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Benjamin J. Robinson

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DISTILLING MINIMUM DUE PROCESS REQUIREMENTS FOR  
PUNITIVE DAMAGES AWARDS

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

*Benjamin J. Robinson\**

An Oregon jury found that Jesse Williams, a long time consumer of Petitioner's Marlboro cigarettes, died because he consumed those cigarettes.<sup>1</sup> The jury was convinced that Williams consumed Petitioner's cigarettes because he believed they were safe to use, and that Petitioner knowingly and falsely led Williams to believe that its cigarettes were safe to consume.<sup>2</sup> As a consequence, the jury awarded Respondent, Williams' widow and personal representative, compensatory damages<sup>3</sup> and imposed punitive damages of \$79.5 million—roughly equivalent to Petitioner's profits during any two-and-a-half-week period for the year in which the judgment was awarded.<sup>4</sup> The trial judge found the punitive damages award excessive and reduced it by approximately sixty percent.<sup>5</sup> Petitioner and Respondent appealed.<sup>6</sup> An Oregon Court of Appeals restored the jury's punitive damages award<sup>7</sup> and the Oregon Supreme Court denied Petitioner further review.<sup>8</sup> The United States Supreme Court granted certiorari and remanded the case in light of its recent punitive damages jurisprudence.<sup>9</sup> The Oregon Court of Appeals once again upheld the jury's punitive damages award, and Petitioner sought review in the Oregon Supreme Court.<sup>10</sup> That court granted review and held that the punitive damages award was not grossly excessive in light of Petitioner's reprehensible conduct.<sup>11</sup> The United States Supreme Court again granted certiorari and,

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\* A.B. Wabash College; J.D. University of Florida Levin College of Law. For my wife, Debra L. Rosenbluth, and for Professor Sharon E. Rush.

1. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1060–61 (2007).

2. *Id.* at 1061.

3. *Id.* at 1060–61.

4. *Williams v. Philip Morris Inc.*, 48 P.3d 824, 841 (Or. Ct. App. 2002), *vacated*, *Philip Morris USA Inc. v. Williams*, 540 U.S. 801 (2003).

5. *Philip Morris*, 127 S. Ct. at 1061.

6. *Id.*

7. *Id.*

8. *Id.*

9. *See Philip Morris*, 540 U.S. at 801 (granting certiorari). The Supreme Court remanded the case in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). *Id.* *State Farm* invalidated a \$145-million punitive damages award as excessive under the Due Process Clause. *State Farm*, 538 U.S. at 429.

10. *Philip Morris*, 127 S. Ct. at 1061.

11. *Id.* at 1062.

in vacating and remanding the case, HELD that a punitive damages award based in part upon the desire to punish a defendant for harming persons not before the court amounts to a taking of property from the defendant without due process of law.<sup>12</sup>

Punitive damages awards serve three primary functions.<sup>13</sup> They (1) punish a defendant's wrongdoing; (2) deter the defendant and others from similar misconduct;<sup>14</sup> and (3) aid in recovering litigation expenses.<sup>15</sup> *Philip Morris USA v. Williams*<sup>16</sup> is the latest in a series of recent cases in which the Supreme Court has confronted whether and to what extent the Constitution imposes procedural requirements and substantive limits on punitive damages awards.<sup>17</sup>

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12. *Id.* at 1060, 1062. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court summarized the factors a court will generally consider when determining whether a liberty or property deprivation was unconstitutionally effected:

[D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 335.

13. See generally 1 LINDA L. SCHLUETER, PUNITIVE DAMAGES §§ 2.0–2.2 (5th ed. 2005) (addressing the nature and purposes of punitive damages).

14. *Philip Morris*, 127 S. Ct. at 1068 (Ginsburg, J., dissenting) (“The purpose of punitive damages . . . is not to compensate, but to punish.”); see also *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (“[P]unitive damages are imposed for purposes of retribution and deterrence.”); SCHLUETER, *supra* note 13, at 29.

15. SCHLUETER, *supra* note 13, at 34.

16. 127 S. Ct. 1057 (2007).

17. The Supreme Court commented on the propriety of punitive damages as far back as 1851. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851) (acknowledging more than one hundred years of punitive damages awards and concluding that “a jury may inflict . . . exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff”). Yet, the Court has more recently constrained punitive damages awards under the principles of procedural due process, substantive due process, the dormant commerce clause, and horizontal federalism. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (holding that there are substantive due process limitations on punitive damages awards that proscribe “grossly excessive” and “arbitrary” punishment); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (holding that appellate courts must review the constitutional propriety of punitive damage awards *de novo*); *BMW*, 517 U.S. at 568 (holding that the Constitution prohibits grossly excessive punishment of tortfeasors); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434–35 (1994) (holding that due process requires judicial review of punitive damages awards); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453–54 (1993) (announcing that the Due Process Clause “imposes substantive limits ‘beyond which penalties may not go’”) (quoting *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 78 (1907));

In *Honda Motor Co. v. Oberg*,<sup>18</sup> the Court considered whether a state could prohibit judicial review of the size of a punitive damages award.<sup>19</sup> The defendant had manufactured and sold an all-terrain vehicle that overturned and severely injured the plaintiff.<sup>20</sup> The plaintiff sued alleging that the manufacturer knew or should have known that the vehicle's design was unreasonably dangerous.<sup>21</sup> The jury found the defendant liable and awarded the plaintiff nearly \$1 million in compensatory damages<sup>22</sup> and punitive damages of \$5 million.<sup>23</sup> The defendant appealed, arguing that the punitive damages award violated the Due Process Clause of the Fourteenth Amendment because the amount was excessive and because the state court lacked the power to review excessive verdicts.<sup>24</sup> Both an Oregon court of appeals and the Oregon Supreme Court upheld the \$5-million award.<sup>25</sup> The Supreme Court granted certiorari<sup>26</sup> and held that a state cannot deny judicial review of the size of a punitive damages award in a manner inconsistent with the common law without violating the Fourteenth Amendment's Due Process Clause.<sup>27</sup> Significantly, before addressing the

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*Haslip*, 499 U.S. at 23 n.11 (noting that the Due Process Clause imposes both a procedural and a substantive limit on the size of punitive damages awards).

18. 512 U.S. 415 (1994).

19. The Oregon Constitution prohibited review of the punitive damages amount awarded by a jury unless the reviewing court could positively say there was no evidence to support the verdict. *Id.* at 418.

20. *Id.*

21. *Id.*

22. *Id.* The jury awarded \$919,390.39 in compensatory damages. *Id.* The compensatory damages were reduced by 20%, to \$735,512.31, because the plaintiff's own negligent conduct contributed to the accident. *Id.*

23. *Id.*

24. *Honda Motor*, 512 U.S. at 415.

25. *Id.* The standard for post-verdict review applied by the Oregon Supreme Court required that:

A jury's award of punitive damages shall not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole; the range that a rational juror would be entitled to award depends, in turn, on the statutory and common law factors that allow an award of punitive damages for the specific kind of claim at issue.

*Oberg v. Honda Motor Co.*, 888 P.2d 8, 10 (1995). An amendment to the Oregon Constitution prohibited judicial review of an amount of punitive damages awarded by a jury "unless the court can affirmatively say there is no evidence to support the verdict." *Honda Motor*, 512 U.S. at 427 n.5 (quoting OR. CONST. art. VII, § 3).

26. *Honda Motor Co. v. Oberg*, 510 U.S. 1068 (1994).

27. *Honda Motor*, 512 U.S. at 418. The Court granted review specifically to consider whether Oregon's limited judicial review complied with the Court's decision in *Haslip*, 499 U.S. 1 (1991). *Id.* at 420. The defendant relied on *Haslip* before the Oregon Court of Appeals and argued that the punitive damages award violated due process because the award was excessive and because Oregon

procedural due process issue, Justice Stevens, writing for the majority of the Court, endorsed the use of substantive due process for the judicial review of punitive damages awards.<sup>28</sup>

The Court reasoned that Oregon's abrogation of a well-established common law protection against arbitrary deprivations of property presumptively violated procedural due process.<sup>29</sup> The Court observed that an Oregon court could only overturn a punitive damages award if it could not find any substantial evidence to support *any* punitive damages award. While Oregon law ensured that punitive damages would not be awarded against defendants entirely innocent of conduct warranting exemplary damages, the Court said that the Oregon procedure provided no assurance that those whose conduct is sanctionable will be protected from punitive damages of arbitrary amounts.<sup>30</sup> The Court also reasoned that "evidence of culpability warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing."<sup>31</sup> The Court recognized that a jury's power to award punitive damages poses an acute danger of the arbitrary deprivation of property and furthermore, that Oregon removed a judicial safeguard against such risk without providing an adequate substitute procedure.<sup>32</sup> By restricting the ability of the judiciary to review the size of punitive damage awards, the Supreme Court concluded that the Oregon Constitution violated a defendant's right to due process.<sup>33</sup>

Yet, the ruling in *Honda Motor* was not based merely on the presumption of unconstitutionality that arose from Oregon's procedural defects. Justice Stevens explained that jury discretion regarding the amount of punitive damages created a danger that defendants would be arbitrarily deprived of property through excessive jury awards.<sup>34</sup> However, the majority opinion did not set forth standards for determining when a punitive damages award was so excessive that it violated substantive due process even if the trial and appellate courts had provided the defendant with fair procedures.<sup>35</sup>

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courts lacked the power to correct excessive verdicts. *Id.* at 418.

28. The *Honda* majority noted that its "recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damages awards . . . [a]lthough they fail to 'draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable.'" *Id.* at 420 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993)).

29. *Id.* at 430.

30. *Honda Motor*, 512 U.S. at 429.

31. *Id.*

32. *Id.* at 432.

33. *Id.*

34. *Id.*

35. *See id.* at 432 n.10 (indicating that a proper standard might be akin to the standard that

Only two years later, in *BMW of North America, Inc. v. Gore*,<sup>36</sup> the Court for the first time reversed an award of punitive damages on the grounds that it was unconstitutionally excessive under the Due Process Clause.<sup>37</sup> In *Gore*, the plaintiff purchased an automobile that defendant misrepresented as new, when in fact the vehicle had been damaged and repaired prior to its sale.<sup>38</sup> The plaintiff prevailed at trial, and the Alabama Supreme Court imposed a \$2-million punitive damages award.<sup>39</sup> The Supreme Court reversed, holding that although a state may impose punitive damages to deter unlawful conduct, the Fourteenth Amendment's Due Process Clause prohibits states from imposing grossly excessive punishments on tortfeasors.<sup>40</sup> Additionally, the Court held that a state cannot allow recovery of punitive damages sought to either deter future conduct in another state where such conduct is lawful, or to recover for past conduct in another state when such conduct did not have an impact upon the forum state.<sup>41</sup>

Writing for the majority, Justice Stevens first addressed the scope of harmful conduct that a state may legitimately seek to punish through punitive damages.<sup>42</sup> According to the Court, the jury in *BMW* had improperly calculated the punitive damages award on the basis of harm to every purchaser nationwide whom BMW failed to inform of the pre-sale

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the Court used to determine whether there was a sufficient factual basis to justify a finding of guilt in a criminal case). Significantly, the Court also rejected a contention that an adoption of a statutory clear-and-convincing standard for an award of punitive damages was adequate because the adoption of such a standard did not provide any assurance that those whose conduct was sanctionable by punitive damages would not be subjected to punitive damages for arbitrary amounts. *Id.* at 433. Finally, the Court rejected a contention that proper jury instructions provided an adequate safeguard because of the risk that juries may choose not to follow such instructions and thereafter render lawless, biased, or arbitrary verdicts. *Id.* at 433 & n.11. Hence, in the absence of an available review of the size of the punitive damage award, the Court ruled that the defendant had been denied due process of law. *See supra* text accompanying note 31.

36. 517 U.S. 559 (1996).

37. *Id.* at 585–86.

38. *Id.* at 563. The jury found that the defendant did not disclose the repair. *Id.* at 579–80.

39. *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619, 629 (Ala. 1994). The Supreme Court of Alabama found the jury's award of \$4 million excessive and reduced it to \$2 million. *Id.*

40. *BMW*, 517 U.S. at 585–86. *But see* *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 451–53 (1993) (upholding a \$10-million punitive damages award where plaintiff recovered \$19,000 in compensatory damages).

41. *BMW*, 517 U.S. at 572–73. The Court reasoned that while punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition within its jurisdiction, the principles of state sovereignty and comity preclude imposing punitive damages for extraterritorial conduct that does not affect its consumers. *Id.* at 572. It said that while each state has the power to protect its own consumers, none may use the deterrent of punitive damages as a means of imposing its regulatory policies on an entire nation. *Id.* at 585.

42. *Id.* at 568–69.

repainting.<sup>43</sup> *BMW* established three “guideposts” to determine whether punitive damages awards are grossly excessive and therefore violate due process.<sup>44</sup> First, a court must consider the degree of reprehensibility of the defendant’s misconduct.<sup>45</sup> Second, a court must evaluate the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award.<sup>46</sup> Third, a court must reconcile the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.<sup>47</sup>

Applying these guideposts, the Court invalidated the punitive damages award under review.<sup>48</sup> The defendant’s misconduct—failing to inform a customer that the new car he purchased had been repainted—was dismissed as “purely economic” and “not sufficiently reprehensible to warrant imposition of a \$2 million exemplary damages award.”<sup>49</sup> Regarding the relationship between the punitive award and the harm inflicted on the plaintiff, the Court concluded that the 500:1 ratio was “breathtaking” and “raise[d] a suspicious judicial eyebrow” placing the award beyond the acceptable range.<sup>50</sup> Finally, the Court noted that the maximum civil penalty for the defendant’s misconduct in Alabama, the plaintiff’s home state, would have been \$2,000, with other states authorizing up to \$10,000.<sup>51</sup> Such an amount was clearly less than the \$2-million punitive award imposed by the Alabama jury, was grossly

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43. *Id.* at 573; see also, Laura J. Hines, *Due Process Limitations on Punitive Damages: Why State Farm Won’t Be the Last Word*, 37 AKRON L. REV. 779, 785 (2004) (“The Court left for another day, however, the question of whether a state may base a punitive damages award on unlawful conduct in other states.”). Significantly, the nondisclosure of manufacturer repainting was expressly lawful in many states. *Id.* at 785.

44. *BMW*, 517 U.S. at 574–75. Justice Scalia dissented, criticizing what he regarded as the illegitimate federalization of “yet another aspect of our Nation’s legal culture (no matter how much in need of correction it may be).” *BMW*, 517 U.S. at 599 (Scalia, J., dissenting); see also Hines, *supra* note 43, at 782–89 (discussing the Supreme Court’s punitive damages jurisprudence before *State Farm*). Justice Scalia observed that the Due Process Clause only guarantees “an opportunity to contest the reasonableness of a damages judgment in state court; but there is no federal guarantee a damages award actually *be* reasonable.” *BMW*, 517 U.S. at 599 (Scalia, J., dissenting). Justice Ginsburg also dissented, arguing that the Court “unnecessarily and unwisely ventures [further] into territory traditionally within the States’ domain.” *Id.* at 607 (Ginsburg, J., dissenting).

45. *Id.* at 575 (suggesting that the degree of reprehensibility is “[p]erhaps the most important indicium of the reasonableness of a punitive damages award”).

46. *Id.* at 580.

47. *Id.* at 575. The Court reasoned that under judicial precedent, it was more appropriate to apply such a standard than to draw a bright line based upon a ratio between compensatory and punitive damages. *Id.* at 582–83, 585.

48. *Id.* at 585–86.

49. *Id.* at 576, 580.

50. *BMW*, 517 U.S. at 583 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1993) (O’Connor, J., dissenting)).

51. *Id.* at 584.

excessive, and “transcend[ed] the constitutional limit.”<sup>52</sup>

Any unwillingness to advocate a tolerable ratio of compensatory to punitive damages quickly faded when the Court considered *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>53</sup> In *State Farm*, the Court again invalidated a punitive damages award as excessive under the Due Process Clause.<sup>54</sup> The plaintiffs sued the defendant for bad-faith failure to settle an insurance claim within policy limits.<sup>55</sup> A jury awarded \$145 million in punitive damages, but the trial court reduced that award to \$25 million.<sup>56</sup> The Utah Supreme Court applied *BMW*'s three guideposts and reinstated the jury's punitive damages award.<sup>57</sup> The U.S. Supreme Court granted certiorari, believing it neither close nor difficult that a \$145-million punitive damages award was excessive under each of *BMW*'s guideposts.<sup>58</sup>

Under the first guidepost, the Court said there was some reprehensibility associated with the defendant's refusal to settle a third-party claim where the liability appeared to be clear and the damages exceeded the plaintiffs' policy limits.<sup>59</sup> The Court reasoned, however, that the lower court erred in accepting extensive evidence of misconduct that lacked a nexus to the insured's third-party claim.<sup>60</sup> Expanding on the

52. *Id.* at 586; see also A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085, 1096–99 (2006) (reviewing the raised-eyebrow test, among others).

53. 538 U.S. 408 (2003).

54. *Id.* at 429.

55. *Id.* at 413–14.

56. *Id.* at 415. The jury also awarded \$2.6 million in compensatory damages. *Id.* The trial court reduced the compensatory damages to \$1 million. *Id.*

57. *Id.*

58. *Id.* at 416, 418. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Supreme Court held that an appellate court must review, de novo, a trial court's application of the *BMW* guideposts. *Id.* at 431. Justice Ginsburg, however, advocated applying an abuse of discretion standard. *Id.* at 444 (Ginsburg, J., dissenting). In *State Farm*, the Court reaffirmed *Cooper*'s mandate of de novo review to ensure that punitive damages awards were based on law and not the decision-maker's caprice. *State Farm*, 538 U.S. at 418.

59. *State Farm*, 538 U.S. at 419–20. The Court asserted that *BMW*'s reprehensibility guidepost required courts to consider five factors, including whether:

[T]he harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

*Id.* (citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 576–77 (1996)).

60. See *id.* at 422 (“Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that

federalism and procedural due process concerns it raised in *BMW*, the Court held that the state had impermissibly infringed upon the sovereignty of its sister states by punishing the defendant for conduct that occurred outside its jurisdiction.<sup>61</sup> Regardless of whether other states would regard the defendant's conduct as lawful or unlawful, the Court ruled that no state has a legitimate interest in punishing conduct outside its borders.<sup>62</sup> Yet, the Court acknowledged that its prior cases established that a plaintiff could introduce out-of-state conduct to demonstrate the relative reprehensibility of a defendant's in-state conduct.<sup>63</sup> It concluded, however, that the punitive damages award upheld by the Utah Supreme Court violated due process because it punished the defendant for conduct "independent from the acts upon which liability was premised . . . ."<sup>64</sup> Thus, the Court signaled that any assessment of reprehensibility under the *BMW* guidepost must be limited to the conduct that caused harm to the plaintiff.

The Court considered *BMW's* second excessiveness guidepost—the disparity between harm and the damages—and again refused to impose a bright-line ratio of punitive to compensatory damages.<sup>65</sup> However, the Court suggested that reviewing courts apply a significantly narrowed range for assessing the excessiveness of a punitive damages award.<sup>66</sup> The Court rejected *State Farm's* 145:1 ratio as excessive<sup>67</sup> and discussed a host of factors justifying ratios of 1:1 or 4:1, before concluding that "few awards exceeding a single-digit ratio" between punitive and compensatory damages will satisfy due process.<sup>68</sup> The Court briefly considered the third guidepost, and concluded that in light of the \$2.6 million in compensatory damages awarded to the plaintiffs, a punitive award near the amount of

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conduct must have a nexus to the specific harm suffered by the plaintiff.").

61. *Id.* The Court emphasized as fundamental principles of federalism that each state may determine what conduct is permitted and proscribed within its borders and what measure of punishment, if any, to impose on wrongdoers within its jurisdiction. *Id.*

62. *Id.* at 421.

63. First, the Court reasoned that such conduct might reveal the deliberateness and culpability of a defendant's actions. *Id.* at 422. Second, prior misconduct, whether inside or out of the court's jurisdiction, may be relevant because a recidivist may be punished more harshly than a first offender, if the conduct in question is similar to prior transgressions. *Id.* at 423.

64. *Id.* at 422.

65. *Id.* at 424–25.

66. *See id.* at 425 ("Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 . . . .").

67. *Id.* at 425, 429. The Court reasoned that this conclusion was especially true in a case where compensatory damages are substantial. *Id.* at 429. Because the punitive damage award in the instant case was excessive, the lower court was instructed to determine the proper amount of punitive damages on remand. *Id.*

68. *Id.* at 425. The Court pointed to a "long legislative history, dating back over 700 years . . . providing for sanctions of double, treble, or quadruple damages to deter and punish." *Id.*

compensatory damages was appropriate.<sup>69</sup>

In vacating the Oregon Supreme Court's judgment, the *Philip Morris* Court again signaled its reluctance to articulate a concrete constitutional limit on the ratio between harm to the plaintiff and the punitive damages award. Instead, the *Philip Morris* Court focused on a threshold procedural due process requirement to invalidate a jury award based partly on a jury's desire to punish the defendant for harming nonparties.<sup>70</sup> The *Philip Morris* Court reiterated *BMW's* reasoning that states may impose punitive damages to further their legitimate interests in punishing and deterring unlawful conduct.<sup>71</sup> Yet those interests, the *Philip Morris* Court reasoned, could not be accomplished by assessing arbitrary punishments.<sup>72</sup> Arbitrary punishments are avoided when states insist on standards that delineate the jury's discretionary authority.<sup>73</sup> Without those proper standards, states' punitive damages systems compromise *State Farm's* assurance of fair notice concerning the severity of a penalty a state may impose.<sup>74</sup>

Further, the *Philip Morris* Court found that where punitive damages amounts are significant, a punitive damages system that lacks proper standards may impose the public policy preferences of one state—or one jury—upon sister states with different policies.<sup>75</sup> Thus, as in *Honda*, the *Philip Morris* Court found that the Constitution imposes limits on both the procedures related to punitive damages awards and on grossly excessive amounts.<sup>76</sup> The *Philip Morris* Court's inquiry focused on Oregon's procedural defects.<sup>77</sup>

For three reasons, the *Philip Morris* Court held that the Due Process Clause forbids a state from using a punitive damages award to punish a defendant for harm inflicted on “strangers” to the litigation.<sup>78</sup> First, a defendant threatened with punishment for injury inflicted upon strangers has no opportunity to defend against the charge.<sup>79</sup> Second, permitting such

69. *Id.* at 428–29. The Court evaluated the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.* at 428. The Court noted that the most relevant civil sanction under Utah state law appeared to be a \$10,000 fine for an act of fraud. *Id.*

70. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1060 (2007).

71. *Id.* at 1062 (citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996)).

72. *Id.*

73. *Id.*

74. *Id.* (citing *BMW*, 517 U.S. at 574).

75. *Id.* (citing *BMW*, 517 U.S. at 571–72).

76. *Philip Morris*, 127 S. Ct. at 1062. The *Philip Morris* Court considered only whether Oregon had unconstitutionally permitted the Petitioner to be punished for harming nonparty victims and avoided the question whether the punitive damages award was “grossly excessive” and therefore constitutionally defective. *Id.*

77. *Id.* at 1063.

78. *Id.*

79. *Id.* The *Philip Morris* Court reasoned that allowing a jury to punish a defendant for harm

punishment would add a “near standardless dimension to the punitive damages equation” and would magnify the fundamental due process concerns—namely arbitrariness, uncertainty, and lack of notice—that the Court has wrestled with throughout its punitive damages jurisprudence.<sup>80</sup> Third, the *Philip Morris* Court found no authority to support the use of punitive damages awards to punish a defendant for harming others.<sup>81</sup>

The Court, however, sympathized with Respondent’s argument that demonstrating harm to others is relevant to reprehensibility.<sup>82</sup> The Court observed that evidence of actual harm to nonparties can help show that the conduct that harmed a plaintiff posed additional, substantial risk to the general public and was, therefore, particularly reprehensible.<sup>83</sup> However, the Court noted that a jury must not take the additional leap forward to use a punitive damages award to punish a defendant directly for harms to the nonparty public.<sup>84</sup> Because imprecise procedure risks unfairness, the Court found it constitutionally important for a court to ensure that each jury is “ask[ing] the right question.”<sup>85</sup> Similarly, because of the risks of arbitrariness, inadequate notice, and imposing one state’s policies on other states, the Court found it particularly important that states avoid procedures that unnecessarily deprive juries of proper legal guidance.<sup>86</sup>

The *Philip Morris* Court then examined the Oregon Supreme Court’s opinion.<sup>87</sup> It observed that Oregon focused on more than the defendant’s reprehensible conduct.<sup>88</sup> In particular, the Court focused on three statements the state’s high court made in rejecting Petitioner’s claim that the Constitution prohibits using punitive damages to punish a defendant for harm to nonparties.<sup>89</sup> First, the Court noted that the state supreme court correctly concluded that *State Farm* held that only a jury could not base an award on dissimilar acts of a defendant.<sup>90</sup> Second, the Court criticized the Oregon Supreme Court’s conclusion that if a jury cannot punish for the reprehensible conduct, there could be no reason to consider such conduct.<sup>91</sup> Instead, the Court reasoned that the Due Process Clause prohibits a state

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to nonparties was said to deprive such defendant of its right “to present every available defense” to the claims at issue. *Id.* (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

80. *Id.*

81. *Id.*

82. *Philip Morris*, 127 S. Ct. at 1063–65.

83. *Id.* at 1064.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 1064–65.

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

89. *Id.* at 1064–65.

90. *Id.* The Court then explicitly held that a jury may not punish for harm to others. *Id.* at 1065.

91. *Id.*

from inflicting punishment for harm to nonparties, but permits a jury to consider such harm in determining reprehensibility.<sup>92</sup> Finally, the Court considered whether a jury could consider harm to nonparties and nevertheless withhold that consideration from the “punishment calculus.”<sup>93</sup> The Court said that “state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring” when juries factor nonparty harm in the punishment calculus.<sup>94</sup> The Court concluded that while substantial procedural flexibility exists for states to determine what kind of procedures to implement to protect against that risk, federal constitutional law obligates the states to provide some form of protection where the risk of misunderstanding is significant.<sup>95</sup>

Justice Stevens, who had written for the Court in both *BMW*<sup>96</sup> and *Honda*,<sup>97</sup> dissented.<sup>98</sup> He reiterated the importance of substantive and procedural constraints on states’ power to impose punitive damages,<sup>99</sup> but strongly criticized the majority’s effort to distinguish between: (1) taking third-party harm into account for assessing the reprehensibility of the defendant’s conduct, which the majority permitted; and (2) assessing third-party harm in order to punish the defendant directly, which the majority proscribed.<sup>100</sup>

In his dissent, Justice Thomas argued that the Constitution does not limit the size of punitive damages awards.<sup>101</sup> Justice Thomas criticized the

92. *Id.* As discussed, *infra*, this passage alone may keep due process scholars occupied for years.

93. *Id.* The Court remarked that this question raises the practical problem of knowing whether a jury punished a defendant for causing injury to others or simply considered such injury during its reprehensibility analysis. *Id.*

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

95. *Id.* Because the Oregon Supreme Court’s application of the *Philip Morris* Court’s standards could result in a significant change in the level of the punitive damages award, the Court did not consider whether the vacated award was constitutionally “grossly excessive.” *Id.*; *see also* *BMW of N. Am. v. Gore*, 517 U.S. 559, 562 (1996) (noting that while a state may impose punitive damages to further its interest in deterring unlawful conduct, the Fourteenth Amendment’s Due Process Clause prohibits states from imposing grossly excessive punishments on tortfeasors).

96. *BMW of N. Am. v. Gore*, 517 U.S. 559, 562 (1996).

97. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 418 (1994).

98. *Philip Morris*, 127 S. Ct. at 1067 (Stevens, J., dissenting). Justice Stevens also authored the majority opinion in *Cooper Industries* and *TXO* (where a majority of Justices, in separate opinions, endorsed the use of substantive and procedural due process principles to limit punitive damages awards). *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 426 (2001); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 446 (1993). In *TXO*, Justice Stevens wrote that “‘grossly excessive’” punitive damages awards amounted to “‘a deprivation of property without due process of law.’” *TXO*, 509 U.S. at 454 (quoting *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909)).

99. *Philip Morris*, 127 S. Ct. at 1065 (Stevens, J., dissenting).

100. *Id.* at 1066–67.

101. *Id.* at 1067 (Thomas, J., dissenting); *see also* *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429–30 (2003) (Thomas, J., dissenting); *Cooper*, 532 U.S. at 443 (Thomas, J.,

classification of the *Philip Morris* holding as procedural, arguing that the majority instead expands the Court's "substantive due process regime" and shows again that the Court's punitive damages jurisprudence is "insusceptible of principled application."<sup>102</sup>

Justice Ginsburg delivered a third dissent, joined by Justices Scalia and Thomas, insisting that the Oregon courts' rulings did not conflict with the majority's opinion.<sup>103</sup> Justice Ginsburg further argued that the Petitioner had failed to preserve any objection regarding the charges delivered to the jury, the evidence introduced at trial, or the Respondent's closing argument.<sup>104</sup> Thus, Justice Ginsburg concluded that the majority ventured beyond the bounds of the case as set by the trial court.<sup>105</sup>

*Philip Morris*, while important in developing the constitutional law on punitive damages, left unresolved several important questions.<sup>106</sup> The case is clear in holding that it is unconstitutional for a jury to award punitive damages to punish a company for harming "strangers to the litigation,"<sup>107</sup> but it does not tell courts how to comply with its holding.<sup>108</sup> *Philip Morris* says little about how trial judges seeking "diligently to adhere to [the Court's] changing, less than crystalline precedent" should instruct their juries to consider a defendant's harmful conduct to third parties.<sup>109</sup> And the *Philip Morris* dissents illustrate that it will be difficult to predict how juries will be able to weigh the evidence of harm to others to determine the reprehensibility of the defendant's conduct, without punishing the defendant for that conduct. If four justices fail to understand this formula, it may be difficult to find a jury that can understand it. So, how might a trial court charge its jury through the high-wire act of applying an

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concurring).

102. *Philip Morris*, 127 S. Ct. at 1067–68 (Thomas, J., dissenting) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting)).

103. *Id.* at 1068 (Ginsburg, J., dissenting). Justice Ginsburg argued that the Oregon courts endeavored to follow the Supreme Court's decisions and had not deprived the jury of proper legal guidance. *Id.*

104. *Id.* Justice Ginsburg did recognize Respondent's valid objection to the trial court's refusal to give one requested charge. *Id.* at 1068–69. Justice Ginsburg then analyzed the proposed instruction before concluding that any judge seeking to "enlighten rather than confuse" would resist such a proposed charge. *Id.* at 1069.

105. *Id.*

106. Perhaps the broadest recurring question the *Philip Morris* decision raises is what deference the Supreme Court owes state legislatures and state courts as branches of a coordinate sovereign. See generally ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 1.5 (5th ed. 2007) (discussing comity as a central theme in the law and study of federal jurisdiction).

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

108. For a general introduction to how this process operates and how the question of punitive damages is presented to a jury, see generally CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 6–16 (2002).

109. *Philip Morris*, 127 S. Ct. at 1069 (Ginsburg, J., dissenting).

instruction that insists that a jury consider harm to other victims, but forbids them from punishing a defendant for that harm?<sup>110</sup> Perhaps Justice Stevens expressed the thoughts of scores of trial judges when he concluded “[t]his nuance eludes me.”<sup>111</sup>

Trial courts will likely meet *Philip Morris*’s charge by changing existing jury instructions,<sup>112</sup> and then releasing the panel to perform whatever mental gymnastics are needed to return a constitutional punitive damages award. On the other hand, this path may encourage lower courts to simply say nothing about the function of a punitive judgment. Arguably, the surest method for a court to avoid review under *Philip Morris* is to say nothing more than the punitive award it has imposed is a proper response to the defendant’s reprehensible conduct toward the victim. Either way, the practical effect of any additional jury instructions will be de minimis and the immediate effect will be to muddy the waters until the Court revisits this issue again.

In *BMW*, the Court limited to a state’s borders the conduct a state could constitutionally punish or deter.<sup>113</sup> Yet, remarkably large punitive damages awards persisted. Then, in *State Farm*, the Court expanded its holding in *BMW* by eliminating a state’s ability to deter and punish even unlawful conduct outside its jurisdiction,<sup>114</sup> and large punitive damages awards still persisted. The *Philip Morris* Court now prohibits a jury from punishing reprehensible conduct to people other than the plaintiff, but nevertheless permits that jury to *consider* the conduct when it is sufficiently analogous to the cause of harm suffered by the plaintiff.<sup>115</sup> Should we now expect a sea of change in punitive damages recoveries? Arguably, no. Justice Ginsburg, in her dissenting *BMW* opinion, rightly pointed out that it would be impossible for the Supreme Court to review all state cases in which the defendant sought Supreme Court review on the basis of an allegedly excessive punitive damages award.<sup>116</sup> Since *BMW* and *State Farm* have clearly failed to confine punitive damages awards to the magical 9:1 ratio, the Supreme Court will need to confront the bounds of substantive due process before its constitutionalization of punitive damages can proceed much further.

The decision is similarly significant for its impact on the ability of

110. *Id.* at 1063–64 (majority opinion).

111. *Id.* at 1067 (Stevens, J., dissenting); *see also id.* at 1069 (Ginsburg, J., dissenting) (concluding that what the jury must do “slips from my grasp”).

112. That instruction forbids “punish[ing] a defendant directly on account of harms it is alleged to have visited on nonparties.” *Id.* at 1064 (majority opinion).

113. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996).

114. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003).

115. *Philip Morris*, 127 S. Ct. at 1063–64.

116. *BMW*, 517 U.S. at 613–14 (Ginsburg, J., joined by Rehnquist, C.J., dissenting).

states to regulate the conduct at issue. *Philip Morris*, along with *BMW* and *State Farm*, suggests that the Court will continue to protect large corporations' economic substantive due process rights from excessive state punishment.<sup>117</sup> However, critics will argue that the states' objectives and expertise deserve greater judicial deference compared to the court's treatment of substantive due process issues. In *State Farm*, the Court explained that a basic principle of federalism presumes that "each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."<sup>118</sup> These "horizontal" federalism concerns play a critical role in the *BMW* and *State Farm* holdings, yet the Court has largely ignored the consistent "vertical" federalism objections of Justices Scalia and Thomas.<sup>119</sup> Perhaps the extent to which each state may make its own reasoned judgment about what conduct is permitted within its borders shifts depending on the type of federalism invoked.

To be sure, punitive damages are intended to punish.<sup>120</sup> But *Philip Morris* resurrects the fundamental question of whether punitive damages exist solely to punish wrongdoing that harms parties before the court. The

117. For a powerful indictment of *Philip Morris*' logic, see Comment, *Punitive Damages*, 121 HARV. L. REV. 275 (2007), which assesses the history and culture of the Fourteenth Amendment and argues generally that the Court used the Amendment to reaffirm and enrich procedural and substantive due process protections for corporations sued for punitive damages. See also F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: "Morals Without Technique"?*, 60 FLA. L. REV. 349, 351 (2008) (criticizing the requirement for a jury instruction that is either incomprehensible, or formalistic); see generally Rosalie Berger Levinson, *Reigning in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 523 & nn. 12-13 (2008) (putting punitive damages in the context of due process jurisprudence).

118. *State Farm*, 538 U.S. at 422.

119. Justice Scalia, for example, has argued that the Supreme Court has "no business in this area, except to assure that due process . . . has been observed." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 472 (1993) (Scalia, J., concurring). But see *BMW*, 517 U.S. at 571 (noting that a state's power to award punitive damages may, in an appropriate case be "subordinate to the federal power over interstate commerce"). Clearly, the *Philip Morris* majority would assert that assuring due process had been observed was precisely what the Court considered. Yet, Justice Field provided a powerfully contrary suggestion, in an effort to make clear the scope of protection provided by the Due Process Clause:

If the laws enacted by a state be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law.

*Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 520 (1885).

120. See *supra* notes 13-14 and accompanying text.

Court's holding suggests an affirmative answer. Yet, a historically significant argument remains that punitive damages should also serve to deter against future conduct involving other parties. The majority opinion ignores the deterrent function of punitive damages. Instead of grappling with deterrence, the Court adopted a theory of procedural due process under which it is unconstitutional to do precisely what deterrence theory indicates one should do in the case of a recidivist, infrequently punished wrongdoer. At the very least, it must be admitted that there is a distinction between awarding one plaintiff punitive damages because the defendant's action *actually* harmed others and awarding a plaintiff punitive damages based on the reprehensibility of an action that had the *potential* to cause harm to many others. Thus, there should be a distinction between permitting the Respondent from collecting extraordinary damages on behalf of all statewide victims (e.g., all of Oregon's dead smokers) and permitting those damages based on the additional deaths Petitioner's conduct may have inflicted.

A final question is whether permitting a jury to consider harms to others as part of the reprehensibility analysis, but not as part of the actual calculation of a punitive judgment, will ultimately provide any tangible benefit to defendants. Perhaps *Philip Morris* will prove to be only a slight jurisprudential addition. The *BMW* majority, for example, believed that using its standards would give enough guidance to lower courts so that the Court should not have to consider many petitions for certiorari where a case involved only an issue of the excessive amount of punitive damages.

Regardless, there seems to be little practical benefit to corporations.<sup>121</sup> First, defendants are already equipped to insure against punitive damages awards in many states.<sup>122</sup> Second, lawyers will be able to offer evidence of the impact of corporate wrongdoing. Clearly, *BMW* allows juries to consider the reprehensibility of the defendant's conduct. Although the jury cannot punish for imposing harm on others, *Philip Morris* provides that the jury can consider the actual or potential harm suffered by others in determining reprehensibility. It will be up to the lower courts to sort out just how they can do this, and how the jury should weigh the evidence, consistent with the Supreme Court's confusing standards.

*Philip Morris* purports to create a new standard to protect defendants

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121. *But see Insurers Hail Supreme Court's Curtailing of Punitive Damages*, INS. J., Feb. 21, 2007, available at <http://www.insurancejournal.com/news/national/2007/02/21/77076.htm> (arguing that the *Philip Morris* decision is important for restraining abusive litigation costs and reducing the threat of punitive damages as leverage to extract higher settlements).

122. Here, the major debate concerns the intersection of deterrence and the insurability of punitive damages. Arguably, allowing punitive damages to be insured frustrates the very purpose of the award and therefore contravenes established public policy. *See* ROBERT H. JERRY, UNDERSTANDING INSURANCE LAW 576 (3d ed. 2002).

from unconstitutional punishment for perceived harm to nonparties. Yet, the standard is one that even some of the Court's own members do not understand. Little, if any, guidance is provided to the lower courts that will have to implement it. However, *Philip Morris* illustrates that the Court is content to tread deeper into fields traditionally tended by the states, without tilling any meaningful lines to define the boundaries of economic substantive due process. It is difficult to forecast whether the Supreme Court would need to continue its active review of state punitive damages awards in light of *Philip Morris*. The next case will likely involve a tort action with no federal issue apart from the size of the damages award. *BMW* and *State Farm* arguably restrict the Court's substantive due process approach, if only implicitly. *Philip Morris* itself seems to place the capstone on procedural due process defects. Continued scrutiny of state awards, under the rubric of procedural due process, would waste the Court's limited resources and signal a retreat from the Rehnquist Court's expansive deference to the states based on federalism principles. Thus, the remaining choice is whether the Court will invoke substantive due process concerns to draw a bright line protection for defendants facing large punitive damages awards. Presumably then, the only question left to answer will be: "How much is too much?"<sup>123</sup>

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123. The Court recently answered this question, but only as it pertains to maritime cases. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008) (holding federal statutory law does not bar a punitive award on top compensatory damages, but limiting such awards to an amount equal to compensatory damages). The Court specifically declined to consider Exxon's challenge to the size of a punitive damages verdict based on due process principles. While the Supreme Court's reasoning in a federal maritime case will not bind state court judges, it may prove persuasive. Nevertheless, Justice Ginsburg again dissented and asked whether the Court would, at the next opportunity, overrule *State Farm* and hold "definitively, that 1:1 is the ceiling due process requires in all of the states, and for all federal claims?" *Exxon*, 128 S. Ct. at 2639 (Ginsburg, J., dissenting).