FAIRNESS THROUGH GUIDANCE: JURY INSTRUCTION ON PUNITIVE DAMAGES AFTER *PHILIP MORRIS V. WILLIAMS*

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I. INTRODUCTION

Punitive damages present a significant issue in American law. *Philip Morris v. Williams*,[1] the United States Supreme Court's most recent foray into litigation involving punitive damages, has once again raised procedural and substantive due process matters regarding fairness to defendants and reawakened debate in this doctrinal area. Proponents of punitive damages argue that the awarding of punitive damages protects the community from wanton or predatory acts—or other behavior

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1.Philip Morris v. Williams, 127 S. Ct. 1057 (2007).

that violates social norms—by sanctioning the defendant and sending a general message that the actions are reprehensible and will not be tolerated.[2] Opponents argue that punitive damage awards by juries have gotten out of hand, and that in addition to being unfair to defendants, they have the potential to put a company out of business or substantially hinder a company's viability.[3] With so much at stake on both sides and the Supreme Court's frequent intervention in this arena, punitive damages doctrine is sorely in need of clarity and guidance. The purpose of this Article is to provide this clarity and guidance by proposing model jury instructions on punitive damages in light of *Philip Morris* and its immediate predecessors.

The Article proceeds in four parts. Part II introduces the Supreme Court's debate in *Philip Morris v. Williams*, borrowing liberally from the Court's opinion to establish the current doctrine on punitive damage awards. Part III then analyzes the problem that drafters face in the wake of *Philip Morris* in revising model jury instructions. Part IV offers some criteria to solve this dilemma, including offering juries written instructions, detailing the Court's requirements, and defining fairness. Part V presents a first take on what model jury instructions meeting these criteria might look like. In conclusion, we articulate the next steps in providing jurors with the guidance necessary to make informed and fair decision-making vis-à-vis punitive

2. *See, e.g.*, THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW (2001).

3. *E.g.*, Theodore B. Olson, *The Parasitic Destruction of America's Civil Justice System*, 47 SMU L. REV. 359 (1994); American Tort Reform Association, *Punitive Damages Reform*, www.atra.org/issues/index.php?issue=7343 (last visited Jan. 11, 2008); U.S. Chamber of Commerce Webcasts, *Reining in Excessive Punitive Damages: The Post-State Farm Litigation Environment* (Apr. 28, 2004), www.uschamber.com/webcasts/2004/0428.htm. Despite these claims, however, most (if not all) states that permit punitive damages forbid awards amounting to what Florida has called "economic castigation." *See* Arab Termite & Pest Control of Fla., Inc. v. Jenkins, 409 So. 2d 1039, 1041 (Fla. 1982); *see also* Vasbinder v. Scott, 976 F.2d 118, 121 (2d Cir. 1992) (considering award excessive when it would consume 30% of net worth and more than 40% of liquid assets); Adams v. Murakami, 813 P.2d 1348, 1351 (Cal. 1991) (holding that award may not be disproportionate to ability to pay); Wedmore v. Jordan Motors, Inc., 589 N.E.2d 1180, 1185-86 (Ind. Ct. App. 1992) (prohibiting award that would result in financial ruin).

damage awards.

II. DEBATE IN THE SUPREME COURT ABOUT JURY GUIDANCE

Although, in the progeny of cases on punitive damages, the United States Supreme Court has never called into question the traditional role of juries in awarding damages, the Court's grappling with doctrine and the claims of "blockbuster awards" have caused some commentators to cast doubt on a jury's ability to make these difficult decisions.[4] The substantial body of empirical research on jury punitive damage awards, however, does not support these claims.[5] Juries infrequently award punitive damages; the frequency and inflation-adjusted size of awards have not increased over the past several decades; awards are generally modest in size; overwhelmingly, awards show a proportionality between compensatory and punitive damages; little evidence indicates juries are biased against business; and judges review the evidence de novo and adjust awards before entering judgment or during appeal.[6] Professor Michael Rustad's thorough review of state statutes and case law indicates the reasons for these findings: many constraints have been placed on when, how, and to what extent juries may award punitive damages.[7] Yet there still exists a minority of awards that some have labeled "blockbuster awards," those involving many millions, even hundreds of millions and occasionally billions of dollars that exceed compensatory damages by large multiples.[8]

4. *E.g.*, Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1 (2004). *See generally* CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2002).

5. Brief for Neil Vidmar et al. as Amici Curiae Supporting Respondents, Philip Morris v. Williams, 127 S. Ct. 1057 (2007) (No. 05-1256), 2006 WL 2689774.

6. *Id.* at 2.

7. Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1326-27 (2005).

8. Hersch & Viscusi, *supra* note 4. Theodore Eisenberg and Martin T. Wells have challenged the analyses of Hersch and Viscusi. Theodore Eisenberg & Martin T. Wells, *The Significant Association Between Punitive and Compensatory Damages in Blockbuster Cases: A Methodological Primer*, 3 J. EMPIRICAL LEGAL STUD. 175 (2006). Their analyses suggest that the number of

These large awards may well be proper responses to extremely outrageous behavior,[9] but they do raise legitimate concerns and foster criticism that jury decisions are standardless.

Addressing this risk of arbitrariness in the majority opinion of the 1991 *Pacific Mutual Life Insurance Company v. Haslip* decision, Justice Harry Blackmun observed 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. . . . [G]eneral concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.[10]

Ultimately, however, the Court approved a fairly vague set of jury instructions,[11] thus creating a constitutional floor and

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cases with high ratios is small. *Id.*

9. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462 (1993). Justice John Paul Stevens, for the majority, wrote, "While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its elicit scheme. . . . [T]he disparity between the punitive award and the potential harm does not, in our view, 'jar one's constitutional sensibilities.'" *Id.* (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991)).

10. *Haslip*, 499 U.S. at 18 (citation omitted).

11. *Id.* The instructions approved read:

> 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.
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> 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.
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> Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, it does to the plaintiff, by

making due process challenges in the decade to come difficult.

Then, a little more than a decade later in *State Farm Mutual Automobile Insurance Co. v. Campbell*,[12] the Court—although focusing primarily on post-verdict judicial review—reexamined the adequacy of jury instructions. It held, *inter alia*, 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."[13] Some commentators predicted a tidal shift in model jury instructions across the United States.[14]

Philip Morris, the Court's latest punitive damages installment, continues this concern with jury guidance by centering on the degree to which third-party harm can be considered in determining the appropriate amount of punitive damages. The Court held that

> the Due Process Clause prohibits a State from punishing an individual without first providing that individual with "an opportunity to present every available defense." Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge . . . .
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> . . . [T]o permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation.

> way of punishment to the defendant and for the added purpose of protecting the public by detering [sic] the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so.
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> 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.

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

13. *Id.* at 422.

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

. . . .

> [Yet] [e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible . . . . [A] jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.[15]

This distinction has drawn the critical attention of Court observers[16] as well as members of the Court. Justice John Paul Stevens, for example, wrote in dissent:

> While apparently recognizing the novelty of its holding, the majority relies on a distinction between taking third-party harm into account in order to assess the reprehensibility of the defendant's conduct—which is permitted—from doing so in order to punish the defendant "directly"—which is forbidden. This nuance eludes me. . . . Judicial restraint counsels us to "exercise the utmost care whenever we are asked to break new ground in this field." Today the majority ignores that sound advice when it announces its new rule of substantive law."[17]

Justice Clarence Thomas similarly criticized that "[the *Philip Morris* majority] opinion proves once again that this Court's punitive damages jurisprudence is 'insusceptible of principled application.'"[18]

The dissenting Justices make an interesting argument regarding the difficulty in distinguishing between third-party harm for the purpose of determining reprehensibility and third-party harm for the purpose of punishing the defendant for harm to third parties. This Article, however, does not address the

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15. Philip Morris v. Williams, 127 S. Ct. 1057, 1063-64 (2007) (citation omitted).

16. *See, e.g.*, Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007).

17. *Philip Morris*, 127 S. Ct. at 1066-67 (Stevens, J., dissenting) (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).

18. *Id.* at 1068 (Thomas, J., dissenting) (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting)). Justice Ginsburg also wrote a dissenting opinion joined by Justices Scalia and Thomas. *Id.* (Ginsburg, J., dissenting).

concerns raised by this ambiguous distinction. It also sets aside other procedural concerns expressed in *Philip Morris* regarding trial evidence, arguments by legal counsel to the jury, and post-verdict judicial review.

Instead, this Article focuses on a part of the *Philip Morris* opinion involving Justice Stephen Breyer's more basic holding "that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question."[19] Indeed, Justice Breyer concludes the majority opinion by emphasizing the Constitutional demand for jury guidance:

> How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injury to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk. Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases.[20]

The premise that state courts must ensure that juries do not violate due process is the basis for jury instructions on punitive damages. In *State Farm*, the Court criticized the efficacy of jury instructions in protecting due process: "'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.'"[21] These "[v]ague instructions . . . do little to aid the decisionmaker in its task of assigning appropriate weight to

19. *Id.* at 1064 (majority opinion).

20. *Id.* at 1065.

21. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003) (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994)).

evidence that is relevant and evidence that is tangential or only inflammatory."[22]

Sheila Scheuerman and Anthony Franze recently completed the significant task of surveying and cataloguing model jury instructions used in all state and federal courts.[23] The Scheuerman and Franze survey confirms the Justices' intuition that existing instructions are inadequate.[24] Scheuerman and Franze conclude that "most instructions fail to reflect the substantive limits on punitive damages and, indeed, often direct juries to consider *unconstitutional* factors in imposing punitive damages."[25] Thus, the inadequacy and potential unconstitutionality of these instructions demands change.

The substance of jury instructions may be all the more important because a lay jury is far less experienced than a professional judge "who not only knows of the statutory maximum punishment applicable to the offense but also is able, in setting the sentence, to draw upon extensive information about the sentencing of other offenders for the same or similar crimes."[26] Since juries lack adequate familiarity with the law,[27] the main mechanism by which courts can hope to influence the fairness of juries' punitive damage awards is sufficient jury instruction.

Although little systematic research has been conducted to measure the influence of jury instructions on damage amounts,

22. *Id.* at 418.

23. Sheila B. Scheuerman & Anthony J. Franze, *Instructing Juries on Punitive Damages: Due Process Revisited after* Philip Morris v. Williams, 10 U. PA. J. CONST. L. (forthcoming 2008).

24. *Id.* (manuscript at 5, on file with authors).

25. *Id.*

26. Andrew L. Frey, *No More Blind Man's Bluff on Punitive Damages: A Plea to the Drafters of Pattern Jury Instructions*, LITIG., Summer 2003, at 28. On the other hand, Mr. Frey's argument ignores the fact that a jury has a decided advantage over the judge because a jury is chosen from ordinary citizens of the community, and arguably has a much greater sense of community values that bear on the reprehensibility of conduct.

27. Some commentators have advocated professional juries to remedy this problem. *See* Kristy Lee Bertelsen, *From Specialized Courts to Specialized Juries: Calling For Professional Juries in Complex Civil Litigation*, 3 SUFFOLK J. TRIAL & APP. ADVOC. 1 (1998). We find this measure too drastic, and believe that jury instructions can adequately address the issue.

particularly with respect to punitive damages,[28] anecdotal evidence from the Arizona Jury Project,[29] commissioned by the Supreme Court of Arizona, strongly indicates that jurors pay attention to jury instructions, especially when they are written.[30] Thus, this Article proceeds on the assumption that jury instructions have a meaningful role in clarifying the law to jurors and "improving" the outcome of their deliberations.[31]

One other clarifying point is necessary. This Article also operates on the foundation that juries are capable of considering the appropriate characteristics in determining punitive damage

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28. *See* EDIE GREENE & BRIAN H. BORNSTEIN, DETERMINING DAMAGES 18–21, 68 (2003); Edith Greene & Brian Bornstein, *Precious Little Guidance: Jury Instruction on Damage Awards*, 6 PSYCHOL. PUB. POL'Y & L. 743, 749 (2000). This type of study has been difficult to conduct given the irrebutable presumption that juries understand and rely upon instructions on the law. *See* Francis v. Franklin, 471 U.S. 307, 324-25 n.9 (1985) (The Court "adhere[s] to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions"); Parker v. Randolph, 442 U.S. 62, 75 n.7 (1979) ("The 'rule'—indeed, the premise upon which the system of jury trials functions under the American judicial system—is that juries can be trusted to follow the trial court's instructions."), *abrogated by* Cruz v. New York, 481 U.S. 186 (1987). As the United States Court of Appeals for the Seventh Circuit noted:

> One enduring element of the jury system, no less vital today than two centuries ago, is insulation from questions about how juries actually decide. . . . Instead of inquiring what juries actually understood, and how they really reasoned, courts invoke a "presumption" that jurors understand and follow their instructions. As Rule 606(b) shows, this is not a bursting bubble, applicable only in the absence of better evidence. It is a rule of law—a description of the premises underlying the jury system, rather than a proposition about jurors' abilities and states of mind.

Gacy v. Welborn, 994 F.2d 305, 313 (7th Cir. 1993).

29. *See, e.g.*, Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, *Juror Discussions During Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1 (2003).

30. *See* NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 158–64, 342 (2007).

31. We also take note of the empirical evidence that suggests that jury instructions can be incomprehensible. *See* Judith L. Ritter, *Your Lips Are Moving . . . But the Words Aren't Clear: Dissecting the Presumption that Jurors Understand Instructions*, 69 MO. L. REV. 163, 198-201 nn.191–212 (2004) (citing several empirical studies). In developing our model jury instructions, therefore, we have attempted to use language accessible to the average juror.

awards. Although some have questioned jury competence in this area,[32] interestingly, even these scholars attribute "[j]urors' good intentions and high levels of motivation [being] thwarted by the inherent complexity of the legal decision task and *by the lack of clear instructions or other effective guidance.*"[33] Providing guidance to juries in the form of stronger jury instructions helps alleviate this concern.

III. THE PROBLEM

Current instructions to juries provide only the most general guidelines with respect to the issues that concerned the majority of the Court in both *State Farm* and *Philip Morris*. Andrew Frey, counsel for Philip Morris in the recent U.S. Supreme Court case, for instance, drew attention to the minimal guidance in the previous Illinois pattern instruction that combined liability and damages into a single long sentence:

> If you find that the defendant's conduct was willful and wanton and proximately caused injury to the plaintiff, 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. [34]

Subsequent to *State Farm*, Illinois revised its instructions to provide substantially more detailed guidance.[35] Scheuerman and

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32. *See generally* SUNSTEIN ET AL., *supra* note 4. *But see* Neil Vidmar, *Experimental Simulations and Tort Reform: Avoidance Error and Overreaching in Sunstein et al.'s* Punitive Damages, 53 EMORY L.J. 1359 (2004) (refuting much of this empirical evidence).

33. SUNSTEIN ET AL., *supra* note 4, at 1360 (emphasis added).

34. Frey, *supra* note 26, at 28 (quoting ILLINOIS SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS, ILLINOIS PATTERN JURY INSTRUCTIONS § 35.01 (2002)).

35. The new instruction reads:

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

Franze's recent survey, however, shows that ten states maintain similar minimum instructions, and eight states plus the District of Columbia have roughly similar instructions except that they allow consideration of the defendant's wealth.[36] Twenty-seven other states instruct the jury to consider multiple factors.[37] Although Scheuerman and Franze acknowledge that these latter states' multi-factor instructions are an improvement over very general instructions, they offer the following assessment:

> Viewed in the best light, the multi-factor instructions exhibit a slight trend in incorporating some substantive due process limits, such as the "reasonable relationship" requirement. On the other hand, many multi-factor instructions direct juries to consider the wrong question, such as by giving the jury a specific dollar figure to consider that may unduly influence the calibration of any award.[38]

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1. How reprehensible was [defendant's name] conduct?

On this subject, you should consider the following:

a) The facts and circumstances of the defendant's conduct;

b) The [financial] vulnerability of the plaintiff;

c) The duration of the misconduct;

d) The frequency of defendant's misconduct;

e) Whether the harm was physical as opposed to economic;

f) Whether defendant tried to conceal the misconduct;

[g) other]

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

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

ILLINOIS SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS, ILLINOIS PATTERN JURY INSTRUCTIONS § 35.01 (Supp. 2007).

36. *See* Scheuerman & Franze, *supra* note 23, (manuscript at 22, 26).
37. *Id.* (manuscript at 30-46).
38. *Id.* (manuscript at 45-46) (footnotes omitted).

Moreover, even the more elaborate instructions make little attempt to define reprehensibility. Most importantly, they have not yet grappled with the fine distinction the Court pronounced in *Philip Morris*: between harm to non-parties to the lawsuit and harm or potential harm to others as a factor in reprehensibility.

IV. SOLVING THE PROBLEM

Our solution to the jury guidance problem is to provide detailed written instructions about punitive damages that the jurors take into the jury room when they begin their deliberations. By detailed, we mean a breakdown of all the dimensions related to the issue.[39] Additionally, we propose some redundancy in those instructions and explicit reference to the concerns of the U.S. Supreme Court.[40]

The proposed instructions may require modification to address specific statutory and case law conditions that vary between states and the specific claims and facts that are at issue in individual trials.[41] They will also have to be modified to comport with procedural variations such as single or bifurcated trial procedures. Thus, our proposed instructions are intended only as a template that can be modified to fit an individual state's legal requirements and case-specific facts. We focus on states, although the instructions could apply to federal cases as well.

A. Give Jurors Written Instructions

Although a systematic analysis of the practices of trial courts does not exist, surveys and anecdotal data suggest that some courts still rely on providing only oral instructions to the jury.[42]

39. *See, e.g.*, Rustad, *supra* note 7.

40. *See also* PETER M. TIERSMA, COMMUNICATING WITH JURIES: HOW TO DRAFT MORE UNDERSTANDABLE JURY INSTRUCTIONS (2006), http://www.ncsconline.org/Juries/Communicating.pdf, for practical steps to drafting coherent jury instructions.

41. *See* Rustad, *supra* note 7.

42. *See, e.g.*, JURY TRIAL INNOVATIONS 174–76 (G. Thomas Munsterman, Paula L. Hannaford & G. Marc Whitehead eds., 1997). Pennsylvania rules specifically prohibit giving written instructions to the jury, but the rules

Research indicates that providing written instructions helps juror comprehension.[43] Research on the Arizona Jury Project,[44] an Arizona Supreme Court initiative that permitted the videotaping of actual jury deliberations, clearly showed that jurors relied heavily on the written instructions provided to jurors in all Arizona civil jury trials. The data indicate that they used the instructions to clarify their understanding and resolve differences in their recollection of the judge's oral instructions.[45]

B. Detail All Relevant Elements and Their Rationale

Strikingly, the Court has not ventured to say exactly what "reprehensibility" is. Scheuerman and Franze's comprehensive review of the model jury instructions for state and federal courts shows that many are short on explicit guidance, merely assuming that jurors will—like Justice Potter Stewart's definition of obscenity[46]—intuitively know reprehensibility when they see it.[47] Implicit in reprehensibility analysis are the notions that the defendant has harmed societal values and that unacceptable behavior merits denunciation for the public interest. The jury communicates this message of disapproval through the awarding of monetary damages to the plaintiff.

Additionally, in light of *Philip Morris*, jurors need to be instructed that they must not give punitive damages for harm to

committee is considering revising the rule to allow the jury to have written instructions during deliberations. Commonwealth of Pennsylvania, *Jury Deliberations: Written Jury Instructions*, THE PENNSYLVANIA BULLETIN, http://www.pabulletin.com/ secure/data/vol34/34-20/843.html.

43. *See* Larry Heuer & Steven Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 LAW & HUM. BEHAV. 409 (1989) *and* Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted By District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423, 456 (1985).

44. *See* Diamond et al., *supra* note 29.

45. For examples of this use of instructions during actual deliberations that were videotaped in the Arizona Jury Project, see VIDMAR & HANS, *supra* note 30, at 147–68.

46. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced . . . [b]ut I know it when I see it . . . .").

47. Scheuerman & Franze, *supra* note 23.

other persons or entities who are not parties to the lawsuit, but at the same time they may consider harm or potential harm to others in assessing reprehensibility.

C. Instruct on Fairness

Although punitive damages are about the behavior of the defendant, in *Philip Morris* and prior cases the Supreme Court has continually expressed concern about fairness to defendants.[48] Consider the issue of the defendant's wealth. Arguably, a defendant's wealth is relevant to the symbolic as well as deterrent effect of a sanction—a large award may be necessary to make the punishment "sting."[49] Yet, there is also merit to the claim that the award should not be large merely because the defendant is wealthy. The problem of how to meaningfully balance these psychologically competing factors is not easily solved. Our proposed solution is to draw concern about fairness to the attention of jurors by specifically mentioning it in the instructions. Although the distinction between procedural and substantive justice is sometimes elusive even to trained lawyers and judges,[50] jurors can be expected to understand the basic concept of fairness. We suggest that drawing attention to fairness to the defendant as well as the plaintiff will cause jurors to reflect on fairness without necessarily moderating their desire to express societal condemnation through a punitive award. Moreover, our novel suggestion is that the instructions should mention the Supreme Court's concern with fairness.

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48. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416-17 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996); Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994).

49. Bains LLC v. ARCO Prods. Co., 405 F.3d 764, 777 (9th Cir. 2005) ("A punitive damages award is supposed to sting so as to deter a defendant's reprehensible conduct, and juries have traditionally been permitted to consider a defendant's assets in determining an award that will carry the right degree of sting.").

50. *See* Philip Morris v. Williams, 127 S. Ct. 1057, 1067 (2007) (Thomas, J., dissenting) ("It matters not that the Court styles today's holding as 'procedural' because the 'procedural' rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages.").

IV. PROPOSED MODEL JURY INSTRUCTIONS

Ladies and Gentlemen of the jury:

I am now going to instruct you on the matter of punitive damages.

Our law in the state of ___ allows for assessing punitive damages if you, the jury, decide that the defendant's actions warrant punitive damages. You do not have to award them if you feel that such damages are inappropriate.

Punitive damages are *not* compensatory damages. Punitive damages are sometimes called "exemplary damages," which means to make an example of.

Punitive damages are awarded for two interrelated purposes:

1. The first purpose is to punish the defendant for behavior that offends community values and is despicable, contemptible, or otherwise morally reprehensible;

2. The second purpose is to protect the public by deterring the defendant from engaging in similar behavior in the future and by sending a message to deter others who might contemplate engaging in similar behavior within our state.

Burden of Proof and Evidence

1. The burden of proof for giving punitive damages is higher than the one used for compensatory damages. Specifically, you must decide if there is "clear and convincing evidence" that the defendant's behavior warrants an award of punitive damages.[51] "Clear and convincing" evidence is a higher burden of proof than the "balance of probabilities" ["preponderance of evidence"] standard, but lower than the "proof beyond a reasonable doubt" standard used for criminal cases.

2. From the evidence produced at this trial, and only at this trial, you must first consider whether that behavior caused or could have caused injury to others such that the defendant is deserving of exemplary punishment.

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51. *See* Rustad, *supra* note 7, at 1324 (reporting that the majority of states have raised the standard from "preponderance of evidence" to "clear and convincing evidence" and that Colorado requires a still higher standard, namely, proof "beyond a reasonable doubt").

3. Amounts of money for punitive damages that may have been suggested by the lawyers for the plaintiff and the defendant in their opening or closing arguments are not evidence. Evidence is the body of testimony under oath and documents provided with that testimony. You must rely exclusively on the evidence presented in this trial.

Factors to Consider

The reprehensibility of unlawful conduct is the primary consideration in deciding punitive damages. Reprehensibility is thought of as having a number of similar meanings and these include despicable, contemptible, blameworthy, condemnable, or deplorable behavior. In other words, it is behavior meriting moral condemnation.[52]

Here is a list of things that you may consider in deciding the degree of reprehensibility, if any, of the defendant's conduct. You may decide that none, some, or all of them may be relevant to the reprehensibility of the defendant(s) behavior. (Author note: These factors should be modified depending on case facts and statutory or case law of the specific state.)

1. Was the harm or potential harm (a) physical or (b) economic or (c) harm to reputation(s) (also called dignitary harm)? Ordinarily, physical harm is more serious than economic or reputational harm—but it is the role of the jury to evaluate the harm in its overall context.

2. To what degree was the defendant's behavior intentional, despicable, malicious, wanton, flagrant or willful? Was the defendant aware of the likelihood that the behavior was or could be harmful?[53]

3. Did the behavior reflect a plan or set of behaviors for morally reprehensible financial or other gain at the expense of others? If so, what was the magnitude of the expected gain at the

52. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001).

53. In *BMW*, the Court approvingly cited a law review article written by David Owen for the proposition that the "'flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages.'" *BMW*, 517 U.S. at 575 n.23 (quoting David Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 387 (1994)).

expense of others? Was the plaintiff financially vulnerable to the behavior of the defendant?

4. How serious was the harm or potential harm to the plaintiff and/or to society?

5. Was there fraud or other deceitful planning involved in the behavior?

6. To what extent did the defendant's behavior create a substantial risk of harm to others or to societal values?

7. What was the duration of the behavior? Has it ceased or is it ongoing?

8. To what degree was the defendant's behavior a single act or a series of acts reflecting a pattern of reprehensible behavior?

9. Did the defendant attempt to conceal the actions or cover up the harm caused by them?

10. To what degree does the defendant now appear to have remorse for the behavior?

11. To what degree are there any other mitigating or excusing circumstances that should reduce the amount of the punitive damages award?

Factors That You Must Not Consider

1. Any punitive damages that you award, if you decide to award them, must not be to compensate for harm that the defendant's conduct caused or may have caused some other person in our state or elsewhere that is not a party to this lawsuit. That person or persons may bring a lawsuit of their own and require a different jury to resolve their claims.

2. You must not consider behavior or injuries to others that occurred outside of this state. That is for the citizens of other states to decide.

Fairness

The United States Supreme Court and our state courts are concerned about fairness when punitive damages are awarded. Fairness extends not only to the plaintiff and to societal interests of the citizens of our state in deterring reprehensible behavior; fairness must also extend to the defendant as well.

1. An award may take into consideration the relative wealth of the defendant. A larger punitive award may be required for a defendant of greater wealth in comparison to a defendant of

lesser wealth. You may also consider the magnitude of the financial or other gain that the defendant expected as a result of the morally reprehensible conduct.

2. You must not, however, punish the defendant solely because the defendant is wealthy.

3. Any award that you give must bear a reasonable relationship to the actual or potential harm caused by the defendant's behavior. The amount of compensatory damages that you awarded may be one guideline but you may consider other factors as well.

Totality of Circumstances

Punitive damages must take into consideration all of the factual circumstances that you have learned about during the trial and the legal guidelines that are set out above.

VI. CONCLUSION

The scope of this Article has been modest. We have proposed a set of model jury instructions in punitive damages cases as an opening salvo to what we hope will be a larger discussion about how to translate the Supreme Court's decision in *Philip Morris* into guidance for juries in America's courtrooms. We fully expect and welcome criticism on our effort to clarify the Court's thinking and to translate this thinking into a meaningful and comprehensive set of instructions to a jury.

Our proposal will be criticized by some as infringing on the autonomy of the individual state to mandate the conditions under which punitive damages shall be given. It will probably also provoke criticism that such an instruction will tilt the jurors toward defendants. This is an empirical question, but our intuitive feeling is that it will not. Ultimately, the development of societal norms still falls upon the juries. Our proposed instruction template does not alter this historical role. Instead, the instructions seek to appropriately guide the decision-making process by which jurors determine if, and how much, punitive damages to award. In short, the instructions are intended to increase the predictability of jury awards and allay the Supreme Court's concern that the process is approaching arbitrariness.

We also anticipate a fuller examination of the role of jury

instructions in punitive damage cases and the way in which judges and juries use this critical mechanism to, respectively, inform and learn of the appropriate considerations to use when levying punitive damage awards. The success or failure of these instructions will be evinced by jurors' ability to cope with some of the most difficult questions posed to them: (1) are punitive damages appropriate in this case, and, if so, (2) what is the appropriate amount? Additionally, the reviewing courts will be either comforted or agitated by the adequacy of this new generation of more vigorous jury instructions.

Ultimately, our proposed jury instructions will help crystallize the debate over the doctrine itself. They are intended as a vehicle to encourage scholars and judges to debate precisely when a punitive damage award is procedurally and substantively fair.