heighten the risk of arbitrary or improper punitive damages awards.⁶³⁸

With all this in mind, the following is an overview of the information we believe, at minimum, should be given to juries to guide their assessment of the amount of punitive damages. While the precise language of such instructions is beyond the scope of this Article,⁶³⁹ we suggest areas of improvement to the model instructions used in various jurisdictions.

A. *Factors That Should Be Given to the Jury*

1. *The Haslip-minimum*

As a threshold matter, the *Haslip*-minimum, for what it's worth, still should be provided to the jury: (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, but within the jury's discretion.⁶⁴⁰ Most jurisdictions' model instructions include factors comparable to the *Haslip*-minimum.

⁶³⁸ The issue of "extra" instructions was raised in *TXO*, where the petitioner argued that West Virginia's instructions directing the jury to consider a defendant's wealth violated due process by leading the jury to focus on improper factors. See Brief of Petitioner at 35, *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993) (No. 92-479) ("Due process may not require a detailed roadmap, but it certainly requires directions of some sort." *Haslip*, 111 S. Ct. at 1059 (O'Connor, J. dissenting)). It should be common ground that the jury ought not be given a roadmap to the wrong destination, which is the 'defendant[']s . . . deep pocket.' *Id.* at 1045.").

The plurality in *TXO* declined to address the issue because it had not been properly presented. It did, however, express concern that "the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident." *TXO*, 509 U.S. at 464. At the same time, the plurality recognized that in "*Haslip* we referred to the 'financial position' of the defendant as one factor that could be taken into account in assessing punitive damages." *Id.* Justice O'Connor was less forgiving. She argued that "the 'additional compensation' instruction, considered together with the instruction directing the jury's attention to TXO's massive wealth, encouraged the jury to transfer some of TXO's impressive wealth to the smaller and more sympathetic respondents In fact, the [jury] instructions practically ensured that this would occur." *Id.* at 490 (O'Connor, J., dissenting). Justice O'Connor also recognized that although wealth was a consideration in *Haslip*, it was only considered by the court during post-verdict review since Alabama generally barred wealth evidence from being presented to the jury.

⁶³⁹ No formal drafting committee, such as the group that drafted the MPDA, has yet been created to devise punitive damages instructions that comport with *State Farm*. See *supra* note 387 (discussing MPDA). A well-known punitive damages litigator who argued for the defendants in *BMW*, *Oberg*, and *Browning-Ferris* has drafted instructions that he believes reflect the principles set forth in *State Farm*. See Frey, *supra* note 8, at 24, 27-28 (proposing jury instructions on punitive damages).

⁶⁴⁰ *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991).

2. *Out-of-state Conduct*

State Farm mandates that trial courts give an out-of-state conduct instruction. Consistent with *State Farm*, courts should instruct the jury that it cannot base the amount of a punitive damages award on a defendant's out-of-state conduct, whether lawful or unlawful in that jurisdiction.⁶⁴¹ No federal model instruction and only two state models currently attempt to address the extraterritoriality issue.⁶⁴²

3. *Harm to Nonparties*

Where a court allows evidence or argument concerning other similar wrongdoing by the defendant for the purpose of assessing reprehensibility, the jury should be told that it cannot punish for harms suffered by nonparties.⁶⁴³ The jury should be informed of the limited purpose of such evidence and that it cannot set punitive damages in an amount to vindicate the harms to those not party to the lawsuit. No jurisdiction includes this limit as part of its model instruction. Several jurisdictions implicitly provide such a limitation in their reasonable relationship instruction, informing the jury that a punitive award be reasonable in relation to the harm "to the plaintiff."⁶⁴⁴ The instructions, however, should be more explicit.

4. *Defendant's Wealth*

In *State Farm*, the Supreme Court again did not include wealth as one of the guideposts, instead noting that wealth has no limiting influence on jury decision making. To the contrary, the Court

⁶⁴¹ See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1522-23 (2003) (holding that a state does not have a "legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction," and additionally, that "[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").

⁶⁴² See *supra* note 636 (discussing comments to New York model instruction and recent supplemental California instructions).

⁶⁴³ See *State Farm*, 123 S. Ct. at 1523. The Court explained:

Due 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 Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.

Id. In light of this holding, courts should bar plaintiff's counsel from the common practice of asking juries to punish defendants for the total harm caused to anyone other than the plaintiff. See Colby, *supra* note 374, at 675 (discussing procedural protections to avoid unconstitutional punitive damages awards based on harm to nonparties). But even then, courts should instruct the jury of the limited use of evidence of harm to nonparties that may be relevant for other purposes, such as ascertaining the degree of reprehensibility of the defendant's conduct. *Id.*

⁶⁴⁴ See discussion *supra* Part II.A.1.c.

recognized that evidence of a defendant's wealth may improperly influence the jury.⁶⁴⁵ At the same time, the Court has not yet taken the additional step of barring wealth evidence from the jury. While some states preclude wealth evidence,⁶⁴⁶ other states permit, or even require,⁶⁴⁷ evidence of a defendant's financial condition. In these states, the jury should be instructed that it cannot increase a punitive damages award simply because the defendant is wealthy or a large corporation.⁶⁴⁸ To avoid constitutional concerns, juries also should be told that a defendant's wealth should be used only as a limiting factor in setting the amount of an award.

The majority of model instructions, however, advise the jury to consider the defendant's "financial condition" or "wealth" when determining the amount of the award⁶⁴⁹ without also providing any instructions on *how* the jury should do so. This virtually invites the jury to inflate the award because the defendant is wealthy, particularly when the defendant is an out-of-state corporation. A few jurisdictions instruct the jury to consider the defendant's "ability to pay" the award.⁶⁵⁰ This instruction indirectly suggests that the jury should inflate the award in relation to the defendant's resources. These instructions should be modified to ensure that a defendant is being punished for its conduct, rather than its size.

Related to a defendant's wealth, several states' model instructions advise the jury to consider a defendant's "profits" from the wrongdoing in setting the punitive award.⁶⁵¹ Jurisdictions should consider deleting profits as a consideration. As with instructions on "financial condition," a profit instruction invites the jury to inflate an award on a wealth-based ground. Additionally, without clarification that the "profits" must be specifically tied to the wrongdoing⁶⁵² and that profits

⁶⁴⁵ See *supra* text accompanying notes 581-83. 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 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 of the defendant.

SUNSTEIN ET AL., *supra* note 3, at 32.

⁶⁴⁶ See, e.g., COLO. REV. STAT. § 13-21-102(6) (1992).

⁶⁴⁷ See, 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).

⁶⁴⁸ See *State Farm*, 123 S. Ct. at 1525 ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.")

⁶⁴⁹ See discussion *supra* Part II.

⁶⁵⁰ See sources cited *supra* notes 414, 416, 428, 432-34, 439.

⁶⁵¹ See sources cited *supra* notes 437-42.

⁶⁵² See *supra* text accompanying notes 355-57.

must relate to in-state activities,⁶⁵³ the instructions are constitutionally suspect. Finally, basing an award on a defendant's financial condition or profits risks punishing a defendant for harm to nonparties, a practice barred by *State Farm*.⁶⁵⁴

In short, the wealth and profit 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*.

5. Reasonable Relationship to Plaintiff's Harm

The jury should be told that any punitive damages award must bear a reasonable relationship to the compensatory damages award. A reasonable relationship instruction provides an inherent constraint on the jury's discretion. In other words, a jury informed that its punitive award must be anchored to the compensatory award and the plaintiff's harm is less likely to fix the award based on impermissible considerations, such as out-of-state conduct, a defendant's wealth, or other potentially improper influences.⁶⁵⁵ Several jurisdictions' model instructions currently include a reasonable relationship instruction;⁶⁵⁶ most, however, do not.⁶⁵⁷ And remarkably, the model instructions in

⁶⁵³ Cf. *supra* text accompanying notes 263-69, 557-62.

⁶⁵⁴ See *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 805 (Cal. Ct. App. 2003) (finding error where jury was instructed to consider defendant's "financial condition" because it permitted jury to punish for an entire course of conduct that harmed nonparties, not restricted to the harm to the plaintiff); see also Colby, *supra* note 374, 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). The comments to California's recently amended model punitive damages instruction note that "the portion of this instruction that is identified as (2) [consideration of the defendant's financial condition] is likely to be irrelevant in many situations. However, until some California court speaks to that issue in light of the *State Farm* case, it remains in the instruction." CAL. CIVIL JURY INSTRUCTIONS (BAJI) § 14.71.1 cmt. (2004), WL CA BAJI 14.71.1.

⁶⁵⁵ For instance, although inconsistent with *State Farm*, some courts permit plaintiffs' lawyers to suggest a punitive damages figure to the jury. See *TVT Records v. Island Def Jam Music Group*, 257 F. Supp. 2d 737, 748-50 (S.D.N.Y. 2003) (ruling plaintiff's counsel could suggest a specific amount of punitive damages to the jury during closing arguments). Empirical data strongly suggests that juries are far more likely to award excessive punitive damages when they are given a frame of reference by counsel:

The dollar amounts that are requested by plaintiffs in their closing arguments to a jury have a dramatic effect on the size of the punitive damages award: the higher the request, the higher the awards. Almost half of the jurors said that the plaintiff's award request influenced their judgment process; analysis of the data indicates that the greater their reliance on the plaintiff's request, the higher the awards. Judges' instructions that arguments by the plaintiff's lawyer are not evidence did not eliminate this effect.

SUNSTEIN ET AL., *supra* note 3, at 62. Accordingly, a reasonable relationship instruction may help counter the improper influence of such requests.

⁶⁵⁶ See discussion *supra* Part II.A.1.c.

⁶⁵⁷ See discussion *supra* Part II.A.1.a-b.

some jurisdictions tell the jury that punitive damages do not need to bear a reasonable relationship to the plaintiff's harm.⁶⁵⁸ At bare minimum, a clear and explicit reasonable relationship instruction should be included in all model instructions.

6. *Deterrent Effect of Compensatory Damages*

State Farm recognized that the deterrent goal of punitive damages may be satisfied where compensatory damages are substantial or include a "punitive element."⁶⁵⁹ No jurisdiction includes this factor as part of its model instruction. In light of *State Farm*, courts should instruct the jury that it should consider whether an additional amount of punitive damages is necessary to achieve the goals of punishment and deterrence.

7. *Reprehensibility*

The jury should receive guidance on this proper consideration.⁶⁶⁰ In *State Farm*, the Supreme Court identified a five factor scale of reprehensible conduct,⁶⁶¹ and many state model instructions already include comparable instructions concerning the nature of a defendant's conduct. Because the importance of each factor will vary from case to case, model instructions should not simply adopt the five *State Farm* factors. Rather, instructions should advise the jury generally to consider the "reprehensibility" of the defendant's conduct, and allow the trial court to include the *State Farm* factors relevant to the particular case.⁶⁶² If all five *State Farm* factors are provided, however, the jury should be informed that the existence of only one factor may not be sufficient to sustain a punitive award and the absence of all factors renders any award suspect.

B. Factors That Should Be Considered Only by Courts During Post-verdict Review

Because the ultimate goal is to prevent the jury from basing its punitive damages award on improper considerations or otherwise

⁶⁵⁸ See sources cited *supra* notes 400, 436 (discussing the Vermont and Pennsylvania instructions).

⁶⁵⁹ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1525 (2003).

⁶⁶⁰ See *id.* at 1521 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)) ("[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.").

⁶⁶¹ See *supra* notes 552-53 and text accompanying notes 273-78.

⁶⁶² See *State Farm*, 123 S. Ct. at 1524 ("The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.").

acting arbitrarily, certain constitutional factors should be considered only by the courts during post-verdict review. Specifically, the jury should not be informed about the availability of comparable penalties or the existence of other prior punitive damages awards based on the same harm, or statutory caps on punitive awards. These factors have the potential to prejudice the jury against the defendant and encourage the jury to base its award on improper considerations. Moreover, these factors are better suited for judicial review, rather than consideration by the jury.

1. *The Third Guidepost*

The jury should not be instructed on the availability of comparable fines or statutory penalties. As *Cooper Industries* noted, this factor “calls for a broad legal comparison,”⁶⁶³ and is better suited to application by judges, not juries.⁶⁶⁴ 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.”⁶⁶⁵ Some of these complicating factors include identifying “comparable” statutory fines, resolving whether the conduct at issue constituted a single or multiple violation of the statute, and determining whether a defendant should have had notice that its conduct would be subject to penalties under those statutes. Courts have long struggled with these issues,⁶⁶⁶ and juries are ill-equipped to consistently apply the third guidepost.

2. *Prior Awards*

Unless requested by the defendant, courts should not instruct the jury on the existence of prior awards against the defendant for the same conduct. This factor could encourage juries to base a punitive

⁶⁶³ *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 (2001).

⁶⁶⁴ See discussion *supra* note 483 and accompanying text.

⁶⁶⁵ *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. The court stated that “[t]his 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).

⁶⁶⁶ See discussion *supra* note 376 and accompanying text.

damages award on a defendant's out-of-state conduct or on perceived harm to nonparties—both improper considerations.

3. *Statutory Caps/Other Improper Frames of Reference*

Several states have enacted statutory caps on punitive damages. In those states that do not already prohibit the jury from being advised of the cap,⁶⁶⁷ model instructions, or, more likely, the comments to model instructions should advise that the jury not be informed of the cap.⁶⁶⁸ Likewise the jury should not be given any other dollar-figure, such as the request by plaintiff's counsel or in pleadings of a particular award, that could be used as an improper influence in setting the amount of the award.⁶⁶⁹ Studies have suggested that juries may improperly rely on such figures in setting the amount of an award.⁶⁷⁰

CONCLUSION

While it is unclear whether and to what extent⁶⁷¹ improved jury instructions will rein in punitive damages “run wild,”⁶⁷² few can dispute that the instructions used in most jurisdictions do nothing to restrain arbitrary decision making. Relying on post-verdict review as a “check” on arbitrary awards is both strikingly inefficient and undermines the jury's role in the process. *State Farm* not only suggests that due process requires more detailed instructions concerning the constitutional limits on punitive damages, it also provides workable standards to devise those instructions. Courts, litigants, and model jury instruction committees should take notice.

⁶⁶⁷ Some states specifically prohibit the jury from being informed of the statutory cap. See *supra* notes 428, 439 (discussing approaches by North Carolina and New Jersey).

⁶⁶⁸ *Accord* *Central Bering Sea Fishermen's Ass'n v. Anderson*, 54 P.3d 271, 281 (Alaska 2002) (“We agree with the appellants that instructing the jury on the punitive damages caps was error. Putting the caps before the jury carried a substantial risk of suggesting the range of appropriate punitive awards. Moreover, no countervailing benefit could be gained from the instruction.” (footnote omitted)). See generally Michael S. Kang, Comment, *Don't Tell Juries About Statutory Damage Caps: The Merits of Nondisclosure*, 66 U. CHI. L. REV. 469, 479-80 (1999) (“[P]sychological studies on jury behavior suggest that knowledge of a damage cap exerts an influence on the amount of an award unrelated to the jury's evaluation of the facts of the case.”).

⁶⁶⁹ See *supra* note 413 (noting Oregon model instruction informing jury of amount of plaintiff's request for punitive damages set forth in pleading).

⁶⁷⁰ See *supra* note 668.

⁶⁷¹ See Robbennolt, *supra* note 3, at 189 (“[T]he impact of these more substantive instructions on juror decision processes and the resulting punitive damage awards remains largely untested. Scant research has examined the influence of punitive damages jury instructions.”).

⁶⁷² See *supra* note 71 and accompanying text.