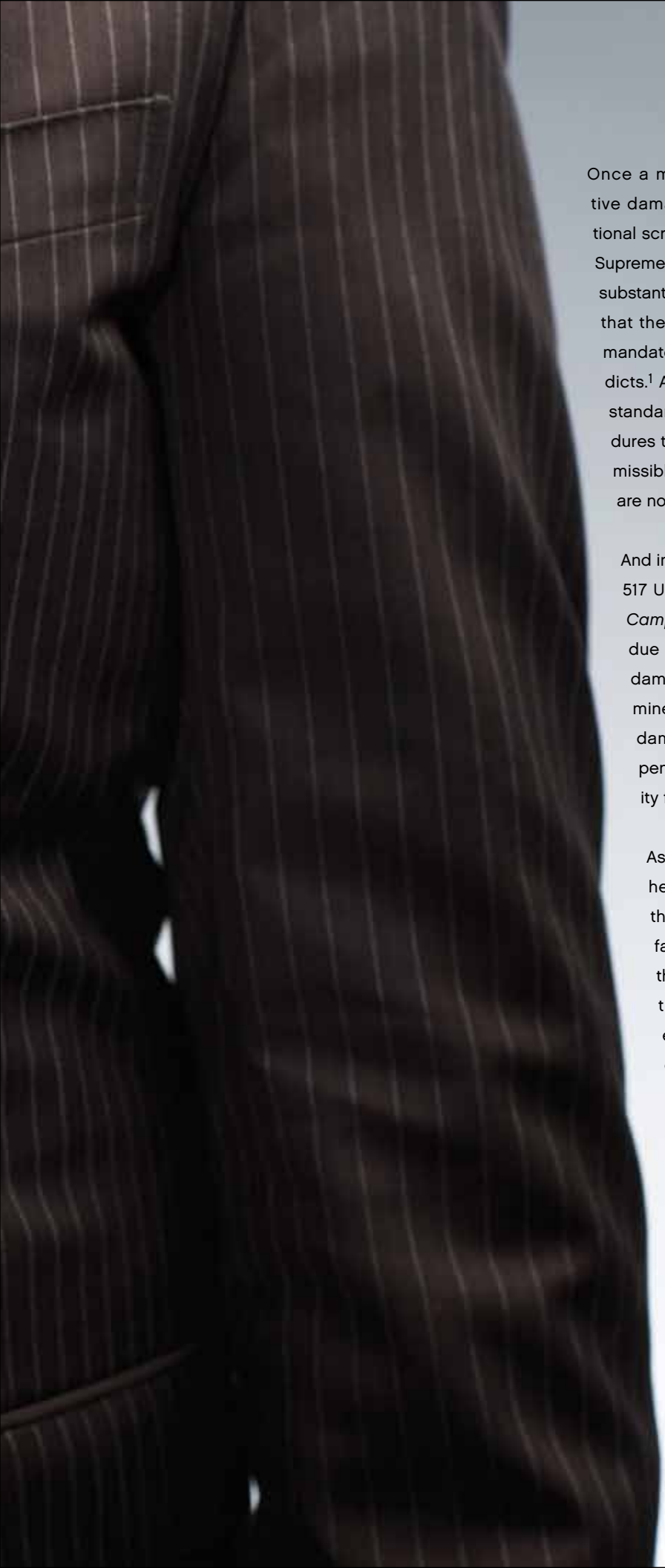
ONE SIZE DOESN'T FIT ALL:

A TAILORED APPROACH TO PUNITIVE DAMAGES ANALYSIS IN PRODUCT LIABILITY CASES



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Once a matter of almost exclusive state-law concern, punitive damages awards have come under increasing constitutional scrutiny in the last two decades. A series of United States Supreme Court decisions have fixed the procedures and set the substantive boundaries of punitive awards. It is now established that the Due Process Clause of the Fourteenth Amendment mandates meaningful judicial review of punitive damages verdicts.[1] An award of punitive damages is subject to a *de novo* standard of appellate review.[2] Trial courts must adopt procedures to ensure that punitive awards are not based on impermissible factors, such as evidence of harm to nonparties who are not before the court.[3]

And in a pair of decisions, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the Supreme Court held that due process forbids the imposition of "excessive" punitive damages, with the excessiveness of an award to be determined by the award's ratio to the amount of compensatory damages, by a comparison to available civil and criminal penalties, and by an application of so-called reprehensibility factors.

As the Court noted in *State Farm*, the last of these, reprehensibility, is "the most important indicium" of assessing the excessiveness of an award. The Court identified five factors to guide lower courts and juries in determining the reprehensibility of a defendant's conduct: (1) whether the harm caused was physical as opposed to merely economic; (2) whether the conduct showed an indifference to or reckless disregard of the health or safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct involved repeated actions or was an isolated incident; and (5) whether the harm was the result of the defendant's intentional misconduct.[4]

These five factors, however, were articulated in the context of cases involving economic torts. As a group, they provide a relatively poor framework for assisting juries and courts in their task of assessing reprehensibility in product liability cases, because many of them are present in *every* product liability action

and thus fail to distinguish among degrees of reprehensibility. Indeed, three of the five *State Farm* factors are present in almost every product liability case and thus provide no means of assessing *relative* reprehensibility:

- **Physical versus economic injury:** Product liability cases almost always involve physical injury.
- **Financial vulnerability:** Some courts have interpreted this factor not as *Gore* indicated—as pertaining to a defendant's *targeting* of a financially vulnerable plaintiff—but as referring to nothing more than the fact that the defendant has a greater net worth than the injured plaintiff or that the plaintiff's injuries left him or her in a financially vulnerable position.[5] Under this expansive (albeit incorrect) definition, this factor is present in nearly every product liability case, because the net worth of individual consumers is almost always smaller than that of product manufacturers.
- **Repeated misconduct:** To the extent courts construe this factor to refer to repeated sales, rather than to repeated acts of misconduct in designing or not redesigning a product, this factor is also present in almost every product liability case because nearly all goods are mass-produced and mass-marketed.

Reliance on these factors, at least as they have been interpreted by some of the courts, is tantamount to instructing the jury that three out of the five *State Farm* factors automatically cut in favor of greater reprehensibility. What is called for instead are factors that meaningfully aid juries and courts in situating—within the context of a product liability action—a particular defendant's conduct on a spectrum of conduct running from the least to the most reprehensible. Because the *State Farm* factors do not assist the jury in determining whether a defendant in a product liability case is "more blameworthy than others," it is therefore appropriate and necessary to develop a list of factors that do.

A MEANINGFUL ASSESSMENT OF REPREHENSIBILITY CALLS FOR PLACING A DEFENDANT'S CONDUCT ON A CONTINUUM OF BEHAVIOR

Punitive damages may be assessed only after a jury awards compensatory damages. Whether punitive damages are additionally appropriate (or, for that matter, constitutional) depends on whether the imposition of damages—in addition to damages that already make the plaintiff whole—is required either to punish that defendant or to deter such conduct in the future.[6] This hinges primarily on how reprehensibly the defendant has acted: the more reprehensible its conduct, the greater the need for a more substantial financial penalty to punish and deter that conduct; the less reprehensible, the lesser the need for a substantial penalty (or any penalty) to punish or deter. "Some wrongs," the Supreme Court has explained, "are more blameworthy than others."[7] Reprehensibility is therefore not a yes-or-no proposition, but rather a matter of *degree*.[8] The factors must in turn function as a tool to help juries and courts place the defendant's conduct along this spectrum of reprehensible behavior.

These factors need not be—and *should* not be—static across all torts, for what may be a helpful factor in assessing reprehensibility in an intentional or economic tort might be present in *all* product liability torts and thus of no value in assessing the *degree* of a product liability defendant's reprehensibility. Relying solely on the *State Farm* factors will therefore deny juries and courts access to several helpful yardsticks for evaluating reprehensibility not mentioned in that case. In other words, there is a substantial downside to a "one size fits all" approach, and there is thus a real need to fashion factors useful in assessing degrees of reprehensibility in product liability actions. Importantly, at no point has the Court ever held that these five factors are the definitive five factors that must always be applied to assess reprehensibility for any and all purposes and in any and all cases. To the contrary, the Court in *Gore* observed that it is entirely legitimate for "the level of punitive damages" to vary for "different classes of cases."[9]

THE FACTORS FOR ASSESSING REPREHENSIBILITY SHOULD LOOK TO A TYPICAL PRODUCT LIABILITY DEFENDANT'S CONDUCT

In determining the factors that will be most useful in assessing the reprehensibility of a defendant's conduct in a product liability case, the logical place to start is by selecting factors that evaluate the reprehensibility of a product liability defendant's conduct at each stage of the typical course of conduct for such a defendant. Usually, the defendant has designed a product that has subsequently injured others, including the plaintiff. Thus, there are two general categories of factors: (1) the defendant's conduct in initially designing the product; and (2) the defendant's conduct in responding to any injuries in light of its knowledge or belief about whether its product caused those injuries. These two categories may be assessed using a number of individual factors:

(1) Whether the defendant, in designing the product, attempted to comply with applicable government or industry safety standards	(I) Factors pertaining to a defendant's initial design decision
(2) Whether the defendant engaged in safety testing	
(3) Whether the defendant took steps to warn consumers about possible injuries	
(4) Whether the defendant affirmatively concealed its knowledge of defects known to cause injury	
(5) Whether the defendant erected a mechanism for receiving customer complaints and monitoring product safety	(II) Factors pertaining to a defendant's reaction to subsequent injuries
(6) Whether and how the defendant investigated product-related injuries	
(7) Whether the defendant voluntarily took measures to make its product safer	
(8) Whether the defendant issued new or additional safety warnings	

Product Design. When designing a product, a defendant's conduct may be viewed as more reprehensible, or less so, depending on the following factors:

Whether the defendant, in designing the product, attempted to comply with applicable government or industry safety standards. A defendant that takes the time to consult relevant safety protocols—whether government or industry standards—and thereafter incorporates them into its product design is acting in a responsible (and nonreprehensible) fashion that is not to be punished or deterred. Similarly, when a product is so novel or cutting-edge that appropriate safety standards do not yet exist, a designer that attempts to meet the standards that are most analogous will not be considered to have acted reprehensibly; indeed, taking the additional step of trying to comply with the most analogous safety standards for the new product is the very antithesis of punitive-damages-worthy conduct. What *is* reprehensible is a defendant that, in the face of clearly applicable standards, elects to ignore them entirely. As one would expect, the law mirrors this logic. In many states, compliance with applicable standards is a complete defense to punitive damages[10] or cuts against a finding of liability.[11] Even if not a bar, compliance or attempted compliance is at a minimum almost universally viewed as weighing against the imposition of punitive damages.[12]

Whether the defendant engaged in safety testing. A defendant that engages in product safety testing is acting cautiously and not reprehensibly. What matters in this regard is the quantity and quality of safety testing, the resources devoted to it, and whether the testing is reasonable. Any awards conferred for product safety and use of the product by persons or entities charged with public safety are, by their very nature, pertinent to demonstrate the reasonableness and nonreprehensibility of the defendant's testing protocols. Conversely, a defendant that "rush[es] into production" without pertinent testing or fails to test at all may warrant a punitive damages award to punish or deter.[13]

Whether the defendant took steps to warn consumers about possible injury. A defendant that knows its product may cause injury is not acting as reprehensibly if it warns consumers about that danger, as compared to a different defendant that, aware of the risk, does nothing to cure the defect and nothing to warn others of it. Most products are not designed to be completely injury-proof, and trying to make them so would often be unreasonable because it would rob them of their intended function and utility: a knife is a knife only if it has a cutting blade, and a bicycle is a bicycle despite its tendency to tip over when ridden. For such products, it is entirely plausible (and certainly not a basis for punitive damages) for a defendant to choose to warn against the risk rather than to ameliorate the so-called defect that causes the injury. Defendants that make this choice are acting responsibly—not reprehensibly.[14]

Whether the defendant affirmatively concealed its knowledge of defects known to cause injury. Having learned that its safety testing was defective or that its product has defects causing injury that can be either remedied or warned against, a defendant that conceals the evidence of such defects in order to make its product more marketable is engaged in far more reprehensible conduct than a defendant that is "upfront" with itself and with consumers by taking corrective measures. To be sure, a defendant need not disclose every step of its design and testing process or every conclusion it draws along the way. But defendants that learn of risks and actively try to suppress them and keep them secret are more likely to warrant punishment and need deterrence.[15]

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[2] *See id.* at 625.

[3] *See id.* at 624.

[4] *See id.* at 631.

[5] *See id.*

[6] The practice of handing residual money over to legal services organizations for the indigent is so prevalent that these organizations have come to rely on *cy pres* distributions to finance their work. Adam Liptak, Sidebar, "Doling Out Other People's Money," *N.Y. Times*, Nov. 26, 2007. Note that this approach stands in contrast to the view that, to the extent possible, residual funds should be used only to "effectuate . . . the interests of silent class members." *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1309 (9th Cir. 1990); *see also* 5 Jerold S. Solovy *et al*., *Moore's Federal Practice* – Civil ¶ 23.171 (2011). In considering nonstatutory *cy pres* in a federal class action, the Ninth Circuit concluded that *cy pres* is designed to provide the "next best" alternative to compensating injured class members and thus is not appropriate when the proposed distribution is unrelated to the interests of silent class members. *Six Mexican Workers*, 904 F.2d at 1308–09. The court proposed escheat (to the state) as an alternative, if no appropriate charity could be identified. *Id.* at 1309.

[7] Tenn. Code Ann. § 23.08; Mass. Civ. Proc. 23(e).

[8] This provision was added in 2008 at the recommendation of the Massachusetts IOLTA Committee. *Id.* Reporter's Notes (2008).

[9] Wash. Civ. R. 23(f).

[10] S.D. Codified Laws § 16-2-57 (2008).

[11] Cal. Code Civ. Proc. § 384; N.C. Gen. Stat. § 1-267.10 (2009).

[12] Both also contain language indicating that the use of residual funds in this manner "is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes." *Id.*

[13] *See In re Microsoft I-V Cases*, 135 Cal. App. 4th 706 (2006).

[14] *Id*. at 721.

[15] 735 Ill. Comp. Stat. 5/2-807 (2009).

[16] The Illinois Equal Justice Act, 30 Ill. Comp. Stat. 765/1 *et seq*., established a system for distributing money to organizations that provide for civil defense for the indigent.

[17] *See* Redish *et al*., *supra* note 1, at 638.

[18] *Id.* at 640–41.

[19] Pub. L. No. 109-2. CAFA extends federal jurisdiction to cases where the aggregate claims of the class exceed $5 million and in which "(A) any member of a class of plaintiffs is a citizen of a State different from any defendant; (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state." 28 U.S.C. § 1332(d)(2).

[20] *See* Redish *et al*., *supra* note 1, at 620 (noting that, among the range of alternatives for dispensing of unclaimed funds in federal court, *cy pres* relief is the one most often granted).

[21] *See* Sam Yospe, "Cy Pres Distributions in Class Action Settlements," 2009 *Colum. Bus. L. Rev*. 1014, 1059 n.154 (2009).

Reaction to Subsequent Injuries. When a manufacturer-defendant's product causes injuries after its sale to consumers, another useful gauge of its reprehensibility is the defendant's reaction. Its reaction is, of necessity, dependent on its knowledge or belief about the *cause* of the injuries. If, for example, people are harmed only when the product is used criminally (*e.g.*, a gun) or misused (*e.g.*, a folding table as a toboggan), the defendant is not acting reprehensibly in concluding that its product is not the cause of the injuries. Additional factors to evaluate reprehensibility in a product liability case should include:

Whether the defendant has erected a mechanism for receiving customer complaints and monitoring product safety. A defendant that has set up a system for accepting customer complaints and for monitoring reported injuries is more likely to be aware when injuries can be traced to a common defect and is less likely to be willfully blind to the knowledge that a product defect is the cause of injuries. Such a system enables a defendant to react more quickly. It is the type of behavior to be encouraged (not punished or deterred), and it consequently cuts against an award of punitive damages.

Whether and how the defendant has investigated product-related injuries. A defendant that knows of repeated product-related injuries and, in the face of such information, makes the conscious decision not to investigate the cause of those injuries (through further product testing or otherwise) acts more reprehensibly than a defendant that attempts to ascertain whether its product is defective and has played any role in those injuries. A defendant's failure to conduct extensive testing immediately after the first product-related injury is unlikely to be of any significance, for the justification and need for testing will likely not be apparent at first and may grow (or dissipate) over time. The jury's role here is to assess whether the testing that was done was appropriate given the surrounding circumstances, which tie directly to whether that reaction was more understandable (and hence less reprehensible) or more callous (and hence more reprehensible).[16] Along the same lines, a defendant's cooperation with any outside investigations indicates a willingness and desire to ascertain any defects and is to be encouraged, thus weighing against a finding of greater reprehensibility.

Whether the defendant voluntarily took measures to make its product safer. A defendant that voluntarily takes action to make its product safer—even if it is not certain whether its product is unsafe in the first place—is acting far less reprehensibly than a defendant that, in the face of certain knowledge of its product's flaws, does nothing.[17] Voluntary action, even at the urging of government or industry groups, is to be encouraged, not punished or deterred.[18] Moreover, the more certain the defendant's knowledge and the more grave the potential injury, the more reprehensible the defendant is for inaction and the more responsible it is for action, which can vary from offers to repair to wholesale product recall, depending upon the certainty and severity of the injuries.

Whether the defendant issued new or additional safety warnings. Where repair or recall of a product is infeasible (because redesign would negate the product's intended purpose or functionality), unwarranted (because the risk of injury is remote and its severity minor), or even unnecessary (because injuries stem from misuse rather than a product defect), a defendant has the ability to issue new or additional warnings. Doing so weighs against a finding of reprehensibility, while failing to take this action can potentially be more reprehensible—particularly in the face of knowledge that the product is in fact defective and coupled with the defendant's failure to try to make the product safer.

CONCLUSION

The U.S. Supreme Court's project of constitutionalizing punitive damages is not yet complete. There is a particular need to resolve the mismatch between the factors that have been identified for assessing reprehensibility in economic tort cases and the typical facts at issue in product liability cases. The work must begin in the lower courts. In states where juries have the first-line responsibility to ensure a reasonable and nonexcessive punitive damages verdict, trial courts should take the first step of providing a suitable instruction that recasts the reprehensibility factors along the lines outlined above. If the jury returns a verdict that includes punitive damages, both trial courts and appellate courts should review those verdicts in light of the manufacturer's design and post-design conduct. And counsel must attempt to convince these courts that they should not reflexively point to a set of factors never intended to be exclusive and that, in product liability cases at least, are a poor fit. ■

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[1] *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420–21 (1994).

[2] *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

[3] *Philip Morris USA v. Williams*, 549 U.S. 346, 353–57 (2007).

[4] *State Farm*, 538 U.S. at 419.

[5] *See, e.g.*, *Century Surety Co. v. Polisso*, 139 Cal. App. 4th 922, 965 n.21 (2006).

[6] *State Farm*, 538 U.S. at 419 ("It should be presumed that a plaintiff has been made whole for his injury by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.").

[7] *Gore*, 517 U.S. at 575.

[8] *See, e.g., id.* at 568 (noting need for "flexibility in determining the level of punitive damages").

[9] *Id*.

[10] *See, e.g.*, Ohio Rev. Stat. Ann. § 2307.80(D)(1).

[11] *See, e.g.*, *DiCarlo v. Keller Ladders, Inc.*, 211 F.3d 465, 468 (8th Cir. 2000).

[12] *See, e.g.*, *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1317 (11th Cir. 1994).

[13] *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1253–54 (10th Cir. 2000).

[14] *See, e.g.*, *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1317 (11th Cir. 2000) ("We have repeatedly held that the issue of punitive damages should not go to the jury when a manufacturer takes steps to warn the plaintiff of the potential danger that injured him; such acts bar a finding of wantonness.").

[15] *See, e.g.*, *Shurr v. A.R. Siegler, Inc.*, 70 F. Supp. 2d 900, 938–39 (E.D. Wis. 1999).

[16] *See, e.g.*, *Lakin v. Senco Prods., Inc.*, 925 P.2d 107, 119 (Or. Ct. App. 1996) (punitive damages proper against nail-gun manufacturer where manufacturer had long been aware of tendency of its nail guns to "double fire," yet it conducted no tests to determine when, or how frequently, double firing occurred).

[17] *See Duran v. Hyundai Motor Am., Inc.*, 271 S.W.3d 178, 207–08 (Tenn. Ct. App. 2008) (no punitive damages, as a matter of law, where defendant voluntarily recalled product).

[18] *In re Exxon Valdez*, 270 F.3d 1215, 1242 (9th Cir. 2001) ("Reprehensibility should be discounted if defendants act promptly and comprehensively to ameliorate any harm they cause in order to encourage such socially beneficial behavior.").