CLINGING TO FEDERALISM: HOW RELUCTANCE TO AMEND STATE LAW-BASED PUNITIVE DAMAGES PROCEDURES IMPEDES DUE PROCESS

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I. INTRODUCTION

Over a decade ago, when a majority of the Supreme Court first recognized substantive due process limits on punitive damages, Justice Scalia lamented that "[t]he Constitution provides no warrant for federalizing yet another aspect of our Nation's legal culture."[1] Justice Ginsburg similarly echoed that the Court "unwisely venture[d] into territory traditionally within

*Counsel, Arnold & Porter LLP, Washington, D.C. I would like to thank the Charleston School of Law for inviting me to participate in this symposium, "Punitive Damages, Due Process, and Deterrence: The Debate After *Philip Morris v. Williams*." I note that during the course of my law practice, I have represented clients in various appeals involving punitive damages issues, including Philip Morris USA in state appellate proceedings in *Philip Morris v. Williams*. Members of Arnold & Porter LLP also were co-counsel for Philip Morris USA in the Supreme Court. The views expressed in this Article are solely my own and not Arnold & Porter LLP or any of the firm's clients.

1. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting); *accord id.* at 598 ("Today we see the latest manifestation of this Court's recent and increasingly insistent concern about punitive damages that run wild. Since the Constitution does not make that concern any of our business, the Court's activities in this area are an unjustified incursion into the province of state governments." (internal quotations and citation omitted)).

the States' domain."[2] Those sentiments, while not carrying the day, have not died.[3] From judicial complaints that the tort process has been improperly federalized,[4] to academics' arguments that the Supreme Court is "serving as a punitive damages puppeteer who interferes with the ability of the states to constrain corporate wrongdoing,"[5] criticism of the so-called federalization of punitive damages lingers.[6]

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2. *Id.* at 607 (Ginsburg, J., dissenting). A few years later, Justice Ginsburg again criticized the Court's approach to punitive damages as imposing improper "marching orders" on the states:

> In a legislative scheme or a state high court's design to cap punitive damages, the handiwork in setting single-digit and 1-to-1 benchmarks could hardly be questioned; in a judicial decree imposed on the States by this Court under the banner of substantive due process, the numerical controls today's decision installs seem to me boldly out of order . . . . I would not join the Court's swift conversion of those guides into instructions that begin to resemble marching orders.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 438-39 (2003) (Ginsburg, J., dissenting).

3. Last term, in *Philip Morris*, Justice Ginsburg, joined by Justice Scalia, again dissented from the Court's reaffirmation that due process limits punitive damages, urging "more respectful treatment to the proceedings and dispositions of state courts that sought diligently to adhere to our changing, less than crystalline precedent." Philip Morris v. Williams, 127 S. Ct. 1057, 1069 (2007) (Ginsburg, J., dissenting).

4. Michael L. Rustad, *Happy No More: Federalism Derailed by the Court that Would Be King of Punitive Damages*, 64 MD. L. REV. 461, 464 (2005) (discussing views of Judge Guido Calabresi).

5. *Id.*

6. *See, e.g.*, Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional*, 53 EMORY L.J. 1, 10 (2004) ("A federalized democratic system should not tolerate so blatant a usurpation of state legislative and judicial prerogatives by an unaccountable federal judicial body."); A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085, 1154 (2006) ("States, through the apparatus of the legislature, the civil jury, and the state judiciary should be left free to make the determination that the challenged conduct of the defendant warrants a particular level of approbation reflected in an approved punitive award."). Professor Spencer criticizes what he sees as the "hypocrisy" of tort reform advocates on punitive damages, arguing that, "[g]iven the fabricated nature of the Court's [punitive damages] doctrine, one suspects that those who call for 'strict constructionism' and deride 'judicial activism' would otherwise be appalled by the Court's actions were the Court not so acting for the benefit of a policy goal these same critics tend to support." *Id.* at 1090.

While I disagree with these views on a number of grounds, in this short essay I focus on a practical concern: the extent to which clinging to federalism has impeded needed procedural reform at the trial level. In particular, I focus on model jury instructions. Despite calls for reform,[7] the punitive damages model instructions relied on by litigants and courts across the country continue to reflect state law standards notwithstanding that, more often than not, those standards ignore or facially conflict with the Supreme Court's federal constitutional benchmarks.[8] Though there may be any number of reasons for the slow pace of legislative and instructional reform,[9] this essay

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The federalism criticisms generally focus on vertical federalism—the relationship between the states and federal government. The Supreme Court's punitive damages jurisprudence, which prohibits punishment for out-of-state conduct, also implicates the relationship among the states—a horizontal federalism principle. *See* Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1, 4-5 n.9 (2004) (distinguishing vertical and horizontal federalism principles in the Supreme Court's punitive damages cases). With regard to horizontal federalism, Professor Allen and I have differed on whether the Court's punitive damages jurisprudence concerning extraterritoriality "incorporates state sovereignty principles within a due process analysis." *Id.* at 22 n.98.

7. *See, e.g.*, 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 24 ("[T]he time has come for a significant overhaul of model or pattern jury instructions, in an effort to ensure that juries are better informed of the considerations that are to guide their punishment-setting function.").

8. *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); 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), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 1071073.

9. Indeed, some may disagree that reform has come slowly or that federalism has played a role. Some of the participants in this symposium have suggested that states have taken seriously the Supreme Court's "marching orders" on punitive damages. Professor Catherine Sharkey, for instance, has noted that "some state courts have, in line with the Court's direction in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, replaced their traditional deferential standard of review with de novo review of defendants' state constitution-based or statutory-based claims that a punitive damages award is excessive." Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1424 (2006). Further, Professor Sharkey claims that the "states arguably have gone further in terms of incorporating the Court's guideposts for appellate review into their substantive standards for

argues that it is time to cast aside any federalism-based resistance to conducting the needed overhaul of model punitive damages instructions. To this end, I provide three reasons why I believe the time for instructional reform is now.

II. WHY INSTRUCTIONAL REFORM NOW?

A. The Court Has Spoken

I can appreciate theoretical debate over the Court's punitive damages jurisprudence, including critiques grounded in federalism.[10] But as a practitioner, I cannot ignore that in 2003, in *State Farm Mutual Automobile Insurance Co. v. Campbell*,[11] and just last term, in *Philip Morris v. Williams*,[12] the Supreme Court reaffirmed that punitive damages are no longer just a creature of state law. As the *Philip Morris* Court made patently clear, substantive and procedural due process impose limits on punitive damages:

> [T]his Court has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as "grossly excessive." See *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (requiring judicial review of the size of punitive awards); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001) (review must be *de novo*); *BMW*, *supra*, at 574-585 (excessiveness decision depends upon the reprehensibility of the defendant's conduct, whether the award bears a reasonable relationship to the actual and potential harm caused by the defendant to the plaintiff, and the difference between the award and sanctions "authorized or imposed in comparable cases"); *State Farm*, *supra*, at 425

punitive damages. Recent legislative (or committee) modifications of state rules of evidence and pattern jury instructions relating to evidence of out-of-state conduct likewise bear the hallmark of *Gore* and *Campbell*." *Id.* at 1424-25.

10. *See, e.g.*, *supra* note 6.

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

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

(excessiveness more likely where ratio exceeds single digits).[13]

For better or for worse, therefore, the Constitution guides and limits punitive damages. The procedures used should take this into account.

To be sure, although the *Philip Morris* Court vacated and remanded the Oregon Supreme Court's affirmation of a $79.5 million punitive award because the jury instruction used at trial failed to protect the defendant's due process rights,[14] the Court did not mandate that courts use any particular procedures or require the adoption of specific jury instructions.[15] Rather, in the Court's own nod to federalism, it held that "the States have some flexibility to determine what *kind* of procedures they will implement."[16] One interpretation of this language is that model jury instruction committees and courts should wait for state legislatures to act before making any changes to (or striking down) existing state statutes or model instructions that fail to reflect, or conflict with, federal standards. For example, the United States District Court for the Northern District of Oklahoma recently acknowledged that a state punitive damages statute may be facially unconstitutional after *Philip Morris*, but the court declined to consider the question in order to give the state legislature an opportunity to act.[17]

That approach, in my view, is wrong. Yes, the Court in *Philip Morris* stated that States can experiment with their procedures. But the Court made equally clear that—whatever

13. *Id.* at 1062-63 (parallel citations omitted).

14. *Id.* at 1063-64.

15. *Id.* at 1064.

16. *Id.* at 1065.

17. Palmer v. Asarco Inc., Nos. 03-CV-0498-CVE-PJC, 03-CV-567-CVE-PJC, 03-CV-565-CVE-PJC, 03-CV-569-CVE-PJC, 03-CV-566-PJC, 2007 WL 666592, at *1 (N.D. Okla. Feb. 27, 2007) ("This motion is premature. In *Philip Morris*, the Supreme Court strongly suggested that state legislatures should be given a chance to amend their punitive damages statutes before courts considered the constitutionality of state punitive damages statutes."); *cf. also* Moody v. Ford Motor Co., 506 F. Supp. 2d 823, 849 n.14 (N.D. Okla. 2007) ("While the constitutionality of section 9.1 [of Oklahoma's state punitive damages statute] is ripe for judicial or legislative review [in light of *Philip Morris*], that issue is not before the Court at this time and the Court will not issue an advisory opinion on the constitutionality of the statute.").

the trial procedure used—"it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one."[18] As a practical matter, what that means is this: In the spirit of Justice Brandeis's oft-cited call for the states as the laboratories of policy experimentation,[19] states are free to experiment with the *types* of procedures they will use at trial to protect a defendant's due process rights. But to the extent jury instructions are one of those procedures—and there is no question that instructions will remain a staple procedural device—the *substance* of those instructions must take into account the federal constitutional guidelines and restraints. The lesson, then, is that there is no excuse for waiting for state legislatures to "experiment" before updating the procedures that already exist, and courts should not hesitate to disregard outdated punitive damages model instructions or find unconstitutional the state laws upon which they are based.

B. Clear and Workable Federal Standards Exist that Can Be Incorporated into Model Instructions

As I have previously argued,[20] it is no longer an excuse to delay trial level procedural reform on the grounds that the federal punitive damages standards are unclear. Instead, "the substantive guideposts and limits are sufficiently defined and understandable to provide to the jury. Absent some other constraint on the jury, due process demands that the jury be advised of the factors that determine the constitutionality of their punitive damages award."[21]

Yet, there has been only minimal reform. I have previously surveyed state model instructions and proposed revisions that I believe would reflect the Supreme Court's constitutional guidelines, so I will not rehearse that here.[22] In brief, however,

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

19. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

20. *See generally* Scheuerman & Franze, *supra* note 8; Franze & Scheuerman, *supra* note 8.

21. Scheuerman & Franze, *supra* note 8, at 65.

22. *See id.* at 20-50; Franze & Scheuerman, *supra* note 8, at 470-86.

most current model instructions fall into one of three main categories.

First, some states have adopted what I call "*Haslip*-minimum" instructions—instructions similar to the one approved by the Court in 1991 in *Pacific Mutual Life Insurance Co. v. Haslip*[23] that merely advise the jury to consider three factors: (1) the purpose and nature of punitive damages; (2) the principle that punitive damages constitute punishment for civil wrongdoing; and (3) an explanation that the imposition of punitive damages is not compulsory.[24] These factors, approved before the Court recognized substantive due process limits on punitive damages, provide virtually no restraint on the jury's discretion and allow impermissible considerations to sneak into the jury room. As Justice O'Connor argued over fifteen years ago, "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."[25]

Second are what I have called "*Haslip*-plus-wealth instructions." These instructions provide the *Haslip*-minimum but also advise the jury to consider the financial condition or profits of the defendant when setting the amount of the award.[26] These wealth-related instructions are constitutionally suspect. Basing an award on a defendant's financial condition or profits—funds or profits derived from third parties who may have been injured by the same course of conduct—punishes a defendant for harm to non-parties, a practice barred by *Philip Morris*.[27] It also risks punishing a defendant for out-of-state or lawful conduct, practices barred by the Court in *BMW*.[28]

23. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19-20 (1991).

24. *See* Scheuerman & Franze, *supra* note 8, at 21.

25. *Haslip*, 499 U.S. at 43 (O'Connor, J., dissenting). Justice Scalia similarly criticized the Alabama jury instruction approved by the majority as "not guidance but platitude." *Id.* at 37 (Scalia, J., concurring).

26. *See* Scheuerman & Franze, *supra* note 8, at 21.

27. *See* Johnson v. Ford Motor Co., 113 P.3d 82, 93-96 (Cal. 2005).

28. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572-73 (1996).

Third are "multi-factor instructions." These are instructions that advise juries to consider a variety of factors, typically based on state law.[29] These instructions incorporate wealth and other potentially problematic considerations into jury decision making.

These categories of instructions all have two things in common: (1) they are based primarily on state law; and (2) each fails to reflect the federal constitutional standards upon which the jury's awards will be judged on appeal. In many instances, they direct juries to consider unconstitutional factors.[30] Though there have been some minimal reforms based on *State Farm* and *Philip Morris*, most instructions remain constitutionally suspect.[31]

The point of all this is that the existing litigation tools are overwhelmingly flawed and there is no sound reason to delay reworking current model instructions. The recent *Philip Morris* case, in which the Supreme Court reversed and remanded based on a flawed instruction, reflects one of the consequences of further delay.

C. Litigants and Courts (and Juries) Need Guidance

An obvious reason for reform is that the courtroom players need guidance. In theory, of course, parties can propose modifications to the model instructions based on the federal constitutional standards. The reality, however, is that courts often are reluctant to depart from model instructions. There is judicial suspicion that "instructions offered by the parties are almost always slanted in some way," and in some jurisdictions the use of model instructions is mandatory.[32] Similarly, there is hesitation to depart from state punitive damages statutes.

29. *See* Scheuerman & Franze, *supra* note 8, at 21.

30. *See id.* at 30-46.

31. *See id.* at 53-65.

32. Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1086 (2001); *see also* 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." (internal citations omitted)).

Indeed, in considering the instruction at issue in *Philip Morris*, the trial court asked the defendant whether there was case law stating that the prohibition on harm to non-parties had to be given to the jury.[33] When counsel advised that there was no case on point, the court refused to give the requested instruction, concluding, "why wander where no judge has been told to go before?"[34]

The need for clarity is perhaps even greater in state rather than federal courts. In the well-known article *The Myth of Parity*, Professor Burt Neuborne argued that "federal courts are more responsive than state courts to Supreme Court commands."[35] Specifically, Professor Neuborne observed that "federal judges appear to recognize an affirmative obligation to carry out and even anticipate the direction of the Supreme Court. Many state judges, on the other hand, appear to acknowledge only an obligation not to disobey clearly established law."[36] Model instructions that implement the Supreme Court's jurisprudence would go a long way to giving courts needed comfort to depart from the traditional state law driven practices. In the interim, appellate courts should not hesitate to acknowledge problems with the model instructions and the state laws upon which they are based.

III. CONCLUSION

Clinging to federalism has contributed to the slow pace of punitive damages instructional reform and had real world consequences. Those in the litigation trenches—and the juries that we ask to perform the complicated task of translating outrage into monetary amounts—need guidance sooner rather

33. Petitioner on Review Philip Morris USA Inc.'s Reply Brief on the Merits Following Remand at 11, Williams v. Philip Morris, No. CA-A106791 (Or. Aug. 7, 2007).

34. *Id.*

35. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1119 n.59 (1977). For an interesting discussion of Neuborne's arguments in the context of preemption, see Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 J.L. & POL'Y 1013, 1029-31 (2007).

36. Neuborne, *supra* note 35, at 1124-25.

than later. It is time for meaningful implementation of the Supreme Court's punitive damages jurisprudence at the trial level. Model jury instructions are as good a place as any to start.