ARTICLES

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

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INTRODUCTION

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

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⁵ Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O’Connor, J., concurring in part and dissenting in part) (“Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. Since then, awards more than 30 times as high have been sustained on appeal.” (citation omitted)); accord, e.g., CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2002) (“Over the past two decades, our country has experienced a dramatic increase in the incidence and magnitude of punitive damages verdicts rendered by juries in civil litigation.”). Others are quick to counter, however, that research on the overall patterns of awards indicate that juries impose punitive damages infrequently and rarely in headline-grabbing amounts. See Brief Amici Curiae of Certain Leading Social Scientists and Legal Scholars in Support of Respondents at 1, State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003) (No. 01-1289) [hereinafter Research Amici Brief] (“A broad social science consensus exists that juries perform rationally in punitive damages cases. Juries award such damages infrequently and in comparatively modest amounts.”); see also Jennifer K. Robbennolt, Determining Punitive Damages: Empirical Insights and Implications for Reform, 50 BUFF. L. REV. 103, 159 (2002) (“Archival research examining overall patterns of awards find that punitive damages are infrequently awarded, moderate in size, awarded in response to
when a jury awards one person nearly double NASA's annual budget—an amount larger than the GDP of more than 100 nations—it does not take a constitutional scholar to recognize that something is awry with juries and punitive damages.  

Although the debate over the existence and extent of a punitive damages "crisis" rages on, courts, scholars, and even some opponents of punitive damages reform have recognized that the vague outrageous conduct, and often reduced post-trial."). Even if rare, however, headline-grabbing awards, like the $28 billion award noted above, provide insight into jury decision making:  

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


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

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

In 1991, however, the U.S. Supreme Court approved the use of skeletal jury instructions, so long as the jurisdiction affords comprehensive post-verdict review. In Pacific Mutual Life Insurance Co. v. Haslip,\footnote{499 U.S. 1 (1991).} the Court recognized that procedural due process requires "adequate guidance from the court"\footnote{Id. at 18.} and "reasonable constraints"\footnote{Id. at 20.} on the jury's discretion. At the same time, the Court upheld punitive damages instructions that Justice O'Connor found "scarcely better than no guidance at all,"\footnote{Id. at 48 (O'Connor, J., dissenting) (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan, J., concurring)).} and that Justice Scalia characterized as "not guidance but platitude."\footnote{Id. at 37 (Scalia, J., concurring).}

After Haslip, the Court spent the next decade addressing the constitutional standards for post-verdict review, including the "guideposts" courts should use to determine whether an award violates substantive due process.\footnote{See discussion infra Part I.C-F. For an explanation of the distinction between procedural and substantive due process, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (1997), which provides:}

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

Substantive due process, as that phrase connotes, asks whether the government has an adequate reason for taking away a person's life, liberty, or property. In other words, substantive due process looks to whether there is a sufficient justification for the government's action . . . . [An] example of the distinction between procedural and substantive due process can be found in challenges to large punitive damage awards. Procedural due process requires that there be safeguards such as instructions to the jury to guide their discretion, and judicial review to assure the reasonableness of the awards. Substantive due process prevents excessive punitive damages awards, regardless of the procedures followed.

\textit{Id.} at 419-20.
expressly avoided the issue or implicitly adhered to a core premise in *Haslip*: instructional deficiencies can be remedied through post-verdict protections.

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

After years of neglect, the jury instruction issue recently resurfaced in *State Farm Mutual Automobile Insurance Co. v. Campbell.* Although *State Farm* focused principally on refining the post-verdict "guideposts," the decision also signaled that it is time to reevaluate how courts instruct juries on assessing punitive damages. In *State Farm*, the Supreme Court noted increasing "concerns over the imprecise manner in which punitive damages systems are administered." And for the first time, the Court stated that a specific punitive damages instruction must be given to the jury; the "jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."

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

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17 See discussion infra Part I.C.
18 See discussion infra Part I.D-F.
19 See discussion infra Part II.D-F.
20 See discussion infra Part II.B.1.
21 See discussion infra Part II.B.1.
23 See discussion infra Part II.A.
24 See discussion infra Part II.A.
26 Id. at 1520.
27 Id. at 1522-23.
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instructions on constitutional limits. More importantly, by requiring courts to instruct the jury on a substantive punitive damages limitation, the Court linked substantive due process with procedural due process requirements. This convergence of substantive and procedural due process suggests that the core limits on punitive damages, traditionally considered only post-verdict, influence pre-verdict procedural requirements and therefore should be provided to the jury in the first instance.

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

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

I. DUE PROCESS AND PUNITIVE DAMAGES BEFORE STATE FARM

The Supreme Court's consideration of the due process limits on punitive damages is of recent vintage. From 1991 to 2001, the Court issued five key decisions\(^\text{27}\) that attempted to provide a constitutional

framework for an area that has been the subject of "long-enduring debate."\textsuperscript{28} By most accounts, that effort failed.\textsuperscript{29}

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

Just two years later, in \textit{TXO Production Corp. v. Alliance Resources Corp.},\textsuperscript{33} a plurality of the Court recognized substantive due process

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\item\textsuperscript{28} \textit{Haslip}, 499 U.S. 1 (1991). Additionally, cases in the 1980s laid the groundwork for the Court’s recognition of due process limitations on punitive damages. \textit{See} Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276 (1989) ("[D]ue process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness."); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71 (1988) (declining to address due process claim that punitive damages were clearly excessive because the issue was not raised in state court proceedings); \textit{see also} discussion \textit{infra} Part I.A.
\item\textsuperscript{29} Courts, practitioners, and scholars alike have criticized the lack of guidance imparted by this decade of opinions. The Wyoming Supreme Court, for instance, has described the Supreme Court’s punitive damages jurisprudence as "tortured." Farmers Ins. Exch. v. Shirley, 958 P.2d 1040, 1043 (Wyo. 1998). One state trial court judge commented that "it has become clear that the Supreme Court will not provide definitive rules to guide trial courts in assessing and reviewing punitive damage awards." Douglas G. Harkin, BMW of North America, Inc. v. Gore: A Trial Judge’s Guide to Jury Instructions and Judicial Review of Punitive Damages Awards, 60 MONT. L. REV. 367, 370 (1999). Practitioners likewise have concluded that the Court’s decisions “established no real standard at all.” Bruce J. McKee, \textit{The Implications of BMW v. Gore for Future Punitive Damages Litigation: Observations from a Participant}, 48 ALA. L. REV. 175, 224 (1996) (quoting Arthur Bryant, Of Trial Lawyers for Public Justice, in John W.R. Murray, \textit{U.S. Supreme Court Rules on Punitive Damages Awards}, LAW. WKLY. USA, at 1 (June 3, 1996)). Other practitioners have described the decisions as an “indecisive mish-mash.” Oliver S. Howard, \textit{Symposium Transcript: Punitive Damages}, 24 PEPP. L. REV. 937, 942 (1997); accord Mark A. Klugheit, “Where the Rubber Meets the Road”: Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation, 52 SYRACUSE L. REV. 803, 804 (2002) ("[B]oth the trial juries which are asked to consider punitive damages and the courts which are expected to review those awards still do so without standards they can meaningfully apply."). Scholars, too, have noted that the Court’s pre-\textit{State Farm} jurisprudence left courts “puzzled” and the “[d]ecisions of lower courts . . . in disarray.” SUNSTEIN \textit{et al.}, \textit{ supra} note 3, at 244.
\item\textsuperscript{30} \textit{Haslip}, 499 U.S. at 18; \textit{see also} discussion \textit{infra} Part I.B.
\item\textsuperscript{31} \textit{Haslip}, 499 U.S. at 18 ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.").
\item\textsuperscript{32} Id.
\item\textsuperscript{33} 509 U.S. 443 (1993).
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limits on punitive damages, including the prohibition against “grossly excessive” punitive awards. As with procedural due process, the Court disavowed any bright-line rule for reviewing whether an award is constitutionally excessive, relying again on a general reasonableness test to be applied on a case-by-case basis. Without concrete standards, courts cobbled together the fact-specific determinations in Haslip and TXO into de facto tests for procedural and substantive due process review.

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

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

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

TXO, 509 U.S. at 458.

Id.

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

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

BMW, 517 U.S. at 575.

See sources cited supra note 29.

See In re Exxon Valdez, No. A89-0095-CV, 2004 WL 170354, at *14 (D. Alaska Jan. 28, 2004) (“Most of the courts considering the constitutionality of punitive damages awards have ignored this first step in the analysis.”); see also White v. Ford Motor Co., 312 F.3d 998, 1013 n.56 (9th Cir. 2002) (holding the “first step” should be analysis of state’s interest and rejecting argument that analysis of punitive damages awards begins with guideposts), amended on denial of reh’g, 335 F.3d 833 (9th Cir. 2003).
as whether juries should be instructed on the guideposts or other constitutional limits on punitive damages. Complicating matters, the Court's 2001 decision in *Cooper Industries, Inc. v. Leatherman Tool Group* held that appellate courts should conduct de novo review of punitive awards under the guideposts. As a result, trial and appellate courts independently review punitive damages awards using factors that in most cases the jury never considered.

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

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

### A. Leaving Due Process Issues for "Another Day":

**Bankers Life & Casualty Co. v. Crenshaw and Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.**

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

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42 552 U.S. 424 (2001); see also discussion infra Part I.F.
44 See discussion infra Part III.
46 See, e.g., Browning-Ferris, 492 U.S. at 277 ("[The Due Process argument] must await another day. Because petitioners failed to raise their due process argument before either the District Court or the Court of Appeals, and made no specific mention of it in their petition for certiorari in this Court, we shall not consider its effect on this award."). Bankers Life, 486 U.S. at 76 ("[T]hese claims were not raised and passed upon in state court, and we decline to reach them here.").
47 See Aetna, 475 U.S. at 828-29 ("These [due process and Eighth Amendment] arguments raise important issues which, in an appropriate setting, must be resolved; however, our disposition of the recusal-for-bias issue makes it unnecessary to reach them.").
While the Court refused to tackle the issue head-on, several Justices expressed due process concerns regarding punitive damages. In *Bankers Life & Casualty Co. v. Crenshaw*, Justice O'Connor wrote separately to express her concern that Mississippi’s "standardless" punitive damages system may violate due process:

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

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

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49 Although Justice Scalia joined Justice O'Connor's concurrence, he did not agree with her due process analysis. In a separate concurrence, Justice Scalia explained that he agreed with Justice O'Connor only in that the Court should not exercise discretion to hear the due process claims presented by the defendant. Id. at 89 (Scalia, J., concurring).
50 Id. at 88 (O'Connor, J., concurring in part and concurring in the judgment) (citations omitted). Despite her concerns, Justice O'Connor agreed with the *Bankers Life* majority that the due process question had not been properly presented for review. Id. ("This due process question, serious as it is, should not be decided today. The argument was not appellant's principal submission to this Court.").
52 Id. at 276-77 (citation omitted). In *Browning-Ferris*, the Court rejected an Eighth Amendment Excessive Fines Clause challenge to punitive damages awards. Id. at 262-76. The Court held that the Excessive Fines Clause does not apply "when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." Id. at 264.
53 Id. at 280 (Brennan, J., concurring) ("I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties.").
54 Id. at 261-62 (citation omitted).
55 Id. at 281 (Brennan, J., concurring).
the instruction correctly stated Vermont law, but concluded that "the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best." Justice O'Connor, joined by Justice Stevens, agreed with Justice Brennan's concerns about the procedures used by the trial court regarding punitive damages, and reiterated the views she expressed in Bankers Life. Because the issue had not been properly raised below, however, all members of the Court agreed that the due process "inquiry must await another day." That day came two years later.

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

In Pacific Mutual Life Insurance Co. v. Haslip, the Court faced a properly presented due process challenge to a punitive damages award. In an opinion authored by Justice Blackmun, joined by Chief Justice Rehnquist and Justices White, Marshall, and Stevens, the Court held that punitive damages are constrained by procedural due process but that the "common law method" for assessing punitive damages used in Alabama was constitutionally sufficient. Haslip laid the foundation for all future punitive damages cases by the Supreme Court. First, the majority's approval of Alabama's minimal jury instructions on punitive damages established a benchmark against
which future procedural due process challenges would be measured. Second, in addition to finding procedural limits on punitive damages, the decision hinted that substantive due process also places limits on the appropriate size of an award. Finally, the concerns raised by Justice O'Connor's dissent and Justice Kennedy's concurrence influenced the Court's later approach to due process limits on punitive damages.

1. The Majority Opinion

In Haslip, the plaintiffs brought a fraud claim in Alabama state court against their insurance company after the company's agent misappropriated the plaintiffs' insurance premiums and then concealed that the plaintiffs had lost coverage. The jury returned a verdict for the plaintiffs and awarded the lead plaintiff $200,000 in compensatory damages and $840,000 in punitive damages. The Alabama Supreme Court upheld the award. In the U.S. Supreme Court, the defendant challenged the punitive damages award "as the product of unbridled jury discretion and as violative of its due process rights." The Court began by discussing the well-established "common-law method for assessing punitive awards" that was used by Alabama and many other states. The common law method is a three-tiered approach under which "the amount of the punitive award is initially determined by [1] a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then [2] reviewed by trial and [3] appellate courts to ensure that it is reasonable." Given its long pedigree, the Court held that the common law approach, as a general matter, was not unconstitutional.

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

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62 Id. at 4-7.
63 Id. at 6.
64 Id. at 7 n.2. The jury returned a general verdict for the lead plaintiff in the amount of $1,040,000. Id. The Supreme Court assumed that "not less than $840,000" was for punitive damages. Id. The other plaintiffs were awarded total sums ranging from $10,288 to $15,290. Id. at 7.
65 Id. (citing Pac. Mut. Life Ins. Co. v. Haslip, 553 So. 2d 537 (Ala. 1989)).
66 Id.
67 Id. at 15.
68 Id. at 42 (O'Connor, J., dissenting); see also infra text accompanying notes 388-401.
69 Haslip, 499 U.S. at 15.
70 Id. at 17 ("[W]e cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be per se unconstitutional.").
71 Id. at 18.
process. The Court declined, however, to create specific constitutional standards for all cases, choosing instead to adopt a general "reasonableness" and "adequate guidance" test to be applied on a case-by-case basis:

We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus. With this standard in mind, the Court analyzed the Alabama common law procedures that resulted in the $840,000 punitive award.

a. Jury Instructions

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

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72 See id. ("One must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities.").
73 Id.
74 Id. at 19. In its entirety, the challenged jury instruction provided:
    Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages.
    This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award punitive damages.
    Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, it does to the plaintiff, by way of punishment to the defendant and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so.
    Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.
Id. at 6 n.1 (alteration in original).
75 Id. at 19.
76 Id. at 20.
purpose”; (2) it “identified the damages as punishment for civil wrongdoing of the kind involved”; and (3) it “explained that their imposition was not compulsory.” These three components, referred to in this Article as the “Haslip-minimum,” later were used by courts as the constitutional benchmark for punitive damages instructions.

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

b. Trial Court Review

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

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77 Id. at 19.
78 Id. at 20 (“The discretion allowed under Alabama law in determining punitive damages is no greater than that pursued in many familiar areas of the law as, for example, deciding ‘the best interests of the child,’ or ‘reasonable care,’ or ‘due diligence,’ or appropriate compensation for pain and suffering or mental anguish.”).
79 Id.
80 Id. at 20-24. The Court noted that Alabama’s post-verdict standards for evaluating punitive awards “distinguishe[d] Alabama’s system from the Vermont and Mississippi schemes about which Justices expressed concern in [Browning-Ferris and Bankers Life].” Id. at 21 n.10. In both Browning-Ferris and Bankers Life, the Justices’ core criticism was the vague jury instructions used by the trial courts in each case. See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan, J., concurring); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 88 (1988) (O’Connor, J., concurring in part and concurring in the judgment); see also supra notes 48-59 and accompanying text (discussing Browning-Ferris and Bankers Life).
81 Haslip, 499 U.S. at 20. This language suggests that the Court implicitly applied part of the Mathews v. Eldridge procedural due process test. See Mathews v. Eldridge, 424 U.S. 319, 332-35 (1976) (explaining the test for procedural due process claims); see also infra note 117. In her dissent, Justice O’Connor argued that Alabama’s system failed the Mathews test. Haslip, 499 U.S. at 53 (O’Connor, J., dissenting); see also infra notes 119-21 and accompanying text.
82 Haslip, 499 U.S. at 20.
83 Id.
found that the Alabama test "ensures meaningful and adequate re-
view by the trial court whenever a jury has fixed the punitive dam-
ages."84

c. Appellate Review

The Court further considered Alabama's system for appellate re-
view of punitive damages awards.85 The Court noted that the Ala-
bama Supreme Court undertook both a "comparative analysis"86 and a "substantive"87 review to ensure that the award did not exceed an amount that met the goals of punishment and deterrence.88 The Court favorably recited seven factors that the Alabama Supreme Court had adopted in Green Oil Co. v. Hornsby89 to determine whether a punitive award was excessive.90 These "Green Oil factors" played an influential role in later punitive damages cases.

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

d. Wealth and Ratio

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

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84 Id.
85 Id. at 20-21.
86 Id. at 21 (citing Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050 (Ala. 1987)).
87 Id.
88 Id.
89 539 So. 2d 218 (Ala. 1989).
90 The "Green Oil factors" are as follows:
(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.
91 Haslip, 499 U.S. at 21-22.
92 Id. at 22.
93 Id.
punitive damages award. Specifically, the Court suggested that regardless of the procedures used, the sheer size of a punitive damages award might "cross the line into the area of constitutional impropriety." But the award in question—which constituted a 4 to 1 ratio of punitive to compensatory damages—while "close to the line," did not cross it.

2. Justice Scalia's Concurrence

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

3. Justice Kennedy's Concurrence

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

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93 Id. at 24. A plurality of the Court recognized a substantive due process right two years later in TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993). See discussion infra Part I.C.
94 See Haslip, 499 U.S. at 24.
95 Id. at 22-23.
96 Id. at 25 (Scalia, J., concurring). The majority rejected Justice Scalia's approach: "It would be just as inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional." Id. at 18. Justice O'Connor also took issue with Justice Scalia's "static notion of due process," finding that "[d]ue process is not a fixed notion." Id. at 60 (O'Connor, J., dissenting).
97 Id. at 24-25 (Scalia, J., concurring).
98 Id. at 24.
99 Id. at 37.
100 Id.
101 Id. at 24-25.
102 Id. at 40 (Kennedy, J., concurring).
process challenge. Rather, in some circumstances, an award of punitive damages assessed under the common law method could violate due process if the award was "returned by a biased or prejudiced jury." He also disagreed with the majority's reasonableness test, stating that a "bias or prejudice" inquiry would provide firmer guidance.

4. Justice O'Connor's Dissent

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

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

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

First, Justice O'Connor opined that the punitive damages instruction failed the void-for-vagueness doctrine. The trial court's
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instruction, which directed the jury to consider the defendant's wrongful conduct and the goal of deterrence in determining the amount of the award, was "scarcely better than no guidance at all."\(^1\) In contrast, Justice O'Connor contended that there existed objective criteria—the post-verdict Green Oil factors—that could be used to help guide juries in making rational punitive damages awards.\(^1\) Justice O'Connor stressed that post hoc application of these factors could not cure the vagueness of the jury instructions: "After-the-fact review of the amount in no way diminishes the fact that the State entrusts its juries with standardless discretion."\(^1\)

Second, Justice O'Connor noted that even if the Court rejected the vagueness rationale, the Alabama instructions failed the Mathews v. Eldridge\(^1\) due process test. Under the Mathews balancing criteria on which to base the exercise of that discretion. . . . [T]he instruction suggests that the jury may do whatever it "feels" like." \(^{112}\) Id. at 44-45.

\(^{111}\) Id. at 43. Under the void-for-vagueness doctrine:

[A] law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966); see also Hill v. Colorado, 530 U.S. 703, 732 (2000) ("A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.").\(^{112}\) Haslip, 499 U.S. at 48 (O'Connor, J., dissenting) (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan, J., concurring)). Justice O'Connor readily acknowledged that the instruction was correct as a matter of state law. \(^{113}\) Id. at 47. But, she argued, merely stating the objectives of punishment and deterrence without providing any information on how to achieve those goals prevented rational decision making: "[T]he trial court's instruction identified the ultimate destination, but did not tell the jury how to get there. Due process may not require a detailed roadmap, but it certainly requires directions of some sort." Id. at 49. See supra note 74 for the full text of the instruction.

\(^{114}\) See Haslip, 499 U.S. at 51-52 ("This is not a case where more precise standards are either impossible or impractical. . . . In my view . . . the 'Green Oil factors' . . . could assist juries to make fair, rational decisions.").

\(^{115}\) Id. at 52.

\(^{116}\) Id.

The majority rejected the application of the void-for-vagueness doctrine to the case: "Decisions about the appropriate consequences of violating a law are significantly different from decisions as to whether a violation has occurred." \(^{117}\) Id. at 24 n.12.

\(^{118}\) Haslip, 499 U.S. at 53 (O'Connor, J., dissenting).
test, Justice O'Connor found that (1) the private interests involved were enormous, ranging up to millions of dollars;\(^\text{119}\) (2) the existing procedures produced unfair and inconsistent awards, and these problems could be easily remedied by instructing juries on the *Green Oil* factors rather than by post hoc judicial review;\(^\text{120}\) and (3) the state had absolutely no interest in "standardless jury discretion."

Justice O'Connor forcefully concluded her dissent by stating: "Alabama's common law scheme ... provides a jury with 'such skeletal guidance,' that it invites—even requires—arbitrary results. It gives free reign to the biases and prejudices of individual jurors, allowing them to target unpopular defendants and punish selectively. In short, it is the antithesis of due process."\(^\text{122}\)

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

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

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

\(^{119}\) Id. at 54.
\(^{120}\) Id. at 54-58. Analyzing the fairness of Alabama's existing procedures, Justice O'Connor thus challenged one of the core premises used by the majority to justify approval of Alabama's minimal instructions: "Post hoc review tests only the amount of the award, not the procedures by which that amount was determined.... Any award of punitive damages rendered under these procedures, no matter how small the amount, is constitutionally infirm." Id. at 43-44; see also id. at 55-56 (discouraging further the use of post hoc review).
\(^{121}\) Id. at 58. Justice O'Connor recognized that the states have a substantial interest in deterrence and punishment, but have no interest in arbitrary punitive damages awards. States cannot object to "procedural measures that merely ensure that punitive damages awards are based on some factual or legal predicate, rather than the personal predilections and whims of individuals jurors." Id. at 59-60.
\(^{122}\) Id. at 63 (citation omitted).
\(^{124}\) See supra text accompanying notes 66-73.
\(^{125}\) 509 U.S. 443 (1993).
\(^{126}\) Id. at 446.
\(^{127}\) Id. at 454.
award violates substantive due process. In addition, the plurality’s approach to reasonableness opened the door for future punitive damages battles. Specifically, the plurality suggested that evidence of a defendant’s wealth and out-of-state conduct could support a punitive damages award. Similarly, the plurality’s approval of a punitive award 526 times the amount of compensatory damages conflicted with Haslip’s suggestion that a 4 to 1 ratio was close to the constitutional line.

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

1. The Plurality Opinion

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

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

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128 Id. at 456-58.
129 Id. at 462 n.28, 464.
130 Id. at 459.
131 Id. at 467-69 (Kennedy, J., concurring in part and concurring in the judgment).
132 Id. at 475-501 (O’Connor, J., dissenting).
133 Id. at 449.
134 Id. at 450.
135 Id. at 451.
136 Id. at 453.
137 Id.
unbridled discretion and violated procedural due process, even under the lenient standard set forth in *Haslip*.138

a. *Substantive Due Process*

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

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

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

138 *Id.* at 462-63.
139 *Id.* at 453-54 (citations omitted).
140 *Id.* at 455.
141 *Id.*
142 *Id.* TXO proposed a test that would gauge a punitive award against: "(1) awards of punitive damages upheld against other defendants in the same jurisdiction, (2) awards upheld for similar conduct in other jurisdictions, (3) legislative penalty decisions with respect to similar conduct, and (4) the relationship of prior punitive awards to the associated compensatory awards." *Id.* at 455-56 (citing Brief for Petitioner at 16, TXO (No. 02-215)).
143 *Id.* at 456. The plurality found flaws with the tests proposed by both Alliance and TXO. Alliance's rational basis standard was flawed because "any award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large, would be acceptable." *Id.* TXO's standard, on the other hand, disregarded protections provided by the judicial process. *Id.* at 456-57. Moreover, the opinion questioned the validity of a test based on a comparison to other cases where "no two cases are truly identical, [and thus] meaningful comparisons of such awards are difficult to make." *Id.* at 457 (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 41-42 (1991) (Kennedy, J., concurring)).
144 *Id.* at 458 (alterations in original) (citations omitted). For Justice Scalia's criticism of the reasonableness text, see *infra* notes 180-85 and accompanying text.
general rule that punitive damages should bear a "reasonable relationship" to compensatory damages.\textsuperscript{145} The plurality recognized that Haslip indicated that a 4 to 1 ratio "may be close to the line' of constitutional impropriety."\textsuperscript{146} The plurality, however, rejected TXO's argument that the high ratio rendered the award unreasonable. The plurality determined that the "dramatic disparity between the actual damages and the punitive award"\textsuperscript{147} was justified on two grounds: (1) "the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded";\textsuperscript{148} and (2) "the possible harm to other victims that might have resulted if similar future behavior were not deterred."\textsuperscript{149} Based on this potential harm analysis, the plurality implicitly suggested that the ratio should not be considered 526 to 1, but rather not more than 10 to 1.\textsuperscript{150} Accordingly, the plurality concluded that the large award did not "jar one's constitutional sensibilities."\textsuperscript{151}

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

b. Wealth and Out-of-state Conduct

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

\textsuperscript{145} TXO, 509 U.S. at 459-61.
\textsuperscript{146} Id. at 459 (citation omitted).
\textsuperscript{147} Id. at 462.
\textsuperscript{148} Id. at 460. For Justice O'Connor's criticism of the potential harm analysis, see infra note 202.
\textsuperscript{149} TXO, 509 U.S. at 460.
\textsuperscript{150} Cf. id. at 462. The plurality did not explicitly characterize the award as a 10 to 1 ratio. Rather, it explained that if TXO's fraud had succeeded, Alliance could have lost anywhere from $1 million to $8.3 million in royalties, effectively resulting in a ratio of not more than ten times the $10 million punitive award. Id. at 462. The Court later expressly characterized the ratio in TXO as "not more than 10 to 1." BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 581 (1996).
\textsuperscript{151} TXO, 509 U.S. at 462 (quoting Pac. Mut. Life Ins. Co. v. Haslip, 409 U.S. 1, 18 (1991)).
\textsuperscript{152} See, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 442 (2001) (discussing the lower court's reliance on "unrealistic" potential harm analysis to justify punitive damages award).
\textsuperscript{153} See sources cited infra note 374.
\textsuperscript{154} See supra discussion accompanying note 92.
\textsuperscript{155} TXO, 509 U.S. at 461-62.
and out-of-state conduct\textsuperscript{156} allowed the jury to base its punitive damages award on improper considerations, such as prejudice against large out-of-state corporations.\textsuperscript{157} Although recognizing that this evidence increased the risk that the jury might act out of bias,\textsuperscript{158} the plurality stated that "factors such as these are typically considered in assessing punitive damages."\textsuperscript{159}

c. \textit{Procedural Due Process}

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

\begin{footnotes}
\item[156] Id. at 462 n.28.
\item[157] Id.
\item[158] Id. at 464 (noting that "emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations").
\item[159] Id. at 462 n.28. Justices White, O'Connor, and Souter disagreed with the plurality's wealth determination. See discussion \textit{infra} accompanying notes 204-07.
\item[160] TXO, 509 U.S. at 462-66.
\item[161] Id.
\item[162] Id. at 463. In its entirety, the challenged instruction provided:

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

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

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

\item[163] Id. at 463-64.
\end{footnotes}
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instruction, but declined to address TXO's procedural due process challenge because the issue "was not properly presented."  

2. Justice Kennedy's Concurrence

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

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

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

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

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

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

167 Id.

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

169 Id. at 467.

170 Id.

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

172 Id. at 468.
bias against a large, out-of-state corporation. Nevertheless, Justice Kennedy found a more probable explanation for the jury’s award: a legitimate decision to harshly punish TXO because of the willful and malicious nature of its conduct. While noting that the case was “close and difficult,” Justice Kennedy concluded that “the jury’s punitive damages award did not amount to an unfair, arbitrary, or irrational seizure of TXO’s property.”

3. Justice Scalia’s Concurrence

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

Justice Scalia, however, wrote separately to challenge the plurality’s determination that the Due Process Clause provides a substantive right to a reasonable punitive damages award. To say that “procedural due process’ requires judicial review of punitive damages awards for reasonableness,” he explained, “is not to say that there is a federal constitutional right to a substantively correct ‘reasonableness’ determination.” Justice Scalia argued that a substantive due process right to a reasonable amount of punitive damages rendered the Excessive Fines Clause superfluous.
Tongue-in-cheek, Justice Scalia purported to find the plurality opinion "valuable" because its lack of meaningful standards did nothing to change "the traditional ones that ought to govern." He observed that future cases would "be disposed of simply with the observation that this is no worse than TXO.

4. Justice O'Connor's Dissent

Consistent with her Haslip dissent, Justice O'Connor, joined by Justice White and Justice Souter (in part), concluded that "neither this award's size nor the procedures that produced it are consistent with the principles this Court articulated in Haslip." First, Justice O'Connor emphasized her Haslip position that due process requires adequate jury instructions. Justice O'Connor found that the "vague and amorphous guidance" provided to juries on punitive damages heightens the risk of "prejudice, bias, and caprice." For example, Justice O'Connor noted that while jurors may be instructed that the goal of punitive damages is punishment and deterrence, courts rarely educate juries on how to reach these goals. While conceding that such instructions may satisfy Haslip, Justice O'Connor concluded that "the lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict." Justice O'Connor noted the difficulty of determining whether a punitive damages award is the result of passion or prejudice, but indicated

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

Id. at 472.

Id. at 471.

Id. at 472.

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

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

Id. at 473-75.

Id. at 474.

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

Id at 474-75.

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

Id. at 476.
that the award's lack of proportionality may provide one measure of bias.\textsuperscript{194}

Second, while Justice O'Connor agreed that substantive due process imposes limits on punitive damages,\textsuperscript{195} she criticized the plurality for adopting the Haslip general reasonableness test instead of more objective criteria for assessing the constitutionality of punitive awards.\textsuperscript{196} Instead, Justice O'Connor concluded that TXO's proposed test\textsuperscript{197} was probative of whether the award violated due process.\textsuperscript{198} Applying the proposed test,\textsuperscript{199} Justice O'Connor concluded that relationship of the punitive to the compensatory award was "dramatically irregular, if not shocking" and "[a]t the very least it should raise a suspicious judicial eyebrow."\textsuperscript{200} Justice O'Connor acknowledged that, in some cases, a disproportionate award may be justified by "unrealized harm to the victim" or the "defendant's anticipated gain."\textsuperscript{201} However, she concluded that the record in TXO did not support these justifications.\textsuperscript{202}

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

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

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

D. Procedural Due Process Requires Post-verdict Review.

Honda Motor Co. v. Oberg

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

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203 Id. at 486.
204 Id. at 489 ("[I]t seems quite likely that the jury in fact was unduly influenced by the fact that TXO is a very large, out-of-state corporation.").
205 Id.
206 Id. at 490.
207 Id. at 499 ("Haslip itself suggests that the defendant's wealth is a permissible consideration, although it does so only in the context of appellate review." (citation omitted)).
208 Id. at 495.
209 Id. at 495-96.
210 Id. at 496-97.
212 Id. at 492.
213 The unusual nature of the issue allowed several Justices to join the decision. Oregon's elimination of procedural constraints on punitive damages brought Justices Kennedy and O'Connor, both of whom were critical of the lack of constraints on jury discretion, into the majority. Similarly, Oregon's departure from historic common law practices likely prompted Justices Scalia and Thomas to join the majority.
1. The Majority Opinion

In Oberg, the plaintiff brought a products liability action against an all-terrain vehicle manufacturer for injuries sustained when the plaintiff's vehicle overturned. The jury awarded the plaintiff $735,512.31 in compensatory damages and $5 million in punitive damages. On appeal, the defendant challenged both the award's excessiveness and Oregon's prohibition against post-verdict review of the amount of a punitive damages award. The Oregon Supreme Court affirmed the verdict.

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

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

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214 Oberg, 512 U.S. at 418.  
215 Id. The jury originally awarded $919,390.39 in compensatory damages, but this amount was reduced by twenty percent because of the plaintiff's contributory fault. Id.  
216 Id.  
217 Id. At the time of Oberg, Oregon courts could not reduce the amount of a punitive damages award on the ground of excessiveness. Id. Rather, a court could vacate the judgment only if there was "no evidence to support the jury's decision." Id. at 419 (quoting Honda Motor Co. v. Oberg, 851 P.2d 1084, 1096 (Or. 1993)).  
218 Oberg, 851 P.2d 1084.  
219 Oberg, 512 U.S. at 418. The Court adopted the plurality view in TXO that "the Constitution imposes a substantive limit on the size of punitive damages awards." Id. at 420. The Court further recognized that TXO failed to provide any "standard that will identify unconstitutionally excessive awards," but decided that Oberg did not present this issue for review. Id.  
220 Id. at 421 (stating that the opinions in Haslip and TXO suggest the Court's analysis in Oberg "should focus on Oregon's departure from traditional procedures").  
221 Id. at 426 ("There is a dramatic difference between the judicial review of punitive damages awards under the common law and the scope of review available in Oregon.").  
222 Id. at 430. The Court noted that the abrogation of a common law protection presumptively violated due process. Id. "When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." Id. (citations omitted).  
223 Id. at 431.  
224 Id.
problem of arbitrary awards and potentially biased juries.\(^{225}\) For instance, the Court recognized that juries often have wide latitude in setting the amounts of awards and the presentation of evidence of a defendant's wealth creates the risk that juries will improperly use their verdicts to express bias against big business.\(^{226}\) The Court held that judicial review is one of the few procedural safeguards the common law provided against such dangers, and Oregon could not properly remove that restraint absent a valid justification or adoption of substitute procedural protections.\(^{227}\)

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

\(^{225}\) Id.

\(^{226}\) Id. at 432. The Court noted that "[p]unitive damages pose an acute danger of arbitrary deprivation of property," and explained that jury instructions often provide no real check on the jury's discretion:

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

Id.

\(^{227}\) See id. ("Oregon has removed that safeguard without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time.").

\(^{228}\) Id. at 432-35.

\(^{229}\) Id. at 433.

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

\(^{231}\) Id.

\(^{232}\) Id. at 435.
2. Justice Scalia’s Concurrence

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

3. Justice Ginsburg’s Dissent

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

In particular, Justice Ginsburg focused on (1) the limit of a punitive damages award to the amount pled in the complaint; (2) the plaintiff’s inability to introduce evidence regarding the defendant’s wealth until after presenting a prima facie claim of punitive damages; (3) the application of the clear and convincing evidence standard; and (4) Oregon’s multifactor jury instructions. With regard to jury instructions, Justice Ginsburg noted that Oregon’s multifactor instructions resembled the seven Green Oil factors that Alabama courts used to test punitive awards. She noted that Haslip looked to...
the "procedure, as a whole and in its net effect." Justice Ginsburg argued that the case presented the flip side of Haslip. Unlike Haslip, where stronger post-verdict review compensated for minimal instructions, in Oberg the detailed jury instructions made up for the limited post-verdict review by providing adequate constitutional guidance to the jury in its assessment of punitive damages.

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

In 1996, the Court shifted its focus back to the substantive due process limits on punitive damages. In *BMW of North America, Inc. v. Gore*, an opinion by Justice Stevens, joined by Justices O'Connor, Kennedy, Souter, and Breyer, the Court did two firsts: it articulated specific post-verdict standards for punitive damages review and it struck down an award as "unconstitutionally excessive." While announcing "guideposts" to assist the lower courts, the Court still disclaimed any bright-line test and adhered to its prior reasonableness standard. The lower courts, however, treated the guideposts as the definitive constitutional test. Importantly, BMW also recognized—as Justices O'Connor and Kennedy previously had urged—that a proper due process inquiry does not just focus on the amount of the award, but also considers whether it is based on improper considerations. Although establishing a framework for the constitutionality of punitive damages awards, the decision prompted divergent lower court interpretations and widespread criticism that the Court had provided no real standards at all.

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243 Id. at 444 (quoting Honda Motor Co. v. Oberg, 851 P.2d 1084, 1096 (Or. 1993)).
244 Id. at 441. Justice Ginsburg observed that jury instructions "are perhaps more likely to prompt rational and fair punitive damage decisions than are the *post hoc* checks employed in jurisdictions following Alabama's pattern." Id. at 444.
245 Although Oregon did not allow post-verdict review for excessiveness, Justice Ginsburg pointed out that Oregon law did allow limited post-verdict review for lack of evidence to support the verdict or for instructional error. Id. at 445-46.
246 Id. at 443-44 (noting that unlike Alabama, Oregon does not allow excessiveness review by the trial court or appellate review to test the award against certain specific criteria).
247 Id. at 450. Finally, Justice Ginsburg disagreed with the majority's view that the common law provided judicial remittitur of the size of a punitive damages award. Id. at 443-44. In her view, early American common law suggested that juries were given vast discretion, even to determine the law. An assessment of damages was "exclusively a jury function." Id. at 447. She also noted that common law did not require Oregon's multifactor instructions. Id. at 448.
249 Id. at 568 (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994)).
250 See infra notes 372-77 and accompanying text.
1. The Majority Opinion

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

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

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

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251 BMW, 517 U.S. at 563 & n.1.
252 See id. at 564 (basing compensatory damage on expert testimony claiming that the value of a repainted BMW is approximately ten percent less than the value of an undamaged new car).
253 Id.
254 Id. at 565.
255 Id. (stating none of the twenty-five states mandated disclosure of repairs costing less than three percent of the suggested retail price of a car).
256 Id. at 566.
257 See id. at 566-67 (articulating the factors in Green Oil v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989), and approved in Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991)).
258 Id. at 567.
259 Id.
260 Id. at 575.
State's legitimate interests in punishment and deterrence," and set forth a two-step process for excessiveness review.

a. Identifying the State Interest

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

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

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

263 Id.

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

265 Id. at 572.

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

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

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

Id.; see also id. at 573 n.19 (noting that extraterritorial conduct remains relevant to assessing the "defendant's character and prospects for rehabilitation").
on BMW's out-of-state conduct, and based its remitted award solely on conduct that occurred within Alabama." \textsuperscript{268} Second, the Court left open whether a state could punish out-of-state conduct that was unlawful in the state where the conduct occurred. \textsuperscript{269}

b. Excessiveness Standards

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

The Court characterized reprehensibility as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award," \textsuperscript{273} and described a sliding scale of reprehensible conduct: violent crimes more reprehensible than nonviolent crimes; \textsuperscript{274} trickery and deceit more reprehensible than negligence; \textsuperscript{275} conduct causing physical harm more reprehensible than conduct causing purely economic harm; \textsuperscript{276} deliberate false statements more reprehensible than omissions of material facts; \textsuperscript{277} and repeated conduct more reprehensible than an isolated incident. \textsuperscript{278} The Court cited Justice Kennedy's
TXO concurrence wherein Kennedy found that the defendant’s “intentional malice was the decisive element in a ‘close and difficult’ case.”

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

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

or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant’s disrespect for the law.” Id. at 576 (quoting TXO, 509 U.S. at 468 (Kennedy, J., concurring)).

Id. at 580.

Id. at 576.

Id.

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

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

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

Id. at 582.

Id. at 580-81 & n.33.

Id. at 581.


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

BMW, 517 U.S. at 583.

Id. (quoting TXO, 509 U.S. at 481 (O’Connor, J., dissenting)).
Within these traditional common law standards, the Court further refined the ratio guidepost to discuss circumstances that may justify a higher ratio. The Court noted that a higher ratio may be justified where "a particularly egregious act has resulted in only a small amount of economic damages," where the "injury is hard to detect," or where "the monetary value of noneconomic harm might have been difficult to determine."

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

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

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293 Id. at 582.
294 Id.
295 Id.
296 Id. at 583.
297 Id.
298 Id. at 584.
299 Id. at 583.
300 Id. at 584 & n.40 (citing the caps on civil fines for violations of Arkansas, Florida, Georgia, Indiana, New Hampshire, and New York statutes).
301 Id. at 585-86 (internal citation omitted). The Court left open the appropriate remedy: "Whether the appropriate remedy requires a new trial or merely an independent determination by the Alabama Supreme Court of the award necessary to vindicate the economic interests of Alabama consumers is a matter that should be addressed by the state court in the first instance." Id. at 586.
2. *Justice Breyer’s Concurrence*

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

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

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

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

503 Id. at 588.

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

505 Id.

506 Id. at 588 (“Legal standards need not be precise in order to satisfy this constitutional concern. But they must offer some kind of constraint upon a jury or court’s discretion, and thus protection against purely arbitrary behavior.” (citation omitted)).

507 Id.

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

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

510 Id. at 588.

511 Id. at 588-89.

512 Id. at 589 (citing Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989)). Justice Breyer criticized the Alabama Supreme Court’s expansive application of the *Green Oil* factors. Id. Justice Breyer noted that the Alabama court’s application of the ratio factor—considering $2 million reasonably related to the potential economic harm in Alabama of $56,000—provided no legal standard that “could have significantly constrained the discretion of Alabama factfinders.”
state courts made no effort to identify any other constraining force that *Green Oil* and the statute lacked, such as any economic theory or basis for the award.313 Fourth, Justice Breyer noted that the award was not supported by historic practice or understanding and was in fact "extraordinary by historical standards."314 Finally, Justice Breyer remarked that, unlike other states that cap punitive damages, Alabama lacked any statutory limits that could help constrain unbounded jury discretion.315

3. Justice Scalia's Dissent

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

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

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

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

313 Id. at 592-94.
314 Id. at 594.
315 Id. at 595 (contrasting Alabama’s lack of a statutory cap on punitive damages with the statutory limits in Connecticut, Florida, Georgia, and Texas).
316 Id. at 598 (Scalia, J., dissenting).
317 Id.
318 Id.
believed the majority's approach was both mistaken and unsusceptible of principled application.\footnote{Id. at 599. Justice Scalia criticized the Court for "federalizing yet another aspect of our Nation's legal culture," and for creating a "new rule of constitutional law . . . constrained by no principle other than the Justices' subjective assessment of the 'reasonableness' of the award in relation to the conduct for which it was assessed." Id.}

Justice Scalia also responded to the three sections of the majority's opinion. First, Justice Scalia took issue with the majority's assertion of a substantive due process right to a reasonable punitive damages award\footnote{Id. at 599-602.} as lacking any precedential support.\footnote{Id. at 600-01.} Justice Scalia argued that the decisions relied upon by the majority "fabricated the 'substantive due process' right at issue."\footnote{Id. at 601.}

Second, because the Alabama Supreme Court limited the size of the award to the defendant's in-state conduct, Justice Scalia characterized the Court's discussion of out-of-state conduct as dicta.\footnote{Id. at 604.} On the merits, Justice Scalia commented that Alabama courts should be able to "consider lawful (but disreputable) conduct, both inside and outside Alabama, for the purpose of assessing just how bad an actor BMW was."\footnote{Id. at 603.}

Third, Justice Scalia criticized the three guideposts,\footnote{Id. at 604-07 (Scalia, J., dissenting).} remarking that they created federal standards for the state law of punitive damages.\footnote{Id. at 605.} Despite this effect, Justice Scalia found that the guideposts did not provide any substantive guidance: "[T]he 'guideposts' mark a road to nowhere; they provide no real guidance at all."\footnote{Id. at 606-07.} Finally, Justice Scalia highlighted the tension between the guideposts and jury findings.\footnote{Id. at 601.} Justice Scalia found no logical basis for reassessing the jury's determination on the degree of a defendant's reprehensibility and, in so doing, ignoring the jury's determination that the defendant's conduct was reprehensible enough to deserve punitive damages.\footnote{Id. at 604-07.}
4. Justice Ginsburg's Dissent

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

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

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

1. The Majority Opinion

In Cooper Industries, a tool manufacturer sued a competitor for unfair competition after the competitor used pictures of the plaintiff's product in advertising, marketing, and packaging its own similar product. The jury awarded the plaintiff $50,000 in compensatory damages and $4.5 million in punitive damages. The district court,
applying the BMW guideposts, held that the award did not violate substantive due process. On appeal, the Ninth Circuit concluded that the district court did not “abuse its discretion” in declining to reduce the punitive award. The Supreme Court granted certiorari to resolve confusion among the federal appellate courts on the appropriate standard of appellate review.

a. De Novo Review

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

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

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538 Id.
539 Id. at 431.
540 Id.
541 Id. at 432.
542 Id. at 432-33.
543 Id. at 433 ("If no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court’s ‘determination under an abuse-of-discretion standard.’" (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279 (1989))).
544 Id. at 433-34.
546 Id. at 434.
547 Id.
548 Id. at 436. The Court summarized the reasons courts apply de novo review in analogous cases, including: (1) the imposition of penalties are not questions of fact; (2) the legal concepts in these areas often are difficult to define and must be considered in the context of a particular
Haslip because there the Court had emphasized the importance of appellate review in ensuring that a jury's award comports with due process.\(^{349}\)

b. The Seventh Amendment

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

c. The Guideposts

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

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

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

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\(^{349}\) Id. at 436 n.9.

\(^{350}\) Id. at 437. The Court was responding to issues raised by amicus curiae. Id. The argument also addressed Seventh Amendment concerns raised in Justice Ginsburg's dissent.

\(^{351}\) Id.

\(^{352}\) See id. at 441.

\(^{353}\) Id.

\(^{354}\) Id.

\(^{355}\) Id. at 441-42.

\(^{356}\) Id. at 442.

\(^{357}\) Id.
misconduct resulted in multiple violations of the Oregon Unlawful Trade Practices Act, each of which carried a maximum penalty of $25,000. The Court noted that the Ninth Circuit expressed no opinion on whether the conduct at issue should be treated as separate violations or as a single violation, and that the record appeared more consistent with a "single-violation theory."

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

2. Justice Thomas's Concurrence

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

3. Justice Scalia's Concurrence

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

4. Justice Ginsburg's Dissent

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

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558 Id. at 442-43.
559 Id. On remand, the Ninth Circuit reduced the $4.5 million punitive damages award to $500,000. Leatherman Tool Group, Inc. v. Cooper Indus., Inc., 285 F.3d 1146, 1147 (9th Cir. 2002).
560 Cooper Indus., 532 U.S. at 443 (Thomas, J., concurring).
561 Id.
562 Id.
563 Id. (Scalia, J., concurring in the judgment).
564 Id. at 444.
565 Id. (Ginsburg, J., dissenting).
566 Id.
Justice Ginsburg recognized that the assessment of punitive damages involves more than the resolution of factual matters, but found that a jury's verdict requires factual determinations, such as the reprehensibility of the defendant's conduct and harm to the plaintiff.\(^{567}\)

Apart from the Seventh Amendment, Justice Ginsburg found that an abuse of discretion standard made practical sense because trial courts have a superior vantage to assess evidence, particularly witness credibility.\(^{368}\) Moreover, Justice Ginsburg determined that the de novo standard is more complex because it "requires lower courts to distinguish between ordinary common-law excessiveness and constitutional excessiveness, and to separate out factfindings that qualify for 'clearly erroneous' review."\(^{569}\) In the end, however, Justice Ginsburg concluded, "Complex as it is, I suspect that approach and mine will yield different outcomes in few cases.\(^{570}\)

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

The Supreme Court's pre-State Farm punitive damages cases raised as many questions as they answered. Courts and commentators repeatedly criticized the decisions as providing no workable standards for post-verdict review.\(^{571}\) But the decisions also affected the development of jury instructions. First, the cases failed to provide clear and complete substantive due process limitations that could readily be translated into considerations for a jury. Specifically, until BMW the Court refused to identify any criteria to measure the substantive limitations on punitive damages. Although BMW's guideposts appeared promising, divergent court interpretations soon gave credence to Justice Scalia's assessment that "the 'guideposts' mark a road to nowhere."\(^{572}\) For instance, some courts justified an expansive interpretation of the second guidepost by pointing to the 526 to 1 ratio

\(^{567}\) Id. at 444-45. Specifically, Justice Ginsburg pointed to the following factual findings determined by juries in assessing punitive damages: "[T]he extent of harm or potential harm caused by the defendant's misconduct, whether the defendant acted in good faith, whether the misconduct was an individual instance or part of a broader pattern, whether the defendant behaved negligently, recklessly, or maliciously." Id. at 446. She analogized the award of punitive damages to awards for pain and suffering: "One million dollars' worth of pain and suffering does not exist as a 'fact' in the world any more or less than one million dollars' worth of moral outrage." Id.

\(^{568}\) Id. at 445.

\(^{569}\) Id. at 450 (citations omitted).

\(^{570}\) Id.

\(^{571}\) See generally discussion supra Part I.

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

\textsuperscript{375} See, e.g., United States v. Big D Enters., Inc., 184 F.3d 924, 933 (8th Cir. 1999) (“[W]here the other [BMW] factors are strong, a 526 to 1 ratio may be appropriate.”); United States v. Oak Manor Apartments, 11 F. Supp. 2d 1047, 1054 (W.D. Ark. 1998) (“While this [100 to 1 ratio] is high, there is no simple mathematical formula that can be applied and the Supreme Court has upheld a punitive damages award of over 526 times the size of actual damages.”).

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

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

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

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

\textsuperscript{375} E.g., In re Exxon Valdez, 236 F. Supp. 2d 1043, 1052 (D. Alaska 2002), vacated sub nom., Sea Hawk Seafoods, Inc. v. Exxon Corp., No. 03-35166, 2003 U.S. App. LEXIS 18219, at *2 (9th Cir. Aug. 18, 2003) (remanding for reconsideration under State Farm); accord Swinton v. Potomac Corp., 270 F.3d 794, 819 (9th Cir. 2001) (finding "little comfort" in application of ratio guidepost by other courts). In the first year after the Court decided BMW, a survey found that ratios approved by state courts ranged up to 500 to 1. Samuel A. Thumma, In the Year Since the High Court’s Landmark Decision in ‘BMW,’ Federal Courts Have Reduced Punitive Damages Awards More Frequently Than Have State Courts, NAT’L L.J., June 30, 1997, at B5; see also Collins Entm’t Corp. v. Coats & Coats Rental Amusement, 584 S.E.2d 120, 140 (S.C. Ct. App. 2003) (noting favorably one commentator’s view that “[a]lthough the ratio is a factor universally argued, there is no consistent pattern in its application” (quoting G. Ross Anderson, Jr., Punitive Damages: A Funny Thing Happened on the Way to the Courthouse, S.C. TRIAL LAW. BULL., Fall 2002, at 12, 13)).
limitless monetary award when weighed against incarceration.\footnote{E.g., Romo v. Ford Motor Co., 99 Cal. App. 4th 1115, 1151 (Cal. Ct. App. 2002) (comparing a corporate defendant's conduct to manslaughter), vacated, 125 S. Ct. 2072 (2003) (remanding for reconsideration under State Farm); see also Bielicki v. Terminix Int'l Co., 225 F.3d 1159, 1166 (10th Cir. 2000) ("Although the punitive damages award is exceptional when compared only to the applicable fines, the authorization of imprisonment in the criminal context can justify a higher award."). Courts have criticized the third guidepost as "ineffective and very difficult to employ." Aken v. Plains Elec. Generation & Transmission Coop., Inc., 49 P.3d 662, 671 (N.M. 2002). On remand in BMW, the Alabama Supreme Court concluded that "a consideration of the statutory penalty does little to aid in a meaningful review of the excessiveness of the punitive damages award." BMW of N. Am., Inc. v. Gore, 701 So. 2d 507, 514 (Ala. 1997). For a discussion of these and other problems with judicial application of the third guidepost, see generally Victor E. Schwartz et al., Selective Due Process: The United States Supreme Court Has Said That Punitive Damages Awards Must Be Reviewed for Excessiveness, but Many Courts Are Failing to Follow the Letter and Spirit of the Law, 82 OR. L. REV. 33 (2003).} Apart from the guideposts, most courts ignored BMW's holding that a punitive award may violate due process not only if its size is grossly excessive, but also if the award is based on improper considerations.\footnote{See cases cited supra note 41.}

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

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

A. Model Instructions on Punitive Damages

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

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

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

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


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


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

584 See id. (discussing reasons courts may be reluctant to depart from the model, including judicial suspicion that “instructions offered by the parties are almost always slanted in some way” and fear that departure from the model may open a floodgate of challenges from prior cases that used the model instruction). Despite reluctance to depart from model instructions, courts frequently still warn litigants that the model’s use will not create an “error free warranty.” W. VA. PROPOSED JURY INSTRUCTIONS FOR CIVIL AND CRIMINAL TRIALS, Introduction, at http://www.state.wv.us/wvsca/jury/intro.htm (“[T]here is no ‘error-free warranty’ that accompanies the use of the pattern jury instructions.”) (last visited Feb. 5, 2004); see also In re Standard Jury Instructions-Civil Cases, 797 So. 2d 1199, 1199 (Fla. 2001) (“We express no opinion on the correctness of these instructions and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of these instructions.”). Indeed, courts occasionally have reversed cases based on the trial court’s use of a model instruction. See Wal-Mart Stores, Inc. v. Binns, 15 S.W.3d 320 (Ark. 2000) (reversing case where jurisdiction’s model instruction on the imposition of punitive damages conflicted with legal requirements of claims at issue). More often, however, courts give weight to model instructions and caution against modifying the model. See Schaefer v. Ready, 3 P.3d 56, 59-60 (Idaho Ct. App. 2000) (“Use of the [model] is not mandatory, only recommended. However, any court that chooses to vary from a jury instruction previously approved by the Idaho Supreme Court, does so with the risk that the verdict rendered may be overturned on appeal.” (citations omitted)).
As Justice O'Connor recognized in Haslip, "States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so. Rarely is a jury told anything more than 'do what you think best.'" Despite calls for reform, many jurisdictions still use instructions comparable to the common law instructions approved in Haslip. Several jurisdictions, however, have taken efforts to provide additional guidance to the jury. The model instructions in these jurisdictions often incorporate state law considerations, many of which were developed before—and potentially conflict with—the Supreme Court's recent identification of constitutional limits on punitive damages.

1. State Model Punitive Damages Instructions

a. States Using Haslip-like Common Law Instructions

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

The purpose of awarding punitive damages or exemplary damages is to allow money recovery to the plaintiff by way of punishment to the defendant, and for the added purpose of protecting the public by deterring

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


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

589 Haslip, 499 U.S. at 19.
the defendant and others from doing such wrong in the future. The imposition of punitive damages is entirely discretionary with the jury. Should you award punitive damages, in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence in the case, and the necessity of preventing similar wrongs.\(^{390}\)

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

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

Indiana, Missouri, Utah, Virginia, and Washington use similar model instructions.

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\(^{390}\) 1 ALA. PATTERN JURY INSTRUCTION CIVIL § 11.03 (2003), WL AL-APJICIV 11.03 (emphasis added); see also id. § 29.21, WL AL-APJICIV 29.21 (similar instruction for libel cases). The Alabama model instruction for fraud actions, however, fails to include all of the components approved in Haslip. See id. § 18.09, WL AL-APJICIV 18.09 (failing to instruct on the purpose of punitive damages). Cf. supra note 74 (quoting text of Haslip instruction).

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

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

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

\(^{394}\) See MO. APPROVED JURY INSTRUCTIONS § 10.01 (6th ed. 2002), WL MAI 10.01 ("[I]f you believe the conduct of defendant ... was outrageous ... you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.") (intentional tort cases); id. § 10.02, WL MAI 10.02 (providing similar instruction for conscious disregard negligence cases); id. § 10.04, WL MAI 10.04 (providing similar instruction for strict liability, product defect or failure to warn cases); id. § 10.05, WL MAI 10.05 (providing similar instruction for product defect and failure to warn cases); id. § 10.06, WL MAI 10.06 (providing similar instruction for negligence and strict liability cases); id. § 10.07, WL MAI 10.07 (providing similar instruction for conscious disregard with specific acts/knowledge cases); id. §§ 4.15-4.16, WL MAI 4.15-4.16 (providing similar instruction for defamation cases).

\(^{395}\) See MODEL UTAH JURY INSTRUCTIONS, CIVIL § 27.20 (1993). This instruction provides in relevant part:

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

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

Id.; accord id. § 10.12 (providing same instruction for defamation cases). The Utah model instruction for federal civil rights actions, however, instructs the jury to consider the nature of the misconduct and that "the amount to be awarded must be fixed with calm discretion and sound reason, and must not be awarded because of sympathy, bias or prejudice." Id. § 15.18.
A few jurisdictions provide the Haslip-minimum with minor—albeit equally vague—additions. The Ohio model jury instruction, for instance, uses the Haslip-minimum, but also instructs the jury not to act out of passion or prejudice: "If you award punitive damages, the amount should be fair and reasonable under all the facts and circumstances. It should not be excessive, nor influenced by passion, sympathy, or prejudice." Georgia's instruction adds that the "measure of such damages is your enlightened conscience as an impartial jury." Vermont's (unofficial) model employs the Haslip-

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396 See VA. MODEL JURY INSTRUCTION 2D § 9.080 (2003). This instruction provides in relevant part:

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

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

> If you find for the plaintiff, and if you award compensatory or nominal damages, you may award punitive damages. You are not required to do so. The purposes of punitive damages are (1) to punish a defendant, and (2) to deter a defendant and others from committing similar acts in the future.

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

> . . . [Y]ou must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party.

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

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

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

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

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

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

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

> . . .

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

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

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

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

b. States Using "Haslip-plus-wealth" Instructions

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

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

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

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

Id. For corporate defendants, Section 7.47 provides in relevant part:

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

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

401 Id. § 7.47.

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

consideration for the jury: the defendant's wealth.\textsuperscript{404} Consistent with Haslip, for instance, Arkansas's model instruction advises the jury to consider the purpose of punitive damages, the nature of the wrongdoing, and makes clear that punitive damages are not compulsory.\textsuperscript{405} When discussing computation of the award, the instruction adds: "In arriving at the amount of punitive damages you may consider the financial condition of [the defendant], as shown by the evidence."\textsuperscript{406} The model instructions in Arizona,\textsuperscript{407} the District of Columbia,\textsuperscript{408} Florida,\textsuperscript{409} Hawaii,\textsuperscript{410} Mississippi,\textsuperscript{411} Nevada,\textsuperscript{412} Oregon,\textsuperscript{413} South Carolina,\textsuperscript{414} Texas,\textsuperscript{415} and Wyoming\textsuperscript{416} provide similar guidance.

\begin{footnotesize}
\begin{enumerate}
\item These Haslip-plus-wealth jurisdictions include Arizona, Arkansas, District of Columbia, Florida, Hawaii, Mississippi, Nevada, Oregon, South Carolina, Texas, and Wyoming.
\item See ARK. MODEL JURY INSTRUCTIONS, CIVIL § 2218 (1999). This instruction provides in relevant part:
\begin{itemize}
\item Punitive damages may be imposed to punish a wrongdoer and deter others from similar conduct. In order to recover punitive damages from [defendant], [plaintiff] has the burden of proving [malice, recklessness, or intentional conduct].
\item [You are not required to assess punitive damages against [defendant] but you may do so if justified by the evidence.]
\end{itemize}
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\item See REVISED ARIZ. JURY INSTRUCTIONS (CIVIL)—Personal Injury Damages 4 (3d ed. 1997).
\item See I STANDARIZED CIVIL JURY INSTRUCTIONS FOR D.C. § 16.03 (2002), LEXIS 1-16 Civil Jury Instructions for DC § 16.03. This instruction provides:
\begin{itemize}
\item If you find defendant liable to plaintiff, you may consider assessing additional damages to punish defendant or to deter defendant and others from similar misconduct in the future . . . .
\item The law provides no fixed standard for the amount of punitive damages you may assess, if any, but leaves the amount to your discretion. [However, if you assess punitive damages, you may consider the character of defendant’s conduct or motive, the nature and extent of the harm to plaintiff that defendant caused, and the nature and extent of defendant’s financial wealth.]
\end{itemize}
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\item See FLA. STANDARD JURY INSTRUCTIONS IN CIVIL CASES, § PD2 (2003 Supp.), WL FLPRAC APP. A PD. This instruction provides in relevant part:
\begin{itemize}
\item In determining the amount of punitive damages, if any, to be assessed as punishment and as a deterrent to others . . . . [y]ou should consider the following:
\item (1) the nature, extent and degree of misconduct and the related circumstances, including the following: whether the wrongful conduct was motivated solely by unreasonable financial gain; whether the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by [defendant] . . . ; whether, at the time of [loss] [injury] [or] [damage], [defendant] . . . had a specific intent to harm (claimant) and the conduct of [defendant] . . . did in fact harm (claimant), [and]
\item [(2) [the] [each] defendant’s financial resources; and]
INSTRUCTING JURIES ON PUNITIVE DAMAGES

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

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

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

See HAW. JURY INSTRUCTIONS § 8.12 (2003), WL HI R CIV JURY Instr. 8.12. This instruction provides in relevant part:

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

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

Id. 411 See MISS. MODEL JURY INSTRUCTIONS CIVIL § 11.13 (2002), WL MSPRACJIC §11.14. This instruction provides in relevant part:

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

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

Id. 412 See NEV. PATTERN JURY INSTRUCTIONS, CIVIL, No. 10.20 (1986). This instruction provides in relevant part:

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

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

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

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

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

... You may award punitive damages, although you are not required to do so because punitive damages are discretionary.

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

(1) The character of the defendant's conduct;
(2) The defendant's motive;
(3) The sum of money that would be required to discourage the defendant and others from engaging in such conduct in the future; and
(4) The income and assets of the defendant. The amount of punitive damages may not exceed the sum of $______.
c. Multifactor Instructions

Twenty-two states instruct the jury to consider multiple factors in setting the amount of punitive damages. In addition to the Haslip-
minimum, these instructions typically inform the jury to consider the reprehensibility of the defendant’s conduct, the financial condition of the defendant, and, most importantly, the relationship (or proportionality) of the punitive damages to the plaintiff’s harm.

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

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

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

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

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

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

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

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

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

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

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

MPDA, supra note 387, § 7.

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

See JUDICIAL COUNCIL OF CAL., CIVIL JURY INSTRUCTION No. 3940 (2003) [hereinafter CACI]; see also id. § 3942 (providing same instruction for individual defendant in bifurcated trial); id. § 3943 (providing same instruction for principal liable for conduct of agent in non-bifurcated trial); id. § 3945 (providing same instruction for entity defendant in non-bifurcated trial); id. § 3947 (providing same instruction for individual and entity defendant in non-bifurcated trial); id. § 3949 (providing same instruction for individual and corporate defendants in bifurcated trial). The CACI were the result of a six-year project by the Judicial Council of California to translate California’s longstanding model instructions, the Book of Approved Jury Instructions ("BAJI"), into “plain, straightforward language.” Press Release, Judicial Council of California, New Plain-English Jury Instructions Adopted to Assist Jurors in California Courts (July 16, 2003), available at http://www.courtnfo.ca.gov/presscenter/newsreleases/NR42-03.htm. The CACI are not mandatory or a replacement to the BAJI, but simply offer an alternative to the BAJI. See Stuart T. Waldrip, Could You Repeat That, Please?, 43 ORANGE COUNTY LAW., Sept. 2001, at 46. Reflecting the project’s “plain language” goals, the CACI instruction concerning the calculation of the amount of punitive damages is essentially the same as its BAJI counterpart:

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

In arriving at any award of punitive damages, consider the following factors:
Several states, including Delaware, Idaho, Iowa, Kentucky, Massachusetts, Montana, New Mexico, New York, North
(a) the harm to P as measured by the damages you have awarded under Instruction _____ and the potential of further harm to P created by D’s [failure to comply with his duties] [conduct to P],

AND;

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

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

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

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

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

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

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

See MONT. PATTERN INSTRUCTIONS (CIVIL) No. 25.66 (Jan. 2003 ed.). This instruction provides in relevant part:

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

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

Id. For a discussion of this instruction from the perspective of a Montana trial judge, see Harkin, supra note 29, at 395-99.

See N.M. STAT. ANN., UNIFORM JURY INSTRUCTIONS—CIVIL § 13-1827 (Michie 1999). This instruction provides in relevant part:

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

Id.; see also id. § 13-861 (providing same instruction for contracts and UCC sales cases); id. § 13-1718 (providing same instruction for bad faith cases); id. § 13-1011 (providing same instruction for defamation cases).

See N.Y. PATTERN JURY INSTRUCTIONS—CIVIL § 2:278 (Dec. 2003), WL NY PJI 2:278. For negligence actions, this instruction provides in relevant part:

In arriving at your decision as to the amount of punitive damages you should consider the following factors:
Carolina, Rhode Island, and South Dakota have adopted instructions comparable in many respects to the California model.

1. The nature and reprehensibility of what the defendant did. That would include the character of the wrongdoing (state the factors that are applicable, such as: whether the defendant’s conduct demonstrated an indifference to, or a reckless disregard of, the health or safety of others, whether the plaintiff was financially vulnerable, how long the conduct went on, the defendant’s awareness of what harm the conduct caused or was likely to cause, any concealment or covering up of the wrongdoing, how often the defendant had committed similar acts of this type in the past). In considering the amount of punitive damages to award, you should weigh this factor heavily.

2. The actual and potential harm created by defendant’s conduct. The amount of punitive damages that you award must be both reasonable and proportionate to the actual and potential harm suffered by the plaintiff, and to the compensatory damages you awarded the plaintiff.

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

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

428 See N.C. PATTERN JURY INSTRUCTIONS FOR CIVIL CASES No. 810.98 (1996). This instruction provides in relevant part:

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

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

- the reprehensibility of the defendant’s motives and conduct
- the likelihood, at the relevant time, of serious harm (to the plaintiff or others similarly situated)
- the degree of the defendant’s awareness of the probable consequences of his conduct
- the duration of the defendant’s conduct
- the actual damages suffered by the plaintiff
- any concealment by the defendant of the facts or consequences of his conduct
- the existence and frequency of any similar past conduct by the defendant
- whether the defendant profited by the conduct
- the defendant’s ability to pay punitive damages, as evidenced by his revenues or net worth.

Id. (footnotes omitted). North Carolina imposes a statutory cap on punitive damages, but provides that the jury cannot be informed of the cap. N.C. GEN. STAT. § 1D-25(c) (1996).

429 See MODEL CIVIL JURY INSTRUCTIONS FOR R.I. No. 10403 (2002 ed.). This instruction provides:

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

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

Id. 430 See S.D. PATTERN INSTRUCTIONS (CIVIL) No. 35-01 (1995). This instruction provides in relevant part:
These states differ, however, in their approach to a reasonable relationship instruction. Unlike California, many states do not expressly instruct the jury that punitive damages must bear a "reasonable relationship" to the plaintiff's harm, but instead simply direct the jury to consider the amount of the plaintiff's actual damages when assessing the punitive award.\(^{431}\) Conversely, a few states—Maine,\(^ {432}\) Maryland,\(^ {433}\) and Wisconsin\(^ {434}\)—use multifactor instructions

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

(1) The amount allowed in actual damages;
(2) The nature and enormity of the wrong;
(3) The intent of the defendant;
(4) The defendant's financial condition; and
(5) All of the circumstances concerning the defendant's actions, including any mitigating circumstances which may operate to reduce, without wholly defeating, punitive damages.

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

432 See ME. JURY INSTRUCTION MANUAL § 7-114 (4th ed. 2003), LEXIS, 1-7 Maine Jury Instruction Manual § 8. This instruction provides in relevant part:

In deciding whether to award punitive damages and in determining the amount of any such damages, you may consider the following:
1. All aggravating and mitigating factors present by the evidence, including the outrageousness of the defendant's conduct;
2. The amount of damages that will have a deterrent effect [and the ability of the defendant to pay such an award]; and
3. [Any criminal punishment that may have already been imposed for the conduct in question which may be considered as mitigating the amount of damages.]

Id.\(^ {433}\) See MD. CIVIL PATTERN JURY INSTRUCTIONS § 10:12 (4th ed. 2002), WL MPJI MD-CLE 10-313. This instruction provides in relevant part:

An award for punitive damages should be:
(1) In an amount that will deter the defendant and others from similar conduct.
(2) Proportionate to the wrongfulness of the defendant's conduct and the defendant's ability to pay.
(3) But not designed to bankrupt or financially destroy a defendant.

Id.\(^ {434}\) See 2 WIS. JURY INSTRUCTIONS—CIVIL No. 1707.2 (2002 Supp.). For products liability actions after May 1995, this instruction provides in relevant part:

If you determine that punitive damages should be awarded, you may then award such sum as will accomplish the purpose of punishing or deterring wrongful conduct. Factors you should consider in answering this question include:
1. the seriousness of the hazard to the public;
2. the profitability of the misconduct;
3. the attitude and conduct on discovery of the misconduct;
4. the degree of the manufacturer's awareness of the hazard and of its excessiveness;
5. the employees involved in causing or concealing the misconduct;
6. the duration of both the improper behavior and its concealment;
7. the financial condition of the manufacturer and the probable effect on the manufacturer of a particular judgment; and
8. the total punishment the manufacturer will probably receive from other sources.

Id. Interestingly, the instructions for non-products liability actions provide different instructions that advise the jury to consider the amount of actual and potential damages. For non-products liability actions after May 1995, Section 1707.1 provides in relevant part:
that do not provide any guidance on the proportionality of the award. Indeed, the comments to the Maryland model expressly acknowledge this omission:

While the committee realizes that an award for punitive damages must bear a reasonable ratio to the actual harm suffered by the plaintiff, under current procedure the trial judge is required to review the jury award to make sure that such a ratio is present. Because of this, and the inherent complexity of the concept, no modification of the instruction is made to reflect this constitutional requirement.\footnote{See 2 PA. SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS \S 14.00 (Jan. 2003 ed.), WL PA-JICIV 14.00 ("[Y]ou may award punitive damages, as well as any compensatory damages, in order to punish the defendant for [his] [her] conduct and to deter the defendant and others from committing similar acts"). Section 14.02 provides in relevant part:

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

* the character of the defendant's act,
* the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause [; in this regard you may include the plaintiff's trouble and expense in seeking to protect [his] [her] interests in legal proceedings and in this suit], and
* the wealth of the defendant insofar as it is relevant in fixing an amount that will punish [him] [her] [it], and deter [him] [her] [it] and others from like conduct in the future. [The amount you assess as punitive damages need not bear any relationship to the amount you choose to award as compensatory damages, and it] [It] is not necessary that you award compensatory damages to the plaintiff in order to assess punitive damages . . . .

The amount of punitive damages awarded must not be the result of passion or prejudice against the defendant on the part of the jury. The sole purpose of punitive damages is to punish the defendant's outrageous conduct and to deter the defendant and others from similar acts.\footnote{Id. \S 14.02, WL PA-JICIV 14.02.}

The Pennsylvania model instruction—providing a clear illustration of how state law-based instructions often conflict with constitutional limits on punitives—expressly advises the jury that it need not consider the relationship of the punitive damages to compensatory damages.\footnote{Id. \S 1707.1.}


The Pennsylvania model instruction—providing a clear illustration of how state law-based instructions often conflict with constitutional limits on punitives—expressly advises the jury that it need not consider the relationship of the punitive damages to compensatory damages.\footnote{See 2 PA. SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS \S 14.00 (Jan. 2003 ed.), WL PA-JICIV 14.00 ("[Y]ou may award punitive damages, as well as any compensatory damages, in order to punish the defendant for [his] [her] conduct and to deter the defendant and others from committing similar acts"). Section 14.02 provides in relevant part:

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

* the character of the defendant's act,
* the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause [; in this regard you may include the plaintiff's trouble and expense in seeking to protect [his] [her] interests in legal proceedings and in this suit], and
* the wealth of the defendant insofar as it is relevant in fixing an amount that will punish [him] [her] [it], and deter [him] [her] [it] and others from like conduct in the future. [The amount you assess as punitive damages need not bear any relationship to the amount you choose to award as compensatory damages, and it] [It] is not necessary that you award compensatory damages to the plaintiff in order to assess punitive damages . . . .

The amount of punitive damages awarded must not be the result of passion or prejudice against the defendant on the part of the jury. The sole purpose of punitive damages is to punish the defendant's outrageous conduct and to deter the defendant and others from similar acts.\footnote{Id. \S 14.02, WL PA-JICIV 14.02.}
California model, Alaska,\textsuperscript{437} Minnesota,\textsuperscript{438} New Jersey,\textsuperscript{439} North Dakota,\textsuperscript{440} Tennessee,\textsuperscript{441} and West Virginia\textsuperscript{442} also instruct the jury to

\textsuperscript{437}See ALA. CIVIL PATTERN JURY INSTRUCTIONS No. 20.20B (1999), http://www.state.ak.us/courts/art20.htm (last visited Feb. 5, 2004). For "actions accruing on or after August 7, 1997," this instruction provides:

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

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

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

\textsuperscript{438}Id. For "actions accruing on or after June 11, 1986 and before August 7, 1997," Instruction No. 20.20 provides in relevant part:

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

\textsuperscript{439}Id. For "actions accruing on or after August 7, 1997," Instruction No. 20.20 provides in relevant part:

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

1. The seriousness of the hazard to the public that may have been or was caused by (defendant)'s misconduct
2. The profit (defendant) made as a result of the misconduct
3. The length of time of the misconduct and if (defendant) hid it
4. The amount (defendant) knew about the hazard and of its danger
5. The attitude and conduct of (defendant) when the misconduct was discovered
6. The number and level of employees involved in causing or hiding the misconduct
7. The financial state of (defendant)
[8. The total effect of other punishment likely to be imposed on (defendant) as a result of the misconduct. This includes compensatory and punitive awards to (plaintiff) and other persons]

[9. The severity of any criminal penalty (defendant) may get.]

**Id.** See N.J. MODEL CIVIL CHARGES No. 6.20A (2000), WL NJ-JICIV 6.20A. For actions after October 1995, this instruction provides in relevant part:

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

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

**Id.; see also id. No. 5.34J, WL NJ-JICIV 5.34J** (providing similar instruction for products liability actions). New Jersey has a statutory cap on punitive damages of “five times the amount of compensatory damages or $350,000, whichever is greater,” but provides that the jury cannot be informed of the cap. N.J. STAT. ANN. § 2A:15-5.14, 5.16 (West 2000).

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

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

1) Whether there is a reasonable relationship between the exemplary damage award claimed and the harm likely to result from the Defendant’s conduct as well as the harm that actually has occurred; and

2) The degree of reprehensibility of the Defendant’s conduct and the duration of that conduct.

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

1) Defendant’s awareness of and any concealment of the conduct;

2) Profitability to the Defendant of the wrongful conduct and the desirability of removing that profit and of having the Defendant also sustain a loss;

3) Criminal sanctions imposed on the Defendant for the same conduct that is the basis for the exemplary damage claim are to be taken into account if offered in mitigation of the exemplary damage award.]

**Id.** See TENN. PATTERN JURY INSTRUCTION—CIVIL No. 14.56 (2002), WL 8 TNPRAC CIV 14.56. This instruction provides in relevant part:

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

1. The defendant’s net worth and financial condition;

2. The objectionable nature of defendant’s wrongdoing, the impact of defendant’s conduct on the plaintiff, and the relationship of the parties;

3. The defendant’s awareness of the amount of harm being caused and the defendant’s motivation in causing the harm;

4. The duration of the defendant’s misconduct and whether the defendant attempted to conceal the conduct;

5. The amount of money the defendant has spent in the effort to recover the losses;

6. Whether defendant profited from the activity, and if so, whether the punitive award should be in excess of the profit in order to deter similar future behavior;
consider the "profitability" of the defendant's conduct and/or advise the jury to consider prior civil or criminal punishments against the defendant when determining the amount of the punitive award.

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

The model instructions in several states reflect state law limits on punitive damages. Colorado\textsuperscript{445} and Oklahoma,\textsuperscript{444} for instance,

7. The number and amount of previous punitive damages awards based upon the same wrongful act;
8. Whether, once the misconduct became known to the defendant, the defendant tried to remedy the situation or offered a prompt and fair settlement for the actual harm caused; and
9. Any other circumstances shown by the evidence that bear on determining the proper amount of the punitive award.

\textit{Id.}\textsuperscript{446} See \textit{W. VA. PROPOSED JURY INSTRUCTIONS FOR AUTOMOBILE AND ROAD LAW PERSONAL INJURY DAMAGE} No. VIII (2000), at http://www.state.wv.us/wvsca/jury/auto.htm (last visited Feb. 5, 2004). This instruction provides in relevant part:

In awarding punitive damages you may consider the following factors:

(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from defendant _____'s conduct as well as to the harm that actually has occurred. If defendant _____'s actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.

(2) You may consider whether defendant _____'s conduct was reprehensible, and in doing so you should take into account how long defendant _____ continued in his actions, whether defendant _____ was aware that its actions were causing or were likely to cause harm, whether defendant _____ attempted to conceal or cover up his actions or the harm caused by such actions, whether/how often defendant _____ engaged in similar conduct in the past.

(3) You may consider whether defendant _____ profited from his wrongful conduct, and if you find defendant _____ did profit from his conduct you may remove the profit and your award should be in excess of the profit, so that the award discourages future bad acts by defendant _____.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) In determining the amount of punitive damages, the financial position of defendant _____ is relevant.

\textit{Id.} This instruction has not been adopted, but only proposed for a six-month provisional usage and comment period. \textit{See W. VA. PROPOSED JURY INSTRUCTIONS FOR CIVIL & CRIMINAL TRIALS}, Introduction, at http://www.state.wv.us/wvsca/jury/intro.htm (last visited Feb. 5, 2004).

\textsuperscript{445} See \textit{COLO. JURY INSTRUCTIONS—CIVIL} § 5:3 (4th ed. 2001) ("If you find beyond a reasonable doubt that the defendant acted in a (fraudulent) (malicious) (willful and wanton) manner, you may award a reasonable sum as punitive damages that may not be more than the amount awarded as actual damages."). By statute, Colorado limits the amount of punitive damages to no more than the amount of the compensatory award. \textit{COLO. REV. STAT.} § 13-21-102(1)(a) (2002). Under certain circumstances, the court may increase the award to no more than three times the amount of actual damages. \textit{Id.} § 13-21-102(3). Conversely, the court "may reduce or disallow an award of punitive damages." \textit{Id.} § 13-21-102(2). Some states prohibit courts from informing the jury about a statutory cap. \textit{See supra} notes 428, 439 (discussing the North Carolina and New Jersey approaches respectively).

\textsuperscript{444} See \textit{OKLA. UNIFORM JURY INSTRUCTIONS—CIVIL} § 5.9 (Vernon 2003), WL VRN-OKFORM OUJI-CIV INSTR. 5.9. This instruction provides in relevant part:
incorporate a statutory cap on punitive awards into their model instructions. The Connecticut instruction, consistent with state law, limits the amount of punitive damages to the plaintiff’s cost of trial. The instructions in Kansas reflect that state’s practice of permitting only the court to determine the amount of a punitive damages award.

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

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

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

In no event should the punitive damages exceed the greater of: (Select One)

- [$100,000.00 or the amount of actual damages you have previously awarded]
- [500,000.00, or twice the amount of actual damages you have previously awarded, or the increased financial benefit derived by the defendant as a direct result of the conduct causing the injury to the plaintiff and other persons or entities].

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

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

See generally Distinctive Printing & Packaging Co. v. Cox, 443 N.W.2d 566, 574 (Neb. 1989) (stating that punitive damages are prohibited by state constitution).

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

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

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

... . . .

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

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

The Eighth Circuit's model instruction for civil rights claims provides equally minimal guidance. The Eighth Circuit’s model instructions committee noted that it “believes that this punitive damages instruction meets the requirements of Haslip.” The Fifth and Eleventh Circuits, on the other hand, use Haslip-plus-wealth instructions.

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

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

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

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

Id. (internal notes omitted).

451 Id. § 4.53 cmt.
Finally, the Ninth Circuit takes the multifactor approach, which includes the Haslip-minimum, as well as an instruction to consider the relationship of the punitive damages to the plaintiff's harm:

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.\textsuperscript{454}

\section{B. Due Process Challenges to Jury Instructions}

\subsection{1. Blind Adherence to the Haslip-minimum}

Not surprisingly, given the Haslip procedural due process regime, most challenges to the constitutional sufficiency of punitive damages instructions have failed. After Haslip, most courts bypassed whether a challenged instruction provided meaningful guidance to the jury and instead merely analyzed whether the instruction contained the three minimal factors approved in Haslip. Hence, both federal\textsuperscript{455} and

\begin{itemize}
\item See \textsc{Fifth Circuit Pattern Jury Instructions (Civil Cases)} § 15.13 (West 1999). This instruction provides in relevant part:

\begin{quote}
In making any award of punitive damages, you should consider that the purpose of punitive damages is to punish a defendant for shocking conduct, and to deter the defendant and others from engaging in similar conduct in the future. The law does not require you to award punitive damages, however, if you decide to award punitive damages, you must use sound reason in setting the amount of the damages. The amount of an award of punitive damages must not reflect bias, prejudice, or sympathy toward any party. However, the amount can be as large as you believe necessary to fulfill the purposes of punitive damages. You may consider the financial resources of the defendant in fixing the amount of punitive damages . . . .
\end{quote}

\textit{Id.}
\item See \textsc{Eleventh Circuit Pattern Jury Instructions (Civil Cases)} § 2.1 (West 2000). This instruction provides in relevant part:

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

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages . . . .
\end{quote}

\textit{Id.}
\item See \textsc{Ninth Circuit Manual of Model Civil Jury Instructions} § 7.5 (West 2001).
\item See, e.g., Dunn v. Hovic, 1 F.3d 1371, 1380 (3d Cir. 1993) (relying on Haslip); A.R. Braswell v. Conagra, Inc., 986 F.2d 1169, 1176 (11th Cir. 1991) ("The district court's jury instructions are similar to those approved by the Supreme Court in \textit{Haslip}."); Am. Employers Ins. Co. v. S. Seeding Servs., Inc., 931 F.2d 1453, 1458 (11th Cir. 1991) (upholding an instruction that told the jury to consider punishment purpose, but otherwise left the amount to "best judgment and good discretion" because the instruction was "substantially similar to the one in Haslip").
\end{itemize}
state courts repeatedly have upheld vague Haslip-like instructions. The Third Circuit, for example, “acknowledge[d] that the district court could have given the jury more guidance on the issue of punitive damages,” but upheld a vague punitive damages instruction because “it contained all of the elements identified by the Court in Haslip.” Likewise, the Kentucky Supreme Court upheld its former Haslip-like instruction touting the jurisdiction’s “venerated practice” of providing “bare-bones” jury instructions.

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

457 Dunn, 1 F.3d at 1380.

458 Id.


A practice of longstanding in this Court’s jurisprudence, indeed a venerated practice, is the giving of “bare-bones” instructions. The instructions given here were taken from Paltrow’s Kentucky Instructions to Juries and included the language of [the statute governing the assessment of punitive damages]. Moreover, counsel for the [plaintiff] reminded the jury time and again that the purpose of punitive damages was to punish wrongdoing.

We discern no shortcoming in the instructions given that violates the standards set forth in Hanson [v. American National Bank & Trust Co., 865 S.W.2d 302, 310 (Ky. 1993)], which upheld the model instruction as “adequate under Haslip” . . . .

Id. (footnotes omitted). Kentucky, however, recently amended its model punitive damages instruction to add “the BMW criteria.” 2 PALMORE’S KENTUCKY INSTRUCTIONS TO JURIES § 39.15, cmt. (Cum. Supp. 2003). The revision was based in part on the determination that “[i]t would be nonsensical for the jury to fix the amount of punitive damages using criteria substantially different than those used by appellate courts in determining de novo whether the award was ‘grossly excessive.’” Id.
Courts also have upheld multifactor instructions because they meet the Haslip-minimum. In some cases, the courts simply assumed that providing factors in addition to the Haslip-minimum—regardless of the content of those factors—affords defendants greater constitutional protection.

2. Looking Beyond the Haslip-minimum

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

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460 See, e.g., Hilao v. Estate of Marcos, 103 F.3d 767, 781 (9th Cir. 1996) (“The district court’s instructions here provided the same information to the jury [as the Haslip instructions].”); Cont’l Trend Res., Inc. v. Oxy USA Inc., 44 F.3d 1465, 1475 (10th Cir. 1995) (finding instructions that advised the jury of the purpose of punitive damages, the discretionary nature of punitive damages, and that the award must bear relationship to the injury (but not necessarily actual damages) “were similar to those approved in Haslip” and constitutional); Morgan v. Woessner, 997 F.2d 1244, 1256 n.13 (9th Cir. 1999) (approving a multifactor instruction under Haslip); Robertson Oil Co. v. Phillips Petroleum Co., 930 F.2d 1342, 1347 (8th Cir. 1991) (holding the issue was waived but concluding the Arkansas model jury instruction “was comparable to that approved in Haslip”); Guzman v. Tower Dev., Inc., Civ. No. 93-00005A, 1994 WL 549860, at *4 (D. Guam App. Div. Oct. 3, 1994) (“The court finds that in comparison with the instructions upheld by the Supreme Court in Haslip and [TXO] . . . the instructions given in this case were constitutionally adequate.”); Viking Ins. Co. v. Jester, 856 S.W.2d 371, 379 (Ark. 1992) (“Both [the proposed instruction and the instruction given] identify the damages as punishment for civil wrongdoing, and both provide that it was within the discretion of the jury to award such damages. Under the Haslip examination, there is no material difference between the instruction given and the proposed instruction.” (citation omitted)); McClure v. Walgreen Co., 613 N.W.2d 225, 233 (Iowa 2000) (holding that the defendant “has demonstrated no violation of the Haslip holding and therefore has demonstrated no constitutional or legal error”); Aken v. Plains Elec. Generation & Transmission Coop., Inc., 49 P.3d 662, 667 (N.M. 2002) (“The jury instructions employed in the instant case meet the standard of Haslip.”); Suffolk Sports Ctr., Inc. v. Bell Constr. Corp., 664 N.Y.S.2d 724, 725 (N.Y. App. Div. 1997) (noting that instruction “properly instructed [the jury] on the assessment of punitive damages” under Haslip); Rodebush v. Okla. Nursing Homes, Ltd., 867 P.2d 1241, 1251 (Okla. 1993) (comparing instructions to those given in Haslip and concluding that “the instructions clearly did not leave the jury unbridled to award punitive damages without guidance”); Heideman v. Am. Family Ins. Group, 473 N.W.2d 14, 25 (Wis. Ct. App. 1991) (upholding an instruction as similar to the Haslip charge); see also Marlen C. Robb & Son Boatyard & Marina, Inc. v. The Vessel Bristol, 898 F. Supp. 526, 544 & n.13 (E.D.N.C. 1994) (implicitly finding pattern instruction consistent with Haslip).

461 Hilgedick v. Koehring Fin. Corp., 8 Cal. Rptr. 2d 76, 89 (Cal. Ct. App. 1992) (finding that California’s multifactor instruction provided “greater constraints on the jury’s discretion than the instructions in Haslip and, in so doing, did more to ensure due process in the initial instance”); accord Boyle v. Lorimar Prods. Inc., 13 F.3d 1357, 1360 (9th Cir. 1994) (“[BAJI 14.71 go[es] somewhat beyond the Alabama instructions approved in Haslip by explicitly (rather than implicitly) directing the jury to fashion an award bearing a relationship to the actual harm and to consider the defendant’s financial condition in determining whether the award is sufficient to punish and deter.”); see also Las Palmas Assocs. v. Las Palmas Ctr. Assocs., 1 Cal. Rptr. 2d 301, 323 (Cal. Ct. App. 1991) (“We think these instructions offer the same degree of protection against arbitrary jury decisions as found constitutionally acceptable in Haslip.”).
that post-verdict review of punitive awards under factors not provided to juries might run afoul of the Seventh Amendment. Others took a more practical approach, anticipating future instructional mandates by the Supreme Court. And still others found more instructional guidance necessary to avoid punitive awards based on improper considerations. None of these decisions directly confronted Haslip.

a. Respect for the Jury

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

At the time of trial, neither state nor federal procedures afforded searching post-verdict review. While the Mattison appeal was pending, however, the South Carolina Supreme Court revised the state’s
post-verdict standards in light of *Haslip*.\footnote{Id.} In *Gamble v. Stevenson*,\footnote{406 S.E.2d 350 (S.C. 1991).} the court adopted several factors for state post-verdict review based on the Alabama *Green Oil* factors discussed in *Haslip*.\footnote{See Mattison, 947 F.2d at 106-07 (discussing *Gamble* and its effects on South Carolina punitive damages law).}

The *Mattison* court concluded that in light of this change, "it would appear that state courts in South Carolina will hereafter operate under the same process held constitutional in *Haslip*."\footnote{Id.} Still, the Fourth Circuit held that in federal diversity actions, *Gamble*’s new state law post-verdict standards did not cure the constitutional deficiencies created by vague jury instructions.\footnote{Id. at 109.} Specifically, the court determined that federal district courts could not apply *Gamble* as part of any post-verdict review.\footnote{Id.} Rather, the court reasoned that post-verdict review in diversity actions would be governed by the Federal Rules of Civil Procedure, which provided a more lenient standard than *Gamble*.\footnote{Id. at 99.} Accordingly, to reconcile the special problems raised by diversity actions,\footnote{Charles Jared Knight, *State-Law Punitive Damage Schemes and the Seventh Amendment Right to Jury Trial in the Federal Courts*, 14 REV. LITIGATION 657, 691 (1995).} the *Mattison* court required district courts to

\footnote{Mattison, 947 F.2d at 108 ("A *Haslip*-type post-trial review, insofar as it is a quasi de novo review by which the court reviews facts, some of which may not have been presented to the jury, would be inconsistent with the restrictions of the Seventh Amendment.").}
include jury instructions on four factors derived from *Gamble* and *Haslip*. 479

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

The legal foundation of *Mattison* and *Geressy* has since been called into question by the Supreme Court's decision in Cooper Industries, provided more detailed instructions than are used in Virginia state courts). But that case later was deemed inapplicable to state court actions. See Markowitz v. Re/Max Preferred Props., No. 148782, 1997 WL 1070600, at *4-5 (Va. Cir. Ct. May 21, 1997) (distinguishing *Johnson* and finding Virginia's model instruction sufficient under *Haslip* for state court actions).

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


481 *Id.* at 521.

482 *Id.*

483 *Id.* Accordingly, the court approved a modification of the New York model instruction to incorporate the first two *BMW* guideposts:

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

*Id.* "This language adequately expresses the law as set out in *BMW* without requiring the jury to make complex determinations and calculations involving civil and criminal law." *Id.* Additionally, the *Geressy* court concluded that an out-of-state conduct instruction was required in light of *BMW*'s concerns regarding state sovereignty. *Id.* at 521-22. Accordingly, the district court in *Geressy* instructed the jury that it was "not authorized to impose punitive damages to protect people outside of the State of New York." *Id.* at 522.
which held that punitive awards are not factual determinations implicating the Seventh Amendment. The decisions, however, reflect still-valid concerns over allowing post-verdict excessiveness review of factors never considered by the jury in the first instance.

b. The Spirit of Haslip Requires More

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

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

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

485 See infra text accompanying notes 624-29.

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


488 Id. at 907.

489 Id. at 908.

490 Cf. id. at 900 n.1 (setting forth jury instruction). The court required these factors because "[d]ue process demands not only that penalties be abstractly fair, but also that a person not be penalized without reasonable warning of the consequences of his acts." Id. at 909.
the courts during post-verdict review.\textsuperscript{491} The court reasoned that juries lack the information necessary to apply these considerations or might be prejudiced if required to consider them.\textsuperscript{492}

c. \textit{The Spirit of BMW Requires More}

After BMW, several courts addressed whether jury instructions should incorporate the guideposts or other substantive due process limits on punitive damages. Most cases implicitly\textsuperscript{493} or explicitly\textsuperscript{494} determined that BMW addressed only post-verdict review, and did not affect instructional requirements. But just as \textit{Games} required more detailed instructions to comport with the spirit of Haslip, a few cases interpreted BMW in a similar way. In \textit{Farmers Insurance Exchange v. Shirley},\textsuperscript{495} the Wyoming Supreme Court recognized that "in BMW the court articulated a majority opinion that permitted Justice O'Connor to shift from her previous dissenting positions and join in the majority opinion."\textsuperscript{496} Presumably referring to Justice O'Connor's prior arguments for more detailed jury instructions, the court viewed BMW as a signal for "a future requirement that for due process to be present those objective [BMW] standards should be given to the jury in the form of instructions."\textsuperscript{497} Even though the jury instructions at issue satisfied state law, the court concluded that the Green Oil factors that influenced Haslip and BMW\textsuperscript{98} should be provided to Wyoming juries. The court reasoned that providing the instructions would avoid the

\textsuperscript{491} Id.
\textsuperscript{492} Id.
\textsuperscript{493} See, e.g., Hilao v. Estate of Marcos, 103 F.3d 767, 780-81 (9th Cir. 1996) (implicitly suggesting that BMW addresses only post-verdict review).
\textsuperscript{494} In \textit{Brokerage Concepts, Inc. v. United States Healthcare, Inc.}, the court noted:
The Court, however, agrees with plaintiff that [BMW] does not suggest that a proportionality charge must be submitted to the jury, but rather that a federal court must review punitive damage amounts with due process considerations in mind. No authority cited by defendants requires this Court to charge the jury on due process considerations governing proportionality.
No. CIV.A. 95-1698, 1999 WL 200668, at *6 (E.D. Pa. Apr. 8, 1999); see also \textit{In re New Orleans Train Car Leakage Fire Litig.}, 795 So. 2d 364, 380 (La. Ct. App. 2001) ("None of these three cases [Haslip, TXO, and BMW] holds that the 'reasonable relationship' factor must be considered by the jury.").
\textsuperscript{495} 958 P.2d 1040 (Wyo. 1998).
\textsuperscript{496} Id. at 1043.
\textsuperscript{497} Id. at 1043-44. The court went on: "BMW demands that we articulate objective standards for the imposition of punitive damages that can be communicated to the jury in the form of instructions and against which the imposition of the punitive award can be weighed in the process of judicial review." Id. at 1045.
\textsuperscript{498} In discussing the Supreme Court's punitive damages jurisprudence, the court noted that in adopting the "guideposts" the BMW Court had "alluded to the application by the Supreme Court of Alabama of the factors articulated in Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 ( Ala. 1989), which had been approved by the Supreme Court of the United States in Haslip." Shirley, 958 P.2d at 1044.
risk of future reversals and possible interference with the right to a jury trial. The Shirley court acknowledged that the U.S. Supreme Court did not expressly require these factors to be provided to the jury, but concluded “that the only sensible approach is to tell the arbiter of punitive damages what the rules are. Consequently such instructions should be given.” The dissent disagreed that due process requires more detailed instructions, arguing that “the discussions in both Haslip and the BMW concurrence speak of objective factors being used by the court in the course of reviewing a jury verdict as a means of imposing a meaningful constraint on the jury’s decision, not as being included in instructions to the jury.”

d. Legitimate State Interests

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

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

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

501 Id. at 1053. Other courts also have recognized the practical benefits of more detailed instructions. See In re Exxon Valdeze, No. A89-0095-CV, 2004 WL 170554, at *15 (D. Alaska Jan. 28, 2004) (recognizing benefit of jury and court working from the same “script” for assessing punitive damages). In Exxon, a tort action stemming from the infamous Alaskan oil spill, the district court concluded that courts should instruct juries on the constitutional standards for imposing punitive damages: “[I]t strikes the court as important to know and be mindful in understanding the second phase of the constitutional analysis (the guideposts) that the trial jury in this case was working with the very same concepts embodied within the BMWguideposts . . . Without proper instructions, jury verdicts are patently suspect.” Id. at *14-15. The court stated that it was important to note that the award in that case was “not a situation where the jury awarded $5 billion in punitive damages based upon one script, with this court second-guessing the jury’s work using a different script.” Id. at *15; see also Kunewa v. Joshua, 924 P.2d 559, 568-71 (Haw. Ct. App. 1996) (analyzing concurring and dissenting views in Haslip and Browning-Ferris in support of permitting the jury to be instructed that it could consider amount of attorneys’ fees in assessing the award).

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

503 312 F.3d 998 (9th Cir. 2002), amended on denial of reh’g, 335 F.3d 833 (9th Cir. 2003).
Ford’s alleged misconduct in other states.\footnote{Id. at 1015.} Ford, in turn, requested an instruction that “would have barred the jury from punishing Ford for impact other than on Nevadans.” \footnote{Id. at 1013.} The district court refused, relying instead on Nevada’s model instruction on punitive damages. \footnote{See id. (refusing to punish Ford for impact on out-of-state residents based on federalism and state sovereignty concerns expressed in BMW).} The Ninth Circuit reversed. \footnote{Id. at 1020.} The Court of Appeals reasoned that BMW not only set forth guidelines for the size of the award (the guideposts), but also established that courts should consider whether a state has a legitimate interest in punishing or deterring the conduct upon which the award was based. \footnote{Id. at 1013 & n.56.} The court explained that since states have no interest in punishing out-of-state conduct, \footnote{Id. at 1017-18.} the jury should have been instructed that it could not use its award to punish conduct that occurred in other states. \footnote{Id. at 1016 & n.69.} Finding that no amount of post-verdict remittitur could cure an award tainted by improper considerations, \footnote{Id. at 1016.} the Ninth Circuit remanded for a new trial, concluding that “[a] punitive damages award that encompasses a defendant’s extraterritorial conduct may be unconstitutional even if the size of the award itself, as compared to the compensatory damages, is not outside the bounds of due process.” \footnote{Id. at 1025.}

The dissent in \textit{White} argued that because the instruction at issue adhered to the \textit{Haslip}-minimum, \footnote{Id. at 1025-26 (Graber, J., concurring in part and dissenting in part). Judge Graber explained: \begin{quote}Read together, \textit{Haslip} and \textit{Honda} [\textit{Motor Co. v. Oberg}] teach that, while due process imposes some requirements on how a jury must be instructed on punitive damages, those requirements are minimal and general. Instead, it is the availability of post-verdict review of punitive damages awards that provides the most substantial procedural check on punitive damages. \end{quote} Id. at 1025.} it satisfied procedural due process. \footnote{Id. at 1026 (“Nevada instructions meet the standards articulated in \textit{Haslip}; they informed the jury that punitive damages were discretionary, that their purpose is to punish and to set an example, and that the amount must bear some relation to the blameworthiness of the defendant’s conduct.”).} The dissent also took issue with the majority’s claim that an award based on impermissible considerations could not be remedied by a post-verdict reduction. \footnote{Id. at 1028-29.} Specifically, the dissent noted that BMW expressly allowed courts to remedy the jury’s improper
consideration of out-of-state conduct by post-verdict review.\textsuperscript{516} Accordingly, the dissent believed that the jury's reliance on Ford's extraterritorial conduct could be remedied by post-verdict review and that a jury instruction was not required.\textsuperscript{517}

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

III. \textit{STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. v. CAMPBELL}

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

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

\textsuperscript{516} Id. at 1028.

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

\textsuperscript{518} 123 S. Ct. 1513 (2003).

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

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

520 State Farm, 123 S. Ct. at 1524.

522 State Farm, 123 S. Ct. at 1522-23; see also supra text accompanying notes 373-75 (discussing expansive interpretations of the ratio guidepost).
523 State Farm, 123 S. Ct. at 1524 ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.").
524 Id. at 1521-23.
plaintiff. Contrary to the common practice of looking to the “total harm” of a defendant’s conduct in determining the appropriate amount of punitive damages, the Court determined that punitive damages should be awarded only to vindicate the rights of the plaintiff, not nonparties who also may have been injured by the defendant’s conduct.

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

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

Finally, and most notable for this Article, the Court dedicated an entire section of the opinion to voice its increased “concerns over the imprecise manner in which punitive damages systems are administered.” The Court acted on this concern by requiring that juries be instructed on one of the substantive due process limits on punitive awards discussed in BMW: “A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” The Court thus connected its procedural due process holdings with its substantive due process refinement of the guideposts.

A. The Facts

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

525 Id. at 1528.
526 See Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 801 (Cal. Ct. App. 2003) (“[T]he court in State Farm went beyond the ‘guideposts’ . . . and articulated a constitutional due process limitation on both the goal and the measure of punitive damages. Further, the result is a punitive damages analysis that focuses primarily on what defendant did to the present plaintiff . . . .”).
527 State Farm, 123 S. Ct. at 1526 (“The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility.”); accord Romo, 6 Cal. Rptr. 3d at 804 (recognizing that State Farm “fundamentally altered” the third guidepost).
528 State Farm, 123 S. Ct. at 1525.
529 Id.
530 Id. at 1520.
531 Id. at 1522-23.
caused by Campbell. While driving on a two-lane highway, Campbell passed six vans and began driving on the wrong side of the road. To avoid a collision with Campbell, an oncoming car swerved and collided with another vehicle. Campbell was not injured in the incident, but one motorist was killed and another injured. The victims brought a wrongful death action against Campbell, who was insured for $50,000 by State Farm. Despite evidence that the accident was caused entirely by Campbell's unsafe driving, State Farm contested liability. State Farm assured Campbell that he had nothing to worry about by going to trial and that his assets were safe. State Farm was wrong. The jury returned a verdict in favor of the plaintiffs, and awarded compensatory damages of $185,849, more than $135,000 over Campbell's policy limit.

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

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

532 Id. at 1517-18.
535 Id. at 1517.
534 Id. at 1517-18.
538 Id. at 1518.
539 Id. (quoting State Farm Mut. Auto. Ins. Co. v. Campbell, 65 P.3d 1134, 1142 (Utah 2001)).
537 Id.
536 Id.
539 Id. at 1519.
540 Id.
Supreme Court reinstated the $145 million punitive damages award based on State Farm's "massive wealth" and nationwide practices.  

B. The Majority Opinion  

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

1. Punitive Damages Procedures  

The Court dedicated the first section of its analysis to expressing concerns about punitive damages procedures. As a threshold matter, the Court reaffirmed that "it is well established that there are procedural and substantive constitutional limitations on these awards." In light of due process and the quasi-criminal nature of punitive damages, the Court expressed increasing "concerns over the imprecise manner in which punitive damages systems are administered." Quoting Honda Motor Co. v. Oberg, the Court noted that jury instructions typically provide only vague guidance to the jury, and the evidence often submitted in support of punitive claims, such as the defendant's wealth, increases the risk of biased decision making. "Vague instructions . . . do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." The Court explained that these concerns about punitive damages procedures prompted its holdings in both BMW and Cooper Industries,
mandating heightened post-verdict protections. "Exacting appellate review ensures that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice." The Court then reviewed the case in light of the guideposts.

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

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

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

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

*Id.* (citation omitted).

*Id.*

*Id.* at 1520-21 (quoting Cooper Indus., Inc. v. Leatherman Tool Group, 552 U.S. 424, 436 (2001) (Breyer, J., concurring)).

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

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

*State Farm*, 123 S. Ct. at 1521.

*Id.*

*Id.*

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

*See* White v. Ford Motor Co., 312 F.3d 998, 1013-14 (9th Cir. 2002) (recognizing the lawful versus unlawful conduct issue left open in *BMW* and finding that a state has no legitimate interest in punishing either), amended on denial of reh’g, 335 F.3d 833 (9th Cir. 2003).
generally has no legitimate interest in punishing a defendant for out-of-state conduct that is unlawful where it occurred. To avoid the misuse of out-of-state conduct evidence, "[a] jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." More broadly, the Court explained that the states have no interest in punishing a defendant for harm to nonparties: "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . ." Doing so, the Court reasoned, unfairly subjects a defendant to the risk of multiple punishments for the same wrongdoing.

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

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560 Id. at 1522-23.
561 Id. at 1523.
562 See id. ("Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.").
563 Id. at 1522. The Court noted that evidence of prior misconduct remains relevant under the five-factor reprehensibility scale to assessing the defendant's deliberateness and culpability, as well as to whether the misconduct was an isolated incident or repeated behavior. Id.
564 Id.
565 Id. at 1523. The Court stated that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." Id. But, at the same time, "evidence of other acts need not be identical to have relevance in the calculation of punitive damages." Id. Some practitioners have criticized this standard as "so vague as to be virtually no standard at all." Cabraser & Nast, supra note 519, at 7.
566 State Farm, 123 S. Ct. at 1523.
567 Id. at 1523-24.
Having established no evidence of similar misconduct by State Farm, the Court concluded that the only conduct pertinent to the reprehensibility analysis was the conduct that harmed the Campbells.

3. The Ratio Guidepost

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

\(^{568}\) Id. at 1524.

\(^{569}\) Id.

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

\(^{571}\) State Farm, 123 S. Ct. at 1524.

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

\(^{573}\) State Farm, 123 S. Ct. at 1524.

\(^{574}\) Id.

\(^{575}\) Id. at 1525.

\(^{576}\) Id.
no doubt that there is a presumption against an award that has a 145-to-1 ratio.\textsuperscript{577}

4. The Comparable Penalties Guidepost

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

5. Defendant's Wealth

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

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

\textsuperscript{577} Id. at 1524.

\textsuperscript{578} See id. at 1526 ("The third guidepost in Gore is the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases.'" (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996))).

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

\textsuperscript{580} See State Farm, 123 S. Ct. at 1526. The Court explained:

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

\textsuperscript{581} Id. at 1525.

\textsuperscript{582} Id.

\textsuperscript{583} Id.
of compensatory damages,\textsuperscript{584} and remanded the case to the Utah courts for further proceedings.

\textbf{C. Justice Scalia's and Justice Thomas's Separate Dissents}

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

\textbf{D. Justice Ginsburg's Dissent}

Justice Ginsburg also dissented, adhering to her view in \textit{BMW} that punitive damages issues should be left to the states.\textsuperscript{586} She expressed concern that the majority had converted the flexible \textit{BMW} guideposts into "marching orders."\textsuperscript{587} Mostly, however, she criticized the majority's evaluation of State Farm's reprehensibility, concluding that the record contained ample evidence\textsuperscript{588} that State Farm's "egregious and malicious" policies were responsible for the plaintiff's harm, as well as harm to many other Utah consumers.\textsuperscript{589} In her view, the majority simply substituted its view of State Farm's conduct for that of the Utah jury and courts.\textsuperscript{590} Reiterating her position in \textit{BMW} that "this Court has no warrant to reform state law governing awards of punitive damages," she concluded that the $145 million punitive award should stand.\textsuperscript{591}

\textbf{IV. \textit{STATE FARM} AND JURY INSTRUCTIONS: REASSESSING THE REQUIREMENTS OF DUE PROCESS}

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

\textsuperscript{584} Id. at 1526.
\textsuperscript{585} Id. (Scalia, J., dissenting); id. (Thomas, J., dissenting). Only the Scalia dissent mentions stare decisis.
\textsuperscript{586} Id. at 1527 (Ginsburg, J., dissenting).
\textsuperscript{587} Id. at 1531.
\textsuperscript{588} Id.
\textsuperscript{589} Id. at 1530-31.
\textsuperscript{590} See id. at 1527 ("Neither the amount of the award nor the trial record, however, justifies this Court's substitution of its judgment for that of Utah's competent decisionmakers.").
\textsuperscript{591} Id. at 1531.
\textsuperscript{592} See id. at 1522-23 (discussing the Court's concern with the jury's use of factors such as out-of-state conduct in determining awards).
punitive damages instruction must be given to the jury.\textsuperscript{593} The Court's requirement of an out-of-state conduct instruction represents a significant departure from \textit{Haslip}. If nothing else, this change should prompt courts to abandon the pre-\textit{State Farm} practice of rejecting instructional challenges with little more than a dismissive "this is no worse than \textit{Haslip}."\textsuperscript{594} But more important than rejecting a rogue adherence to the \textit{Haslip}-minimum, \textit{State Farm}'s instructional mandate and concern about punitive damages procedures suggest that it is time to revisit the concepts of "adequate guidance" and "reasonableness" in a post-\textit{Haslip} world. All told, after \textit{State Farm} there is no sound reason to instruct juries on only one substantive due process protection and not others.

\textbf{A. State Farm Rejected Haslip's Principal Justification for the Use of Vague Jury Instructions}

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

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

\textsuperscript{593} Id.
\textsuperscript{594} Cf. \textit{TXO Prod. Corp. v. Alliance Res. Corp.}, 509 U.S. 443, 472 (1993) (Scalia, J., concurring) (finding the court's lack of guidance and approval of a large punitive award would permit future cases to "be disposed of simply with the observation that 'this is no worse than \textit{TXO}'").
\textsuperscript{595} See discussion \textit{supra} notes 78-81 and accompanying text.
\textsuperscript{596} See \textit{supra} notes 170-71, 263-66 and accompanying text (discussing consideration of such factors as bias, passion or prejudice, state interests, and out-of-state conduct).
\textsuperscript{597} See \textit{Minneapolis, St. P. & S.S.M. Ry. v. Moquin}, 283 U.S. 520, 521 (1931) (remititur cannot remedy verdict under federal statute that was the result of passion and prejudice). To be sure, courts occasionally have remitted awards because of "passion or prejudice." But in these instances, the passion or prejudice inquiry was usually just a legal fiction to challenge awards suspect in size alone. See \textit{Honda Motor Co. v. Oberg}, 512 U.S. 415, 425 & n.4 (1994) (discussing early history of punitive damages review and noting that "because of the difficulty of probing juror reasoning, passion and prejudice review was, in fact, review of the amount of awards. Judges would infer passion, prejudice, or partiality from the size of the award.").
improper considerations—such as punishing the defendant for out-of-state conduct committed against individuals not parties to the case—post-verdict remittitur can do nothing to cure the award's improper foundation. In other words, an award based on unconstitutional considerations is still improper even if reduced to one dollar.

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

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

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

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

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

599 *White*, 312 F.3d at 1019-20.

600 Id. at 1016 (emphasis added).

601 Id. at 1020. Although not cited in *State Farm*, the *White* decision was the subject of supplemental briefs and also was discussed during oral argument. See Supplemental Brief for Petitioner, State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003) (No. 01-1289); Transcript of Oral Argument at 49-52 (Dec. 11, 2002), *State Farm* (No. 01-1289), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/01-1289.pdf.
matter how small the amount, is constitutionally infirm." Put another way, post-verdict review of the size of an award addresses a different error; it cannot remedy the independent problem of trial procedures that foster improper decision making. In analogous contexts, the Supreme Court has acknowledged as much. In *Ward v. Village of Monroeville*, the Supreme Court addressed the constitutionality of a system that permitted a village mayor to act as the judge in adjudicating traffic offenses. The Court considered whether the system deprived the defendant of his due process right to a trial before an impartial decision maker. The defendant argued that because the mayor was responsible for revenue generating for the village, the mayor could not impose fines in an impartial manner. The village countered that any due process violation at the trial level could be corrected by an appeal or a trial de novo in the county state court. The Supreme Court concluded that the defendant was entitled to fair procedures in the first instance:

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

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

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603 409 U.S. 57 (1972).
604 Id. at 57-58.
605 Id. at 58.
606 Id. at 61.
607 Id. at 61-62. *Ward* was decided before *Haslip*, but is conspicuously absent from the decision. See Melsheimer & Stodghill, *supra* note 387, at 339 (discussing *Ward*). *Ward* can be read to conflict with *Haslip* 's position that vague instructions can be cured through post-verdict review. On the other hand, unlike the common law punitive damages system in *Haslip*, the mayor's court system in *Ward* was inherently biased in that the risk of improper influences over the process existed in every case. In any event, *Ward* has current relevance given the post-*Haslip* recognition of substantive due process limits on punitive damages, the focus on whether an award is based on improper considerations, and the Court's heightened concern of quasi-criminal punitive sanctions being awarded without comparable criminal procedural protections.
B. State Farm's Convergence of Substantive and Procedural Due Process Requires that Juries Receive More Guidance

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

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

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

608 See supra notes 93-95, 139-44 and accompanying text.
609 See supra notes 89-91 and accompanying text.
610 See BMW of N. Am. v. Gore, 517 U.S. 559, 574 (1996) (stating that a person should receive "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose").
611 See supra notes 93-95 and accompanying text.
In *State Farm*, the Court took the logical, if not inevitable, step of recognizing that the factors relevant to assessing reasonableness for post-verdict substantive due process review guide the concept of reasonableness for procedural due process. By mandating an out-of-state conduct instruction, the Court recognized that a defendant's substantive due process right to a nonexcessive/nonarbitrary award requires better constraints on the jury's discretion. That one step both countermanded the lower courts' standard practice of simply upholding instructions as adequate so long as they included the *Haslip*-minimum, and also addressed a post-*BMW* argument that additional instructions are not required because the guideposts and other limitations concerned only post-verdict review.613

C. Protecting Substantive Due Process Rights Requires Heightened Procedural Protections

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

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613 See cases cited supra notes 455-56, 460-61, 493-94.
614 See supra notes 341-49 and accompanying text. Thus, *Haslip*'s reliance on the state law post-verdict *Green Oil* factors as a sufficient check on the jury's discretion never addressed the fact that as a matter of substantive due process a jury's discretion is constrained. In other words, the process may have provided adequate procedural protections when considering the award in light of state substantive law, but that never addressed whether it adequately protected constitutional rights.
617 *Id.*
prompted its creation of post-verdict protections, including the “guideposts” and de novo appellate review. The same reasoning warrants heightened pre-verdict procedural protections. For instance, the Supreme Court repeatedly has recognized that in capital cases—one of the “analogous” contexts Cooper Industries used to support the de novo appellate standard of review—the jury must be provided information that will permit it to make a rational punishment determination. Specifically, courts must instruct juries about a defendant’s ineligibility for parole where the state urges the jury to impose the death penalty based on the defendant’s “future dangerousness.” The Court has reasoned that “[t]he trial court’s refusal to apprise the jury of information so crucial to its sentencing determination...cannot be reconciled with our well-established precedents interpreting the Due Process Clause.”

The same could be said for punitive damages cases. Similarly, “it is a familiar principle that, when evidence is admitted for one purpose, but would violate the Constitution for the jury to consider it for a different purpose, the court should instruct the jury not to consider the evidence for the impermissible purpose.” That risk is ever-present in punitive damages cases where evidence of a defendant’s prior similar misconduct may be admissible to establish the scope and “reprehensibility” of the defendant’s conduct, but could also be misused by the jury to punish the defendant for harm to nonparties who were injured by that conduct. Indeed, in State Farm, the Court recognized that “lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant’s action in the State where it was tortious,” but the “jury must be instructed... that it may not use evidence of out-of-state conduct to punish a defendant.”

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618 Id.
619 See, e.g., Kelly v. South Carolina, 554 U.S. 246 (2002); Shafer v. South Carolina, 532 U.S. 36 (2001); Simmons v. South Carolina, 512 U.S. 154 (1994). Each of these cases held that due process requires that the sentencing juries in capital cases be informed that the defendant is parole ineligible where the state relies on future dangerousness in support of the death penalty.
620 Simmons, 512 U.S. at 164.
621 Outside the death penalty context, the Court similarly has recognized that juries must be instructed on constitutional safeguards. See Taylor v. Kentucky, 436 U.S. 478 (1978) (mandating jury instruction in criminal cases regarding presumption of innocence); see also Brief of Ford Motor Company as Amicus Curiae in Support of Petitioner at 19-27, State Farm, 123 S. Ct. 1513 (2003) (No. 01-1289) (arguing that Taylor and other cases require jury instructions concerning the constitutional limits on punitive damages).
622 Colby, supra note 374, at 676 (citing criminal instructional cases).
623 State Farm, 123 S. Ct. at 1522.
D. Requiring Jury Instructions on the Constitutional Limits on Punitive Damages Under State Farm Respects the Role of the Jury

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

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

E. Some Counterarguments

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

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

624 See supra text accompanying notes 341-49.
625 See supra text accompanying notes 350-51.
626 See discussion supra note 459.
627 See supra discussion accompanying notes 477-89.
dissimilar out-of-state conduct, not a general argument that better instructions were required by due process. The Court repeatedly has declined to address punitive issues not squarely or properly before it. Accordingly, it is no surprise that the Court’s opinion went only as far as it did.

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

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

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

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


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


633 See supra text accompanying notes 353-54.

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

635 The Court itself has recognized that twenty-first century punitive damages are not the same creature that they were at common law. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437 n.11 (2001) (“Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries . . . .”).
not even consider for a moment the fact that the common law did not require an instruction on the permissible use of evidence of a defendant's out-of-state conduct.

In sum, after State Farm, all signs point to the need to reassess procedural due process and to require jury instructions that inform the jury of the standards that should guide and limit their awards. Courts and litigants that fail to take notice do so at their peril.656

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

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

However, you must not use out-of-state evidence to award plaintiff punitive damages against the defendant for conduct that occurred outside California. CAL. CIVIL JURY INSTRUCTIONS (BAJI) § 14.71.1 (2004), WL CA BAJI 14.71.1. The new reprehensibility instruction provides:

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

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

Id. § 14.71.2, WL CA BAJI 14.71.2. As discussed infra Part V, while the New York and California revisions should have gone much further, they are a step in the right direction.
V. WHAT GUIDANCE SHOULD BE PROVIDED TO THE JURY AFTER STATE FARM

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

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

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637 Recently, the California Court of Appeal has determined that the California model instruction is improper after _State Farm_. _See_ Romo, 6 Cal. Rptr. 3d at 805. The model instruction used at trial directed the jury to consider the defendant’s “financial condition” in setting the amount of the award. _Id._ The court concluded that this instruction improperly permitted the jury to base the award on harm to nonparties. _Id._ at 805 n.7. Another district of the same court—based on another aspect of _State Farm_—concluded that the consideration of a defendant’s financial condition is constitutionally suspect after _State Farm_. _See_ Henley v. Philip Morris Inc., 9 Cal. Rptr. 3d 29, 74 (Cal. Ct. App. 2004) (“Defendant correctly notes that the constitutional soundness of the third consideration has been rendered uncertain by [State Farm’s] seemingly categorical rejection of the Utah Supreme Court’s reliance on the defendant’s ‘massive wealth’ as one justification for the award there.” (citation omitted)). Other courts, however, have not addressed potential inconsistencies between the constitutional standards and state factors. A few courts, for instance, have recognized that the _BMW/State Farm_ constitutional factors must be addressed during post-verdict review. But these courts simply have adopted a combined test incorporating both state and federal considerations without addressing whether the state factors, such as considering a defendant’s wealth, may conflict with constitutional limits. _See_ Roth, 667 N.W.2d at 666 (incorporating state’s “five-factor test” with the guideposts “outlined by the Supreme Court”); _see also_ Trinity Evangelical Lutheran Church & Sch.-Freistadt v. Tower Ins. Co., 661 N.W.2d 789, 800 (Wis. 2003) (equating the Wisconsin court’s test, including defendant’s wealth, to be “virtually identical” to Supreme Court’s constitutional test).
may affirmatively misguide the jury and heighten the risk of arbitrary or improper punitive damages awards.\footnote{The issue of "extra" instructions was raised in \textit{TXO}, where the petitioner argued that West Virginia's instructions directing the jury to consider a defendant's wealth violated due process by leading the jury to focus on improper factors. \textit{See Brief of Petitioner at 35, TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993) (No. 92-479)} ("'Due process may not require a detailed roadmap, but it certainly requires directions of some sort.' \textit{Haslip}, 111 S. Ct. at 1059 (O'Connor, J. dissenting). It should be common ground that the jury ought not be given a roadmap to the wrong destination, which is the 'defendant'... deep pocket.' \textit{Id.} at 1045.").}

With all this in mind, the following is an overview of the information we believe, at minimum, should be given to juries to guide their assessment of the amount of punitive damages. While the precise language of such instructions is beyond the scope of this Article,\footnote{No formal drafting committee, such as the group that drafted the MPDA, has yet been created to devise punitive damages instructions that comport with \textit{State Farm}. \textit{See supra} note 387 (discussing MPDA). A well-known punitive damages litigator who argued for the defendants in \textit{BMW, Oberb}, and \textit{Browning-Ferris} has drafted instructions that he believes reflect the principles set forth in \textit{State Farm}. \textit{See Frey, supra} note 8, at 24, 27-28 (proposing jury instructions on punitive damages).} we suggest areas of improvement to the model instructions used in various jurisdictions.

\textbf{A. Factors That Should Be Given to the Jury}

\textit{1. The Haslip-minimum}

As a threshold matter, the \textit{Haslip}-minimum, for what it's worth, still should be provided to the jury: (1) the purpose and nature of punitive damages; (2) the principle that punitive damages constitute punishment for civil wrongdoing; and (3) an explanation that the imposition of punitive damages is not compulsory, but within the jury's discretion.\footnote{Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991).} Most jurisdictions' model instructions include factors comparable to the \textit{Haslip}-minimum.
2. Out-of-state Conduct

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

3. Harm to Nonparties

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

4. Defendant's Wealth

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

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641 See State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1522-23 (2003) (holding that a state does not have a “legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction,” and additionally, that “[a] jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred”).

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

643 See State Farm, 123 S. Ct. at 1523. The Court explained:
   Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis .... Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.
Id. In light of this holding, courts should bar plaintiff’s counsel from the common practice of asking juries to punish defendants for the total harm caused to anyone other than the plaintiff. See Colby, supra note 374, at 675 (discussing procedural protections to avoid unconstitutional punitive damages awards based on harm to nonparties). But even then, courts should instruct the jury of the limited use of evidence of harm to nonparties that may be relevant for other purposes, such as ascertaining the degree of reprehensibility of the defendant’s conduct. Id.

644 See discussion supra Part II.A.1.c.
recognized that evidence of a defendant's wealth may improperly influence the jury. At the same time, the Court has not yet taken the additional step of barring wealth evidence from the jury. While some states preclude wealth evidence, other states permit, or even require, evidence of a defendant's financial condition. In these states, the jury should be instructed that it cannot increase a punitive damages award simply because the defendant is wealthy or a large corporation. To avoid constitutional concerns, juries also should be told that a defendant's wealth should be used only as a limiting factor in setting the amount of an award.

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

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

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645 See supra text accompanying notes 581-83. The Court's concerns about the improper use of wealth evidence are supported by empirical studies.

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

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


647 See, e.g., Adams v. Murakami, 813 P.2d 1348 (Cal. 1991) (holding that evidence of a defendant's financial condition is a prerequisite to an award of punitive damages).

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

649 See discussion supra Part II.

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

651 See sources cited supra notes 437-42.

652 See supra text accompanying notes 355-57.
must relate to in-state activities, the instructions are constitutionally suspect. Finally, basing an award on a defendant's financial condition or profits risks punishing a defendant for harm to nonparties, a practice barred by State Farm.

In short, the wealth and profit instructions in most jurisdictions raise serious constitutional concerns and should be scrutinized to assess whether and in what form the instructions should be retained after State Farm.

5. Reasonable Relationship to Plaintiff's Harm

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

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653 Cf. supra text accompanying notes 263-69, 557-62.
654 See Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 805 (Cal. Ct. App. 2003) (finding error where jury was instructed to consider defendant's "financial condition" because it permitted jury to punish for an entire course of conduct that harmed nonparties, not restricted to the harm to the plaintiff); see also Colby, supra note 374, at 675-76 (arguing that plaintiff's counsel should not be permitted to ask jury to take away profits from defendant's entire course of conduct and that jury should be instructed that it cannot remove profits based on victims not before the court). The comments to California's recently amended model punitive damages instruction note that "the portion of this instruction that is identified as (2) [consideration of the defendant's financial condition] is likely to be irrelevant in many situations. However, until some California court speaks to that issue in light of the State Farm case, it remains in the instruction." CAL. CIVIL JURY INSTRUCTIONS (BAJI) § 14.71.1 cmt. (2004), WL CA BAJI 14.71.1.
655 For instance, although inconsistent with State Farm, some courts permit plaintiffs' lawyers to suggest a punitive damages figure to the jury. See TVT Records v. Island Def Jam Music Group, 257 F. Supp. 2d 737, 748-50 (S.D.N.Y. 2003) (ruling plaintiff's counsel could suggest a specific amount of punitive damages to the jury during closing arguments). Empirical data strongly suggests that juries are far more likely to award excessive punitive damages when they are given a frame of reference by counsel: The dollar amounts that are requested by plaintiffs in their closing arguments to a jury have a dramatic effect on the size of the punitive damages award: the higher the request, the higher the awards. Almost half of the jurors said that the plaintiff's award request influenced their judgment process; analysis of the data indicates that the greater their reliance on the plaintiff's request, the higher the awards. Judges' instructions that arguments by the plaintiff's lawyer are not evidence did not eliminate this effect.
656 See discussion supra Part II.A.1.c.
657 See discussion supra Part II.A.1.a-b.
some jurisdictions tell the jury that punitive damages do not need to bear a reasonable relationship to the plaintiff's harm. At bare minimum, a clear and explicit reasonable relationship instruction should be included in all model instructions.

6. Deterrent Effect of Compensatory Damages

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

7. Reprehensibility

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

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

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

1. The Third Guidepost

The jury should not be instructed on the availability of comparable fines or statutory penalties. As Cooper Industries noted, this factor "calls for a broad legal comparison," and is better suited to application by judges, not juries. Even courts advocating the use of more detailed instructions have determined that "there are too many complicating and prejudicial factors in asking a lay jury to consider the third element." Some of these complicating factors include identifying "comparable" statutory fines, resolving whether the conduct at issue constituted a single or multiple violation of the statute, and determining whether a defendant should have had notice that its conduct would be subject to penalties under those statutes. Courts have long struggled with these issues, and juries are ill-equipped to consistently apply the third guidepost.

2. Prior Awards

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

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604 See discussion supra note 483 and accompanying text.
605 Geressy v. Digital Equip. Corp., 950 F. Supp. 519, 521 (E.D.N.Y. 1997). Accordingly, the court approved a modification of the New York model instruction to include an instruction on the first two guideposts:

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

Id. The court stated that "[t]his language adequately expresses the law as set out in [BMW] without requiring the jury to make complex determinations and calculations involving civil and criminal law." Id. (citation omitted).
606 See discussion supra note 376 and accompanying text.
damages award on a defendant's out-of-state conduct or on perceived harm to nonparties—both improper considerations.

3. Statutory Caps/Other Improper Frames of Reference

Several states have enacted statutory caps on punitive damages. In those states that do not already prohibit the jury from being advised of the cap, model instructions, or, more likely, the comments to model instructions should advise that the jury not be informed of the cap. Likewise the jury should not be given any other dollar-figure, such as the request by plaintiff's counsel or in pleadings of a particular award, that could be used as an improper influence in setting the amount of the award. Studies have suggested that juries may improperly rely on such figures in setting the amount of an award.

CONCLUSION

While it is unclear whether and to what extent improved jury instructions will rein in punitive damages "run wild," few can dispute that the instructions used in most jurisdictions do nothing to restrain arbitrary decision making. Relying on post-verdict review as a "check" on arbitrary awards is both strikingly inefficient and undermines the jury's role in the process. State Farm not only suggests that due process requires more detailed instructions concerning the constitutional limits on punitive damages, it also provides workable standards to devise those instructions. Courts, litigants, and model jury instruction committees should take notice.

667 Some states specifically prohibit the jury from being informed of the statutory cap. See supra notes 428, 439 (discussing approaches by North Carolina and New Jersey).

668 Accord Central Bering Sea Fishermen's Ass'n v. Anderson, 54 P.3d 271, 281 (Alaska 2002) ("We agree with the appellants that instructing the jury on the punitive damages caps was error. Putting the caps before the jury carried a substantial risk of suggesting the range of appropriate punitive awards. Moreover, no countervailing benefit could be gained from the instruction." (footnote omitted)). See generally Michael S. Kang, Comment, Don't Tell Juries About Statutory Damage Caps: The Merits of Nondisclosure, 66 U. CHI. L. REV. 469, 479-80 (1999) ("[P]sychological studies on jury behavior suggest that knowledge of a damage cap exerts an influence on the amount of an award unrelated to the jury's evaluation of the facts of the case.").

669 See supra note 415 (noting Oregon model instruction informing jury of amount of plaintiff's request for punitive damages set forth in pleading).

670 See supra note 668.

671 See Robbennolt, supra note 3, at 189 ("[T]he impact of these more substantive instructions on juror decision processes and the resulting punitive damage awards remains largely untested. Scant research has examined the influence of punitive damages jury instructions.").

672 See supra note 71 and accompanying text.