
Comments

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Punitives, Damaged: The Troubling Due Process Implications of *Philip Morris v. Williams* and the Case for a Sounder Approach to Litigating Third- Party Harm

For nearly two decades, the U.S. Supreme Court has struggled to articulate the point at which a punitive damages award is so excessive that it violates a defendant's Fourteenth Amendment Due Process rights. In 2007, the Court continued that journey in *Philip Morris v. Williams*,¹ deciding for the first time that the *purpose* of a punitive damages award—as opposed to the amount—could be so improper as to render an award unconstitutional.² In *Philip Morris*, the Court considered whether the Due Process Clause permits a jury to base its punitive damages award on the defendant's harm to third parties not named in the suit. The Court's conclusion—in effect “yes, and no”—indicated that a jury may consider a defendant's harm to third parties when evaluating the reprehensibility of a defendant's conduct, the predominant factor in determining the size of a punitive damages award.³ The Court concluded that a jury may not, however,

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¹ 127 S. Ct. 1057 (2007).

² *Id.* at 1062–63.

³ *Id.* at 1063.

punish a defendant directly for injuries inflicted upon strangers to the litigation.⁴

As this Comment presents, the distinction that the Supreme Court endeavored to draw in *Philip Morris* is illusory, profoundly problematic, and poses greater uncertainties than those it sought to answer. A discussion of the difficulties inherent in applying the Court's novel standard shows that the optimal way to simultaneously retain the doctrine of punitive damages and protect a defendant's due process rights is to prohibit a jury's consideration of nonparty harm altogether.⁵

Part I of this Comment summarizes the history of punitive damages jurisprudence leading up to the conflict in *Philip Morris*. Part II discusses the factual and procedural history of *Philip Morris* and explains the Supreme Court's holding in the case. Part III analyzes the Court's reasoning and the problems it presents upon real-world application. Part IV concludes this Comment by briefly discussing an alternative approach that is both clearer than the Court's standard and more protective of a defendant's rights under the Due Process Clause.

I

DUE PROCESS LIMITS ON PUNITIVE DAMAGES: A BRIEF HISTORY

Although punitive damages are often the subject of controversy and debate, their use to punish and deter misconduct is firmly embedded in our legal tradition.⁶ Historically rooted in criminal sanctions, punitive damages first became a civil remedy in English common law during the 18th century and were first recognized in the United States in 1791.⁷ Punitive damages awards gradually continued to gain acceptance among American courts through the mid-19th century, with the Supreme Court in *Day v. Woodworth* ultimately

⁴ *Id.* at 1064.

⁵ Within this issue, the terms "nonparty" and "out-of-court third party" are generally used interchangeably by both the Supreme Court and its critics. For purposes of this Comment, the terms are synonymous.

⁶ See Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1285 (1993) (noting that punitive damages date back at least as far as the Hindu Code of Manu, Hammurabi's Code, and the Bible).

⁷ Alan Calnan, *Ending the Punitive Damage Debate*, 45 DEPAUL L. REV. 101, 108–09 (1995) (citing *Coryell v. Colbough*, 1 N.J.L. 77 (1791)).

declaring the doctrine “a well-established principle of the common law,” the propriety of which “will not admit of argument.”⁸

The Court noted in *Day* that punitive damages awards were distinct from traditional compensatory damages, being based upon “the enormity of [the] offence rather than the measure of compensation to the plaintiff,” such as in cases “where the injury has been wanton and malicious, or gross and outrageous.”⁹ Today, the reasoning underlying punitive damages remains much the same. Unlike compensatory damages, which are intended to redress the actual loss a plaintiff has suffered,¹⁰ punitive damages are aimed at deterrence and retribution¹¹ and arise in part from a state’s interest in punishing unlawful tortious conduct and deterring its repetition.¹² Punitive damages awards thus represent an amount beyond that which makes a plaintiff “whole again.”¹³ As a result of the unique purpose behind punitive damages, states today generally impose a substantial burden upon a plaintiff before punitive damages are awarded.¹⁴ In most jurisdictions, that burden requires showing that the defendant’s wrongful act was done intentionally or with willful indifference, deliberate disregard, malice, or a similar state of mind.¹⁵

Punitive damages, being so rooted in a state’s interest in protecting its citizens from particularly harmful or egregious acts, assuredly serve some important and popular social purposes. In recent years, however, increasing debate has focused on the size of punitive

⁸ *Day v. Woodworth*, 54 U.S. 363, 371 (1851).

⁹ *Id.* (emphasis added).

¹⁰ *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (citing RESTATEMENT (SECOND) OF TORTS § 903 (1979)).

¹¹ *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 908(1) (1979)).

¹² *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266–67 (1981); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

¹³ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (“It should be presumed a plaintiff has been made whole for his injuries 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.”).

¹⁴ See LINDA L. SCHLUETER, 1 PUNITIVE DAMAGES § 4.2(A)(2), at 159–62 (5th ed. 2005) (discussing the pleading requirements and the basis for a claim in a punitive damages case).

¹⁵ See *id.*

damages awards, their frequency, and the overall impact they have on the legal system.¹⁶

Though views vary widely, that debate predominantly involves two concerns. First, critics fear that punitive damages can be arbitrarily imposed, particularly where a jury may not be able to accurately discern the culpability of a defendant's conduct.¹⁷ Second, many point to the possibility that punitive damages can be excessive under the circumstances, either by duplicating the same punishment against one defendant in successive trials,¹⁸ or by imposing an award "that has no relation to reality."¹⁹

Driven by those two concerns, the last twenty years have seen a dramatic change in the jurisprudence of punitive damages review. Before the late 1980s, state courts generally reviewed punitive damages awards without regard to federal constitutional concerns.²⁰ Instead, they were guided either by diverse standards of "reasonableness" and "excessiveness"²¹ or by statutory constraints on punitive damages. Those statutory constraints, which most states had enacted or tightened by the mid-1990s,²² included heightened burden of proof requirements, bifurcation of "liability" and "punitive" phases at trial, and so-called "split recovery" rules that direct a percentage of punitive damages awards to state funds.²³ In addition, it was not uncommon for courts to impose their own reductions on punitive damages awards during post-trial proceedings through the common-

¹⁶ See, e.g., W. Kip Viscusi, *The Blockbuster Punitive Damages Awards*, 53 EMORY L.J. 1405, 1405–08, 1428 tbl.1 (2004) (discussing the media attention given to punitive damages awards, the interest of tort reformers, and the rise of "blockbuster" awards ranging from \$100 million to more than \$1 billion).

¹⁷ Jeff Bleich, Michelle Friedland, Dan Powell & Aimee Feinberg, *Smoke Signals: Philip Morris Provides Yet Another Chapter in the Ongoing Saga of Punitive Damages in the U.S. Supreme Court*, OR. ST. B. BULL., June 2007, at 24.

¹⁸ See, e.g., Howard A. Denemark, *Seeking Greater Fairness When Awarding Multiple Plaintiffs Punitive Damages for a Single Act By a Defendant*, 63 OHIO ST. L.J. 931, 950–52 (2002).

¹⁹ Bleich et al., *supra* note 17, at 24.

²⁰ See generally Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983) (noting the lack of clear constitutional standards in judicial review of punitive damages).

²¹ See *id.* at 290–91; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("In most jurisdictions jury discretion over the amounts awarded [in punitive damages] is limited only by the gentle rule that they not be excessive.").

²² Ansley C. Tillman, *Unwarranted Entry: An Examination of the Supreme Court's Decision to Enter the Punitive Damages Arena*, 24 REV. LITIG. 473, 494 (2005).

²³ *Id.* at 494–95.

law power of remittitur.²⁴ In any case, as the authority to impose punitive damages stemmed from a state's own power to punish and protect its citizens, the basis for such review was consistently solely a matter of state law.²⁵

In several cases in the late 1980s and early 1990s, the breadth of courts' authority to review punitive damages swiftly began to change, beginning with the Supreme Court's opinion in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.* in 1989.²⁶ In that case, a defendant in an antitrust action challenged a punitive damage award of \$6 million under the Excessive Fines Clause of the Eighth Amendment.²⁷ The Court concluded that the Excessive Fines Clause did not apply to punitive damages awards between private parties,²⁸ but noted concern that an excessively large punitive damages award might instead violate the Due Process Clause of the Fourteenth Amendment.²⁹ Because the appellant in that case had not raised the due process issue before either the District Court or the Court of Appeals, however, the Court did not consider the question directly and ultimately upheld the award.³⁰

Two years later, the Court confronted the due process issue head-on for the first time in *Pacific Life Insurance Co. v. Haslip*.³¹ In *Haslip*, the Court clearly stated its constitutional obligations as related to punitive damages review under the Due Process Clause.³² Those obligations included both a review of the reasonableness of a punitive damages award and the adequateness of judicial guidance to the jury because "unlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."³³ Ultimately, the Court stopped short of overturning

²⁴ *Id.* at 493.

²⁵ It had long been settled that under the traditional common law approach, a jury's determination to impose an award of punitive damages may be reviewed by appellate courts—including the Supreme Court—to ensure that it is reasonable under a rational-basis review. *See, e.g., Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991). The Supreme Court, however, has never struck down a punitive damages award between private actors on the basis that it was unreasonable.

²⁶ 492 U.S. 257.

²⁷ *See id.*

²⁸ *Id.* at 264.

²⁹ *Id.* at 276.

³⁰ *Id.* at 278.

³¹ 499 U.S. 1 (1991).

³² *Id.* at 9–12.

³³ *Id.* at 18 (citing *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U.S. 86, 111 (1909)).

the punitive damages award at issue in *Haslip*, finding the state court's application of certain standards had adequately constrained the jury's decision.³⁴ Before closing the issue, however, the Court warned that the amount of the award in *Haslip* — more than four times the amount of compensatory damages, and more than 200 times the plaintiff's out-of-pocket expenses — was “close to the line.”³⁵

It was not until *BMW v. Gore* in 1996 that the Court first struck down a punitive damages award as excessive on due process grounds.³⁶ In *BMW*, plaintiff Ira Gore Jr. had purchased a new car that was, unbeknownst to him, repainted by the distributor to hide surface damage that occurred during transit.³⁷ Gore alleged that BMW's failure to disclose that post-manufacture paint job amounted to fraud, and a jury awarded him \$4000 in compensatory damages.³⁸ Additionally, the jury awarded \$4 million in punitive damages (later reduced to \$2 million on appeal to the Alabama Supreme Court) based on evidence that the defendant's practice was widespread and had affected a large number of other BMW consumers.³⁹ Gore appealed the decision to the U.S. Supreme Court.

On review, the Court began by noting its approval of the Alabama decision to reduce the award by half, agreeing that the jury had improperly based its decision in part upon conduct that had happened outside the state.⁴⁰ Writing for the majority, Justice Blackmun explained that the punitive damages award could punish more than merely BMW's fraud upon Gore himself, but the state did 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.”⁴¹ Having narrowed the scope of the award to reflect only conduct that occurred within the state, the Court turned to its greater task: to “illuminate ‘the character of the standard that will identify unconstitutionally excessive awards’ of punitive damages” in future cases.⁴² To that end, the Court developed an analysis of the potential excessiveness of a punitive damages award, which consisted of three

³⁴ *Id.* at 23–24.

³⁵ *Id.*

³⁶ 517 U.S. 559.

³⁷ *Id.* at 563.

³⁸ *Id.* at 563–64.

³⁹ *Id.* at 564.

⁴⁰ *Id.* at 572–73.

⁴¹ *Id.* at 572–73.

⁴² *Id.* at 568 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994)).

“guideposts.”⁴³ First, and “[p]erhaps . . . most important,” a reviewing court should consider the degree of reprehensibility of the defendant’s conduct in keeping with the *Day* court’s command that punitive damages “should reflect ‘the enormity of [the] offense.’”⁴⁴ In determining that degree of reprehensibility, the Court explained, a reviewing court should consider several aggravating factors such as violence,⁴⁵ trickery or deceit,⁴⁶ or an “indifference to or reckless disregard for the health and safety of others.”⁴⁷ Second, a court should require a “reasonable relationship” (often called the “ratio test”) between a punitive damages award and “the actual harm inflicted on the plaintiff.”⁴⁸ Third and finally, a court should take into consideration any disparity between the sanction imposed and civil penalties authorized or imposed in similar cases.⁴⁹

Applying these factors in *BMW*, the Supreme Court came to several conclusions. As to reprehensibility, the Court concluded that BMW’s actions exhibited “none of the circumstances ordinarily associated with egregiously improper conduct.”⁵⁰ Furthermore, the 500-to-1 ratio between punitive and compensatory damages awarded to the plaintiff was “dramatically greater” than those the Court had considered reasonable in prior cases.⁵¹ Finally, the Court noted the massive disparity between the punitive and compensatory damages awards and the very small civil sanctions possible.⁵² Finding that each of the guideposts weighed in favor of excessiveness, the Court reversed the award as a violation of the defendant’s right to due process.⁵³

Seven years later, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court revisited and clarified the *BMW* framework, again striking down a jury’s punitive damages award on due process grounds.⁵⁴ In *State Farm*, a jury had awarded \$2.6 million in

⁴³ *Id.* at 574.

⁴⁴ *Id.* at 575 (quoting *Day v. Woodworth*, 54 U.S. 363, 371 (1851)).

⁴⁵ *Id.* at 576 (quoting *Solem v. Helm*, 463 U.S. 277, 292–93 (1983)).

⁴⁶ *Id.* (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 (1993)).

⁴⁷ *Id.*

⁴⁸ *Id.* at 580–81.

⁴⁹ *Id.* at 583–84.

⁵⁰ *Id.* at 580.

⁵¹ *Id.* at 581–82.

⁵² *Id.* at 583–85.

⁵³ *Id.* at 585–86.

⁵⁴ 538 U.S. 408 (2003).

compensatory damages and \$145 million in punitive damages against State Farm Insurance for wrongfully failing to pay claims against a policyholder.⁵⁵ The Court adhered to the three guidepost analysis set out in *BMW*, and narrowed the first of those guideposts – the degree of reprehensibility – to five discrete factors: (1) whether the harm caused was physical as opposed to economic; (2) whether the target of the conduct was financially vulnerable; (3) whether the conduct involved repeated actions or was an isolated incident; (4) whether the harm resulted from intentional malice, trickery, or deceit, as opposed to mere accident; and (5) whether the harm evinced an indifference to or a reckless disregard for the health or safety of others.⁵⁶ In evaluating the facts under its clarified guideposts, the Court curtly declared the case “neither close nor difficult,”⁵⁷ and struck down the jury’s punitive damages award as “neither reasonable nor proportionate to the wrong committed.”⁵⁸

Among the most salient points the Court raised in its discussion of the case was the geographic limitation first explored in *BMW*. While the Court adhered to its command that determining a defendant’s reprehensibility should include consideration of whether “the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others,” the Court also made it clear that a court *cannot*, under the auspices of a punitive damages award, punish a defendant for conduct to third parties outside the state.⁵⁹ In arriving at an appropriate punitive damages award, the state court jury in *State Farm* had relied heavily upon the statistical probability that the defendant would be punished in fewer than one of every 50,000 instances of similar conduct across the country.⁶⁰ The Supreme Court, citing *BMW*, scolded the state court for using the case “as a platform to expose, and punish,” State Farm’s nationwide policies rather than specifically for its conduct directed toward the plaintiff.⁶¹ Relying upon fundamental tenets of federalism as its support, the Court made a point of stating clearly, as it had in *BMW*, that a state

⁵⁵ *Id.* at 415.

⁵⁶ *Id.* at 419 (citing *BMW*, 517 U.S. at 576–77).

⁵⁷ *Id.* at 418.

⁵⁸ *Id.* at 429.

⁵⁹ *Id.* at 419–20.

⁶⁰ *Id.* at 426.

⁶¹ *Id.* at 420.

has no power to impose its own judgment upon a defendant's actions in other states.⁶²

Crucially, however, the Court did not go so far as to altogether *prohibit* evidence that a defendant's harm extended to third parties outside the state. Instead, the Court merely limited the use of such evidence to demonstrate "the deliberateness and culpability" of the defendant's action.⁶³ Further, the Court required that such conduct "have a nexus to the specific harm suffered by the plaintiff" to ensure a defendant is not simply punished for being an unsavory individual.⁶⁴ The likelihood that other instances of a defendant's conduct will generally go unpunished, the Court explained, was simply not a legitimate basis upon which to determine an award of punitive damages. As the Court stated, "[d]ue process does not permit courts . . . to adjudicate the merits of *other parties' hypothetical claims* against a defendant."⁶⁵ The Court further stated that "[a]lthough evidence of other acts need not be identical to have relevance in the calculation of punitive damages,"⁶⁶ "[a] defendant's dissimilar acts . . . may not serve as the basis for punitive damages."⁶⁷ Thus, evidence of the defendant's conduct toward third parties could serve as a basis to determine punitive damages, but only conduct similar and relevant to the harm suffered by the plaintiff and only in a manner that dealt with the "deliberateness and culpability"⁶⁸ of the conduct at issue.

Turning to the remainder of the *BMW* analysis, the Court held that although no bright-line ratio would be required, "few awards exceeding a single-digit ratio between punitive and compensatory damages"⁶⁹ would satisfy due process, and there was doubtless a "presumption against" a 145-to-1 ratio.⁷⁰ Furthermore, the Court noted, the \$145 million punitive damages award was overwhelmingly greater than the state's nearest relevant criminal penalty of \$10,000.⁷¹ The Court determined the award to be "an irrational and arbitrary

⁶² *Id.* at 420–22.

⁶³ *Id.* at 422.

⁶⁴ *Id.*

⁶⁵ *Id.* at 423 (emphasis added).

⁶⁶ *Id.*

⁶⁷ *Id.* at 422–23.

⁶⁸ *Id.* at 422.

⁶⁹ *Id.* at 425.

⁷⁰ *Id.* at 426.

⁷¹ *Id.* at 428.

deprivation of the property of the defendant” in violation of the Due Process Clause and reversed the state court’s decision.⁷²

After *State Farm*, analysts and academics focused primarily on the Court’s pronouncement favoring single-digit ratios. Several law review articles speculated as to whether the Court had, in effect, imposed a de facto 9-to-1 limit upon punitive damages.⁷³ But *State Farm*’s quieter holding concerning harm to third parties raised a more critical question: if the Court prohibited a punitive damage award based on the defendant’s “lawful out-of-state conduct” or “dissimilar acts,” could a state allow punitive damages for *similar* acts done against others within the *same* state? *BMW v. Gore* seemed to suggest the answer should be yes; although the Alabama jury in that case could not base its punitive damages award upon BMW’s similar conduct in other states, the Court remarked in a footnote that “the error-free portion of the jury verdict” could be reached by multiplying the harm done to each vehicle by the number of repainted vehicles sold *within the state*.⁷⁴ And as the Court had recognized in several cases preceding *BMW*, “the existence and frequency of similar past conduct” is a typical and legitimate consideration in assessing punitive damages.⁷⁵ On the other hand, however, the Court expressly stated in *State Farm* that the Due Process Clause prohibits a court from “adjudicat[ing] the merits of other parties’ hypothetical claims.”⁷⁶ Considering a defendant’s harm to others, it seemed, was simultaneously prohibited and “error free.” Through apparently inconsistent language, the Court uncovered a surprisingly complex aspect of punitive damages: in determining an appropriate punitive damage award, how is a jury to treat a defendant’s conduct to those *other* than the plaintiff?

⁷² *Id.* at 429.

⁷³ See, e.g., Andrew C.W. Lund, *The Road from Nowhere? Punitive Damage Ratios After BMW v. Gore and State Farm Mutual Automobile Insurance Co. v. Campbell*, 20 *TOURO L. REV.* 943 (2005).

⁷⁴ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 567–68 n.11 (1996).

⁷⁵ *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 n.28 (1993) (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21–22 (1991)).

⁷⁶ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003).

II

THE CURIOUS CASE OF *PHILIP MORRIS v. WILLIAMS*

The questions raised by *State Farm* engendered a great deal of litigation.⁷⁷ As a result, two outcomes were expected when the Court in 2006 granted certiorari in *Philip Morris v. Williams*. First, many foresaw further development in the *BMW/State Farm* substantive due process analysis, particularly with regard to the Court's "ratio" standard.⁷⁸ Second, many hoped for a clarification of the issues of harm to nonparties raised by both *BMW* and *State Farm*.⁷⁹ As it turned out, the former concern was not addressed at all—and the latter was made only more confounding.⁸⁰

A. *Philip Morris: The Factual and Procedural Background*

Philip Morris v. Williams arose out of the death of Jesse Williams, a heavy smoker whose surviving spouse brought claims for negligence and deceit against the manufacturer of Williams' favored cigarette.⁸¹ Mrs. Williams asserted that Philip Morris, over the course of forty years, had knowingly and falsely led Mr. Williams to believe smoking was safe—a belief she contended ultimately led to his death.⁸² Mrs. Williams alleged Philip Morris's conduct amounted to deceit and sought both compensatory and punitive damages.⁸³ The jury found for Mrs. Williams and awarded compensatory damages of approximately \$821,000 and punitive damages of \$79.5 million.⁸⁴

The subsequent procedural history is uniquely convoluted. After reviewing the jury verdict, the trial judge found the \$79.5 million punitive damages award "excessive" under *BMW v. Gore* and reduced the award to \$32 million.⁸⁵ On appeal, the Oregon Court of Appeals

⁷⁷ Erwin Chemerinsky, *More Questions About Punitive Damages*, TRIAL, May 2007, at 72.

⁷⁸ See, e.g., Linda Greenhouse, *Supreme Court to Weigh Award in a Smoker's Death*, N.Y. TIMES, May 31, 2006, at C3; Bloomberg.com, *Philip Morris Punitive Damages Get High Court Hearing*, BLOOMBERG NEWS, May 30, 2006, <http://www.bloomberg.com/apps/news?pid=10000087&sid=aYpnGewZ1NUY>.

⁷⁹ See *id.*

⁸⁰ See *Philip Morris v. Williams*, 127 S. Ct. 1057 (2007).

⁸¹ *Id.* at 1060.

⁸² See *id.* at 1060–61.

⁸³ *Id.* at 1060–61.

⁸⁴ *Id.*

⁸⁵ *Id.*

restored the award of \$79.5 million, concluding the trial court should not have reduced the jury's measure of appropriate punitive damages.⁸⁶ After unsuccessfully seeking review in the Oregon Supreme Court, Philip Morris was then granted certiorari by the U.S. Supreme Court,⁸⁷ which remanded the case for further proceedings in light of its then-recent decision in *State Farm v. Campbell*.⁸⁸ Bolstered by what appeared to be a new 9-to-1 ceiling on punitive damages awards, Philip Morris returned to the Oregon courts to argue that its sanction—at nearly 100 times Williams's compensatory damages award—was “grossly excessive.”⁸⁹

On remand, Philip Morris then supplemented its argument for excessiveness with a second assignment of error culled from *State Farm*, asserting that the trial court erred in failing to properly instruct the jury concerning what it could and could not do with regard to the defendant's conduct toward those not represented in court.⁹⁰ At trial, Philip Morris had submitted to the court its “Proposed Jury Instruction No. 34,” an instruction that purported to explain to the jury the difference between permissible and impermissible considerations of the harm defendant's conduct allegedly caused to nonparties.⁹¹ The proposed jury instruction, in relevant part, stated:

The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.⁹²

Although the trial court did incorporate concepts from Philip Morris's proposed instruction into its final jury instructions, the “court did not give proposed jury instruction No. 34 in the form in which Philip Morris proffered it.”⁹³ That decision, Philip Morris now

⁸⁶ *Williams v. Philip Morris Inc.*, 182 Or. App. 44, 72, *adh'd to on recons.*, 183 Or. App. 192 (2002).

⁸⁷ *Philip Morris*, 127 S. Ct. at 1062.

⁸⁸ *See id.* at 1065.

⁸⁹ *See Williams v. Philip Morris Inc.*, 344 Or. 45 (2008).

⁹⁰ *Id.* at 55.

⁹¹ *Id.* at 50.

⁹² *Id.*

⁹³ *Id.* at 50–51 n.1.

argued, constituted reversible error under *State Farm*.⁹⁴ After *State Farm*, they asserted, courts were prohibited from imposing punitive damages awards based upon punishment for harm caused to nonparties; the trial court's decision not to give Philip Morris's proffered jury instruction, they argued, created a risk that the jury did exactly that.⁹⁵

The Oregon Court of Appeals and the Oregon Supreme Court successively rejected Philip Morris's argument.⁹⁶ As the Oregon Supreme Court noted, *State Farm* had not explicitly held that a jury cannot punish for the harm caused to others.⁹⁷ Instead, it had merely held that a jury could not base its award upon a defendant's *dissimilar* acts.⁹⁸ Regardless of whether the jury in *Philip Morris* had in fact considered the defendant's similar acts to other individuals, the Oregon Supreme Court would not force upon them a jury instruction that represented a different standard than that which it read in *State Farm*. The Oregon Supreme Court went on to note the confusion that would result if Philip Morris's reading of the law were accurate: "[i]f a jury cannot *punish* for the conduct [to nonparties], then it is difficult to see why it may consider it at all."⁹⁹ Further, the court stated that "[i]t is unclear . . . how a jury could 'consider' harm to others, yet withhold that consideration from the punishment calculus."¹⁰⁰ The Oregon Supreme Court reaffirmed the punitive damages award, and, as was to be expected, Philip Morris once again appealed to the U.S. Supreme Court.¹⁰¹

The U.S. Supreme Court, likely perceiving the complexity that nonparty harm brought to the *BMW/State Farm* due process analysis, granted certiorari.¹⁰² As Philip Morris had argued in its appeal to the Oregon courts, the trial court's asserted error lay in its refusal to give Philip Morris's proposed jury instruction, presenting the risk that a portion of the \$79.5 million award represented punishment for its

⁹⁴ *Id.* at 52.

⁹⁵ *Philip Morris*, 127 S. Ct. at 1064.

⁹⁶ *Id.*

⁹⁷ *See id.*

⁹⁸ *Id.* at 1065.

⁹⁹ *Id.* at 1064–65 (quoting *Williams v. Philip Morris Inc.*, 340 Or. 35, 52 (2006)) (emphasis added) (first alteration original).

¹⁰⁰ *Id.* at 1065 (quoting *Williams*, 340 Or. at 52) (first alteration original).

¹⁰¹ *Id.* at 1062.

¹⁰² *Id.*

harm to others – a punishment Philip Morris argued the Due Process clause would forbid.¹⁰³

B. The Supreme Court's Majority Opinion

In a 5-to-4 decision, the Court narrowly agreed with Philip Morris, reversing the Oregon Supreme Court's decision and remanding the case for further proceedings.¹⁰⁴ Writing for the majority, Justice Breyer stated that "[i]n our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."¹⁰⁵ To hold otherwise, Breyer wrote, would present two problems of constitutional import. First, to permit a state to punish a defendant for harm it inflicted upon other unidentified individuals who did not participate in the lawsuit would deprive the defendant of its constitutionally protected right to "present every available defense."¹⁰⁶ Second, permitting punishment for injury to a nonparty victim would require speculation on the part of the jury as to the extent, number, and circumstances of those injuries.¹⁰⁷ Such speculation produces constitutionally impermissible risks of arbitrariness, uncertainty, and lack of notice to the defendant.¹⁰⁸ To avoid such risks, the Court held, a jury may not use punitive damages to punish a defendant for the harm caused others.¹⁰⁹ Recognizing the inconsistency of its earlier language on this point in *BMW* and *State Farm*, the Court conceded that it had never before explicitly held that a jury may not punish for the harm a defendant causes to out-of-court third parties.¹¹⁰ But, the Court concluded, "we do so hold now."¹¹¹

¹⁰³ *Id.* at 1061. Philip Morris also argued that the punitive damages award was "grossly excessive," as the nearly 100-to-1 ratio of punitive damages to compensatory damages far exceeded the single-digit multiplier rule implied in *State Farm*. However, having resolved the case on other grounds, the Court never reached the issue. *Id.* at 1065.

¹⁰⁴ *See id.*

¹⁰⁵ *Id.* at 1063.

¹⁰⁶ *Id.* (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See id.* at 1063–65.

¹¹¹ *Id.* at 1065.

As alluringly clear as that language seemed, only three paragraphs later the Court added a considerably more complex facet to its analysis:

[Williams] argues that she is free to show harm to other victims because it is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. That is to say, harm to others shows more reprehensible conduct. Philip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we. Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm¹¹² to the general public, and so was particularly reprehensible

In other words, there is only one appropriate way in which a jury can consider harm to nonparties in its determination of a punitive damages award. A jury *may* consider evidence of harm to nonparties in its determination of the reprehensibility of the defendant's conduct, but may *not* use that evidence to punish a defendant directly for the harm it is alleged to have caused.

As a theoretical distinction, the line the Court drew was perhaps a viable one. But as the Oregon Supreme Court recognized in its opinion on Philip Morris's second appeal, the prospect of applying such a nuanced standard to an actual jury's decision-making process raised some vexing questions. First, since the Court has described reprehensibility as the "most important" factor in determining the size of a punitive damages award,¹¹³ how is a jury to consider harm to nonparties in determining the reprehensibility of the defendant's conduct yet *withhold* that consideration from its overall calculation of how large that punishment should be? Second, once a jury has awarded punitive damages, how could a reviewing court determine whether that jury "considered" such nonparty harm solely within the rubric of reprehensibility, rather than in seeking to punish the defendant directly? The Supreme Court's response, if not altogether circuitous, was less than helpful: "Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring."¹¹⁴ Where such a risk exists, the Court continued, a state court must protect against that

¹¹² *Id.* at 1063–64.

¹¹³ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

¹¹⁴ *Philip Morris*, 127 S. Ct. at 1065.

risk upon a party's request.¹¹⁵ Presumably – although the court did not expressly say so – such “protection” would come in the form of an adequately illuminating jury instruction.

Having announced its new rule and the reasoning upon which it was based, the Court then applied those principles to the jury instructions given in the case at hand. The Court explained that “[t]he instruction that Philip Morris said the trial court should have given distinguishes between using harm to others as part of the ‘reasonable relationship’ equation (which it would allow) and using it directly as a basis for punishment.”¹¹⁶ The Oregon Supreme Court, on the other hand, permitted some measure of direct punishment for harm to others and thus “applied the wrong constitutional standard” when considering Philip Morris’s appeal.¹¹⁷ The Court thus vacated the Oregon Supreme Court’s opinion and remanded for further proceedings in accord with its new rule.¹¹⁸

C. *The Dissents*

Chief Justice Roberts and Justices Kennedy, Souter, and Alito joined Justice Breyer’s majority opinion.¹¹⁹ Justices Stevens, Thomas, and Ginsburg filed separate dissenting opinions, and Justice

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1064.

¹¹⁷ *Id.* at 1065.

¹¹⁸ On remand, the Oregon Supreme Court reinstated the punitive damages award, but did so for reasons unrelated to the U.S. Supreme Court’s opinion. *See Williams v. Philip Morris Inc.*, 344 Or. 45 (2008). Under Oregon law, an appellate court will not reverse a trial court’s refusal to give a proposed jury instruction unless the proposed instruction is “clear and correct in all respects” and “altogether free from error.” *Beglau v. Albertus*, 272 Or. 170, 179 (1975); *see also Hernandez v. Barbo Machinery Co.*, 327 Or. 99, 106 (1998) (“[T]here is no error [in refusing to give a proposed instruction] if the requested instruction is not correct in all respects.”). Because the Oregon Supreme Court on remand found Philip Morris’s proposed jury instruction contained several misstatements of Oregon law unrelated to the U.S. Supreme Court’s opinion, it held that the trial court’s refusal to give Philip Morris’s proposed jury instruction did not constitute reversible error. *Philip Morris*, 344 Or. at 59–60. The court did not reach the due process question. *See id.* at 55–56. It’s worth noting that, despite the unusually tangled and protracted procedural history of the *Philip Morris* litigation, the story may not yet be over. Although a state court decision “based on bona fide separate, adequate, and independent [state] grounds” will no longer be subject to U.S. Supreme Court review, *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), the parties have returned to the U.S. Supreme Court a third time to determine whether the Oregon court’s decision was indeed based upon “adequate and independent” state grounds, *see Philip Morris USA Inc. v. Williams*, 128 S. Ct. 2904 (2008) (granting certiorari).

¹¹⁹ *Philip Morris*, 127 S. Ct. at 1060.

Scalia joined Justice Ginsburg's dissent.¹²⁰ Justice Stevens disagreed with the Court's holding that juries could not consider harm to nonparties when punishing a defendant's conduct because, he contended, public harm is the *sine qua non* of punitive damages.¹²¹ There is "no reason why an interest in punishing a wrongdoer 'for harming persons who are not before the court,' should not be taken into consideration when assessing the appropriate sanction for reprehensible conduct,"¹²² Justice Stevens wrote, because punitive damages are by definition "a sanction for the *public harm* the defendant's conduct has caused or threatened."¹²³

Justice Ginsburg, in her dissent, did not take issue with the Court's substantive conclusion, agreeing that "when punitive damages are at issue, a jury is properly instructed to consider the extent of harm suffered by others as a measure of reprehensibility, but not to mete out punishment for injuries in fact sustained by nonparties."¹²⁴ But, she contended, "[t]he Oregon courts did not rule otherwise."¹²⁵ Because the majority failed to identify any specific element of the Oregon court's opinion that contradicted the majority's rule, Justice Ginsburg concluded that vacating the Oregon court's judgment was unwarranted.¹²⁶

Justice Thomas, joining Justice Ginsburg's dissent in full, also wrote separately to reiterate the view he had taken in *State Farm* that "the Constitution does not constrain the size of punitive damages awards."¹²⁷

III

THE COURT'S PROBLEMATIC NEWFOUND RULE

Although the Court in *Philip Morris* strove to clear up the confusion in *BMW* and *State Farm* regarding harm to nonparties, the Court's opinion appears to present more problems than it resolves. Ultimately, the deficiency of the *Philip Morris* standard boils down to

¹²⁰ *Id.*

¹²¹ *See id.* at 1066–67 (Stevens, J., dissenting).

¹²² *Id.* at 1066 (Stevens, J., dissenting) (internal citation omitted).

¹²³ *Id.* (emphasis added).

¹²⁴ *Id.* at 1068 (Ginsburg, J., dissenting).

¹²⁵ *Id.*

¹²⁶ *See id.* at 1068–69.

¹²⁷ *Id.* at 1067 (Thomas, J., dissenting) (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429–30 (Thomas, J., dissenting)).

three principal flaws. First, the Court's distinction is illusory. A meaningful distinction cannot be made between juror determinations of reprehensibility and determinations of the amount of punitive damages because the size of an appropriate punitive damages award depends primarily on the reprehensibility of the defendant's conduct. Second, even if such a distinction could be made, the Court's standard is based upon such delicate nuance that a jury is unlikely to understand or employ it effectively. Third, even if a jury *is* to understand and properly employ the Court's narrow distinction, it will not matter because that standard does not accomplish the objectives the Court has stated are necessary to comport with the Due Process Clause. This Comment examines each point separately.

A. The Court's Standard Is Illusory

The most immediate problem with the *Philip Morris* standard is one of logical inconsistency. Put simply, the Court cannot meaningfully distinguish the use of nonparty injury in determining reprehensibility and punishment when determining punishment depends predominantly upon a determination of reprehensibility.

Under the Court's new standard, jurors are allowed to consider injury to nonparties when determining the reprehensibility of a defendant's conduct.¹²⁸ The Court, in turn, has repeatedly stated that reprehensibility is the single most important factor in determining the reasonableness of a punitive damages award under its substantive due process review.¹²⁹ A jury, then, should appropriately consider the reprehensibility of the defendant's conduct when determining the amount of punitive damages to assess. Ultimately, the Court has thus asked a jury to consider injuries to nonparties when determining reprehensibility and to consider reprehensibility when determining the size of the punitive damages award. The problem, however, is that the Court has then *prohibited* the jury from considering injuries to nonparties when determining total punitive damages. Stated another way, the jury is to consider fact A to answer question B, then look to the answer to question B in order to make its final determination C. At the same time, however, the jury is prohibited from basing its final determination C upon that same fact A.

¹²⁸ *Id.* at 1063–64.

¹²⁹ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

Beyond being an altogether confusing tangle of rules—a separate problem, discussed below—the Court’s standard asks a jury to perform a logical impossibility. If jurors consider injury to nonparties in the process of determining reprehensibility, and if, at the same time, they consider reprehensibility to determine the amount of punitive damages to impose, jurors unavoidably will have considered injury to nonparties when determining the total punitive damages award. This is precisely what *Philip Morris* forbids. Thus, to follow the Court’s standard in any case in which an out-of-court individual has been injured, a jury must do exactly what the Court has held the Due Process Clause does not permit. Justice Stevens, in dissent, noted this fundamental inconsistency: “When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant’s conduct, the jury is by definition punishing the defendant—directly—for third party harm. . . . The Court endorses a contrary conclusion without providing us with any reasoned justification.”¹³⁰ Put simply, one way or another, a jury following *Philip Morris* will have to consider injury to nonparties in order to reach a constitutionally appropriate amount of punitive damages to award. For the Court to suggest otherwise is fallacious and internally inconsistent.

B. The Court’s Standard Will Confuse a Jury

Whether or not *Philip Morris* is logically sound, a jury will nevertheless receive instructions that reflect its holding. This uncovers a second problem inherent in the Court’s rule: even if there *is* a logical distinction to be made, a jury of ordinary citizens is unlikely to understand it. The dizzying language and nuanced distinctions the Court employs to differentiate between legitimate and illegitimate means of considering harm to nonparties produce a complex rule the jury likely will not grasp.

Importantly, to argue that a jury is likely to be confused by the *Philip Morris* ruling is not merely a comment upon jurors’ ability to understand and properly employ complex legal standards. Rather, it is to argue that the rule itself is too confusing to be useful. Even sophisticated legal minds have responded to the Court’s holding with uncertainty. Justice Stevens’s dissent is particularly telling in this respect:

¹³⁰ *Philip Morris*, 127 S. Ct. at 1067 (Stevens, J., dissenting).

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.¹³¹

Justice Stevens's dissent is remarkable in that it does not merely express disagreement with the line drawn by the majority; rather, his language suggests he does not fully *understand* the distinction the majority tries to make. Similarly, Justice Thomas, dissenting separately, called the majority's rule “confusing.”¹³² Response to the Court's opinion in *Philip Morris* among academics and legal theorists was equally puzzled and reflected a particular concern for the practical application of the Court's newfound standard.¹³³ Noted constitutional theorist Erwin Chemerinsky seemed immediately to throw up his hands:

How, then, should a jury be instructed? It can be told that it can consider harm to nonparties in assessing the reprehensibility of a defendant's conduct and that reprehensibility is the most important factor in determining the size of the punitive damages award. But the jury also must be told that it cannot punish the defendant for harm to nonparties. Perhaps Breyer and the Court's majority understand the theoretical difference here, but it is hard to imagine juries comprehending it.¹³⁴

In the year since *Philip Morris* was written, surely several state court juries have been tasked with contemplating that “theoretical” difference. Unfortunately, we have no way to determine whether those jurors do, in fact, understand the distinction *Philip Morris* demands that they make. On remand to the Oregon Supreme Court, however, the attorneys for Philip Morris and Mrs. Williams had an opportunity in September 2007 to present some of the first in-court discourse on the Supreme Court's holding in *Philip Morris*. During oral argument, William F. Gary, counsel for Petitioner Philip Morris, had the following exchange with Chief Justice Paul DeMuniz:

GARY: [Counsel for the Respondent has] been arguing consistently that it's okay to punish for harm to others, and now [after *Philip Morris v. Williams*] he's saying there's no significant risk that the jury did so.

¹³¹ *Id.* at 1066–67 (internal citations omitted).

¹³² *Id.* at 1067 (Thomas, J., dissenting).

¹³³ See, e.g., Chemerinsky, *supra* note 77, at 72.

¹³⁴ *Id.* at 74.

C. JUSTICE DEMUNIZ: Well, it's okay to *punish* [for harm to others] as long as it's done within the cabin of reprehensibility, isn't that right?

GARY: No. And again, this distinction— which is important, but is, as everybody I think recognizes, is a difficult and elusive distinction —[means] you can *consider* harm to others, as the Supreme Court said in its opinion, because it is evidence that shows that the conduct exposed others to a risk of harm. So it goes to reprehensibility. But you cannot *impose punishment* for the harm that was caused to others.¹³⁵

Chief Justice DeMuniz's comment may have represented a genuine confusion about the distinction between "punishing" a defendant and merely "considering" nonparty harm within the cabin of reprehensibility, or it may have been instead an observation that the distinction is dubious to begin with. In either case, the uncertainty in the courtroom among two experienced appellate attorneys and five Supreme Court justices was evident. During that same proceeding, Justice Michael Gillette expressed his bewilderment when, discussing what was required to ensure that a punitive damages jury instruction complied with the Due Process Clause, he commented, "this is a situation in which [at trial] most of God's children still didn't have any idea with respect to what some of the rules were, and I would respectfully suggest that some of God's children *still* don't know, me among them."¹³⁶ By the time that oral argument took place, more than six months had passed since the Supreme Court's opinion in *Philip Morris*, and the Oregon court had been presented with several briefs offering analyses of its holding. Nevertheless, many in that courtroom — educated lawyers all — still struggled to ascertain just what was required of them in order to adhere to the Due Process Clause.

Considering their difficulty, the concern of Chemerinsky and others takes on a more alarming dimension: how, then, are we to instruct juries? That is to say not simply "what should we tell jurors," but rather, *how are we to expect them to understand it?* The Supreme Court's proffered "answer" that courts simply "cannot authorize procedures that create [the] . . . risk of any such confusion occurring,"¹³⁷ is in fact no answer at all when it is the Court's

¹³⁵ Audio Compact Disc: Oral Argument of Petitioner, *Williams v. Philip Morris Inc.*, SC S051805 (Or. Sup. Ct., Sept. 2007) (on file with Oregon State Court Administrator).

¹³⁶ *Id.*

¹³⁷ *Philip Morris*, 127 S. Ct. at 1065.

standard itself that is the source of that confusion. Worse still, jurors will generally not have a legal education or a detailed attempt at explanation of the *Philip Morris* standard, as the Oregon Supreme Court and many legal theorists have had in their efforts to understand the case. Instead, they will simply have a jury instruction.

Consider the following scenario: a passenger on a crowded bus is severely injured when the bus driver angrily begins to careen and swerve recklessly through a congested city street, ultimately causing several high-speed collisions. After an expensive and lengthy hospital visit, the passenger files a personal injury suit against the driver and his employer, seeking both compensatory and punitive damages. At trial, the jury learns that several dozen bus passengers and nearby drivers were also severely injured as a result of the driver's conduct. The jurors find for the plaintiff and conclude that punitive damages are appropriate, having determined that the bus driver showed a reckless and outrageous indifference to an unreasonable risk of harm and that he acted with a conscious indifference to the health, safety, and welfare of others. The jurors are then presented with an instruction identical to that approved by the Supreme Court in *Philip Morris*, stating in relevant part:

If you determine that some amount of punitive damages should be imposed on the defendant, it will then be your task to set an amount that is appropriate. . . . While there is no set formula to be applied in reaching an appropriate amount, I will now advise you of some of the factors that you may wish to consider in this connection. . . . The size of any punishment should bear a reasonable relationship to the harm caused to [plaintiff] by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own¹³⁸

A juror would likely understand the significance of that instruction at its polar ends: on one hand, a defendant who caused harm to many is more worthy of punishment than a defendant who harmed only one. On the other hand, only the plaintiff's case is currently before the court, and a punitive damages award should thus not represent whatever compensatory damages another individual may be entitled to. But between those two extremes lies a wide and perplexing field. Faced with the instruction to "consider the extent of harm suffered by

¹³⁸ Williams v. Philip Morris Inc., 344 Or. 45, 63 (2008).

others” when determining how large a defendant’s punishment should be, but not to “punish the defendant for its alleged misconduct on other persons,” what is a juror to make of evidence that the driver was not driving in an empty parking lot, but rather a crowded freeway? What will a juror imagine his or her duty to be with respect to evidence that the bus was packed with passengers, rather than a single rider? When recalling evidence that the plaintiff’s fellow riders were not merely jostled, but were severely injured, what will a juror understand to be the practical difference between “considering” the extent of those passengers’ injuries when determining punishment and actually “punishing” for such injuries? If indeed there is a meaningful difference between the two, the likelihood that a juror will be able to discern it seems slim. If a jury does not properly understand or employ that distinction, the Court’s attempt at protecting a defendant’s rights under the Due Process Clause will have been altogether ineffective.

C. The Court’s Standard Will Not Protect a Defendant’s Due Process Rights

The third problem presented by *Philip Morris*, though not immediately apparent, is perhaps the most troubling. Even adhering to the Court’s standard, a jury may still have every opportunity to engage in the speculation and unconstitutional conjecture that gave rise to the Court’s due process concerns in the first place. Even if a jury *does* fully understand and properly employ the majority’s narrow distinction between proper and improper use of nonparty harm in a punitive damages case, the result is praiseworthy only if that standard limits the jury’s discretion in a way that meaningfully protects a defendant’s due process rights. Unfortunately, it may have no such effect.

As the Supreme Court noted in *Philip Morris*, several dangers necessitate procedural due process limitations on a jury’s imposition of punitive damages awards. The first of those dangers concerns a defendant’s constitutionally protected “opportunity to present every available defense.”¹³⁹ Generally, a defendant accused of injuring another party has the opportunity to present arguments in defense, such as a defense of comparative negligence or privilege. A defendant threatened with punishment for injuring an out-of-court

¹³⁹ *Philip Morris*, 127 S. Ct. at 1063 (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

victim, however, has no opportunity to defend against the charge with respect to that (perhaps unknown) individual. Within the facts of the *Philip Morris* case, for example, the Court remarked that another injured smoker may have known that cigarettes were dangerous, or may never have relied upon Philip Morris's statements to the contrary. Though injured by cigarettes, that smoker would not have been injured by Philip Morris's fraud, a fact that breaks the causal link necessary to attach liability. Being a "stranger to the litigation," however, that smoker would never be in court to reveal that crucial information. As a result, the defendant's opportunity to assert a valid defense would be lost. Using punitive damages to punish a defendant for alleged nonparty harm thus creates the dangerous risk that the defendant will be deprived of the chance to properly defend itself.

To avoid that risk, the Court held that the Constitution requires "assurance that the jury will ask the right question, not the wrong one," and look to nonparty harm not to punish, but "simply to determine reprehensibility."¹⁴⁰ What the Court did not explain, however, is why allowing a jury to consider harm to nonparties presents any *less* risk to the defendant's due process rights when it is merely used to determine reprehensibility. So long as a defendant may have viable defenses against a nonparty (for example, that the defendant's conduct was not the proximate cause of the nonparty's injury), it is not enough to prohibit a jury from punishing the defendant for that injury yet still allow a jury to use that injury to indicate the defendant's culpability. Stated more simply, if the defendant might not be liable for a nonparty's injury in the first place, then the extent of that injury ceases to be a valid basis from which to determine reprehensibility.

If a jury nevertheless takes that individual's injury into account to determine a defendant's reprehensibility, as the Court suggests, then that defendant may be presented with exactly the same due process risks the Court ascribes to punishment. By definition, a nonparty—the circumstances of whose injuries may remain a mystery—will never be before the court to tell his or her story, and, as a result, a defendant will never have the opportunity to present whatever defenses he may have the right to assert. Just as *punishing* a defendant for such nonparty harm risks violating the defendant's due process right to assert every available defense, *determining reprehensibility* on the basis of the injuries of a nonparty creates an

¹⁴⁰ *Id.* at 1064.

equally impermissible risk to a defendant's right to procedural due process. So long as the defendant is denied the opportunity to defend against allegations of nonparty harm, it should be of no comfort to anyone that a jury might use information regarding such harm "only" to determine that the defendant is more blameworthy.

Moreover, where a defendant is not, in fact, at fault for a nonparty's alleged injury—though the nonparty may not be present to enable the defendant to establish that fact—imposing punitive damages for that harm introduces *substantive* unfairness in addition to problems of procedural due process. In such a case, regardless of whether the nonparty harm is punished directly or merely "considered" within the cabin of reprehensibility, the effect of any increased award will be to impose a legal penalty upon the defendant for wrongs for which it was not legally responsible.

In either case—whether or not a defendant was *in fact* responsible for the alleged nonparty harm—the same procedural deficiency remains: because the subject of nonparty harm is, by definition, one who is not present in the action and is likely unidentified, the jury can do little but guess as to the nature and extent of his or her injuries. It was, in fact, just such conjecture on the jury's part that the Supreme Court highlighted as a second principal threat to a defendant's due process rights. As the Court questioned, "[h]ow many such [out-of-court] victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate."¹⁴¹ Such speculation, the Court held, "would add a near standardless dimension to the punitive damages equation," magnifying the "fundamental due process concerns . . . [of] arbitrariness, uncertainty and lack of notice" to the defendant.¹⁴² The jury does not *know* that nonparty's story, and if we are to give the Due Process Clause any meaning at all, the jury must not be permitted to simply guess.

Crucially, however, that same concern applies whether a jury is considering nonparty harm to establish punishment or to determine reprehensibility. For a jury to look to the injuries of an out-of-court and possibly unidentified nonparty as a measure of the reprehensibility of a defendant's conduct requires engaging in exactly the same speculative questions the Court held were such a threat to a

¹⁴¹ *Id.* at 1063.

¹⁴² *Id.*

defendant's due process rights. How serious was the harm in question? How many did it befall? And under what circumstances did it occur? Whether the conclusion the jury ultimately reaches on the basis of those questions is that the defendant should be punished for its conduct toward nonparties or merely, as the Court suggests, "that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible,"¹⁴³ the threat to due process is the same. The jury is basing its decision to impose punitive damages upon questions it likely cannot answer and upon answers that may be altogether arbitrary.

The Court's distinction between punishing and merely determining reprehensibility is thus a far less reliable safeguard of a defendant's due process rights than the language in *Philip Morris* suggests. In either case, the concurrent risks to the defendant—lack of opportunity to assert defenses on one hand, and arbitrariness and speculation on the other—stem from the same fatal procedural flaw: the sanction imposed upon the defendant is founded upon the story of one who is not there to tell it. That fundamental procedural deficiency is made all the more troubling by the complex and subtle nature of the Court's distinction and by the resulting likelihood that a jury will not understand or employ that distinction as the Court intends.

IV

AFTER *PHILIP MORRIS*: A SOUNDER APPROACH

In the wake of *Philip Morris*, the Supreme Court will be tasked with reconciling two opposing principles. On the one hand, it is appropriate to impose greater punitive damages for conduct that injures many than for conduct that injures only the plaintiff. Punitive damages exist to punish and deter particularly reprehensible tortious acts, and an act that causes harm to many (whether they are ultimately present in court or not) is, in the abstract, indisputably more reprehensible than an act that causes harm to few.¹⁴⁴ On the other hand, allowing a jury to freely consider that nonparty harm when determining an award of punitive damages presents substantial risks to a defendant's constitutional rights. As a result of that incongruity,

¹⁴³ *Id.* at 1064.

¹⁴⁴ See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 577 (1996)).

the Court is left with only two options: it must either impose upon the jury a set of sensible and effective constraints – perhaps allowing the jury to consider only certain *kinds* of harm and disallowing others, or allowing the jury to consider such harm only for certain *purposes* and not for others– or else bar the jury’s consideration of nonparty harm altogether.

A. *The Deficiencies of Other Recently Proposed Solutions*

The rule set out in *Philip Morris* represents an attempt at a system of sensible and effective constraints. But as this Comment illustrates, that standard is neither sensible nor effective. In the year since the Court’s opinion in *Philip Morris*, several legal scholars have proposed other standards to constrain a jury’s discretion in imposing punitive damages. A brief analysis shows that those proposed standards, too, suffer from critical deficiencies.

One recently proposed standard, for example, relies on a distinction between *actual* harm to third parties and harm that is merely a *potential* result of the defendant’s conduct.¹⁴⁵ That proposal comprises two parts. First, jurors would be altogether prohibited from considering actual harm to out-of-court third parties for many of the same reasons the Supreme Court cited in *Philip Morris*.¹⁴⁶ Second, in contrast to *Philip Morris*, jurors would be allowed to consider the *potential* harm a defendant’s conduct could have caused because states allegedly “must be allowed to consider potential injury to nonparties if they are to effectively punish and deter reprehensible conduct.”¹⁴⁷ That approach, unfortunately, solves one due process concern at the expense of another. Prohibiting a jury from considering actual harm to nonparties does effectively prevent a court from “adjudicat[ing] the merits of other parties’ hypothetical claims,” in accord with both *State Farm* and *Philip Morris*.¹⁴⁸ However, another substantial concern of the *Philip Morris* Court was the danger of a rule that would permit jury speculation as to the extent, number, and circumstances of nonparty injuries.¹⁴⁹ Such speculation, the

¹⁴⁵ Daniel Sulser Agle, *Working the Unworkable Rule Established in Philip Morris: Acknowledging the Difference Between Actual and Potential Injury to Nonparties*, 2007 B.Y.U. L. REV. 1317, 1353 (2007).

¹⁴⁶ *See id.*

¹⁴⁷ *Id.* at 1356.

¹⁴⁸ *State Farm*, 538 U.S. at 423.

¹⁴⁹ *Philip Morris*, 127 S. Ct. at 1063.

Court held, produces constitutionally impermissible risks of arbitrariness, uncertainty, and lack of notice to a defendant.¹⁵⁰ To allow a jury to punish a defendant for third party harm that merely *could have* occurred, as that standard suggests, would only encourage such unbridled speculation and would thereby exacerbate the threat to a defendant's due process rights. Furthermore, concerns of the defendant's constitutionally guaranteed right to present every available defense would be similarly magnified, since a defendant could not possibly defend against harm that only *potentially* could have taken place.

A second proposed standard suggests a "Prior Adjudication Rule" based primarily upon the distinction between harm to third parties who have already asserted their rights in court and those who have not.¹⁵¹ That standard would allow a jury to consider third party harm when determining an appropriate punitive damages award, but only to the extent such harm has been litigated to its conclusion with a finding against the defendant.¹⁵² Such a standard would address the concern of a defendant's right to present every available defense because "[i]n previously adjudicated cases, the defendant had an opportunity to assert the applicable defenses, thus satisfying due process considerations."¹⁵³ In addition, such previously litigated third party harm will be clearly defined, eliminating concerns of unchecked jury speculation.

Again, however, such a standard addresses certain threats to a defendant's due process rights at the expense of compounding another. Here, employing a "prior adjudication rule" increases the risk of duplicative punishment against a single defendant in successive trials. The principal reason a jury is forbidden from adjudicating the merits of other parties' hypothetical claims is because doing so "creates the possibility of multiple punitive damages awards for the same conduct,"¹⁵⁴ which violates due process. Allowing a jury to consider third party harm only to the extent such harm has been "fully litigated to its conclusion" would *encourage* such duplicative awards, since, by definition, any corresponding increase in the punishment the jury assesses will have already been

¹⁵⁰ *Id.*

¹⁵¹ Ben Figa, *The New Due Process Limitation in Philip Morris: A Critique and an Alternative Rule Based on Prior Adjudication*, 85 DENV. U. L. REV. 179, 192 (2007).

¹⁵² *Id.*

¹⁵³ *Id.* at 193-94.

¹⁵⁴ *State Farm*, 538 U.S. at 423.

imposed in full against the defendant in a previous suit. A standard that thus encourages duplicative punishment cannot be employed without impermissible risks to a defendant's due process rights.

B. A Proposed Solution: Prohibit a Jury's Consideration of Nonparty Harm Altogether

Out of twenty years of punitive damages jurisprudence culminating with *Philip Morris*, an incontrovertible principle has emerged: the Due Process Clause of the Constitution forbids a jury to punish a defendant for injury that it inflicts upon nonparties.¹⁵⁵ Attempts to qualify that principle with complex instructions regarding the jury's discretion — consider, but do not punish; or, consider and punish for harm that *could* happen, but not conduct which in fact happened; or, consider and punish, but only to the extent that another plaintiff has done so already — all appear to be both futile and unhelpful. Such constraints are either too complex to be practical or are insufficiently protective of due process rights to be of any legal benefit.

In addition to such problems of design, attempts to direct the jury regarding its calculation of punitive damages may also be inherently ineffective. Empirical research suggests that, due to a low level of comprehension and recall by jurors, jury instructions have little impact on how juries compute punitive damages awards.¹⁵⁶ As others have noted, that research suggests it is far less effective to instruct a jury on how to consider certain evidence than it is to prevent the jury from hearing that evidence altogether.¹⁵⁷ The most promising solution, then, may be the simplest: a jury should be prohibited from imposing punitive damages for a defendant's injury to nonparties for any purpose. A jury would thus be limited to imposing punitive damages for the harm inflicted upon parties to the action. Accordingly, a jury may consider harm in its reprehensibility analysis *only* to the extent that the harm is to parties to the action.

Adopting such a rule presents significant advantages over the approach in *Philip Morris*. First, such a rule is logical and easily comprehensible by a jury. Jurors who are directed not to base an award of punitive damages in any way upon the defendant's harm to

¹⁵⁵ *Philip Morris*, 127 S. Ct. at 1063.

¹⁵⁶ CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 223 (2002) (“Our empirical studies demonstrate that jury instructions do not play a governing role in jurors’ decisions concerning liability for punitive damages.”).

¹⁵⁷ Figa, *supra* note 151, at 191–92.

nonparties will not be faced with drawing complex theoretical distinctions or adhering to a confusing tangle of rules. Rather, they will be presented with a straightforward and clear instruction. As a result, jurors will more likely faithfully perform their duties in accordance with the jury instructions they are given.

Moreover, such a complete prohibition indisputably affords greater protections to a defendant's due process rights. Limiting a jury's consideration to only those who are parties to the action ensures that a defendant will have the opportunity to assert every available defense. Thus limited, a jury will have no reason to engage in speculation as to the cause, number, and nature of the injuries for which a defendant is to be punished; the only harm relevant to the jury's calculation will be clearly defined by evidence presented in court.

To argue that barring consideration of nonparty harm is an approach both easily understood and constitutionally benign, however, is too easy, and is not enough to establish that such an approach is sounder than that commanded by the Supreme Court in *Philip Morris*. The more important assessment lies in determining whether a complete bar to considering nonparty harm leaves the purpose of a punitive damages award intact. Could an award of punitive damages, so restricted in its calculation as to effectively disregard nonparty harm, still remain faithful to the principle that harm to many is more reprehensible and thus more deserving of greater punishment?

The answer is twofold. First, punitive damages in a private civil case properly function to punish private civil wrongs.¹⁵⁸ As such,

¹⁵⁸ Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages As Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 590 (2003). This view is not universally held. Many in the legal community—Justice Stevens among them—adhere to the notion that punitive damages exist to punish the defendant for the entirety of the harm committed upon society. See *Philip Morris*, 127 S. Ct. at 1066. That view, however, is legally untenable and historically inaccurate. As Professor Colby has noted,

Many of the bedrock principles of punitive damages law — such as the rule that the plaintiff must prevail on an underlying civil cause of action in order to recover punitive damages, the requirement that the amount of punitive damages must bear a reasonable relationship to the amount of compensatory damages, and the fact that [in most states] the punitive damages are paid to the plaintiff — are impossible to reconcile with an understanding of punitive damages as punishment for public wrongs.

. . . [Moreover], historically, courts understood punitive damages to be punishment not for the wrongful act (and all societal consequences thereof), but rather for the distinct legal wrong done to the individual plaintiff.

Colby, *supra*, at 590.

when a defendant's tortious conduct toward the plaintiff also results in tortious conduct toward an out-of-court nonparty, the proper remedy for that nonparty's injury is the award of compensatory and punitive damages if and when that nonparty elects to assert its rights in court. If a defendant's tortious conduct affects a great number of individuals, the defendant will naturally be exposed to a greater number of legal actions—and thus greater damages—than if he had harmed only one.¹⁵⁹

Second, if such other injured individuals elect *not* to assert their rights in court—causing the total amount of punitive damages imposed upon a defendant to fall short of what it might otherwise be—the defendant's constitutional right to due process must trump an existing plaintiff's desire to correct that punishment by imposing damages for their harm. Put simply, any such “shortfall” in punitive damages represents a fundamental conflict between the need to impose an award sufficient to punish and deter on one hand, and the defendant's constitutional right to due process on the other. To the extent such a direct conflict exists, the defendant's constitutional rights must prevail.

Certainly, adopting such an approach requires bringing about a significant change in modern punitive damages practice. At the outset, it means narrowing the Supreme Court's five factors of reprehensibility to four. Determining the reprehensibility of a defendant's tortious act would thus involve considering whether the plaintiff's harm was physical as opposed to economic; whether the plaintiff was financially vulnerable; whether the defendant's conduct involved repeated actions toward the plaintiff or was a mere isolated incident; and whether the plaintiff's harm was the result of intentional malice, trickery, or deceit, as opposed to mere accident. The defendant's apparent regard (or lack thereof) for the safety of those *other* than the plaintiff would no longer be considered. Although that disregard may make the defendant's course of conduct more reprehensible in a broader sense, it tells a court nothing about the blameworthiness of the defendant's conduct *toward the plaintiff*.

¹⁵⁹ While the defendant's conduct in such a case would clearly be more reprehensible in an abstract sense, it would be no more reprehensible *with respect to the plaintiff*. It is that injury to the plaintiff—not the abstract reprehensibility of the defendant's conduct, nor its effect on society—that forms the basis for any civil action and any damages that arise therefrom. Moreover, if the defendant's tortious conduct evinces a disregard for public safety—such as the reckless bus driver in the example above—such reckless disregard may properly be pursued in a criminal action.

Ultimately, it is that narrowing in focus—from punishment for a defendant’s entire course of conduct and whatever public harm it caused, to punishment for only the act that caused the plaintiff’s injury—that underlies the change in approach suggested here. Contrary to Justice Stevens’s dissent in *Philip Morris*, punitive damages should not be a sanction for the public harm a defendant’s conduct has caused or threatened. Rather, punitive damages are a punishment for a defendant’s injurious act toward a plaintiff, where that act is, in the words of the *Day* Court, so “wanton and malicious” or “gross and outrageous” that compensatory damages alone are insufficient. Accordingly, a jury must neither punish *nor* merely “consider” nonparty harm when imposing an award of punitive damages.

That change is neither simple nor easy to effect. But it presents significant advantages over the unworkable standard set forth in *Philip Morris* by affording greater protection to a defendant’s constitutional rights, by providing a jury with clear and effective direction in its determination of an appropriate punitive damages award, and by helping to refocus punitive damages to their proper scope.

CONCLUSION

Troublesome as the Supreme Court’s newfound standard is, *Philip Morris* is certainly not the last word on punitive damages review. Rather, it is merely the latest in a line of cases comprising a decades-long attempt to answer a deceptively simple question: how shall we impose punitive damages in a manner that is fair and constitutional? Surely the state has a legitimate interest in punishing and deterring reprehensible misconduct; at the same time, defendants faced with punitive damages awards must be afforded certain constitutional protections. Although the Supreme Court’s attempt to balance those competing considerations has thus far been flawed, the Court will certainly have the opportunity to rework and clarify its approach to third party harm in future punitive damages cases. When that opportunity arises, the Court must heed the practical and constitutional difficulties its current rule presents and adopt in its place a rule consistent with *Philip Morris*’s bedrock principle: the Due Process Clause forbids a jury to punish a defendant for injury that it inflicts upon nonparties. Until such a rule is adopted by the Court, the constitutional and practical deficiencies of the *Philip*

Morris rule will continue to confound jurors and jurists alike—and will continue to threaten the very due process rights that rule stands to protect.