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**PROCEDURAL PROTECTIONS IN PUNITIVE DAMAGE  
CASES: ENSURING THAT JURIES ARE ASKING THE  
RIGHT QUESTIONS ABOUT WEALTH EVIDENCE**

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I. INTRODUCTION

In the United States Supreme Court’s most recent pronouncement of Due Process Clause constraints on punitive damage awards, *Philip Morris USA v. Williams*,<sup>1</sup> the Court declared that juries may not use punitive damages to punish

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\* I would like to thank Jay Nelson for his comments and insights, which were invaluable.

1. 549 U.S. 346 (2007). The Supreme Court has addressed punitive damages again since *Philip*

defendants directly for harm to nonparties to the litigation, though juries may consider harm to nonparties in appraising the reprehensibility of the defendant's conduct.<sup>2</sup> In so holding, the Court imposed upon the states an obligation to "avoid procedure that unnecessarily deprives juries of proper legal guidance" and to "provide assurance that juries are not asking the wrong question."<sup>3</sup> The Court's decision in *Philip Morris* revitalizes the role of proper procedural protections in punitive damage cases. Although due process review of punitive damage awards was born out of an examination of the sufficiency of the procedural protections afforded the defendant,<sup>4</sup> prior to *Philip Morris*, the more result-oriented "excessiveness review" had dominated Supreme Court opinions since its inception in 1993.<sup>5</sup>

The *Philip Morris* majority put particular emphasis on adequate guidance to juries as a necessary procedural protection for punitive damage defendants—a concern raised by the Court more than a century ago,<sup>6</sup> and one that continues to draw criticism from practitioners and legal scholars as well.<sup>7</sup> Although the Court's holding in *Philip Morris* elucidates, to some degree, the guidance courts must provide to jurors in order to check the impact of evidence of harm to strangers to the litigation caused by the defendant's conduct, there is little consensus as to the guidance courts must provide to jurors in considering other punitive damage evidence that likewise poses an acute due process danger if not properly restrained by the courts.

This disparity and the perceived ineffectiveness of the existing jury instructions to adequately constrain "outlier" punitive awards provide a likely impetus for the Supreme Court's preference in recent years for the more concrete constraints of the excessiveness review.<sup>8</sup> The Court's opinion in *Philip Morris*, however, reminds us that proper procedural protections, even if not alone sufficient to ensure the reasonableness of the punitive damages ultimately

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*Morris* in *Exxon Shipping Co. v. Baker*, but the Court elected to decide the challenge to the size of the punitive award in *Baker* under federal maritime common law rather than constitutional due process. 128 S. Ct. 2605, 2626 (2008).

2. *Philip Morris*, 549 U.S. at 355.

3. *Id.*

4. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (affirming punitive damage award where procedures provided "sufficiently definite and meaningful constraint" on jury discretion).

5. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (stating Fourteenth Amendment prohibits "grossly excessive" damages in tort cases); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (stating "grossly excessive" awards violate constitutional due process); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458–62 (1993) (holding punitive damages were not "grossly excessive," and were therefore constitutional).

6. *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885) ("The discretion of the jury in such cases is not controlled by any very definite rules . . .").

7. See, e.g., Andrew L. Frey & Dennis P. Orr, *Litigating Damages: Actual and Punitive*, 29 LITIG. 33, 37 (2003) (arguing most jury instructions regarding punitive damages fail to provide necessary guidance for juries and cause inconsistencies in damages awarded).

8. See, e.g., *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2628 (2008) (suggesting jury instructions are ineffective at producing consistency in punitive damage awards in tort cases).

awarded, remain essential to a constitutionally sound punitive award.<sup>9</sup> A punitive damage award that is not constitutionally excessive in amount is impermissible nonetheless if the defendant was not afforded adequate assurance against the due process violations often implicated in punitive damage suits.<sup>10</sup>

Preeminent among the exigencies against which states must adequately safeguard is ill-constrained consideration of evidence of the defendant's wealth.<sup>11</sup> Although most states allow jurors to consider wealth evidence in assessing punitive damages, few states provide jurors with information on how to cabin that consideration, despite the Supreme Court's repeated exhortations of the due process risks raised by such evidence.<sup>12</sup> This Article takes the position that *Philip Morris* should control treatment of evidence of the defendant's wealth, and thus, under the principles of *Philip Morris*, states are likewise constitutionally

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9. *E.g.*, *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007) (stating due process requirements of nonarbitrariness, adequate notice, and avoidance of imposing one state's policy preferences on other states are served by procedures that provide guidance to juries deciding amounts of punitive damages).

10. The *Philip Morris* Court did not reach the excessiveness issue, reversing on the basis of inadequate procedural due process alone.

11. The Supreme Court's Justices have repeatedly trumpeted the due process concerns invoked by wealth evidence in punitive damage cases. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 591 (1996) (Breyer, J., concurring) (suggesting consideration of financial position of defendant in determining punitive damages provides basis for inflating awards); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (arguing that emphasis on defendant's wealth may cause determination of damages to be influenced by anticorporate prejudice); *TXO*, 509 U.S. at 492 (O'Connor, J., dissenting, joined by Souter and White, JJ.) (noting that courts "must have authority to recognize the special danger" created by jury consideration of wealth evidence); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42-43 (1991) (O'Connor, J., dissenting) ("States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so. . . . Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth. . . . 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.").

12. For examples of jury charges in states where state law permits the admission of wealth evidence in punitive damage trials, see ALASKA CIVIL PATTERN JURY INSTR. § 20.20B (2008), available at <http://www.state.ak.us/courts/insciv/20.20B.doc>; REVISED ARIZONA JURY INSTR. (CIVIL), PERS. INJURY DAMAGES INSTR.: PUNITIVE DAMAGES (2005); ARKANSAS MODEL JURY INSTR.—CIVIL § 2218 (2009); PATTERN JURY INSTR. FOR CIVIL PRACTICE IN THE SUPERIOR COURT OF THE STATE OF DELAWARE § 22.27 (2006); FLORIDA STANDARD JURY INSTR. IN CIVIL CASES PD1(b)(2), PD2(d) (2007), available at [http://www.floridasupremecourt.org/civ\\_jury\\_instructions/EntireDocument/entireDocument.pdf](http://www.floridasupremecourt.org/civ_jury_instructions/EntireDocument/entireDocument.pdf); HAWAII STANDARD CIVIL JURY INSTR. § 8.12 (1999), available at <http://www.state.hi.us/jud/pdf/CIVJI08.pdf>; IDAHO CIVIL JURY INSTR. § 9.20.5 (2003); ILLINOIS PATTERN JURY INSTR.—CIVIL § 35.01 (2008); MARYLAND CIVIL PATTERN JURY INSTR. § 10:13 (2006); MASSACHUSETTS SUPERIOR COURT CIVIL PRACTICE JURY INSTR. §§ 3.15, 5.3.5 (2008); MINNESOTA JURY INSTR. GUIDES—CIVIL § 94.10 (2008); MISSISSIPPI MODEL JURY INSTR.—CIVIL § 11:15 (2005); MISSOURI APPROVED JURY INSTR. § 10.01 (2008); NEW JERSEY MODEL CIVIL JURY CHARGES § 8.60 (2000), available at <http://www.judiciary.state.nj.us/civil/charges/8.60.pdf>; NEW YORK PATTERN JURY INSTR.—CIVIL § 2:278 (2005); OHIO JURY INSTR. § 21.71 (2008); OKLAHOMA UNIF. JURY INSTR. § 5.5 (2007); PENNSYLVANIA SUGGESTED STANDARD CIVIL JURY INSTR. § 14.02 (2009); ANDERSON'S SOUTH CAROLINA REQUESTS TO CHARGE—CIVIL § 13-21 (2002); TENNESSEE PATTERN JURY INSTR.—CIVIL § 14.56 (2008); TEXAS PATTERN JURY CHARGES §§ 9.6, 85.3, 110.34 (2008); VIRGINIA JURY INSTR. §§ 23:17, 46:19 (2008).

obligated to provide jurors with guidance as to the proper function of wealth evidence in assessing punitive damages.<sup>13</sup> Both harm to nonparties and the financial condition of the defendant are properly considered in the jury's assessment of punitive damages, yet both are only relevant for a limited purpose, and both create considerable risk of bias or prejudice in the jury.<sup>14</sup> States therefore must provide jurors with some parameters for considering wealth evidence to ensure that jurors are not using punitive damages to punish defendants directly for their financial status, just as they must take reasonable measures to ensure that jurors are not punishing defendants directly for harm to nonparties.<sup>15</sup>

In light of the state's burden to ensure that juries are not asking the wrong questions, this Article identifies a number of remediable inadequacies in state jury instructions with regard to properly restricting consideration of wealth evidence to its relevant role in determining the amount of damages necessary to adequately punish the defendant and deter similar future conduct,<sup>16</sup> but not to punish the defendant directly for its financial status. Despite the complexity of this issue, the Supreme Court has provided considerable legal guidance from which state courts may formulate more efficacious jury instructions; yet, states' punitive jury instructions largely fail to account for the Court's pronouncements on this issue.<sup>17</sup> Finally, this Article takes the position that passing such guidance on to the jury, where appropriate, better enables jurors to produce outcomes

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13. *Cf. Philip Morris*, 549 U.S. at 355 (requiring states to provide guidance to juries about how to use evidence of harm to third parties appropriately in context of determining punitive damages).

14. *Cf. id.* (noting limited purpose for which juries can consider harms defendant caused to third parties in determining punitive damages).

15. *Id.*

16. Retribution and deterrence are the two most commonly espoused societal purposes of punitive damage awards. The function of retribution is generally to inflict some harm on the wrongdoer in response to the harm inflicted by the wrongdoer on society. *See, e.g.,* Paul J. Zwier, *The Utility of a Nonconsequentialist Rationale for Civil-Jury-Awarded Punitive Damages*, 54 U. KAN. L. REV. 403, 428 (2006) (describing retribution theory of punitive damages as expressions of "community's moral outrage"). Deterrence requires disincentivization of the wrongful conduct in order to prevent its repetition in the future. *See generally* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (discussing deterrent function of legal institutions in private law disputes). For a more complete discussion of deterrence, *see, for example,* Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 866-67, 874-88 (1989). Scholars have identified other purposes for punitive damages. *See, e.g.,* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982) (identifying following functions: (1) punishing defendant, (2) deterring defendant from repeating offense, (3) deterring others from committing offenses, (4) preserving the peace, (5) inducing private law enforcement, (6) compensating victims for otherwise uncompensable losses, and (7) paying plaintiff's attorney's fees); David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1277-79 (1976) (describing four functions: retribution, deterrence, law enforcement, and compensation for losses "not ordinarily recoverable as compensatory, such as actual losses that the plaintiff is unable to prove"); *see also* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 451-52 (2003) (arguing in favor of recognition of social damages as component of punitive damages).

17. *See infra* Part III for a discussion of the constitutional inadequacy of state jury instructions relative to evidence of a defendant's wealth.

that abide by applicable legal standards than the presently typical, vague instructions that do not confine the jury to constitutionally permissible consideration of the defendant's wealth in assessing punitive damages.<sup>18</sup> This and other similar procedural due process issues in punitive damage cases are given new life under *Philip Morris*, and demand more conscientious treatment from state legislatures and the courts.

## II. EVOLUTION OF THE COURT'S MODERN APPROACH TO PUNITIVE DAMAGE CASES

In the Supreme Court's inaugural punitive damage due process review, the Court measured due process compliance against the procedures employed by state courts to reasonably constrain the punitive award. In subsequent opinions, however, the crux of the Court's due process analysis is the disparity between the compensatory damage award and the punitive damage award, and whether that disparity can be justified by the factual circumstances of the suit. Under the Court's excessiveness jurisprudence, the Court initially upheld a punitive award that was 526 times the amount of actual damages awarded, but the Court eventually espoused a general rule that constitutionally permissible punitive awards will rarely exceed a single-digit ratio to the compensatory damages awarded.<sup>19</sup> In *Philip Morris USA v. Williams*,<sup>20</sup> the Court's attention shifted back to procedural protections for punitive damage defendants, even though the excessiveness of the punitive damage award was also before the Court.<sup>21</sup> Most recently, in *Exxon Shipping Co. v. Baker*,<sup>22</sup> the Supreme Court took the opportunity of federal maritime common law to create its own punitive damage regime.<sup>23</sup> The Court did not reach the constitutional due process challenge in

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18. This Article focuses on jury guidance that arises from legal authority and does not attempt to delve into the realm of economic-theory-based jury guidance, to the extent the two concepts are separable. The economic theories implicated by punitive damage awards are well developed in other scholarly articles. See, e.g., Dobbs, *supra* note 16, at 840 (arguing that deterrence should be principal, or only, basis for punitive damages); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 911–14 (1998) (arguing, among other things, that deterrence requires punitive damages only as necessary to offset likelihood of evading punishment for wrongful conduct, and noting that emphasis on defendant's wealth is in tension with this objective); see also Cass R. Sunstein, David Schkade & Daniel Kahneman, *Do People Want Optimal Deterrence?* 29 J. LEGAL STUD. 237, 238–41 (2000) (finding that Polinsky-Shavell approach to punitive damage instructions was not effective with juries); W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313, 316 (2001) (finding that juries were not receptive to formula-based punitive damage determinations).

19. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (overturning award with 145:1 ratio); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (overturning award with 500:1 ratio); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993) (upholding award with 526:1 ratio).

20. 549 U.S. 346 (2007).

21. *Philip Morris*, 549 U.S. at 352.

22. 128 S. Ct. 2605 (2008).

23. *Baker*, 128 S. Ct. at 2633–34.

*Baker*,<sup>24</sup> and instead crafted more formulaic limits on the punitive damages that may be awarded in maritime cases.<sup>25</sup>

A. *The Supreme Court Imposes Due Process Limits on Punitive Damage Awards*

The string of cases through which the United States Supreme Court would develop its modern approach to punitive damage awards began in the late 1980s. Justice O'Connor took the first step toward excessiveness review in *Bankers Life & Casualty Co. v. Crenshaw*<sup>26</sup> in 1988. In *Crenshaw*, the Supreme Court held that a statute imposing a monetary penalty on unsuccessful appellants from money judgments did not violate the Equal Protection Clause of the Fourteenth Amendment.<sup>27</sup> The Court declined to reach the petitioner's due process and other constitutional challenges to the punitive award because they had not been raised below.<sup>28</sup> Justice O'Connor wrote separately, however, taking the opportunity to voice her growing concern with the lack of objective constraints on the jury in fixing the dollar amount of punitive damage awards,<sup>29</sup> noting that "the impact of these windfall recoveries is unpredictable and potentially substantial."<sup>30</sup>

The following year, the Court again declined to reach a due process challenge to a punitive damage award but conspicuously left open the possibility of future certiorari on this basis. In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,<sup>31</sup> appellants brought constitutional and federal common law challenges to a punitive damage award of \$6 million where actual damages awarded were \$51,146. The majority held that the Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages awarded in civil suits between private parties.<sup>32</sup> The *Browning-Ferris* majority did not reach the due

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24. *Id.* at 2626.

25. *Id.* at 2633.

26. 486 U.S. 71 (1988).

27. *Crenshaw*, 486 U.S. at 80–85.

28. *Id.* at 76.

29. *Id.* at 87 (O'Connor, J., concurring in part and concurring in judgment).

30. *Id.* (quoting *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 (1979)).

31. 492 U.S. 257 (1989).

32. *Browning-Ferris*, 492 U.S. at 275–76. Prior to the holding in *Browning-Ferris*, a number of scholars argued that the Eighth Amendment should constrain punitive damage awards. See, e.g., Gerald W. Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 COOLEY L. REV. 667, 670 (1988) (arguing that Excessive Fines Clause "place[s] limitations on the magnitude of punitive damages awards in civil tort litigation"); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 140 (1986) (suggesting repetitive punitive liability for single wrong may be excessive and therefore unconstitutional); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1234 (1987) (arguing that Excessive Fines Clause "should apply to the imposition of punitive damages"). Justices O'Connor and Stevens, dissenting in part, argued that the Eighth Amendment can apply to civil suit punitive damage awards, and the Court should therefore have remanded the case to the court of appeals to review the award for excessiveness. *Browning-Ferris*, 492 U.S. at 286 (O'Connor, J., concurring in part and dissenting in part, joined by Stevens, J.).

process argument, which had not been properly preserved.<sup>33</sup> Justices Brennan and O'Connor authored opinions in which they separately emphasized that the Court's opinion "leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases."<sup>34</sup> Not surprisingly, a surge in petitions for writs of certiorari mounting due process attacks on punitive damage awards swiftly ensued.<sup>35</sup>

In 1991, the Court at last reached a due process challenge to punitive damages. In *Pacific Mutual Life Insurance Co. v. Haslip*,<sup>36</sup> the jury awarded over one million dollars in punitive damages, more than four times the compensatory damages awarded, against an insurance company whose agent had misappropriated insurance premiums paid by Haslip and others.<sup>37</sup> This misappropriation caused the insureds' policies to lapse, unbeknownst to the policyholders until they made a claim and the insurer refused payment.<sup>38</sup> Despite the admonitions of *Browning-Ferris*, the plurality in *Haslip* held that the punitive damages awarded by the Alabama jury did not violate the Due Process Clause of the Fourteenth Amendment.<sup>39</sup>

The plurality began its examination of the constitutionality of the punitive damages awarded to Haslip by stating that, while the court could not draw a "mathematical bright line" between constitutionally permissible and impermissible punitive awards, the "constitutional calculus" would incorporate consideration of general concerns of reasonableness and adequate guidance from the court.<sup>40</sup> In determining whether these concerns were alleviated by

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33. *Browning-Ferris*, 492 U.S. at 276–77.

34. *Id.* at 280 (Brennan, J., concurring, joined by Marshall, J.); *id.* at 283 (O'Connor, J., concurring in part and dissenting in part, joined by Stevens, J.). Justice Brennan wrote separately in order to bring attention to early Supreme Court cases indicating that the Due Process Clause may prohibit damage awards that are "grossly excessive" or "wholly disproportioned to the offense." *Id.* at 280–81 (Brennan, J., concurring, joined by Marshall, J.) (quoting *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909); *St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66–67 (1919)). Justice O'Connor, who dissented from the Court's determination that the Eighth Amendment did not constrain punitive damage awards in civil suits between private parties, agreed that a due process challenge was not properly before the Court, but highlighted the "skyrocketing" of punitive damages awards and the need to curb juries' "unbridled discretion" to impose punitive damages. *Id.* at 282–83 (O'Connor, J., concurring in part and dissenting in part, joined by Stevens, J.).

35. See *Court Rejects 3 Bids to Curb Punitive Damages*, N.Y. TIMES, July 4, 1989, § 1, at 42 (detailing three appeals involving punitive damages denied certiorari soon after *Browning-Ferris* decision).

36. 499 U.S. 1 (1991).

37. *Haslip*, 499 U.S. at 6–7.

38. *Id.* at 4–5.

39. *Id.* at 23–24.

40. *Id.* at 18–19. The majority's oft-quoted opening to its constitutional assessment of the punitive award in *Haslip* reads:

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. 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

commensurate constraint on the jury's discretion in awarding punitive damages, the plurality examined three strata of restraint: (1) jury instructions, (2) review by the trial court, and (3) review by the Alabama Supreme Court.<sup>41</sup> In concluding that the jury instructions at issue properly confined the jury's discretion, the plurality noted that "[t]he 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."<sup>42</sup> Thus, the Court asserted, "[a]s long as the discretion is exercised within reasonable constraints, due process is satisfied."<sup>43</sup>

*B. Punitive Damage Jurisprudence Expands from Procedural Protections to Excessiveness Analysis*

After *Haslip*, and until *Philip Morris*, the Supreme Court's punitive damage opinions hinged not on the sufficiency of the jury instructions and judicial review afforded the defendant, but rather on a substantive constitutional right against the imposition of grossly excessive penalties.<sup>44</sup> The shift in priority was gradual. In *TXO Production Corp. v. Alliance Resources Corp.*,<sup>45</sup> the plurality addressed (and dismissed) TXO's complaints regarding the jury charge and judicial review provided by West Virginia's courts as an independent constitutional challenge,<sup>46</sup> although it did so only after a considerably more expository analysis of TXO's claim that the punitive award of more than 500 times the compensatory damages was so excessive as to constitute an arbitrary deprivation of property without due process of law.<sup>47</sup> In *BMW of North America, Inc. v. Gore*<sup>48</sup> and *State Farm Mutual Automobile Insurance Co. v. Campbell*,<sup>49</sup> however, the Court's discussion of procedural protections, which was limited to evidentiary concerns, was embedded within the rubric of its excessiveness review.<sup>50</sup>

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adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus. With these concerns in mind, we review the constitutionality of the punitive damages awarded in this case.

*Id.* (internal citations omitted).

41. *Haslip*, 499 U.S. at 19–22.

42. *Id.* at 20.

43. *Id.*

44. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416–26 (2003) (overturning punitive damage award that was more than 145 times actual damages as "grossly excessive"); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585–86 (1996) (holding that punitive damages awarded were "grossly excessive" and therefore unconstitutional); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 (1993) (finding damages awarded were not so grossly excessive as to violate Constitution).

45. 509 U.S. 443 (1993).

46. *TXO*, 509 U.S. at 462–65.

47. The *TXO* plurality afforded approximately ten pages of its opinion to the discussion of TXO's excessiveness challenge, and just over three pages to dismissing TXO's procedural complaints. *Id.* at 453–62 (excessiveness); *id.* at 462–66 (jury charge and judicial review).

48. 517 U.S. 559 (1996).

49. 538 U.S. 408 (2003).

50. As a prerequisite determination of the proper parameters for its excessiveness inquiry, the

As the prominence of procedural due process protections diminished in the Court's punitive damage opinions, the significance of the disparity between the punitive and compensatory award escalated. Whereas the *TXO* plurality stated that it did not consider the dramatic disparity (526:1) between the actual damages and the punitive award controlling,<sup>51</sup> the *State Farm* majority asserted that few awards exceeding a single-digit ratio would comport with constitutional due process.<sup>52</sup> At the same time, several factors which were once considered to mitigate such a disparity no longer appear to do so. For example, while the Court once considered the wealth of the defendant and the possibility of criminal sanctions for the defendant's conduct in its constitutional calculus, these considerations, although still relevant in some respect, are ineffective to offset a significant disparity between the punitive and compensatory award.<sup>53</sup>

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*Gore* majority expressly endorsed the Alabama Supreme Court's exclusion of out-of-state conduct in determining the punitive award. 517 U.S. at 568 ("[T]he federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve. We therefore focus our attention first on the scope of Alabama's legitimate interests in punishing BMW and deterring it from future misconduct."). In *State Farm*, the Supreme Court eschewed evidence of out-of-state and dissimilar conduct—relied upon by Utah's trial and appellate courts—as part of its assessment of the reprehensibility of State Farm's conduct. 538 U.S. at 422–24.

51. *TXO*, 509 U.S. at 462.

52. *State Farm*, 538 U.S. at 425.

53. In refusing to overturn the punitive damage award in *TXO* on the basis of the disparity between the actual and punitive awards, the Court stated:

The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.

*TXO*, 509 U.S. at 462. By contrast, in *State Farm*, the Court declared that the financial status of the defendant cannot justify an otherwise grossly excessive punitive damage award. 538 U.S. at 427.

In *Haslip*, just before concluding that the punitive damages awarded were permissible under the Constitution, the Court had noted that, while the punitive damages awarded were more than four times the amount of compensatory damages, more than 200 times the plaintiff's out-of-pocket expenses, and much in excess of the civil fine that could be imposed in Alabama for the defendant's actions, an individual could be subject to imprisonment for such conduct. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991). The *State Farm* Court, however, eschewed reliance on criminal penalties as a justification for exorbitant punitive damages. 538 U.S. at 428. The Court explained:

We note that, in the past, we have also looked to criminal penalties that could be imposed. The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

*Id.* (internal citations omitted).

1. *TXO Production Corp. v. Alliance Resources Corp.*

In 1993, the Court upheld a \$10 million punitive damages award—an award 526 times greater than the actual damages awarded—in the face of due process challenges.<sup>54</sup> *TXO* involved a common law slander of title action, in which the record showed that TXO had acted in bad faith by asserting a claim based on a quitclaim deed that TXO knew to be worthless, in an effort to renegotiate its royalty agreement with the plaintiff.<sup>55</sup> In finding that the punitive award was not so “grossly excessive” as to violate due process, the Court reiterated that it could not “draw a mathematical bright line” in analyzing the constitutionality of punitive awards, but that its “constitutional calculus” would rest on a general reasonableness concern.<sup>56</sup>

*TXO* marked a shift in focus for the Court’s punitive damages scrutiny. The *TXO* plurality readily dismissed the petitioner’s arguments regarding the adequacy of the jury instructions and trial and appellate court review<sup>57</sup>—issues which dominated the Court’s *Haslip* analysis<sup>58</sup>—and concentrated instead on whether the drastic disparity between the actual damage award and punitive damage award rendered the punitive award “grossly excessive.”<sup>59</sup> The Court found several considerations that mitigated the initially alarming disparity between the punitive award and the compensatory award, including: the magnitude of the potential harm if defendant had succeeded in its plan, possible harm to other victims if similar future behavior was not deterred, the defendant’s bad faith, the defendant’s wealth, and the fact that the conduct at issue was part of a broader pattern of misbehavior.<sup>60</sup>

In *Haslip*, although the Court indicated approval of the criteria enumerated by the Alabama Supreme Court for review of the appropriateness of punitive damage awards, including the consideration of the “‘financial position’ of the defendant,”<sup>61</sup> evidence of the insurer’s wealth had not been admitted at trial pursuant to Alabama law.<sup>62</sup> In *TXO*, the defendant argued that the jury instructions employed by the trial court were inadequate because they authorized the jury to take “the wealth of the perpetrator” into account in determining punitive damages on the ground that a larger penalty may be necessary to effectively deter an entity of greater means.<sup>63</sup> The Court declined to reach the petitioner’s attack on the jury instructions because it was not properly

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54. *TXO*, 509 U.S. at 443.

55. *Id.* at 448–51. The record also contained evidence that TXO had engaged in similar business strategies in its dealings in other parts of the country. *Id.*

56. *Id.* at 458 (quoting *Haslip*, 499 U.S. at 18).

57. *Id.* at 462–66.

58. *See Haslip*, 499 U.S. at 19–23 (concluding that jury instructions, trial, and appellate review were sufficiently meaningful constraints on punitive damage award).

59. *TXO*, 509 U.S. at 459–62.

60. *Id.* at 462.

61. *Haslip*, 499 U.S. at 21–22.

62. *Id.* at 19 (citing *S. Life & Health Ins. Co. v. Whitman*, 358 So. 2d 1025, 1026–27 (Ala. 1978)).

63. *TXO*, 509 U.S. at 463.

presented to the highest court of the state; however, the Court noted in dicta that, although it had recognized the financial condition of the defendant as a permissible consideration in assessing punitive damages in *Haslip*, emphasis on the wealth of the wrongdoer increased the risk that an award may be influenced by prejudice against large, out-of-state corporations.<sup>64</sup> In her dissent, Justice O'Connor asserted that the jury instruction and argument in the case virtually ensured undue influence of the jury against the wealthy, out-of-state defendant,<sup>65</sup> and that the Alabama Supreme Court's review was insufficient to conform to the criteria espoused in *Haslip*.<sup>66</sup>

## 2. *BMW of North America, Inc. v. Gore*

In *Gore*, for the first time, the Supreme Court overturned a punitive damages award on the grounds that the award was grossly excessive in relation to the state's legitimate interests in punishing unlawful conduct and deterring its repetition, thus violating the Due Process Clause of the Constitution.<sup>67</sup> The suit arose out of BMW of North America's practice of not disclosing to its customers predelivery damage to new vehicles when the repair costs for such damages did not exceed three percent of the vehicle's suggested retail price.<sup>68</sup> Gore, whose new BMW had been repainted prior to purchase without his knowledge, sued BMW, alleging that the failure to disclose the repaint constituted fraud under Alabama law.<sup>69</sup> The jury awarded Gore \$4,000 in compensatory damages and \$4 million in punitive damages.<sup>70</sup>

The Alabama Supreme Court remitted the punitive award to \$2 million on the ground that the jury had calculated the punitive damage award by multiplying Gore's compensatory damages by the number of similar sales, improperly including out-of-state sales.<sup>71</sup> The Supreme Court approved of this exclusion of out-of-state conduct from the punitive damages calculation,<sup>72</sup> but still found the \$2 million punitive award to be grossly excessive.<sup>73</sup>

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64. *Id.* at 464 (citing *Haslip*, 499 U.S. 21–22).

65. *See id.* at 486–95 (O'Connor, J., dissenting) (noting that instruction and argument focused heavily on defendant's wealth and prompted jury to award windfall).

66. *Id.* at 495–96.

67. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 584–85 (1996) (asserting that lesser damages would serve to prevent recidivism). Justice Stevens delivered the opinion of the Court, joined by Justices O'Connor, Kennedy, Souter, and Breyer. *Id.* at 561.

68. *Id.* at 563–64.

69. *Id.* at 563.

70. *Id.* at 565.

71. *Gore*, 517 U.S. at 567. It is not clear how the Alabama Supreme Court calculated \$2 million as the "constitutionally reasonable punitive damages award in this case." *Id.* at 567 & n.10. The court may have given some weight to the fact that this remittance resulted in a 500 to 1 ratio between the punitive damages awarded and the compensatory damages awarded—a ratio slightly less than the 526 to 1 ratio upheld in *TXO*. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 459, 462 (1993).

72. *Gore*, 517 U.S. at 572–73. The Court did, however, note in a footnote that out-of-state conduct remains a relevant and proper consideration in assessing the reprehensibility of the defendant's conduct. *Id.* at 574 n.21 (citing *TXO*, 509 U.S. at 462 n.28).

73. *Id.* at 574–75.

In examining the constitutionality of the size of the punitive award, the plurality identified three “guideposts” that dominate modern punitive damages methodology: (1) reprehensibility of the defendant’s conduct, (2) ratio of the punitive damages to the actual harm inflicted on the plaintiff, and (3) criminal and civil sanctions that may be imposed for comparable conduct.<sup>74</sup> Under the reprehensibility guidepost, the Court listed a myriad of nonexclusive “aggregating factors” relating to the severity of the impact on the plaintiff and the nature of the conduct engaged in by the defendant.<sup>75</sup> Because these factors were not present in this case, the Court found that BMW’s conduct was not sufficiently reprehensible to warrant a \$2 million punitive damage award.<sup>76</sup>

Under the ratio guidepost, the Court stated that exemplary damages must bear a “reasonable relationship” to compensatory damages.<sup>77</sup> The plurality reconciled its ratio examination with prior Supreme Court opinions by pointing out that in *Haslip* the Court noted that an exemplary award in excess of four times the amount of compensatory damages might be “close to the line,” and in *TXO*, the Court endorsed the Alabama Supreme Court’s inquiry into “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.”<sup>78</sup> Again refusing to draw a “mathematical bright line” of constitutionality for punitive awards,<sup>79</sup> the *Gore* plurality identified several circumstances in which a greater ratio may be constitutionally permissible: where a particularly egregious act results in only minor damages, where the injury is hard to detect, or where there is noneconomic harm that is difficult to value.<sup>80</sup> Concluding its ratio analysis, the plurality quoted Justice O’Connor’s *TXO* dissent, stating that a “breathtaking 500 to 1 [ratio]. . . must surely ‘raise a suspicious judicial eyebrow.’”<sup>81</sup>

Justice Breyer, joined by Justices Souter and O’Connor, concurred, writing separately to address the procedural requirements for due process compliance established in *Haslip*.<sup>82</sup> The concurrence declared a strong presumption of validity where fair procedures were followed, but stated that this presumption was overcome in this case because *Haslip*’s procedural imperatives—reasonable

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74. *Id.* at 574–75, 583.

75. *Id.* at 576–77. These factors included: (a) whether the harm is “purely economic”; (b) whether there is evidence of “indifference to or reckless disregard for the health and safety of others”; (c) whether the conduct is part of a “pattern of tortious conduct”; (d) whether there is evidence of bad faith, deliberate false statements, acts or affirmative misconduct, or concealment of evidence of improper motive; and (e) whether there is evidence that the defendant persisted in its course of conduct after it had been adjudged unlawful. *Gore*, 517 U.S. at 576–77.

76. *Id.* at 575–80.

77. *Id.* at 580–81.

78. *Id.* at 581 (emphasis omitted) (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993)).

79. *Id.* at 583.

80. *Gore*, 517 U.S. at 583.

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

82. *Id.* at 586–98 (Breyer, J., concurring, joined by O’Connor and Souter, JJ.).

constraints on the jury's discretion, meaningful and adequate trial court review, and appellate review that ensures that the award is reasonable in light of its purposes of punishment and deterrence—were not met here.<sup>83</sup>

3. *State Farm Mutual Automobile Insurance Co. v. Campbell*

In *State Farm*, the Court struck down a punitive damages award as grossly excessive a second time, garnering a majority in doing so for the first time, despite a punitive-to-actual damages ratio significantly smaller than that in *Gore* and conduct ostensibly more reprehensible than the failure to disclose minor repairs to a new vehicle.<sup>84</sup> Campbell brought suit against State Farm based on its conduct in representing Campbell in litigation arising out of an automobile accident for which Campbell was found liable.<sup>85</sup> The evidence presented to the *State Farm* jury was that State Farm had committed various acts of negligence and bad faith throughout its representation of Campbell, which included: advising the Campbells not to hire separate counsel; consistently reassuring Campbell that he was not liable despite the consensus among the company's own investigators that Campbell was at fault for the crash; refusing a settlement offer for the policy limit of \$50,000 and, when the jury ultimately found Campbell liable in an amount more than \$135,000 in excess of the policy limit, initially refusing to pay the excess or to appeal the judgment.<sup>86</sup> The Campbells received \$2.6 million in compensatory damages and \$145 million in punitive damages from the jury, reduced by the judge to \$1 million and \$25 million, respectively.<sup>87</sup> On appeal, the Utah Supreme Court reinstated the \$145 million punitive damage award.<sup>88</sup>

The majority opinion, written by Justice Kennedy, reprimanded the lower courts for relying on evidence of conduct occurring outside of Utah and on evidence of conduct dissimilar to the acts at issue in the case.<sup>89</sup> Relying heavily on *Gore's* observation that a state's courts lack authority to punish defendants for conduct that is lawful where it occurred and does not impact the state or its residents, the Court reached a step further, stating: "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."<sup>90</sup> Ultimately, the Court found that the 145 to 1 ratio was not justified in this case, stating that it was now an established principle of Supreme Court jurisprudence that "in practice, few awards exceeding a single-digit ratio between punitive and

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83. *Id.* at 586–87.

84. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 413–15, 426, 429 (2003).

85. *Id.* at 412–15.

86. *Id.* The evidence indicated that State Farm assured the Campbells that their assets were safe during the litigation but, once the jury verdict came in, instructed the Campbells that they might want to put "for sale" signs on their property "to get things moving." *Id.* at 413.

87. *Id.* at 415.

88. *State Farm*, 538 U.S. at 415.

89. *Id.* at 420–24.

90. *Id.* at 421.

compensatory damages, to a significant degree, will satisfy due process.”<sup>91</sup> In contrast to the Court’s statement in *TXO* that, where fair procedures are followed, a jury’s assessment of punitive damages is entitled to a “strong presumption of validity,”<sup>92</sup> the majority stated here that “there is a presumption against an award that has a 145-to-1 ratio,” without regard to the procedures employed by the courts below.<sup>93</sup>

The Court made two new observations applicable to the ratio test. First, the Court asserted that due process may require a lesser ratio when compensatory damages are substantial, identifying this as the flip-side of the Court’s statement in *Gore* that a higher ratio may be justified where a particularly egregious act has resulted in only a small amount of economic damages.<sup>94</sup> Second, the Court reasoned that, because damages awarded for emotional distress serve to punish the offender as much as to compensate the victim, a punitive damage award may be duplicative when emotional distress damages have been awarded as well.<sup>95</sup>

### C. *A Return to Procedural Due Process*

*Philip Morris USA v. Williams* represents a significant shift in the Supreme Court’s punitive damages jurisprudence on several fronts. Most conspicuously, the Court abstained from the substantive excessiveness review that has dominated its punitive damage analysis since 1993<sup>96</sup> and instead engaged in an examination of whether the “Constitution’s procedural limitations”<sup>97</sup> had been violated.<sup>98</sup> Additionally, although the Court repeatedly referred back to the constitutional concerns raised in the Court’s previous punitive damage award

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91. *Id.* at 425. In so stating, the Court relied on its assertion in *Haslip* that a punitive damage award of more than four times the compensatory damages was “close to the line of constitutional impropriety,” which, the Court pointed out, was cited in *Gore* along with a historical list of statutory penalties providing for double, treble, or quadruple damages. *Id.* (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23–24 (1991); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 & n.33 (1996)).

92. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 457 (1993). The *TXO* Court stated: “Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable . . .” *Id.*

93. *State Farm*, 538 U.S. at 426.

94. *Id.* at 425.

95. *Id.* at 426.

96. *See, e.g., TXO*, 509 U.S. at 459–62 (evaluating punitive damages to assess whether they are “grossly excessive”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571–81 (1996) (same); *State Farm*, 538 U.S. at 424–28 (assessing ratio of punitive damages to compensatory damages as indicator of constitutionality).

97. *Philip Morris USA v. Williams*, 549 U.S. 346, 353–54 (2007). Justice Thomas’s dissent argued that the plurality’s categorization of its holding as “procedural” was inaccurate. *Id.* at 360 (Thomas, J., dissenting).

98. The Supreme Court’s decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* is not included in this discussion because, although it dealt with a procedural aspect of punitive damage decisions—the standard of review—the Court did not rule on the constitutionality of a punitive damage award in that case. 532 U.S. 424, 443 (2001) (vacating judgment of court of appeals and remanding for reconsideration under de novo standard of review).

analyses,<sup>99</sup> the Court's review in *Philip Morris* centered on a due process protection not previously spotlighted—the defendant's right to an opportunity to defend against a claim.<sup>100</sup> Perhaps most consequential, *Philip Morris* is the first post-*Haslip* Supreme Court case to hold a punitive damage award unconstitutional for denial of due process where the award was not held to be grossly excessive.

In *Philip Morris*, the Court held that a jury award based in part upon the jury's desire to punish the defendant for harm caused to nonparties to the litigation constitutes an unconstitutional taking of property without due process.<sup>101</sup> The Court then explained that consideration of harm to nonparties remained relevant to the jury's determination of the reprehensibility of the defendant's conduct, but that a state's punitive damage procedures must adequately constrain the jury's consideration of such harm to the assessment of reprehensibility.<sup>102</sup> The majority<sup>103</sup> concluded that the Due Process Clause "requires States to provide assurance that juries are not asking the wrong question" in this regard,<sup>104</sup> and remanded the case back to the Oregon Supreme Court to determine whether the procedures employed in the case adequately protected against the risk that the jury awarded punitive damages to punish Philip Morris for harm to persons not before the court.<sup>105</sup>

#### 1. *Philip Morris USA v. Williams*

Mayola Williams brought suit against Philip Morris on behalf of the estate of her deceased husband, Jesse Williams, alleging that Philip Morris's negligence and deceit contributed to the death of her husband.<sup>106</sup> The jury found Philip Morris liable on both counts, and awarded Williams \$821,000 in compensatory damages for negligence and fraud<sup>107</sup> and \$79.5 million in punitive damages on the fraud claim.<sup>108</sup> The trial judge reduced the punitive award to \$32 million on the basis of federal excessiveness standards,<sup>109</sup> but the Oregon Court of Appeals restored the \$79.5 million award.<sup>110</sup>

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99. *Philip Morris*, 549 U.S. at 353 (citing *Gore* and *State Farm* for proposition that State must properly confine jury's discretion in awarding punitive damages given risks of lack of fair notice, arbitrariness, and imposition of State policy on other states); *id.* at 354 (noting that allowing jury to consider harm to nonparties would magnify "the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty and lack of notice").

100. *Id.* at 354.

101. *Id.* at 354–55.

102. *Id.*

103. The majority opinion was written by Justice Breyer and joined by Chief Justice Roberts and Justices Kennedy, Souter, and Alito. *Philip Morris*, 549 U.S. at 348.

104. *Id.* at 355.

105. *Id.* at 356.

106. *Id.* at 349.

107. *Id.* at 350; *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1171 (Or. 2006).

108. *Philip Morris*, 549 U.S. at 350.

109. *Philip Morris*, 127 P.3d at 1171 (noting that trial court found that \$79.5 million award was "within the range a rational juror could assess based on the record as a whole and applying the Oregon

The Oregon Supreme Court initially denied review,<sup>111</sup> but the United States Supreme Court granted certiorari and remanded the case back to the Oregon Court of Appeals for reconsideration in light of *State Farm*, which had been decided in the interim.<sup>112</sup> The Oregon Court of Appeals reached the same result on remand,<sup>113</sup> and the Oregon Supreme Court granted review.<sup>114</sup> At the Oregon Supreme Court, Philip Morris argued, among other things, that (1) the trial court erred in rejecting its proposed instruction on punitive damages, and (2) the punitive damage award was “grossly excessive” under the *Gore* guideposts.<sup>115</sup>

The jury instruction that Philip Morris had proposed to the trial court stated that the jury could consider the following factors in determining the proper amount of a punitive damage award:

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

....

(2) The size of the punishment may appropriately reflect the degree of reprehensibility of the defendant’s conduct—that is, how far the defendant has departed from accepted societal norms of conduct.<sup>116</sup>

Philip Morris argued that subpart (1) of this instruction was essential to prevent the jury from punishing it for the impact of its conduct on nonparties to the lawsuit, particularly in light of jury argument by counsel for Williams directing the jury to “think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been,” and stating, “In Oregon, how many people do we see outside, driving home . . . smoking cigarettes? . . . [C]igarettes . . . are going to kill ten [of every hundred]. [And] the market share of Marlboros [i.e., Philip Morris] is one-third [i.e., one of every three killed].”<sup>117</sup>

The Oregon Supreme Court held that the trial court did not err in refusing to give Philip Morris’s proposed instruction, concluding that the instruction was incorrect under Oregon law.<sup>118</sup> The Oregon Supreme Court also rejected Philip

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common law and statutory factors,” but nevertheless concluding that award was “excessive under federal standards”).

110. *Williams v. Philip Morris Inc.*, 48 P.3d 824, 842 (Or. Ct. App. 2002), *aff’d on reh’g*, 51 P.3d 670 (Or. Ct. App. 2002).

111. *Williams v. Philip Morris Inc.*, 61 P.3d 938 (Or. 2002).

112. *Philip Morris USA Inc. v. Williams*, 540 U.S. 801, 801 (2003).

113. *Williams v. Philip Morris Inc.*, 92 P.3d 126, 127–28 (Or. Ct. App. 2004).

114. *Philip Morris*, 127 P.3d at 1167.

115. *Id.* at 1171.

116. *Philip Morris*, 549 U.S. at 362–64 (Ginsburg, J., dissenting).

117. *Id.* at 351 (majority opinion).

118. *Philip Morris*, 127 P.3d at 1175.

Morris's "grossly excessive" argument, applying the *Gore* guideposts but finding the disproportionate ratio between actual and punitive damages permissible given the "extreme and outrageous circumstances" of the case.<sup>119</sup> The Supreme Court of the United States again granted certiorari.<sup>120</sup>

In *Philip Morris*, the Supreme Court prefaced its due process analysis by observing that its prior holdings emphasized the need to properly cabin the jury's discretion on account of three due process concerns implicated by punitive damage awards—the potential for lack of fair notice of the severity of the penalty a state may impose for certain conduct, the risk of arbitrary punishments, and the possibility that awards may be so large as to impose the policy of one state (or one jury) upon other states.<sup>121</sup> The Court then asserted that the Due Process Clause also prohibits the utilization of punitive damages to punish a defendant for harm inflicted on strangers to the litigation,<sup>122</sup> leading to its admonition that, as with other due process dangers implicated by punitive damage awards, states are required to limit the jury's discretion in awarding punitive damages in ways that adequately protect against the risk of an improperly derived award.<sup>123</sup>

The Court invoked three bases for its conclusion that the Due Process Clause prohibits punishment of a defendant for harm caused by the defendant's conduct toward nonparties to the litigation.<sup>124</sup> First, the Court cited to a party's right to "an opportunity to present every available defense" prior to the determination of punishment.<sup>125</sup> Echoing Philip Morris's oral argument, the Court pointed out that in a case like this, a defendant will not have the opportunity to prove its individual-specific defenses, such as lack of reliance, as to the claims of parties which are not before the court.<sup>126</sup> The Court next stated that allowing the jury to punish a defendant for injuries to nonparties "would add a near standardless dimension to the punitive damages equation," observing that the jury would be forced to speculate as to the number, nature, and extent of harm to nonparties since the evidence essential to the assessment of such harm would not be presented during the trial.<sup>127</sup> The Court noted that this potential

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119. *Id.* at 1176–82. The Court noted that the absence of a bright-line test indicates that the United States Supreme Court recognized that there were exceptions to the general single-digit rule and that *Campbell* "specifically contemplated that *some* awards exceeding single-digit ratios would satisfy due process." *Id.* at 1181. Given the extraordinarily reprehensible conduct by Philip Morris found by the jury, the Oregon Supreme Court determined that this suit was such an exceptional case. *Id.* at 1181–82.

120. *Philip Morris USA v. Williams*, 547 U.S. 1162 (2006).

121. *Philip Morris*, 549 U.S. at 352.

122. *Id.* at 353.

123. *Id.* at 355.

124. *Id.* at 353–54.

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

126. *Philip Morris*, 549 U.S. at 353.

127. *Id.* at 354; *cf.* *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 485 (1993) (O'Connor, J., dissenting, joined by White, J., and in part by Souter, J.) (asserting that majority upheld punitive damage award on basis of potential harm to plaintiff despite absence of any evidence at trial that would have allowed jury to assess amount of any unrealized, potential harm).

problem also magnified due process concerns enumerated in the Court's previous punitive damage opinions—lack of notice and arbitrariness.<sup>128</sup> Finally, the Court asserted that its prior jurisprudence provided no support for allowing a jury to award punitive damages for the purpose of punishing the defendant for harm to nonparties and distinguished statements in earlier decisions that could be read to the contrary.<sup>129</sup>

The Court next acknowledged that the jury may properly consider harm to nonparties in determining the reprehensibility of the defendant's conduct.<sup>130</sup> "Yet," the Court cautioned, "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties."<sup>131</sup> The Court did not expound on the practical distinction between a jury award properly increased by the jury on the basis of a high degree of reprehensibility, established by evidence of harm inflicted on nonparties to the litigation, and a jury award improperly increased by the jury on the basis of its desire to punish the defendant directly, arising from evidence of harm inflicted on nonparties. Punishment of the defendant for its reprehensible conduct is well established as a proper purpose of punitive damages, and more reprehensible conduct should be punished more severely.<sup>132</sup> Thus, it may be difficult for state courts and juries to discern and, more importantly, to abide by, the difference between punishing a defendant more severely for conduct that is more reprehensible because it resulted in harm to nonparties and punishing a defendant more severely for conduct directly because it resulted in harm to nonparties.<sup>133</sup>

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128. *Philip Morris*, 549 U.S. at 354.

129. *Id.* The Court first distinguished its prior reliance on potential harm in *TXO* and *State Farm*, asserting that the potential harm at issue was only the potential harm to the plaintiff. *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424 (2003); *TXO*, 509 U.S. at 460–62). The Court then distinguished a footnoted comment in *Gore* that referenced the remainder of the jury charge as "error-free," after the Alabama Supreme Court found error in the portion of the jury's determination that considered extra-state conduct. *Id.* (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 n.11 (1996)). The Court explained that the comment was limited to the context of the errors at issue, and that the *Gore* Court did not purport to address the issue of harm to others. *Id.*

130. *Philip Morris*, 549 U.S. at 355.

131. *Id.*

132. *Id.*

133. Justice Stevens discusses this issue in his dissent:

While apparently recognizing the novelty of its holding, the majority relies on a distinction between taking third-party harm into account in order to assess the reprehensibility of the defendant's conduct—which is permitted—from doing so in order to punish the defendant "directly"—which is forbidden. This nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant—directly—for third-party harm.

*Id.* at 360 (Stevens, J., dissenting) (internal citations omitted).

Chief Justice Roberts sought an explanation of the distinction from counsel for Philip Morris at oral argument. Transcript of Oral Argument at 11–12, *Philip Morris*, 549 U.S. 346 (No. 05-1256). Later in oral argument, the Chief Justice offered his own distinction for response from counsel for Williams. See *infra* note 273 for a discussion of this distinction.

Next, the Court addressed the propriety of the following statements made by the Oregon Supreme Court in a footnote:

Philip Morris does not explain how its instruction summarizes its interpretation of *Campbell*. It is unclear to us how a jury could “consider” harm to others, yet withhold that consideration from the punishment calculus. If a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all.<sup>134</sup>

The Court objected to the latter sentence, explaining that conduct that caused harm to others could be considered by the jury in determining reprehensibility, but not as a basis for punishing the defendant for such harms.<sup>135</sup> For comparison, the Court cited a discussion of recidivism statutes (in which a criminal defendant’s prior criminal conduct may be considered in sentencing), noting that such statutes “do not impose an additional penalty for the earlier crimes, but instead . . . a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.”<sup>136</sup>

The Court noted that the third sentence of the footnote raised the practical concern of how to determine whether a jury took harm to nonparties into account only in assessing reprehensibility or whether the jury also sought to punish the defendant for that harm.<sup>137</sup> The Court’s “answer” to this concern was that state courts must not “authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring.”<sup>138</sup> The Court asserted that, while states have “some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection” when the case so requires.<sup>139</sup> The Court did not elaborate on what kinds of protection might be constitutionally sufficient.<sup>140</sup> The Court simply remanded the case to the Oregon Supreme Court to determine if such necessary due process protections had been imposed.<sup>141</sup>

## 2. *Philip Morris* Marks a Shift in Supreme Court Punitive Damage Jurisprudence

Instead of burying the procedural concern at issue within the Court’s three-pronged excessiveness analysis, the *Philip Morris* majority treated the state court’s procedural deficiency as dispositive. This approach differs from that in

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134. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1175 n.3 (Or. 2006).

135. *Philip Morris*, 549 U.S. at 356–57.

136. *Id.* at 357 (citing *Witte v. U.S.*, 515 U.S. 389, 400 (1995) (quoting *Gryger v. Burke*, 334 U.S. 728, 732 (1948))).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Philip Morris*, 549 U.S. at 357. In *Haslip*, the Court examined three areas of procedural protections: the jury charge, trial court oversight, and appellate review. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19–22 (1991). Here, however, only the jury charge appears to have been at issue. *Philip Morris*, 549 U.S. at 550–52. It is not clear whether procedural safeguards in the review process or elsewhere could adequately protect against the constitutional risk raised by the Court in this case.

141. *Philip Morris*, 549 U.S. at 358.

the Supreme Court's three previous punitive damage opinions. In *Gore* and *State Farm*, the Supreme Court's abjuration of improperly considered evidence of out-of-state or dissimilar conduct simply resulted in a less compelling case for upholding the punitive award under the excessiveness review.<sup>142</sup> When the Court adopted Alabama's exclusion of out-of-state behavior in *Gore* the effect was that the state's interest in punishing and deterring BMW's conduct was abated correspondingly and the punitive award was ultimately found grossly excessive in relation to this interest.<sup>143</sup> In *State Farm*, the Court's exclusion of improperly admitted evidence diminished the reprehensibility of the defendant's conduct as a factor in determining whether the punitive award was grossly excessive.<sup>144</sup>

In *Philip Morris*, however, the Court did not treat the possible impermissible consideration of evidence by the jury as an element in determining whether the amount of the award exceeded constitutional limits.<sup>145</sup> Instead, the *Philip Morris* Court's opinion turned solely on the procedural issue.<sup>146</sup> This distinction from prior punitive damage cases is crucial in that it confirms that inadequate procedures can invalidate a punitive damage award, even where punitive damages are warranted, and even where such procedures do not necessarily result in a constitutionally excessive award. Under the principle espoused in *Philip Morris*, a jury may not award a greater amount of punitive damages on the basis of improper prejudice against the defendant, even if the increased award is within the range of otherwise reasonable awards. Such a restriction may have an increasingly significant impact on punitive damage defendants. Although a number of studies indicate that punitive damages are not "out of control," as popular belief once suggested,<sup>147</sup> large outlier punitive awards continue to occur with some frequency.<sup>148</sup> Additionally, defendants are equally entitled to procedures that guard against small, systematic inflations of punitive damage awards as a result of prejudice or arbitrariness, which may not be prevented by statutory caps and do not appear "grossly excessive" on their face.

Under *Philip Morris*, states transgress constitutional prescription in properly awarding punitive damages if the states' procedural processes "unnecessarily deprive[] juries of proper legal guidance."<sup>149</sup> No other constitutional infirmity is necessary, and the Court did not require that the

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142. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 420–24 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996).

143. *Gore*, 517 U.S. at 574.

144. *State Farm*, 538 U.S. at 424.

145. *Philip Morris*, 549 U.S. at 550–52.

146. *Id.*

147. See Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 962–76 (2007) (detailing various studies which show frequency and amount of punitive damage awards have not substantially increased).

148. See *Developments in the Law – The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1783 (2000) (counting at least a dozen cases where juries assessed punitive damages ranging from \$20 million to more than \$200 million).

149. *Philip Morris*, 549 U.S. at 355.

inadequate procedure result in identifiable substantive harm—i.e., the Court did not inquire as to whether the *Philip Morris* jury did or probably did punish Philip Morris directly for harm to nonparties, but held that the Constitution requires protection from the possibility of such an occurrence where the risk is significant.<sup>150</sup> In areas that present significant due process dangers, then, punitive damage jury instructions that fail to provide adequate guidance to the jury may, alone, violate the state's constitutional duty to defendants in its courts.<sup>151</sup> Because it may be effectively impossible to determine whether a jury did, in fact, improperly rely on admissible evidence for impermissible purposes, a right to preemptive protection in the jury charge is particularly important for evidence that lends itself to both proper and improper roles in the punitive damage determination. Whereas past Supreme Court opinions have alluded to the importance of competent jury instructions, *Philip Morris* makes it clear that insufficient jury guidance rises to the level of unconstitutionality.<sup>152</sup>

*D. Ratio Rules in Maritime Law Punitive Damage Assessments*

In *Exxon Shipping Co. v. Baker*, Exxon Shipping Co. challenged a \$2.5 billion punitive damage award.<sup>153</sup> The Court took the opportunity in *Baker* to create federal common law standards for punitive damage awards without reliance on the outer boundaries imposed by the Constitution.<sup>154</sup> Left to its own discretion, the Court adopted a 1 to 1 maximum punitive to actual damages ratio as the appropriate legal standard for punitive damage awards in maritime cases.<sup>155</sup> In reaching this conclusion, the Court rejected several other traditional means for curtailing jury discretion in punitive damage cases, such as jury

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150. *Id.* at 357 (“[W]e believe that where the risk of that misunderstanding is a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk.”).

151. *Id.* at 355 (“We therefore conclude that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.”).

152. *See id.* (holding that asking jury wrong question may violate Due Process Clause).

153. 128 S. Ct. 2605, 2611 (2008).

154. *Id.* at 2627–34.

155. *Id.* at 2633.

instructions<sup>156</sup> or statutory caps,<sup>157</sup> and focused largely on statistical data on median punitive award ratios as determinative of reasonableness.<sup>158</sup>

The Court concluded that the best approach is to peg punitive damages to compensatory damages using a ratio or maximum multiplier.<sup>159</sup> The Court determined that statistical data on the median punitive-to-compensatory damage award ratio in various civil verdict studies was the best evidence of what would be a reasonable ratio.<sup>160</sup> Assuming that “awards at the median or lower would roughly express jurors’ sense of reasonable penalties” in nonexceptional cases, the Court concluded that the median ratio, 0.65 to 1, was appropriate in cases like *Baker*, which lack the recognized justifications for a larger-than-normal ratio such as particularly egregious behavior or low probability of detection.<sup>161</sup> Having set the reasonable ratio for the average award at 0.65 to 1, the Court determined that 1 to 1 was the appropriate maximum ratio for maritime punitive damage awards.<sup>162</sup>

The Supreme Court’s majority opinion in *Baker* offers considerable insight into the Court’s subjective view of the superior mechanism for producing reasonable and consistent punitive damage awards, but *Baker* dealt exclusively with the federal maritime common law and did not reach constitutional due process issues, substantive or procedural. Because the standards set forth in *Baker* do not apply to state law claims, *Baker* does not alter the punitive damage analysis in most punitive damage cases.

#### E. *Where Are We Now?*

The procedural proclamations of *Philip Morris* are entirely consistent with the Supreme Court’s excessiveness jurisprudence, which will undoubtedly continue to play a prominent role in punitive damage verdict reviews.<sup>163</sup>

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156. As evidence to support its conclusion that jury instructions were not well suited to prevent unpredictable results and outlier awards in punitive damage cases, the Court cited state punitive damage jury instructions from Maryland and Alabama as exemplars. *Id.* at 2627–28. Without identifying the precise inadequacies of the quoted jury instructions, the Court stated that the cited examples “leave us skeptical that verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers.” *Id.* at 2628. The Court concluded that jury instructions could “go just so far in promoting systemic consistency when awards are not tied to specifically proven items of damage,” asserting that its experience with historical efforts to produce consistency in criminal sentencing “leaves us doubtful that anything but a quantified approach will work.” *Baker*, 128 S. Ct. at 2628.

157. *Id.* at 2629.

158. *Id.* at 2632–34.

159. *Id.* at 2629.

160. *Id.* at 2633.

161. *Baker*, 128 S. Ct. at 2633.

162. *Id.*

163. The Court’s grant of certiorari on the excessiveness issue presented by petitioners indicates that the Court would have engaged in its excessiveness analysis had the procedural issue not been dispositive. See *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (“Because we shall not decide whether the award here at issue is ‘grossly excessive,’ we need now only consider the Constitution’s procedural limitations.”).

Procedural due process and substantive due process in punitive damage cases constitute two sides of the same coin. As the *Philip Morris* majority indicated, both procedural and substantive due process protections in punitive damage cases are necessitated by the same constitutional concerns—lack of fair notice, arbitrary punishments, and extraterritorial application of state policy.<sup>164</sup> Additionally, as discussed above, in cases in which the Court has determined that the punitive award violated federal excessiveness limits, procedural defects were generally identified as a cause of the initial excessive award.<sup>165</sup> Under the Court's excessiveness jurisprudence, punitive damage defendants treated procedural improprieties primarily as evidence of a substantively improper result.<sup>166</sup> After *Philip Morris*, punitive damage defendants should approach the procedures by which punitive damages were awarded as an independent basis for constitutional complaint—a second bite at the apple that may be particularly important where the amount awarded falls close to or within the range of awards permitted by the Due Process Clause.

Procedural due process challenges in punitive damage suits may hold more appeal to the Supreme Court than they previously held. With the outer limits of constitutionally permitted punitive penalties fairly well outlined in *Gore* and *State Farm*, the Court may be more interested in cleaning up procedural improprieties than further honing its excessiveness review. This is one plausible explanation for the Court's decision to resolve *Philip Morris* on procedural due process grounds without embedding the procedural due process analysis within the framework of an excessiveness review. Of course, the Court is likely to continue to chip away at the outer bounds on the amount that a court is constitutionally permitted to award in punitive damages.<sup>167</sup> With the single-digit-ratio maximum in place to curtail most extreme awards, however, the Court now has the luxury of focusing, once again, on the more nuanced procedural due process issues that plague punitive damage adjudications.

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164. *Id.* at 354.

165. See *supra* notes 44–53 and accompanying text for examples of cases in which the Court's discussion of punitive damages challenges included considerations of both federal excessiveness limits and procedural defects.

166. See, e.g., Brief for Petitioner at 16–23, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (No. 01-1289) (arguing that lower court's reliance on impermissible evidence resulted in excessive punitive award); *id.* at 23–28 (arguing that excessive punitive award resulted from procedure that allowed plaintiffs to put State Farm on trial as institution for its nationwide conduct over twenty-year period).

167. When the Supreme Court recently addressed the propriety of the \$2.5 billion punitive award in *Baker* under maritime law, it specifically declined to grant certiorari on the issue of whether the award was excessive under constitutional standards, presumably because the federal common law standards adopted by the Court would necessarily fall within constitutional constraints. *In re Exxon Valdez*, 490 F.3d 1066 (9th Cir. 2007), *cert. granted sub nom.* *Exxon Shipping Co. v. Baker*, 128 S. Ct. 492 (Oct. 29, 2007) (No. 07-219). The Court nevertheless took the opportunity to note, in a footnote, that the one to one maximum ratio adopted by the Court to govern in maritime cases might also be the maximum ratio permitted by the Constitution in light of the substantiality of the actual damages awarded. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2634 n.28 (2008).

### III. ENSURING THAT JURIES ARE ASKING THE RIGHT QUESTIONS WITH REGARD TO WEALTH EVIDENCE

The absence of meaningful guidance for jurors in punitive damage cases is an issue often exhorted by the Supreme Court's Justices.<sup>168</sup> Many legal scholars and practitioners have likewise concluded that pattern jury charges in most jurisdictions are inadequate to enable jurors to accurately assess punitive damage awards.<sup>169</sup> Though states have engaged in considerable tort reform aimed at addressing perceived infirmities in punitive damage award patterns, reforms such as statutory caps, bifurcation of punitive damage trials, and heightened evidentiary standards do little to aid juries in properly calculating the amount of the punitive award.<sup>170</sup> Adequate guidance to the jury is a

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168. See, e.g., *State Farm*, 538 U.S. at 417–18 (noting that jury charges to avoid “passion and prejudice” do not help juror “assign[] appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory”); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994) (“Punitive damages pose an acute danger of arbitrary deprivation of property. 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.”); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 474–75 (1993) (O'Connor, J., dissenting, joined by White, J., and in part by Souter, J.) (opining that jurors are often given little specific guidance on use of punitive damage awards or how to accomplish intended goals of punitive damages, which leads to abuse); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring, joined by Marshall, J.) (“[T]he jury in this case was sent to the jury room with nothing more than the following terse instruction: ‘In determining the amount of punitive damages, . . . you may take into account the character of the defendants, their financial standing, and the nature of their acts.’ Guidance like this is scarcely better than no guidance at all.” (internal citations omitted)).

169. Edith Greene & Brian Bornstein, *Precious Little Guidance: Jury Instruction on Damage Awards*, 6 PSYCHOL. PUB. POL'Y. & L. 743, 746 (2000); 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); see also Amicus Curiae Brief of the Ass'n of Trial Lawyers of America in Support of the Respondents at 21, *State Farm*, 538 U.S. 408 (No. 01-1289) (arguing that “root cause” of excessive punitive damage awards is “woefully unguided juries”); Frey & Orr, *supra* note 7, at 44 (noting inadequacy of jury instructions on punitive damages in most states, resulting in unpredictable, inconsistent jury decisions).

170. Although many states statutorily provide for bifurcation of the punitive damage calculation from the liability and compensatory damage stage of the trial in an attempt to ameliorate the risk that jurors will inflate actual damages or be more inclined to find punitive liability if exposed to wealth evidence, several scholars have concluded that jurors' assessment of compensatory damages and decision to award punitive damages are not generally improperly influenced by the defendant's financial status. See, e.g., Jennifer K. Robbennolt, *Punitive Damage Decision Making: The Decisions of Citizens and Trial Court Judges*, 26 LAW & HUM. BEHAV. 315, 336 (2002) (reporting that juries generally use defendant's financial situation appropriately). See generally NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS* (1995); Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the “Deep-Pockets” Hypothesis*, 30 LAW & SOC'Y REV. 121 (1996). Additionally, there is some empirical evidence that bifurcated trials produce larger punitive awards than unitary trials. See Frey & Orr, *supra* note 7, at 41 (noting that many defense attorneys prefer unitary trials); Edith Greene et al., *Compensating Plaintiffs and Punishing Defendants: Is Bifurcation Necessary?*, 24 LAW & HUM. BEHAV. 187, 201–02 (2000) (discussing several studies showing higher damage awards in bifurcated trials).

constitutional necessity, however, where evidence presented to the jury creates a significant risk that the punitive damages may be calculated in a manner that results in an arbitrary deprivation of property without due process.<sup>171</sup> Evidence of the defendant's wealth creates just such a danger,<sup>172</sup> and states have a constitutional obligation to provide procedures which offer defendants some form of protection against wealth bias when appropriate in light of the evidence presented at trial.

A. *Wealth Evidence Necessitates Adequate Jury Guidance Under Philip Morris*

In most states that permit punitive awards, punitive damage statutes and model jury charges expressly include the financial condition of the defendant as an element that the jury is instructed to take into account in assessing punitive damages.<sup>173</sup> Consideration of the wealth of the bad actor in awarding punitive damages has deep historical roots.<sup>174</sup> Traditionally, the wealth of the defendant has been viewed as relevant to both the societal goals of punitive damages—deterrence and punishment<sup>175</sup>—each of which has been recognized as a

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171. See *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007) (holding that punitive damage awards may not be arbitrary).

172. See *supra* note 11 for a discussion of how wealth evidence may improperly influence jurors.

173. For examples of jury instructions and statutes that provide for consideration of evidence regarding the financial condition of the defendant in determining punitive damages, see KAN. CIV. PROC. CODE ANN. § 60-3702(b)(6) (West Supp. 2008); MINN. STAT. § 549.209(3) (2002); MISS. CODE ANN. § 11-1-65(1)(e) (West 2008); MONT. CODE ANN. § 27-1-221(7)(a) (2008); NEV. REV. STAT. ANN. § 42.005(4) (LexisNexis 2006); N.J. STAT. § 2A:15-5.12(C)(4) (2008); N.C. GEN. STAT. ANN. § 1D-35(2)(i) (2007); OKLA. STAT. ANN. tit. 23 § 9.1(A)(7) (West 2008); TEX. CIV. PRAC. & REM. CODE ANN. § 41.011(a)(6) (2008); ALASKA CIVIL PATTERN JURY INSTR. § 20.20B (2008), available at <http://www.state.ak.us/courts/insciv/20.20B.doc>; REVISED ARIZONA JURY INSTR. (CIVIL), PERS. INJURY DAMAGES INSTR.: PUNITIVE DAMAGES (2005); ARKANSAS MODEL JURY INSTR.—CIVIL § 2218 (2009); JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTR. §§ 3940, 3942, 3945 (2009); PATTERN JURY INSTR. FOR CIVIL PRACTICE IN THE SUPERIOR COURT OF THE STATE OF DELAWARE § 22.27 (2006); FLORIDA STANDARD JURY INSTR. IN CIVIL CASES PD1(b)(2), PD2(d) (2007), available at [http://www.floridasupremecourt.org/civ\\_jury\\_instructions/EntireDocument/entireDocument.pdf](http://www.floridasupremecourt.org/civ_jury_instructions/EntireDocument/entireDocument.pdf); HAWAII STANDARD CIVIL JURY INSTR. § 8.12 (1999), available at <http://www.state.hi.us/jud/pdf/CIVJI08.pdf>; IDAHO CIVIL JURY INSTR. § 9.20.5 (2003); ILLINOIS PATTERN JURY INSTR.—CIVIL § 35.01 (2008); MARYLAND CIVIL PATTERN JURY INSTR. § 10:13 (2006); MASSACHUSETTS SUPERIOR COURT CIVIL PRACTICE JURY INSTR. §§ 3.15, 5.3.5 (2008); NEW YORK PATTERN JURY INSTR.—CIVIL § 2:278 (2005); PENNSYLVANIA SUGGESTED STANDARD CIVIL JURY INSTR. § 14.02 (2009); ANDERSON'S SOUTH CAROLINA REQUESTS TO CHARGE—CIVIL § 13-21 (2002); TENNESSEE PATTERN JURY INSTR.—CIVIL § 14.56 (2008).

174. See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300 (1989) (O'Connor, J., concurring in part and dissenting in part) (citing *Magna Carta* and Blackstone's Commentaries); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1285 (1993) (detailing history of punitive damage doctrine). *But see* *Hunt v. Chi. & N.W.R.R.*, 26 Iowa 363, 373 (1868) (stating weight of authority is against allowing defendant's financial situation to be considered).

175. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 591 (1996) (Breyer, J., concurring, joined by O'Connor and Souter, JJ.) ("Since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of this factor to the State's interest in retribution (though not necessarily to its interest in deterrence, given the more distant relation between a defendant's wealth

constitutionally legitimate state interest.<sup>176</sup> Despite adamant opposition from some legal and economic scholars, it is fairly well established under federal law that the defendant's wealth is a constitutionally permissible consideration in assessing and reviewing punitive damages awards.<sup>177</sup> In light of the Supreme Court's repeated exhortations against the due process dangers of improper consideration of a defendant's wealth,<sup>178</sup> however, a state must be particularly careful to "insist[] upon proper standards that will cabin the jury's discretionary authority" in consideration of this element, just as it must do with evidence of harm to nonparties to the litigation.<sup>179</sup>

*Philip Morris USA v. Williams*<sup>180</sup> supports, even compels, this conclusion.<sup>181</sup> In *Philip Morris*, the Court recognized that the admission of evidence of harm caused to strangers to the litigation created a significant due process danger that juries would punish the defendant directly for those harms.<sup>182</sup> The Court recognized that the admission of such evidence is permissible in a punitive damage suit because harm to nonparties may have direct bearing on the reprehensibility of the defendant's conduct, but concluded that, in light of the due process danger created by such evidence, states have a constitutional obligation to ensure that juries are "will ask the right question, not the wrong one" with regard to evidence of harm to nonparties.<sup>183</sup> Concordantly, the Supreme Court has repeatedly recognized the due process danger that juries will punish a defendant directly for its financial status,<sup>184</sup> but held that the admission of wealth evidence is permissible in a punitive damage suit because it is legally relevant to the amount of punitive damages necessary to commensurately punish and deter the defendant's conduct.<sup>185</sup> Thus, like evidence of harm to nonparties, evidence of the defendant's financial condition is properly considered by the jury in assessing punitive damages, but only for specific purposes. And, like evidence of harm to nonparties, juries may not be permitted to punish defendants directly on the basis of wealth evidence.<sup>186</sup>

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and its responses to economic incentives."); Rustad & Koenig, *supra* note 174, at 1285–86 (noting historical use of punitive damages as method of punishment).

176. *Philip Morris*, 549 U.S. at 352–53; *Gore*, 517 U.S. at 568.

177. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 n.28 (1993).

178. See *supra* notes 96–105 and accompanying text for a discussion of the Court's contention in *Philip Morris* that the procedural limitations of the Constitution can be violated where a jury's considerations are not appropriately restrained.

179. *Philip Morris*, 549 U.S. at 352.

180. 549 U.S. 346 (2007).

181. *Philip Morris*, 549 U.S. at 352–58.

182. *Id.* at 353–55.

183. *Id.* at 355.

184. See *supra* note 11 for a summary of courts' warnings about the dangers of allowing wealth evidence.

185. See *supra* note 173 and accompanying text for a discussion of states allowing wealth evidence.

186. *Cf. Philip Morris*, 549 U.S. at 355–57 (holding that evidence of harm to others cannot be used to punish defendant directly).

Essentially, the *Philip Morris* Court employed the principle that, because some factors relevant to a punitive damages award determination are of a nature likely to be misused by the jury in a constitutionally meaningful manner, courts must take prophylactic measures to ensure that the jury compartmentalizes the impact of such potentially prejudicial considerations to the portion of the analysis to which they are relevant.<sup>187</sup> Wealth evidence falls squarely within the category of considerations that the Court has determined to be subject to such misuse. Consequently, it appears that, under the rationale of *Philip Morris*, state courts are constitutionally compelled to implement procedures that restrain the jury's discretion in considering wealth evidence to protect against improper over-reliance on wealth evidence in assessing punitive damages.

*B. Eliminating Jury Consideration of Wealth Evidence*

Although the majority of courts encountering the issue have determined that the wealth of a defendant is a proper consideration in assessing punitive damages,<sup>188</sup> there are a few notable exceptions. Distinguishing the theory of diminishing marginal utility in the corporate context, the Seventh Circuit launched a considerable attack on the relevancy of a corporate defendant's net worth to the goals of deterrence and punishment.<sup>189</sup> Additionally, a small number of states have statutorily or judicially removed consideration of the defendant's financial condition from the jury's purview—by excluding evidence of the defendant's financial condition, by providing for postverdict adjustment by the trial court in light of the defendant's financial condition, or by reassigning the task of calculating punitive damage awards to trial judges. That some courts have argued against allowing the jury to consider a defendant's wealth at all, occasionally in the face of significant precedent to the contrary,<sup>190</sup> highlights the gravity of the danger posed by such evidence. While the efficacy of excluding wealth evidence as a means of protecting defendants from wealth bias remains debatable, the arguments made by these courts underscore some of the due process dangers that courts allowing such evidence must endeavor to avoid with competent jury instructions.

Under Colorado, Kentucky, and North Dakota law, evidence of a defendant's financial condition is not admissible in punitive damages cases.<sup>191</sup> The Supreme Court of Kentucky recently reiterated its rationale for the

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187. *Id.* at 357.

188. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 n.28 (1993); Annotation, *Punitive Damages: Relationship to Defendant's Wealth as Factor in Determining Propriety of Award*, 87 A.L.R. 4th 141, 151 (1991).

189. See *infra* notes 285–86 and accompanying text for the Seventh Circuit's reasoning in *Zazú Designs v. L'Oréal*, 979 F.2d 499 (7th Cir. 1992).

190. *E.g.*, *Givens v. Berkley*, 56 S.W. 158, 159 (Ky. 1900) (overruling *Crosby v. Bradley*, 11 Ky. L. Rptr. 954 (Ky. Super. 1890), and *Louisville, Cincinnati & Lexington R.R. Co. v. Mahony's Adm'x*, 70 Ky. (7 Bush) 235 (Ky. 1870), and holding that neither party's financial circumstances are admissible for purposes of jury's determination of punitive damages).

191. COLO. REV. STAT. § 13-21-102(6) (2003); N.D. CENT. CODE § 32-03.2-11(3) (1996 & Supp. 2007); *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 167 (Ky. 2004).

exclusion of such evidence (first advanced by the court in 1900),<sup>192</sup> stating:

[O]ur predecessor court stated that “we are clearly of the opinion that no evidence as to the financial condition of either defendant or plaintiff should be admitted in any case in which punitive damages might be recovered” because “[t]he tendency of this class of testimony would be to lead the jury to consider chiefly the pecuniary condition of the defendant, rather than the enormity or wantonness of the act for which punitive damages might be allowed.”<sup>193</sup>

The exclusion of wealth evidence, however, does not necessarily ensure that the jury will not take the defendant’s financial status into account in determining whether punitive damages are merited and in what amount. Rather, exclusion of financial evidence ensures that, if the jury does take the defendant’s wealth into consideration, it does so without the information necessary to accurately assess that wealth. For example, a jury is likely to assume that a defendant such as Wal-Mart or Exxon has considerable wealth, but the numerical value the jury assigns to that wealth may be grossly inaccurate if the jury is not given any financial data on which to anchor that assessment. To offset this phenomenon, some states give the defendant the right to introduce its financial information in order to guard against misconceptions of the defendant’s finances that may result from the defendant’s status as, for example, a corporate entity or a locally well-known business.<sup>194</sup> In states where evidence of the defendant’s financial condition is excluded, it may be necessary, at a minimum, to instruct the jury that it may not take the defendant’s financial status into account in determining the amount of punitive damages to award. Pattern jury charges in Colorado<sup>195</sup> and North Dakota,<sup>196</sup> however, contain no such admonition. Similarly, Kentucky’s Supreme Court has declined to endorse a punitive damage instruction informing the jury that it is not permitted to consider the defendant’s financial condition in calculating punitive damages.<sup>197</sup>

Distinct from evidence of financial status, both Kentucky and North Dakota statutorily allow for jury consideration of the profitability of the alleged misconduct in assessing a punitive damage award.<sup>198</sup> Profitability evidence often bleeds into evidence of the size and resources of a corporate defendant, particularly if the jury is permitted to consider the total potential profits defendant expected from a large-scale “scheme” of conduct that resulted in harm to the plaintiff rather than only the profits the defendant might have realized

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192. *Givens*, 56 S.W. at 159.

193. *Smith*, 142 S.W.3d at 167 (citing *Givens*, 56 S.W. at 159).

194. For example, before wealth evidence was statutorily prohibited, North Dakota common law provided that, just as the plaintiff had a right to introduce evidence of defendant’s wealth, the defendant had a right to introduce evidence of his lack thereof. *Tice v. Mandel*, 76 N.W.2d 124, 137 (N.D. 1956) (citing *King v. Hanson*, 99 N.W. 1085, 1092 (N.D. 1904)).

195. COLORADO JURY INSTR.—CIVIL § 5:3 (2008).

196. NORTH DAKOTA PATTERN JURY INSTR.—CIVIL § 72.00 (2006).

197. *Smith*, 142 S.W.3d at 167.

198. N.D. CENT. CODE § 32-03.2-11(5)(c)(2) (1996 & Supp. 2007); *United Parcel Serv. Co. v. Rickert*, 996 S.W.2d 464, 470 (Ky. 1999).

from the plaintiff alone.<sup>199</sup> Providing jurors with only partial information regarding the defendant's resources invites the jury to speculate as to the defendant's assets; and, again, there is no empirical evidence that the absence of direct evidence of wealth or the presence of only partial wealth evidence will prevent the jury from considering the defendant's financial status in seeking to impose social justice. Jury speculation as to the defendant's finances may operate to the detriment of defendants whose resources are overestimated, and incomplete information leaves jurors ill-equipped to accurately assess the amount of punitive damages necessary to achieve the societal objectives of such an award.<sup>200</sup>

Alabama law also prohibits the introduction of wealth evidence at trial.<sup>201</sup> Unlike Colorado law, which prohibits consideration of the defendant's financial condition not only in the jury's initial calculation of punitive damages but also in reviewing the appropriateness of the damages awarded,<sup>202</sup> Alabama punitive damages statutes provide for a postverdict review of the excessiveness of the jury's punitive damage award by the trial court in which the trial court considers the economic impact of the verdict on the defendant and is authorized to adjust the award accordingly.<sup>203</sup> The trial court may consider all relevant evidence in its postverdict review,<sup>204</sup> including the defendant's financial status. This review appears to be *de novo*, as no presumption of correctness applies to the jury's award.<sup>205</sup> The defendant's otherwise undiscoverable financial data becomes discoverable after the verdict is rendered.

Alabama juries are instructed to consider the character of the defendant's conduct, the degree of wrong established by the evidence in the suit, and the necessity of preventing similar wrongs.<sup>206</sup> Such an instruction presumably lessens the due process dangers posed by a jury's consideration of some of the factors reserved for consideration of the trial court after the verdict, including that

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199. For example, in *Philip Morris*, the court could have reasonably informed the jury that Philip Morris occupied one-third of the Oregon tobacco market in order for the jury to assess the potential of Philip Morris to profit from misleading the Oregon public about the health risks of smoking. See *Philip Morris USA v. Williams*, 549 U.S. 346, 350 (2007) (quoting closing arguments in which plaintiff's counsel informed jury of Philip Morris's market share); *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1178 n.5 (Or. 2006) (noting "profitability of the defendant's misconduct" as one statutorily provided factor in determining punitive damages under Oregon law). Such evidence, especially when combined with Philip Morris's successful commercial branding of its name, is likely to lead the jury to inferences about Philip Morris's financial condition regardless of whether wealth evidence is introduced.

200. *Cf. Delzer v. United Bank*, 559 N.W.2d 531, 537 n.8 (N.D. 1997) ("We have observed that tying an exemplary damage award to the amount of compensatory damages awarded, through a proportionality rule, 'may defeat the punitive and deterrent objectives of exemplary damages' and 'conflict[s] with the well-established principle that the punitive award may properly vary with the defendant's financial circumstances.'" (quoting *Dahlen v. Landis*, 314 N.W.2d 63, 69 (N.D. 1981))).

201. ALA. CODE § 6-11-23(b) (LexisNexis 2005).

202. COLO. REV. STAT. § 13-21-102(6) (2003).

203. ALA. CODE § 6-11-23(b).

204. *Id.*

205. *Id.* at § 6-11-23(a).

206. ALABAMA PATTERN JURY INSTR.—CIVIL § 11.03 (2008).

associated with the defendant's wealth. Limiting the relevant information available to the jury in assessing punitive damages, however, necessarily impedes the jury's ability to achieve optimal deterrence and retribution as determined in light of all of the evidence. Put another way, forcing the jury to calculate punitive damages without accounting for the defendant's wealth, a factor that the trial court will consider in its independent calculation, puts the jury in a poor position to produce an award that comports with that arrived at by the trial court. At one point, the Alabama Supreme Court expressed serious doubt as to the wisdom of this approach.<sup>207</sup>

Alabama's procedural process is appealing in that it leaves a substantial portion of the punitive assessment in the hands of the jury. This approach allows the jury to perform its fact-finding function in determining the proper amount of punitive damages, which is an inherently fact-intensive determination.<sup>208</sup> It also provides the jury with the satisfaction of exacting social justice for conduct deemed socially repugnant, without which juries may be more likely to inflate compensatory damages.<sup>209</sup> Additionally, postverdict trial court adjustment of the punitive award in light of the defendant's ability to pay, when warranted, does diminish the danger created by overvaluation of the defendant's business by the jury in the absence of direct wealth evidence.<sup>210</sup>

However, providing jurors with only partial information puts the jury at a distinct disadvantage in calculating an award that achieves the award's objectives.<sup>211</sup> And, again, it is not clear that the absence of direct evidence of the defendant's wealth significantly lessens the likelihood that the jury will take the defendant's perceived finances into consideration in determining the punitive award. The standard jury instructions for punitive damage cases in Alabama, like in most states, inform the jury of the purposes of punitive damages—to punish the defendant for its conduct and to deter the defendant and others from similar future conduct.<sup>212</sup> The proposition that a larger monetary penalty is necessary to inflict the same amount of retribution on a wealthier individual or entity than on an impecunious defendant is intuitive for many potential jurors, regardless of whether it is supported by economic theory. The same may be said for the instinct that a greater penalty may be necessary to prevent a wealthy corporation from engaging in similar behavior in the future, if the potential profitability outweighed the risk of punitive damages, than would be necessary to deter a smaller business entity for whom the risk of such punitive damages would mean financial ruin. Thus, like other states that exclude wealth evidence, it is clear that

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207. *Life Ins. Co. of Ga. v. Johnson*, 684 So. 2d 685, 694 (Ala. 1996), *vacated by* 519 U.S. 923 (1996) and *remanded for review in light of* *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996).

208. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.11 (2001); *id.* at 445–46 (Ginsburg, J., dissenting).

209. *See* *Greene & Bornstein*, *supra* note 169, at 762 (suggesting that caps on punitive damages may inflate compensatory damage awards).

210. ALA. CODE § 6-11-23(b) (listing, among factors for consideration by trial court, “the economic impact of the verdict on the defendant”).

211. *See Johnson*, 684 So. 2d at 694 (describing disadvantageous position of jurors).

212. ALABAMA PATTERN JURY INSTR.—CIVIL § 11.03 (2008).

Alabama's approach is not a panacea to wealth bias in punitive damage assessments.<sup>213</sup>

Punitive damage statutes in Connecticut and Kansas go a step further, removing the assessment of the amount of punitive damages from the jury's purview entirely.<sup>214</sup> In Kansas, if the jury finds that punitive damages are appropriate, the trial court sets the amount of the punitive award after a separate postverdict hearing on the issue.<sup>215</sup> The same is true in Connecticut for punitive damages in products liability cases,<sup>216</sup> and punitive damages under Connecticut's deceptive trade practice statutes are entirely discretionary for the trial court.<sup>217</sup> The defendant's financial condition is one of the statutorily designated factors that the trial court may consider in assessing the punitive damage award in Kansas and is a relevant consideration under Connecticut common law as well.<sup>218</sup>

Many commentators have advocated this approach—i.e., a jury determination whether punitive damages are warranted and judicial assessment of the amount of the punitive award—as providing a compromise that allows continued jury participation while eliminating some (or all) of the risk of arbitrariness often associated with jury assessments.<sup>219</sup> Fundamentally, however, it is not clear that trial judges are, in fact, better equipped to calculate punitive damages. Empirical studies in other fields of legal research indicate that judges are subject to many of the criticisms lodged against juries,<sup>220</sup> including findings that judges are “unable to ignore inadmissible evidence”<sup>221</sup> and are “vulnerable

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213. Again here, an instruction to the jury expressly prohibiting the jury from taking the defendant's perceived size and wealth into consideration in assessing punitive damages may diminish the potential for prejudice based on wealth assumptions.

214. CONN. GEN. STAT. ANN. §§ 42-110g(a), 52-240b (West 2005); KAN. CIV. PROC. CODE ANN. § 60-3702(a) (West Supp. 2008). Connecticut's example has less applicability to the inquiry of this Article in light of the limited availability of punitive damages in Connecticut and the statutory cap of twice the amount of actual damages awarded. CONN. GEN. STAT. ANN. §§ 42-110g(a), 52-240b.

215. KAN. CIV. PROC. CODE ANN. § 60-3702(a).

216. CONN. GEN. STAT. ANN. § 52-240b.

217. *Id.* § 42-110g.

218. KAN. CIV. PROC. CODE ANN. § 60-3702(b)(6); *United Tech. Corp. v. Am. Home Assurance Co.*, 118 F. Supp. 2d 174, 180–81 (D. Conn. 2000) (applying Connecticut law).

219. For commentaries advocating determination of punitive damages by judges, see Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 ARIZ. L. REV. 901, 916 (1998); Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179, 227 (1998); David A. Schkade, *Erratic by Design: A Task Analysis of Punitive Damages Assessment*, 39 HARV. J. ON LEGIS. 121, 135–36 (2002); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2078 (1998).

220. See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 791–92, 797, 802–03, 809–10, 814 (2001) (detailing how judges suffer from several well-known jury biases); Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 147 (2002) (stating that existing research suggests that judges and juries react similarly in criminal context).

221. Robbennolt, *supra* note 220, at 147 (citing Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effects of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113, 125–26 (1994)).

to cognitive fallacies” such as hindsight bias,<sup>222</sup> anchoring,<sup>223</sup> egocentric bias,<sup>224</sup> framing,<sup>225</sup> and the representativeness heuristic.<sup>226</sup>

With regard to punitive damages, several studies suggest that judges award punitive damages at approximately the same rate and with approximately the same punitive-to-actual-damages ratio as juries.<sup>227</sup> The authors of one empirical study of bench and jury trial outcomes across the United States concluded that shifting greater responsibility to judges would not result in a substantial change in punitive damage award patterns.<sup>228</sup> Another study, which similarly showed little variance in the magnitude and variability between punitive damages awarded by juries and judges, also concluded that, while the wealth of the defendant did not influence jurors’ compensatory awards, judges were marginally more likely to inappropriately utilize wealth information in assessing the compensatory damages.<sup>229</sup>

Additionally, there is some evidence that depriving juries of the right to extract retribution for the social wrong committed by the defendant increases the probability that the jury will improperly inflate the compensatory award to achieve this goal.<sup>230</sup> One study found that, while jurors exhibited no tendency to augment compensatory awards when informed that punitive damages would be capped at a set amount, “[j]urors who had no option to award punitive damages

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222. *Id.* (citing John C. Anderson et al., *Evaluation of Auditor Decisions: Hindsight Bias Effects and the Expectation Gap*, 14 J. ECON. PSYCHOL. 711, 730–32 (1993)). Hindsight bias occurs when the perceived probability of an outcome is inflated or deflated based on the knowledge of what actually occurred. *Id.* at 117 n.192.

223. *Id.*; Guthrie et al., *supra* note 220, at 791–92. In this context, anchoring refers to the use of irrelevant values as a starting point for determining another value. Guthrie et al., *supra* note 220, at 788.

224. Robbennolt, *supra* note 220, at 147 (citing Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979, 982, 994 (1994)). Egocentric bias results from the overestimation of one’s own abilities. Guthrie et al., *supra* note 220, at 811–12.

225. Robbennolt, *supra* note 220, at 147 n.195 (citing Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341 (1984)) (“Framing refers to the evaluation of outcomes relative to a neutral reference point. Outcomes are evaluated differently depending on whether they are framed as gains or losses.”).

226. *Id.* at 147 n.196 (citing Guthrie et al., *supra* note 220, at 809–10) (noting that representativeness heuristic refers to method whereby “decision makers make categorizations” based on similarity of object being evaluated to other objects in that category). *See generally* Daniel Kahneman & Amos Tversky, *Belief in the Law of Small Numbers*, 76 PSYCHOL. BULL. 105 (1971).

227. *See, e.g.*, Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 779 (2002) (explaining that “observed differences” between decisions made by judges and those made by juries with regard to punitive damages “may result from differences in the cases judges and juries decide and not from differences in their treatment of those cases”); Robbennolt, *supra* note 170, at 336 (noting similarity between decisions of judges and citizens with respect to punitive damages).

228. Eisenberg et al., *supra* note 227, at 779. *But see* CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 206–07 (2002) (concluding that judges performed better than jurors in assessing risk).

229. Robbennolt, *supra* note 170, at 333–34.

230. Greene & Bornstein, *supra* note 169, at 762.

returned the highest compensatory damages award of any group.”<sup>231</sup> Finally, even assuming that putting the amount of any punitive award in the hands of the trial judge abates the risk of bias or prejudice against wealthy corporate defendants, it raises due process (and other constitutional) concerns of its own.<sup>232</sup>

Although the Supreme Court has held that the determination of the appropriate amount of punitive damages does not constitute a true finding of “fact” within the meaning of the Seventh Amendment’s prohibition on reexamination of facts,<sup>233</sup> it is not clear that federal and state constitutional rights to trial by jury are not implicated by punitive damage assessments. The valuation of punitive damages has historically been delegated to the jury, and there is support in prior Supreme Court opinions for the wisdom of this approach.<sup>234</sup> Additionally, assigning the initial assessment of punitive damages to the judges eliminates a layer of procedural protection for punitive damage defendants by subsuming the original calculation of punitive damages and the initial post-trial judicial review of the punitive award into a single step performed by a single actor.<sup>235</sup>

In sum, it is not clear that reformatory measures that eliminate the jury’s consideration of wealth evidence achieve their goal of eradicating wealth bias in punitive damage assessments. Nor is it clear that the perceived benefits of such procedures are not eclipsed by the foreseeable disadvantages of requiring the jury to assess punitive damages with incomplete evidence on a legally relevant component or removing the punitive damage assessment from the jury’s purview entirely. If handcuffing the jury from awarding punitive damages is not optimal and blindfolding the jury to wealth evidence hinders its ability to produce a legally accurate assessment, then the answer may be, as the Supreme Court has repeatedly suggested, in providing the jury with adequate information and

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231. *Id.*

232. *Compare* Smith v. Printup, 866 P.2d 985, 992 (Kan. 1993) (rejecting state and federal constitutional challenges to Kansas statute that placed determination of amount of punitive damages in court’s hands), *with* Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 401 (Ohio 1994) (holding that Ohio statute requiring court to determine amount of punitive or exemplary damages violated state constitutional right to trial by jury).

233. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001). The Court in *Cooper* held that federal courts of appeals must apply a *de novo* standard when reviewing a district court’s determination of the constitutionality of a punitive damage award. *Id.* In holding that the Seventh Amendment did not preclude *de novo* review of punitive damage awards for constitutionality, the Court specifically noted that it was not suggesting that the Seventh Amendment would allow a court to disregard the specific findings of fact upon which the jury’s punitive damage assessment rested. *Id.* at 437 n.11. For a discussion of the Court’s holding in *Cooper* and criticism of its underlying historical and functional arguments, see Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 195–204 (2003).

234. *Cooper Indus.*, 532 U.S. at 437 n.11; *id.* at 445–46 (Ginsburg, J., dissenting).

235. *Cf.* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991) (concluding that Pacific Mutual “had the benefit of the full panoply of Alabama’s procedural protections” where the jury was adequately instructed and award was subjected to adequate trial and appellate court review).

guidance in making this complex and intangible translation of societal indignation into dollars.

*C. Cabining the Jury's Consideration of Wealth Evidence in Assessing Punitive Damages*

In states that allow the introduction of wealth evidence in punitive damages cases, it is most common for pattern jury instructions on punitive damages to simply list the wealth of the defendant as one of several factors for the jury to consider in determining the amount awarded, without further guidance on how the jury may consider such evidence.<sup>236</sup> Such instructions implicitly advise the jury that it may punish a wealthy defendant more severely than a defendant of lesser means, but fail to provide any parameters on the jury's ability to augment the punitive award on that basis. Some states provide even less guidance to the jury, allowing the introduction of wealth evidence but furnishing the jury with no instructions regarding the use of such evidence in calculating punitive damages.<sup>237</sup> Instructions in both categories fail to apprise jurors of the purposes for which they may consider wealth evidence—to effectively achieve deterrence and retribution—or of the purposes for which the jury may *not* consider wealth evidence—such as redistribution of wealth.

A handful of states provide greater jury guidance by informing jurors that they are to consider a defendant's wealth in relation to determining the amount

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236. For examples of jury instructions that expressly authorize consideration of the wealth of the defendant, but provide no further guidance, see ALASKA CIVIL PATTERN JURY INSTR. § 20.20B (2008), available at <http://www.state.ak.us/courts/insciv/20.20B.doc>; REVISED ARIZONA JURY INSTR. (CIVIL), PERS. INJURY DAMAGES INSTR.: PUNITIVE DAMAGES (2005); PATTERN JURY INSTR. FOR CIVIL PRACTICE IN THE SUPERIOR COURT OF THE STATE OF DELAWARE § 22.27 (2006); FLORIDA STANDARD JURY INSTR. IN CIVIL CASES PD1(b)(2), PD2(d) (2007), available at [http://www.floridasupremecourt.org/civ\\_jury\\_instructions/EntireDocument/entireDocument.pdf](http://www.floridasupremecourt.org/civ_jury_instructions/EntireDocument/entireDocument.pdf); IDAHO CIVIL JURY INSTR. § 9.20.5 (2003); MARYLAND CIVIL PATTERN JURY INSTR. § 10:13 (2006); MINNESOTA JURY INSTR. GUIDES—CIVIL § 94.10 (2008); MISSISSIPPI MODEL JURY INSTR.—CIVIL § 11:15 (2005); NEW JERSEY MODEL CIVIL JURY CHARGES § 8.60 (2000), available at <http://www.judiciary.state.nj.us/civil/charges/8.60.pdf>; NEW YORK PATTERN JURY INSTR.—CIVIL § 2:278 (2005); OKLAHOMA UNIF. JURY INSTR. §§ 5.5, 5.9 (2007); ANDERSON'S SOUTH CAROLINA REQUESTS TO CHARGE—CIVIL § 13-21 (2002); TENNESSEE PATTERN JURY INSTR.—CIVIL § 14.56 (2008). Some pattern instructions do not identify any factors for the jury to consider in determining the amount of a punitive award, but do inform the jury that they may consider the financial condition of the defendant in determining the amount, making the financial condition of the defendant the only consideration expressly identified in the instructions for fixing the amount of the punitive award. For examples of such instructions, see FIFTH CIRCUIT PATTERN JURY INSTR.—CIVIL § 15.13 (2006); ELEVENTH CIRCUIT PATTERN JURY INSTR. (CIVIL CASES) § 1.1.1 (2005); ARKANSAS MODEL JURY INSTR.—CIVIL § 2218 (2009). Idaho's standard jury charge informs the jury that it may consider evidence of the defendant's wealth only with respect to assessing punitive damages, but does not list the defendant's wealth among the considerations named for calculating the amount of the award. IDAHO CIVIL JURY INSTR. § 9.20.5.

237. For examples of jury instructions in states that permit consideration of wealth evidence in assessing punitive damage awards, but make no provision in the jury instruction for what the jury may do with such evidence, see GEORGIA SUGGESTED PATTERN JURY INSTR. CIVIL § 66.750 (2008); MISSOURI APPROVED JURY INSTR. §§ 10.01, 10.02 (2008); NEW MEXICO UNIF. JURY INSTR.—CIVIL § 13-1827 (2003); OHIO JURY INSTR. § 23.71 (2008); VIRGINIA JURY INSTR. §§ 23:17, 46:19, 48:34, 49:21 (2008).

that will adequately punish the defendant for its conduct and deter similar conduct in the future.<sup>238</sup> While such instructions satisfy the first criticism above, they do not satisfy the latter. Specifically, they do not admonish jurors that they may not punish the defendant directly for its financial status or otherwise utilize the financial disparity between the plaintiff and the defendant as a basis for redistribution of wealth. Under the United States Supreme Court's reasoning in *Philip Morris*, however, such cabining of the jury's consideration of wealth evidence may be a constitutional necessity.<sup>239</sup>

Although some commentators are dubious about the ability or willingness of jurors to comprehend and abide by comprehensive jury instructions,<sup>240</sup> what little empirical research there is on the issue is conflicting and inconclusive.<sup>241</sup> Most legal scholars recognize that juries' ability to produce consistent and legally accurate punitive damage awards is crippled by vague instructions and minimal guidance.<sup>242</sup> The absence of meaningful guidance, however, is unnecessary in many instances. The Supreme Court has now provided the judiciary with considerable criteria and standards for assessing the constitutional propriety of punitive awards.<sup>243</sup> Most courts have attempted to employ the Supreme Court's analysis in reviewing punitive awards, perceptively relieved to have more concrete parameters under which to evaluate punitive damages. However, few jurisdictions have chosen to provide the luxury of this increased guidance to the jurors who bear the burden of making the pioneering attempt at converting outrage into dollars.<sup>244</sup> The jury is unlikely to pass the Supreme Court's constitutional calculus test when it is provided few of the variables in the equation. This is especially true with regard to wealth evidence, which lends

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238. For examples of state jury instructions that permit juries to consider the defendant's wealth, with additional guidance in determining punitive damage awards, see JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTR. §§ 3942, 3945 (2009); HAWAII STANDARD CIVIL JURY INSTR. § 8.12 (1999), available at <http://www.state.hi.us/jud/pdf/CIVJI08.pdf>; ILLINOIS PATTERN JURY INSTR.—CIVIL § 35.01 (2008); MASSACHUSETTS SUPERIOR COURT CIVIL PRACTICE JURY INSTR. §§ 3.15, 5.3.5 (2008); PENNSYLVANIA SUGGESTED STANDARD CIVIL JURY INSTR. § 14.02 (2009).

239. *Cf. Philip Morris USA v. Williams*, 549 U.S. 346, 353–55 (2007) (suggesting that “proper legal guidance” to jury is needed to ensure due process).

240. SUNSTEIN ET AL., *supra* note 228, at 91–93.

241. Compare Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297, 332–34 (finding that jurors were approximately ninety percent accurate in their postdeliberation comprehension of jury instructions based on multiple-choice test), with Reid Hastie et al., *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 LAW & HUM. BEHAV., 287, 295 (1998) (finding that jurors had median score of five percent accuracy based on unaided recollection postverdict).

242. See *supra* note 169 and accompanying text for a discussion of scholarship addressing the impact of inadequate jury instructions on punitive damages awarded by juries.

243. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–85 (1996) (establishing *Gore* guideposts and providing several exemplary considerations thereunder).

244. By contrast, pattern punitive damage charges in California, Illinois, and New York expressly lay out the first and second *Gore* guideposts for the jury and provide a number of reprehensibility factors listed by the *Gore* majority. JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTR. §§ 3940, 3942, 3945 (2009); ILLINOIS PATTERN JURY INSTR.—CIVIL § 35.01 (2008); NEW YORK PATTERN JURY INSTR.—CIVIL § 2:278 (2005).

itself readily to both permissible and impermissible functions. This section of the Article attempts to distill from the Supreme Court's punitive damage tutelage those constitutional principles that may serve to reduce the dangers of wealth bias in punitive damages suits if properly incorporated into the jury charge.

The role of wealth evidence in calculating and reviewing punitive damage awards has been addressed by the Supreme Court on several occasions. In *Pacific Mutual Life Insurance Co. v. Haslip*,<sup>245</sup> although evidence of Pacific Mutual's net worth was excluded at trial,<sup>246</sup> the Supreme Court expressly approved of the Alabama Supreme Court's review of punitive damages awards on the basis of seven factors, one of which was the financial condition of the defendant.<sup>247</sup> In *TXO Production Corp. v. Alliance Resources Corp.*,<sup>248</sup> the jury charge allowed consideration of the financial condition of the defendant and instructed the jury that state law recognized that a larger punitive damage award might be necessary for purposes of deterrence where the defendant had greater financial worth.<sup>249</sup> Although the *TXO* Court did not reach the issue, the Court twice addressed TXO's argument that the jury's consideration of its financial status resulted in unfair prejudice in determining the amount of the punitive damage award.<sup>250</sup> First, in a footnote, the Court rejected TXO's argument that the trial court's admission of evidence of TXO's financial worth and TXO's wrongful conduct "in other parts of the country" biased the jury in its punitive damage assessment, stating that "[u]nder well-settled law" such factors "are typically considered in assessing punitive damages. Indeed, the Alabama factors we approved in *Haslip* included both."<sup>251</sup> The second time the *TXO* Court addressed the argument, it again recognized its approval of the consideration of wealth evidence in *Haslip* but also expressly endorsed TXO's argument that an emphasis on the wealth of the wrongdoer increased the risk that a punitive damage award might be influenced by prejudice, especially where the defendant was a nonresident of the state.<sup>252</sup>

In *BMW of North America, Inc. v. Gore*,<sup>253</sup> the Supreme Court again faced the Alabama Supreme Court's seven-factor punitive damage examination.<sup>254</sup> Because the Court applied its excessiveness review rather than a review of procedural protections, the *Gore* majority did not again address the propriety of Alabama's factors.<sup>255</sup> However, Justice Breyer's concurrence, joined by Justices O'Connor and Souter, indicated that, although the Alabama Supreme Court's

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245. 499 U.S. 1 (1991).

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

247. *Id.* at 22–23.

248. 509 U.S. 443 (1993).

249. *TXO*, 509 U.S. at 463 n.29. TXO also objected that the jury charge improperly identified one of the purposes of punitive damages as providing "additional compensation." *Id.*

250. *Id.* at 462 n.28, 463–64.

251. *Id.* at 462 n.28.

252. *Id.* at 464 (citing *Haslip*, 499 U.S. at 21–22).

253. 517 U.S. 559 (1996).

254. *Gore*, 517 U.S. at 566.

255. *Id.* at 568.

seven factors were proper, Alabama's interpretation and application of those factors was not.<sup>256</sup> Justice Breyer acknowledged that the defendant's wealth was a permissible consideration, but pointed out that, because of its operation as a basis only for increasing awards, it could not expiate an otherwise excessive award.<sup>257</sup> This position was adopted by the Court in *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>258</sup>

We can take three lessons from the interplay between the Supreme Court's opinions on this issue. First, *Haslip* makes it clear that a defendant's financial condition is a valid consideration for appellate review of a jury's punitive damage award.<sup>259</sup> The *TXO* Court might have distinguished *Haslip* on this ground—i.e., that *Haslip* dealt solely with the consideration in terms of appellate review and not with consideration of this factor by the jury—but chose not to.<sup>260</sup> Instead, the *TXO* Court differentiated between an argument that evidence of the defendant's financial condition is not a proper jury consideration in assessing punitive damages (an argument which the Court summarily dismissed in footnote twenty-eight) and an argument that such evidence magnifies the risk of unfair prejudice in the jury (an argument the Court endorses).<sup>261</sup> Thus, our second lesson is that evidence of the defendant's wealth is analogous to evidence of a harm caused by the defendant's conduct to nonparties in that consideration of such evidence by the jury for at least some purpose has been expressly condoned by the Supreme Court but, at the same time, the evidence poses an serious due process risk against which some form of protection may be necessary.<sup>262</sup>

Additionally, the Court's assertion in *State Farm* that “[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award” places certain limits on the jury's ability to adjust the amount of a punitive award in light of the defendant's financial position.<sup>263</sup> Where the punitive damages awarded fall well inside the range of constitutionally permissible awards, the jury is presumably permitted to adjust the award upward in order to adequately deter and punish the defendant in light of the defendant's wealth, so long as the

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256. *Id.* at 589 (Breyer, J., concurring).

257. *Id.* at 591 (stating, in considering defendant's wealth as factor in Alabama's punitive damage review, “This factor, however, 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 . . . . 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.”).

258. 538 U.S. 408, 427–28 (2003).

259. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22–23 (1991).

260. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462–66 (1993).

261. *Id.* at 462 n.28, 463; *see also id.* at 491–92 (O'Connor, J., dissenting) (noting that, although historically courts have found defendants' wealth relevant, “courts must have authority to recognize the special danger of bias that such considerations create”).

262. *Cf. Philip Morris USA v. Williams*, 549 U.S. 346, 353–55 (2007) (holding Due Process Clause requires states to ensure juries are not considering harm to nonparties in calculating punitive damages).

263. *State Farm*, 538 U.S. at 427.

adjustment does not push the award beyond that constitutionally acceptable range.<sup>264</sup> However, if the jury has awarded an amount that is at the outermost point of the spectrum of permissible punitive awards before the defendant's wealth is taken into account, the defendant's wealth does not expand the ambit of what is constitutionally permissible, and the jury may not increase the award in excess of the constitutional boundary.<sup>265</sup> Despite the Supreme Court's unequivocal edict, states that inform the jury that they may consider the defendant's wealth in calculating punitive damages, almost without exception, fail to further inform the jury that the defendant's wealth will not justify an excessive punitive award.<sup>266</sup>

Note that this third axiom does not appear to limit the jury's ability to adjust a punitive damage award downward in light of the defendant's financial condition. Jury instructions encouraging the jury to employ considerations of wealth to reduce punitive awards under certain circumstances, rather than allowing consideration of wealth to act as a one-way ratchet for "inflating awards when the defendant is wealthy," may diminish one concern voiced by the Court on this issue.<sup>267</sup> At least three states have amended their model jury instructions for punitive damages cases to include an instruction that prohibits the jury from entering a punitive award that exceeds the defendant's ability to pay or that will "bankrupt" or "financially destroy" the defendant.<sup>268</sup> Similarly, a number of courts have held punitive awards constitutionally excessive relative to the defendant's wealth.<sup>269</sup> Although states with statutory punitive damage caps

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264. *See id.* at 427–28 (noting that Court declined to hold that wealth consideration is forbidden where award is otherwise constitutionally permissible).

265. *Id.* at 427.

266. Again, California stands out as an exception. *See* JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTR. §§ 3940, 3942, 3945 (2009) (instructing jury: "You may not increase the punitive award above an amount that is otherwise appropriate merely because [*name of defendant*] has substantial financial resources.").

267. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 591 (1996) (Breyer, J., concurring, joined by O'Connor and Stevens, JJ.).

268. *See, e.g.*, JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTR. §§ 3940, 3942, 3945 (providing instruction that any award by jury may not exceed defendant's ability to pay); MARYLAND CIVIL PATTERN JURY INSTR. § 10:13 (2006) (advising jury that punitive award may not be designed to bankrupt or financially destroy defendant); *In re Standard Jury Instructions—Civil Cases*, 867 So. 2d 1164, 1164 (Fla. 2004) (adding instruction to Florida's model jury instructions for punitive damage determinations precluding award that would "financially destroy" defendant). In California, one court of appeals found that the state's approved jury instruction, which instructed the jury to consider "[t]he amount of punitive damages which will have a deterrent effect on the defendant in light of defendant's financial condition," was unconstitutional under the Supreme Court's opinion in *State Farm. Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 805 (Cal. Ct. App. 2003).

269. *E.g.*, *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004) (holding as part of its "reprehensibility" guidepost analysis that "the [punitive] award of more than eight times Healthmark's net worth was conscience-shocking as a matter of Arkansas law and grossly excessive from the due process perspective"); *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992) (holding punitive award equaling thirty percent of defendant's net worth excessive); *S.J. Amoroso Constr. Co. v. Lazovich & Lazovich*, 810 P.2d 775, 778 (Nev. 1991) (holding punitive damages totaling one-third of defendant's net worth excessive). *But see Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 136 P.3d 428, 450–51 (Kan. 2006) (rejecting defendant's request that court take its financial condition, which it

frequently limit the award to the greater of a specified amount or a multiple of the compensatory award, a few state legislatures have established limitations based on the defendant's net worth.<sup>270</sup> State laws providing different maximum punitive penalties for different defendants depending on the defendant's financial status, however, may raise constitutional concerns of their own. By comparison, a jury charge which encourages juries to rely on wealth evidence not only when it justifies an increase in punitive damages, but also when it counsels against a high dollar award, has been implicitly condoned by at least some members of the Court.<sup>271</sup>

Finally, the rationale adopted by the Court in *Philip Morris* may require a punitive damage jury charge instructing the jury that it may consider the wealth of the defendant in determining the amount necessary to properly punish the defendant for its conduct and deter similar future conduct but may not punish the defendant directly for its financial status. Just as with the equivalent

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asserted to be typified by loss rather than profit, into consideration in determining whether punitive damages awarded against it were unconstitutionally excessive on grounds that, under *Gore* and *Campbell*, defendant's wealth, or lack thereof, was merely peripheral consideration compared to three *Gore* guideposts); *Welch v. Epstein*, 536 S.E.2d 408, 424–25 (S.C. Ct. App. 2000) (upholding punitive damage award that would bankrupt defendant). Courts in a number of jurisdictions have recognized the general principal that a punitive award should not financially destroy the defendant. *See, e.g., Vasbinder*, 976 F.2d at 121 (holding punitive damage award should not constitute high percentage of perpetrator's net worth); *Brooks v. Rios*, 707 So. 2d 374, 375 (Fla. Dist. Ct. App. 1998) (holding punitive damages should punish and deter but not bankrupt defendant); *Wedmore v. Jordan Motors, Inc.*, 589 N.E.2d 1180, 1185–86 (Ind. Ct. App. 1992) (ordering remittitur in response to punitive damage award of more than half of defendant's net worth); *Ace Truck & Equip. Rentals, Inc. v. Khan*, 746 P.2d 132, 135–36 (Nev. 1987) (noting financial ruin is one factor courts should examine to determine if punitive damage award is excessive), *abrogated by Bongiovi v. Sullivan*, 138 P.3d 433 (Nev. 2006). California courts have held that a punitive damage award may not, as a general rule, exceed ten percent of the defendant's net worth. *Kimmins v. Fagan & Fagan*, No. D047599, 2006 WL 3445513, at \*9 (Cal. Ct. App. Nov. 30, 2006).

270. *See, e.g., KAN. CIV. PROC. CODE ANN. § 60.3702(e)–(f)* (West Supp. 2008) (providing that punitive damage awards, which are set by court, are limited to lesser of highest annual gross income earned by defendant within preceding five years or \$5 million, except that: (1) when court determines that this amount is clearly inadequate to penalize defendant, court may award up to fifty percent of defendant's net worth, or (2) when court determines that profitability of defendant's wrongful conduct exceeds or is expected to exceed statutory limit, court may award punitive damages equal to up to 1.5 times profit or expected profit from misconduct); *MISS. CODE ANN. § 11-1-65(3)* (West 2008) (providing different caps for defendants of different net worth); *MONT. CODE ANN. § 27-1-220(3)* (2008) (limiting punitive damages to lesser of \$10 million or ten percent of defendant's net worth). Some states prescribe a punitive damage cap based on a multiple of the compensatory award but then provide a wealth-based cap as an exception to the general cap, designed to prevent the financial destruction of small businesses. *See ALA. CODE § 6-11-21(b)* (LexisNexis 2005) (generally limiting punitive damages to greater of three times compensatory damages or \$500,000, but providing that punitive awards against business defendants with net worth of \$2 million or less cannot exceed greater of \$50,000 or ten percent of business's net worth); *OHIO REV. CODE ANN. § 2315.21(D)(2)* (LexisNexis 2005) (providing general cap of twice compensatory award with exception for small employers and individual defendants whose punitive liability is limited to lesser of two times compensatory award or ten percent of defendant's net worth).

271. *See Gore*, 517 U.S. at 591 (Breyer, J., concurring, joined by O'Connor and Stevens, JJ.) (noting that wealth of defendant should be considered, in part, because fixed-amount punitive damage award would punish poor defendants more than it does wealthy ones).

distinction for consideration of harm to nonparties, the “nuance” between awarding higher punitive damages to punish a defendant’s conduct because he is wealthy and awarding higher punitive damages in order to punish a defendant for being wealthy may be subtle.<sup>272</sup> However, as Chief Justice Roberts pointed out with regard to an instruction that the jury may not punish the defendant directly for harm to nonparties, such an instruction with regard to wealth evidence may provide a “more natural limit.”<sup>273</sup>

For example, increasing the punitive award to ensure that the defendant is punished justifies an increase in the award only up to an amount that will have an impact on the defendant. Generally, this should incentivize the jury to increase the award where the amount otherwise appropriate would be so insignificant in light of the defendant’s great wealth that the defendant would not truly feel its impact. Such an increase has inherent limitations—i.e., the objective does not justify an increase greater than is necessary to chasten the defendant.<sup>274</sup> Similarly, the goal of deterring similar behavior in the future has connate confines within which it will justify an increased award. These parameters may shift somewhat depending on the underlying economic principles, such as gain elimination or cost internalization, but they remain reasonably tethered to the social objective.<sup>275</sup> A redistribution of wealth objective, on the other hand, ceases to advocate increased punitive damages only at the point when the disparity of wealth between the parties is abrogated. Utilization of wealth evidence to pursue wealth equality, then, not only creates effectively unbounded discretion in the jury, but also encourages the inflation of punitive awards beyond what is necessary to accomplish the legitimate objectives of punitive damages.

Another practical implication of the Court’s distinction between a relevant consideration and direct punishment may be that the jury is prohibited from using the defendant’s wealth as an independent multiplier in the punitive

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272. *Philip Morris USA v. Williams*, 549 U.S. 346, 360 (2007) (Stevens, J., dissenting) (describing as indistinguishable the difference between permissibly evaluating third-party harm to determine reprehensibility and impermissibly punishing defendant directly).

273. Transcript of Oral Argument, *supra* note 133, at 32. At oral argument in *Philip Morris*, Chief Justice Roberts first inquired of counsel for Philip Morris how a jury could understand that they were not permitted to punish defendants for harm to others but were permitted to punish defendants more severely for conduct that is more reprehensible in light of harm to others. See *supra* note 133 for a description of this inquiry. Later in oral argument, the Chief Justice offered a distinction of his own: if the jury is allowed to punish for harm to nonparties and the conduct in question is believed to have harmed 1,000 nonparties, the jury may calculate punitive damages as the compensatory damages times 1,000; but, if the jury only considers harm to others only as a factor in determining reprehensibility, the conduct is not 1,000 times more reprehensible. Transcript of Oral Argument, *supra* note 133, at 19–32.

274. *Cf. Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982) (noting that punitive damages should be large enough to be retributive and serve as deterrent, short of destruction of defendant); *Fraidin v. Wietzman*, 611 A.2d 1046, 1068 (Md. Ct. Spec. App. 1992) (noting financial destruction is not necessary to punish defendant).

275. See, e.g., Brief Amicus Curiae of Professors Keith N. Hylton et al. in Support of Respondents at 10–15, *Philip Morris*, 549 U.S. 346 (No. 05-1256) (discussing economic theories of gain elimination and cost internalization within context of punitive damage awards). *But see* SUNSTEIN ET AL., *supra* note 228, at 162–70 (finding that jurors were resistant to optimal deterrence theory, even when provided with mathematical formula for calculating award under theory).

damage equation—i.e., the jury may consider wealth in determining the numerical values used to calculate punitive damages but may not calculate punitive damages as a percent of the defendant's wealth.<sup>276</sup> This is similar to the distinction offered by Chief Justice Roberts at oral argument in *Philip Morris*, that juries allowed to punish directly for harm to nonparties might use the number of other individuals harmed by the defendant's conduct as the multiplier in calculating punitive damages.<sup>277</sup> When wealth evidence is admitted, there is the potential for juries (and judges) to calculate the punitive damages as a percentage of the defendant's net worth or other wealth measure.<sup>278</sup> Whereas in Chief Justice Roberts's hypothetical calculation the number of wronged individuals improperly replaces reprehensibility as the multiplier, in this calculation, the defendant's net worth improperly replaces compensatory damages as the multiplicand.<sup>279</sup>

Essentially, while the defendant's wealth may be a factor in determining the punitive damage award, it cannot be *the* factor.<sup>280</sup> The amount of the award may reflect the jury's appraisal of the defendant's conduct, adjusted upward or downward if the jury believes that a lesser or greater award is adequate and necessary to achieve the goals of punishment and deterrence in light of the defendant's wealth; the defendant's wealth may not be used in lieu of its conduct as the starting point from which damages are calculated. This principle is demonstrated in the Seventh Circuit's opinion in *Zazú Designs v. L'Oréal*.<sup>281</sup> The district court in *Zazú* found that the defendant, L'Oréal, had willfully infringed on the plaintiff's trademark and had engaged in "oppressive and deceitful" conduct in the course of the litigation, and awarded \$1 million in punitive damages.<sup>282</sup> The district court reached this amount by determining that an award of five percent of the defendant's net worth (which the district court erroneously believed to be \$20 million) was necessary to deter similar future conduct by the defendant.<sup>283</sup> After holding that the district court's judgment was reversible on other grounds,<sup>284</sup> the Seventh Circuit attacked the district court's damages award, objecting strongly to the district court's means of calculating the award:

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276. Cf. *Philip Morris*, 549 U.S. at 353–55 (distinguishing allowable use of harm to others as part of punitive damage calculation to determine reprehensibility of conduct from impermissible use of increasing punitive damage awards to punish defendant for other bad acts).

277. Transcript of Oral Argument, *supra* note 133, at 11.

278. See, e.g., *Zazú Designs v. L'Oréal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) (providing example of judge who calculated punitive damages based on net worth and arrived at grossly excessive punitive damage award).

279. Transcript of Oral Argument, *supra* note 133, at 31.

280. See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 490 (1993) (O'Connor, J., dissenting) (observing that jury is more likely to award exorbitant punitive damages when only consideration is wealth of defendant).

281. 979 F.2d 499 (7th Cir. 1992).

282. *Zazú Designs*, 979 F.2d at 507 (quoting *Zazú Designs v. L'Oréal S.A.*, 9 U.S.P.Q.2d (BNA) 1972, 1979 (N.D. Ill. 1988), *rev'd*, 979 F.2d 499 (7th Cir. 1992)).

283. *Id.*

284. *Id.* at 505.

One million dollars cannot be justified as necessary to either compensation or deterrence. The judge discussed neither. Instead he calculated the award as a percentage of L'Oreal's (supposed) net worth—as if having a large net worth were the wrong to be deterred!<sup>285</sup>

Thus, juries should be discouraged from calculating punitive damages based on a percentage of the defendant's wealth or income. As indicated in *Zazú*, employing the defendant's net worth as a "starting point" for calculating punitive damages is unlikely to result in an amount that accurately reflects society's interests in awarding punitive damages.<sup>286</sup> Yet, the defendant's financial status remains a relevant consideration, and jurors have a natural inclination to seize on to numerical data provided them as an "anchor" for setting parameters on the amount to be awarded.<sup>287</sup>

One mechanism to lessen the jury's proclivity for calculating the punitive damage award as a direct reflection of the defendant's financial status may be to instruct the jury on a two-step punitive damages calculation procedure: directing the jury to first calculate an amount based on other relevant factors such as the reprehensibility of the defendant's conduct, then to adjust that number upward or downward to reflect any increase or decrease necessary to achieve the proper degree of punishment and deterrence in light of the defendant's financial position. Isolating the adjustment for the defendant's financial condition allows the jury an opportunity to reflect on the percentage of the award based solely on the defendant's financial condition. Such an opportunity for reflection may be particularly effective when combined with appropriate admonitory instructions—for example, a warning that, while the jury may consider the defendant's financial condition in determining what amount is necessary to adequately deter similar misconduct in the future and punish the defendant for the conduct proven by the evidence at trial, it may not award a greater amount in order to punish the defendant directly for its financial status;<sup>288</sup> or a warning similar to that found in California CACI jury charges, which advises the jury that it may not increase the punitive award above an amount that is otherwise appropriate merely because the defendant has substantial financial resources.<sup>289</sup> Providing separate answer blanks in the charge for the punitive damage amount before and after the wealth-adjustment might further temper an inclination toward bias against wealthy defendants by highlighting the size of the

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285. *Id.* at 508.

286. *See id.* (opining that punitive damage award calculated as percentage of wealth was inappropriate).

287. Anchoring refers to the natural cognitive process in which a person selects an initial value (the "anchor") and then adjusts from that number to conform the circumstances of a particular decision. For a discussion of how punitive damages awards can be affected by "anchoring effects," see SUNSTEIN ET AL., *supra* note 228, at 73–74; W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313, 329 (2001).

288. *Cf. Philip Morris USA v. Williams*, 549 U.S. 346, 353–55 (2007) (allowing juries to consider harm to others in determining reprehensibility of defendant's conduct, but not to punish defendant for other wrongs).

289. JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTR. §§ 3940, 3942, 3945 (2009).

adjustment; at a minimum, this would ameliorate some of the burden of identifying such bias for reviewing courts.

Another means of lessening the risk of punitive awards inflated by bias against large corporate defendants may be found in curtailing appeals to such prejudice by counsel during the trial.<sup>290</sup> In *Philip Morris*, the majority recognized jury argument, along with evidence admitted at trial, as having the potential to create a need for additional procedural protections for punitive damage defendants.<sup>291</sup> Several Justices have recognized the specific due process danger created by jury argument emphasizing the wealth of the defendant.<sup>292</sup> Placing restrictions on closing arguments on punitive damages is not unprecedented—several federal courts have advocated curtailing counsels' specification of a particular amount for noneconomic damages such as punitive damages or pain and suffering.<sup>293</sup> Prohibiting plaintiffs' counsel from emphasizing defendants' financial information in closing may prevent jurors from using this number as the "anchor" for punitive award calculation rather than the degree of reprehensibility, which is not easily converted into a dollar figure.<sup>294</sup>

In addition to the instruction the United States Supreme Court has provided directly on the issue of wealth bias in punitive damage cases, the Court

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290. *Cf. Frey & Orr, supra* note 7, at 37 (advising defense counsel to make a motion in limine to limit plaintiff's counsel from making arguments that "seek to capitalize on the defendant's corporate status or on local bias against outsiders," in light of difficulty of objection during closing arguments and increased likelihood of improper argument in punitive damage cases).

291. *Philip Morris*, 549 U.S. at 356–57.

292. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 486–89 (1993) (O'Connor, J., dissenting, joined by White and Souter, JJ.) (arguing that closing arguments by plaintiff's counsel, in combination with jury instructions that permitted jury to take defendant's financial status into account in determining punitive damages, demonstrated that jury's award was result of prejudice or bias).

293. *E.g., Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1016 (2d Cir. 1995) (disapproving of specified damages amounts as potentially misleading to jury), *vacated on other grounds*, 518 U.S. 1031 (1996); *Waldorf v. Shuta*, 896 F.2d 723, 744 (3d Cir. 1990) (prohibiting counsel from requesting specific dollar amount for pain and suffering in closing arguments); *cf. Mileski v. Long Island R.R. Co.*, 499 F.2d 1169, 1172 (2d Cir.1974) ("A jury with little or no experience in such matters, rather than rely upon its own estimates and reasoning, may give undue weight to the figures advanced by plaintiff's counsel . . ."). *But see* *Caletz v. Blackmon*, 476 F. Supp. 2d 946, 959 (N.D. Ill. 2007) (holding that counsel could be allowed to specify amount for noneconomic damages where judge submitted appropriate limiting instruction to jury). In *Consorti*, the Second Circuit explained:

While this court has not adopted a per se rule about the propriety of suggested damage amounts, we wish to emphasize that specifying target amounts for the jury to award is disfavored. Such suggestions anchor the jurors' expectations of a fair award at a place set by counsel, rather than by the evidence. A jury is likely to infer that counsel's choice of a particular number is backed by some authority or legal precedent. Specific proposals have a real potential to sway the jury unduly. While under the circumstances present here we do not yet reach the point of holding that it is error to permit such recommendations, it is not a desirable practice. We encourage trial judges to bar such recommendations.

*Consorti*, 72 F.3d at 1016 (internal citations omitted).

294. *See* Reid Hastie et al., *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 *LAW & HUM. BEHAV.* 445, 449, 463, 466 (1999) (describing anchoring effects on jurors, and impact of numbers suggested in closing argument on jurors' decision-making process, regardless of judge's instruction).

has offered appurtenant counsel on jury guidance that is likely to diminish prejudice against wealthy defendants, as well as other jury bias or caprice, by providing constitutionally appropriate substitutes. For example, providing the jury with an accurate description of punitive damages and their purpose will steer the jury in the right direction,<sup>295</sup> and incorporating *Gore* guideposts into the jury charge may discourage juries from focusing disproportionately on the defendant's wealth in calculating a punitive damage award by providing the jury with alternative "anchors" that do not suffer from the same due process risks.<sup>296</sup> Where the evidence at trial creates due process risks of the nature identified by the Supreme Court's punitive damage jurisprudence, jury instructions that provide jurors with pertinent information on how to properly calculate punitive damages are a necessary compliment to jury instructions that advise the jury of impermissible means of determining the punitive award. The adequacy of the jury's charge is a question of the totality of the circumstance, to be judged in light of the nature of the evidence, the arguments of counsel, and other such influences on jury cognition and deliberation.<sup>297</sup> A single admonitory instruction against the improper use of wealth evidence may not suffice to meet constitutional standards where there is insufficient information as to how wealth evidence may properly be used and where that use falls within the bigger picture of the punitive damage calculation.

The Supreme Court has supplied insight on the definition of punitive damages in jury instructions. The Court has recognized and endorsed the retributive and deterrent functions of punitive damages.<sup>298</sup> In *Haslip*, the jury charge used by the Alabama trial court informed jurors that the purpose of punitive damages is "not to compensate the plaintiff for any injury' but 'to punish the defendant' and 'for the added purpose of protecting the public by [detering] the defendant and others from doing such wrong in the future.'"<sup>299</sup> The Court observed:

To be sure, the instructions gave the jury significant discretion in its determination of punitive damages. But that discretion was not

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295. See *supra* Part III.A for a discussion of the need for jury guidance in punitive damage decisions to prevent due process violations from improper use of wealth evidence.

296. See *supra* note 287 and accompanying text for a discussion of jury tendencies to anchor, and the danger of juries anchoring their awards to irrelevant values.

297. Cf. *Philip Morris USA v. Williams*, 549 U.S. 346, 356 (2007) (requiring protection against misunderstanding when trial evidence or counsel's argument create significant risk of jury confusion about role of reprehensibility in punitive damage calculation); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417–18 (2003) (expressing concern about vague jury instructions that provide little guidance on determining punitive awards); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 463–65 (1993) (denouncing vague wording in jury instructions as inappropriate for punitive damages calculation); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19–20 (1991) (approving jury instructions that gave jury discretion in punitive calculations, but also conveying bounds of that decision).

298. *E.g.*, *Haslip*, 499 U.S. at 21; *id.* at 25 (Scalia, J., concurring) (noting proposition that punitive damages may be allowed in certain cases in nearly all states for purposes of retribution and deterrence, citing 1 J.G. SUTHERLAND, *LAW OF DAMAGES* 721–22, 722 n.1, 726–27 (Callaghan & Co. 1884)).

299. *Id.* at 19 (majority opinion) (alteration in original).

unlimited. It was confined to deterrence and retribution, the state policy concerns sought to be advanced. And if punitive damages were to be awarded, the jury “must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.” The instructions thus enlightened the jury as to the punitive damages’ nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.<sup>300</sup>

In *TXO*, by contrast, the jury charge, which allowed the jury to take TXO’s wealth into account in determining punitive damages, advised the jury that one of the purposes of punitive damages is “to provide additional compensation for the conduct to which the injured parties have been subjected.”<sup>301</sup> The plurality commented only that they did not understand the reference to “additional compensation,” but the three dissenting judges assailed the charge, asserting that it improperly invited the jury to redistribute wealth to the plaintiffs by inaccurately describing punitive damages as additional compensation.<sup>302</sup> Thus, state jury charges that provide no explanation or an inaccurate description of the legitimate state interests served by punitive awards may “unnecessarily deprive[] juries of proper legal guidance,”<sup>303</sup> and exacerbate the dangers posed by consideration of wealth evidence.

In light of the Supreme Court’s “ratio” guidepost in *Gore*,<sup>304</sup> encouraging the jury to orient the punitive award to the compensatory award provides the jury with an alternative (to the defendant’s net worth) anchor for the punitive damage award that is constitutionally sound.<sup>305</sup> A punitive damage jury charge that instructs the jury that the punitive award must bear a reasonable relationship to the compensatory damage award is likely to “promote a more rational decisionmaking process, both (a) by tethering the jury’s discretion to the harm involved in the case before it, and (b) by reducing to manageable proportions the scale on which jurors may assign dollar values to the harm they have adjudicated.”<sup>306</sup> By promoting reliance on constitutionally appropriate methods for determining punitive damages, such an instruction diminishes the jury’s faculty for improper reliance on wealth evidence.

A number of states’ standard punitive damage jury charges instruct the jury that the punitive award should bear a reasonable relationship to the harm or potential harm to the plaintiff as a result of the defendant’s conduct.<sup>307</sup> Some

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300. *Id.* (internal citations omitted).

301. *TXO*, 509 U.S. at 463 (internal citations omitted).

302. *Id.* at 490 (O’Connor, J., dissenting, joined by White and Souter, JJ.).

303. *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007).

304. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 577–78 (1996).

305. See Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 22–23, *Philip Morris*, 549 U.S. 346 (No. 05-1256) (arguing that “the ratio guidepost should be used to guide juries *ab initio*” rather than solely to “constrain their judgment *post hoc*”).

306. *Id.*

307. For examples of state jury instructions addressing the reasonable relationship between

states advise the jury that the harm or potential harm to the plaintiff is a factor in determining the punitive award without explicitly stating that there must be a reasonable relationship between that harm and the amount of punitive damages awarded.<sup>308</sup> By comparison, at least four states' pattern jury charge for punitive damages advise the jury that the punitive damage award must bear a reasonable relationship to the amount of compensatory damages awarded to the plaintiff.<sup>309</sup>

While a comparison to actual or potential *harm* may accurately capture the intent of the Supreme Court's "ratio" guidepost, a comparison to the *amount* of compensatory or actual damages awarded is also employed by the Court and provides the jury with a numerical value that it may use to give context to the appropriate amount of punitive damages.<sup>310</sup> A separate instruction informing the jury that the amount of punitive damages should bear a reasonable relationship to the amount of compensatory damages awarded—ideally providing the dollar amount previously awarded, or a space for the jury to fill in that dollar amount in trials that are not bifurcated or trifurcated—may be the most effective option in terms of providing the jury with a permissible anchor for translating societal outrage into a dollar amount. Providing the instruction separately rather than as one among a list of factors more accurately reflects the nature of the ratio analysis, which is based on the amount of the punitive award that results at the completion of the deliberation process.<sup>311</sup> Supplying the dollar amount in the instruction may abate the recency effect of dollar figures advanced by plaintiff's counsel as the wealth of the defendant in closing argument or in the final phase of bifurcated and trifurcated trials.<sup>312</sup>

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punitive damages and harm to the plaintiff, see JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTR. §§ 3942, 3949 (2009); IDAHO CIVIL JURY INSTR. §§ 9.20, 9.20.5 (2003); ILLINOIS PATTERN JURY INSTR.—CIVIL § 35.01 (2008); NEW JERSEY MODEL CIVIL JURY CHARGES § 8.60 (2000), *available at* <http://www.judiciary.state.nj.us/civil/civindx.htm>; NORTH DAKOTA PATTERN JURY INSTR.—CIVIL § 72.00 (2006).

308. For examples of state jury instructions that take this approach, see MASSACHUSETTS SUPERIOR COURT CIVIL PRACTICE JURY INSTR. §§ 3.15, 5.3.5 (2008); OKLAHOMA UNIF. JURY INSTR. §§ 5.5, 5.9 (2007); PENNSYLVANIA SUGGESTED STANDARD CIVIL JURY INSTR. § 14.02 (2009); ANDERSON'S SOUTH CAROLINA REQUESTS TO CHARGE—CIVIL § 13-21 (2002). Alaska pattern jury instructions list the amount of compensatory damages awarded to the plaintiff as a factor for consideration. ALASKA CIVIL PATTERN JURY INSTR. §20.20B (2008), *available at* <http://www.state.ak.us/courts/insciv/20.20B.doc>. Illinois pattern jury instructions list actual and potential harm as a punitive damage consideration, but also provide an instruction that the "punitive damages must be reasonable," to which an optional further instruction may be added to inform the jury that the damages must also be "in proportion to the actual and potential harm suffered by the plaintiff." ILLINOIS PATTERN JURY INSTR.—CIVIL § 35.01.

309. PATTERN JURY INSTR. FOR CIVIL PRACTICE IN THE SUPERIOR COURT OF THE STATE OF DELAWARE § 22.27 (2006); NEW MEXICO UNIF. JURY INSTR. CIVIL § 13-1827 (2003); NEW YORK PATTERN JURY INSTR.—CIVIL § 2:278 (2005).

310. The Court uses actual harm to the plaintiff and compensatory damages interchangeably under its "ratio" guidepost in *Gore*. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580–81 (1996).

311. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424–28 (2003) (concluding courts must assess reasonableness of whole amount of punitive damages in context of whole amount of compensatory damages); *Gore*, 517 U.S. at 580–82 (emphasizing importance of reasonableness in ratio analysis when comparing compensatory damages to punitive damages).

312. *See Frey & Orr, supra* note 7, at 36 (noting that many defense attorneys dislike bifurcated

Although the Supreme Court's opinion in *Gore* used compensatory damages and actual or potential harm interchangeably as the touchstone for the ratio test, an instruction directing the jury toward the amount of the compensatory award rather than the actual or potential harm to the plaintiff, although more suitable for anchoring the jury's punitive damage appraisal, may require, in order to fully capture *Gore*'s ratio analysis, accompanying instructions in appropriate cases. These instructions would inform the jury that: (a) a greater difference between the amount of compensatory damages awarded and the amount of punitive damages awarded may be warranted where the defendant's conduct is particularly egregious but results in a relatively small compensatory award, where the injury is hard to detect, or where the monetary value of noneconomic damages is difficult to determine;<sup>313</sup> and (b) conversely, a smaller ratio between the compensatory damage award and the punitive award will be reasonable where the compensatory damages awarded are substantial or when the compensatory damages already include a punitive element, such as noneconomic damages for emotional distress.<sup>314</sup>

This is not the end of the Court's lessons on the reasonable relationship requirement in the context of jury guidance. Several of the Court's Justices have further indicated that a requirement that punitive damages bear a reasonable relationship to actual or potential harm provides useful guidance only to the extent there is an understanding of what constitutes "reasonable" in the context of punitive damage awards.<sup>315</sup> Here, the Court has afforded states concrete numerical values that state courts may offer to shepherd juries in the determination of what "ratio" may be considered reasonable. Thus, the jury should be informed not only that the punitive damages must bear a "reasonable relationship" to the compensatory award, but also that a "reasonable relationship" generally does not exceed a *total*<sup>316</sup> award of double, treble, or

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proceedings because, among other reasons, the second phase of the trial may consist of "nothing more than evidence of the defendant's finances and closing arguments . . . focusing the jury's attention on the large financial numbers").

313. *Gore*, 517 U.S. at 582.

314. *State Farm*, 538 U.S. at 425–26.

315. *Gore*, 517 U.S. at 589–92 (Breyer, J., concurring, joined by O'Connor and Souter, JJ.) (noting reasonable relationship standard offers little guidance to jury in determining what is reasonable).

316. Statutory penalties providing for double, treble, or quadruple damages include the actual damages—i.e., a punitive award of two times the compensatory damages is a treble damages award. Juries may need to be reminded that the double, treble, and quadruple award guidelines reference the total amount awarded, including compensatory damages. *O'Lee v. Compuware Corp.*, No. A111774, 2007 WL 963450, at \*19–20 (Cal. Ct. App. Apr. 2, 2007).

quadruple damages<sup>317</sup> and that a punitive award of ten times the compensatory damages or more is only reasonable under extraordinary circumstances.<sup>318</sup>

The third prong of *Gore*'s constitutional calculus test provides another permissible alternative anchor for juries in undertaking to translate affront into dollars.<sup>319</sup> Providing jurors, in the jury charge, with information on other civil penalties available in the state for conduct of a similar nature, including dollar amounts or multipliers where available, in conjunction with an instruction apprising the jury that it may take guidance from other civil penalties available for similar conduct in determining the appropriate amount of the punitive award, shifts the jury's attention to dollar amounts or damages multipliers that have been approved by the legislature for similar offenses.<sup>320</sup> In *State Farm*, the Supreme Court indicated that potential criminal penalties were useful as a part of the third *Gore* factor to the extent such penalties evidenced a measure of the state's interest in deterring the defendant's conduct.<sup>321</sup> The Court then asserted that criminal penalties were less useful as a basis of comparison for determining the reasonableness of the ratio of punitive damages to compensatory damages, considering the heightened legal protections applicable to the imposition of criminal sanctions that are not available for civil defendants.<sup>322</sup> In light of this admonition, a jury instruction informing the jury of available sanctions for comparable conduct should focus on civil rather than criminal penalties.<sup>323</sup>

Taken as a whole, the Supreme Court has provided significant instruction to state courts with regard to the calculation of punitive damages, both directly and indirectly related to the due process dangers of wealth bias. Under the Court's most recently announced principles, states should not unnecessarily deprive their jurors of this guidance, especially in cases where wealth evidence or wealth-based arguments of counsel increase the risk of arbitrariness or prejudice in the jury's determination of the punitive award.<sup>324</sup>

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317. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23–24 (1991) (noting that award of more than four times amount of compensatory damages might be close to constitutional limit); *Gore*, 517 U.S. at 580–81 (citing historical precedent for statutory penalties of double, treble, and quadruple damages).

318. *State Farm*, 538 U.S. at 425 (“[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”).

319. See *Gore*, 517 U.S. at 584 (creating third guidepost allowing juries to consider civil penalties for analogous acts when determining punitive amounts).

320. Few jurisdictions have incorporated the third *Gore* guidepost into their standard jury charge. The pattern punitive damage instructions in the Eighth Circuit, however, provide “the amount of fines and civil penalties applicable to similar conduct” as a factor in determining the amount of the punitive award where there is evidence or judicial notice of such civil penalties. MANUAL OF MODEL CIVIL JURY INSTR. FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 4.50C (2007).

321. *State Farm*, 538 U.S. at 428.

322. *Id.* (warning against using civil process to impose criminal penalties because of different protections and standards of proof).

323. *Id.*

324. *Cf. Philip Morris USA v. Williams*, 549 U.S. 346, 352–55 (2007) (finding similar guidance necessary in reprehensibility of harm context).

## IV. CONCLUSION

The United States Supreme Court's first post-*Haslip* reversal of a punitive damage award on purely procedural grounds has considerable import. The Court has gone further than ever before to send a clear message to lower courts and state legislatures that adequate procedural protections are a constitutional necessity in punitive damage cases.<sup>325</sup> In doing so, the Court put particular emphasis on the importance of competent jury guidance.<sup>326</sup> This comes at a time when state jury charges are often grossly insufficient to inform the jury of the legal parameters that direct and confine proper jury consideration of wealth evidence in determining punitive damages. The Supreme Court has provided courts below with a framework and a variety of determinants for assessing punitive damages, and state courts have, generally, appropriately endeavored to incorporate this guidance into punitive damage decisions. However, state courts have by and large failed to pass this guidance on to jurors. "Hide the ball" may be an effective teaching strategy in the law school classroom, but it is a poor tactic for formulating a jury charge. Uninformed of the relevant constraints on their consideration of wealth evidence, typically presented to them without limiting instruction, jurors have little opportunity to make the complex and consequential determination of appropriate punitive damages successfully.

Under *Philip Morris USA v. Williams*,<sup>327</sup> the punitive damages jury charge practice employed by most states does not comport with constitutional imperatives, particularly in cases where the evidence or argument of counsel increases the danger that the jury's passions will be improperly incited or that the jury will pay disproportionate attention to certain evidence at the expense of other relevant considerations—e.g., cases where the jury is presented with evidence of the defendant's financial status.<sup>328</sup> Supreme Court punitive damage jurisprudence provides a variety of means by which lower courts may provide guidance to juries that is designed to lessen the risk of arbitrary deprivation of property for punitive damage defendants when wealth evidence is introduced at trial. While some such guidance may be merely advisable, some may constitute a constitutional necessity. In light of the principles enounced in *Philip Morris*, state courts have a duty to ensure that juries are asking the right questions with regard to wealth evidence by informing them of the purposes for which they may consider wealth evidence and the purposes for which they may not consider wealth evidence.<sup>329</sup> State courts unnecessarily deprive juries of this guidance when they fail to disclose these parameters to the jury when called for by the evidence in the case. In doing so, these states authorize procedures that create an unreasonable and unnecessary risk of deprivation of property without due

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325. See *id.* (describing necessity of guidance in reprehensibility of harm context).

326. *Id.* at 355.

327. 549 U.S. 346 (2007).

328. See *Philip Morris*, 549 U.S. at 352–55 (discussing guidance with regard to defendant's wealth in reprehensibility of harm context).

329. *Cf. id.* at 355 (addressing same need for guidance).

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process of law, in violation of the duties imposed on the states by the Due Process Clause of the Fourteenth Amendment.

Wealth evidence is only one category, although a prominent one, of punitive damages evidence that implicates the *Philip Morris* rationale. The ripple of the Supreme Court's most recent punitive damage due process analysis will undoubtedly generate attention to proper procedural protections for punitive damage litigants in a myriad of other circumstances. It appears that, with the outer boundaries of punitive award amounts fairly well established, the Supreme Court has invited litigants and scholars to turn a critical eye to the less-quantifiable due process dangers intrinsic to the mechanisms of awarding semicriminal penalties through civil processes. This expansion in the Court's scrutiny opens the door to a broad array of focused procedural criticisms of American punitive damage law.