

## Punishment Defanged: How the United States Supreme Court Has Undermined the Legitimacy and Effectiveness of Punitive Damages [*Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007)]

Heather R. Klaassen\*

*Yesterday's decision is another disturbing sign that—as the current [C]ourt reads the Constitution—powerful parties have more rights than regular people.*<sup>1</sup>

### I. INTRODUCTION

The parties in *Philip Morris USA v. Williams*<sup>2</sup> represented the David and Goliath of tort litigation. Philip Morris, a national cigarette manufacturing company, was an economically formidable defendant.<sup>3</sup> The plaintiff, Jesse Williams, was a sixty-seven-year-old retired school janitor living in Oregon.<sup>4</sup> For nearly forty years, the national company pursued a business strategy that not only disregarded the health and safety of its consumers, but affirmatively sought to deceive consumers into believing that tobacco was not hazardous to their health.<sup>5</sup> Having become addicted to cigarettes at a young age, Jesse Williams developed inoperable lung cancer and eventually died.<sup>6</sup> He was not the only one to suffer as a result of the company's business decisions.

The bureaucratic business model distances the decision-makers from those persons most intimately affected by the company's executive

---

\* B.A. 2005, Bethany College; J.D. Candidate 2009, Washburn University School of Law. Thank you to Claire Terrebonne for alerting me to this case, to Matthew Stromberg, Brooke Hesler, Professor Alex Glashauser, and Professor Jeffrey Jackson for their editorial insight and suggestions, to Taylor Hight for his technical assistance, and to Professor Michael Schwartz for recommending this topic and sharing his thoughts.

1. Editorial, *Shielding the Powerful*, N.Y. TIMES, Feb. 21, 2007, at A20 (commenting on the U.S. Supreme Court's decision in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007)).

2. 127 S. Ct. 1057 (2007).

3. See *Williams v. Philip Morris, Inc.*, 48 P.3d 824, 841 (Or. Ct. App. 2002). The Oregon Court of Appeals noted that Philip Morris's "net worth [was] over \$17 billion, and its profits for the year closest to the trial were over \$1.6 billion, or approximately \$30.7 million per week." *Id.* In the 1950s, Philip Morris was "the fifth largest tobacco company in the country." *Id.* at 833 n.10. By 2002, the company claimed "approximately half of the domestic market for cigarettes." *Id.*; cf. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1396 (1993) (noting that punitive damages are necessary to deter "economically formidable wrongdoers").

4. Barry Meier, *Jury Awards \$81 Million to Oregon Smoker's Family*, N.Y. TIMES, March 31, 1999, at A14.

5. *Williams*, 48 P.3d at 838-39, 841.

6. *Id.* at 829.

decisions. As a result, a financially-motivated business such as Philip Morris is more removed from its consumers' welfare than a local restaurant that interacts with its customers on a daily basis. Unlike a local business, however, the decisions of a national business affect thousands of lives daily, presenting broader implications for society. A single lawsuit brought by a private individual is unlikely to affect the company's national business strategy, unless society has a remedy that will serve as an effective deterrent, and thereby spare other consumers from experiencing the same suffering.<sup>7</sup>

Traditionally, states used punitive damages to "vindicate the public interest."<sup>8</sup> More recently, however, states' ability to punish and deter corporate defendants has been severely constrained. In 1991, the United States Supreme Court used the Due Process Clause of the Fourteenth Amendment to the United States Constitution to place procedural and substantive limits on punitive damages.<sup>9</sup> Since then, the Court has continued to review the constitutionality of punitive damages awards, and with each new case, it has diligently hammered out a rule to be applied in future cases. Viewed collectively, however, the Supreme Court's decisions regarding punitive damages are neither coherent nor Constitution-based.<sup>10</sup> By replacing state policy decisions with Supreme Court policy decisions, the Court has undercut the traditional role of punitive damages as a means of punishment and deterrence.<sup>11</sup> Although an Oregon jury awarded Jesse Williams's estate \$79.5 million in punitive damages to punish Philip Morris, the Supreme Court remanded the case for reconsideration.<sup>12</sup> When the Supreme Court decided *Philip Morris*, critics suggested that, under the current Court, the Due Process Clause gave greater protection to corporate money than to the human lives affected by corporate decision-making.<sup>13</sup>

The Court's recent punitive damages jurisprudence has come under considerable attack by legal scholars.<sup>14</sup> The tests developed by the

---

7. If the trial court only awarded compensatory damages for Jesse Williams's death, Philip Morris would have been required to pay no more than \$521,485.80. See *infra* Part III.A. and note 80. This amount was a drop in the bucket compared to the \$30.7 million the company was making each week. See *supra* note 3.

8. Laura J. Hines, *Obstacles to Determining Punitive Damages in Class Actions*, 36 WAKE FOREST L. REV. 889, 892 (2001).

9. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

10. See, e.g., *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (Scalia, J., dissenting); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001) (Thomas, J., concurring); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 470-71 (1993) (Scalia, J., concurring in the judgment).

11. Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1, 47 (2004); see Caprice L. Roberts, *Ratios, (Ir)rationality & Civil Rights Punitive Awards*, 39 AKRON L. REV. 1019, 1035 (2006).

12. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1061-62 (2007).

13. Editorial, *supra* note 1, at A20; see *The Supreme Court—Leading Cases*, 121 HARV. L. REV. 275, 275 (2007).

14. See, e.g., Allen, *supra* note 11; Roberts, *supra* note 11; Paul J. Zwier, *The Utility of a Non-consequentialist Rationale for Civil-Jury-Awarded Punitive Damages*, 54 U. KAN. L. REV. 403

Court to evaluate the reasonableness of a punitive damages award have undermined the central importance of the facts of the case. Most pointedly, the Court nearly ignored the facts in *Philip Morris* and announced that a jury may not use punitive damages to punish a defendant for endangering nonparties, but it may use punitive damages to punish a defendant for the *reprehensibility* of endangering nonparties.<sup>15</sup> Such amorphous semantic distinctions have little practical value.<sup>16</sup>

This Comment analyzes how the Supreme Court's punitive damages precedent has proven unworkable. Part II provides a brief history of the Supreme Court's decisions regarding punitive damages. Part III describes the factual background of the *Philip Morris* case and its procedural history. Part IV explains the Court's holding in *Philip Morris* and its various dissenting opinions, and Part V analyzes the inconsistencies that riddle the Supreme Court's precedent, punctuated most recently by its holding in *Philip Morris*. *Philip Morris*, however, is best understood in light of the Supreme Court's seventeen-year affair with punitive damages.

## II. BACKGROUND

Punitive damages have a long history, dating back to the Code of Hammurabi in 2000 B.C.<sup>17</sup> Since the Magna Carta, however, governing institutions have sought to protect a defendant's life, liberty, and property from "arbitrary coercion."<sup>18</sup> In fact, American common law endows judges with the authority to vacate any punitive damages award that is patently unreasonable because it is "'monstrously excessive,' 'shocks the conscience' of the court, has 'no rational connection' to the evidence, or clearly 'appears to be the result of passion and prejudice.'"<sup>19</sup> In light of this long-standing tradition and the rarity with which punitive damages have been awarded,<sup>20</sup> the Court's decision to become

---

(2006); Michael L. Rustad, *Happy No More: Federalism Derailed by the Court that Would be King of Punitive Damages*, 64 MD. L. REV. 461 (2005); Jim Davis II, Note, *BMW v. Gore: Why the States (Not the U.S. Supreme Court) Should Review Substantive Due Process Challenges to Large Punitive Damage Awards*, 46 U. KAN. L. REV. 395 (1998).

15. See *Philip Morris*, 127 S. Ct. at 1064.

16. The Supreme Court "test" scholars frequently cite with disdain appeared in *BMW of N. Am. v. Gore*, 517 U.S. 559, 583 (1996). The Court stated that a punitive damages award was constitutionally suspect when it involved a "breathtaking" ratio that would "raise a suspicious judicial eyebrow." *Gore*, 517 U.S. at 583 (internal citations omitted); see Pamela S. Karlan, "Pricking the Lines": *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 907 (2004) (citing this "test" with humor).

17. Jim Gash, *Solving the Multiple Punishments Problem: A Call for a National Punitive Damages Registry*, 99 NW. U. L. REV. 1613, 1618-19 (2005).

18. *Gore*, 517 U.S. at 587 (Breyer, J., concurring).

19. JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251, 260 (2003).

20. See Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83, 93 (2007) (noting that juries only award punitive damages in two percent to nine percent of cases that the plaintiff wins).

involved in restraining punitive damages was somewhat surprising.

The United States did not adopt the Fourteenth Amendment and its accompanying Due Process Clause until 1868.<sup>21</sup> Early in the Twentieth Century, the Supreme Court hinted that the Due Process Clause placed restrictions on punitive damages awarded in state courts,<sup>22</sup> but the Court did not apply the Clause to a punitive damages award until 1991.<sup>23</sup> Since then, the Court has gradually constructed a constitutional framework around punitive damages to circumscribe the jury's discretion and thereby protect the defendant from abuse.<sup>24</sup> Although the Justices responsible for interpreting the Due Process Clause have not always agreed on how the Constitution directs the analysis, in part because punitive damages predate the Fourteenth Amendment,<sup>25</sup> they have consistently emphasized that "[i]t 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 . . . is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."<sup>26</sup>

The Supreme Court first addressed the constitutional aspects of punitive damages in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*<sup>27</sup> In *Browning-Ferris*, the Court found the Excessive Fines Clause of the Eighth Amendment inapplicable to punitive damages awarded in civil suits between private parties.<sup>28</sup> The Court indicated, however, that the Due Process Clause of the Fourteenth Amendment placed an outer limit on punitive damages;<sup>29</sup> but, because

---

21. Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589, 589 (2003).

22. See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453-54, 454 n.17 (1993). In *TXO*, the Court cited the following cases for the proposition that the Due Process Clause places a substantive limit on punitive damages: *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 78 (1907); *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919); and *Standard Oil Co. of Ind. v. Mo.*, 224 U.S. 270, 286 (1912). In *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915), the Court set aside a punitive damages award for violating the Due Process Clause, but this was primarily because the defendant had *not* acted in bad faith when it caused the injury. *TXO*, 509 U.S. at 454 n.17.

23. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 24-40 (1991) (Scalia, J., concurring) (providing an extensive history of the legal evolution of punitive damages and "due process").

24. See *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062-63 (2007).

25. *Haslip*, 499 U.S. at 26-27 (Scalia, J., concurring) ("In 1868, therefore, when the Fourteenth Amendment was adopted, punitive damages were undoubtedly an established part of the American common law of torts. It is just as clear that no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount.").

26. *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

27. 492 U.S. 257 (1989). In *Browning-Ferris*, a waste-disposal service brought suit against a competitor for violating the Sherman Act with an aggressive predatory pricing scheme intended to run the plaintiff out of business. *Id.* at 260. The jury awarded the plaintiff \$51,146 in compensatory damages and \$6 million in punitive damages. *Id.* at 262. The defendant argued that the punitive damages award was unconstitutional under the Excessive Fines Clause of the Eighth Amendment. *Id.* The Court reviewed the history and purpose of the Excessive Fines Clause and held that it was designed to restrain government abuse, not a jury's discretion in awarding civil damages between private litigants. *Id.* at 266.

28. *Id.* at 272.

29. *Id.* at 276.

the appellant failed to preserve the issue for appeal, the Court did not decide whether this particular punitive damages award was excessive under the Constitution.<sup>30</sup>

The Court had the opportunity to discuss the Due Process Clause limitations of punitive damages for the first time in 1991. In *Pacific Mutual Life Insurance Co. v. Haslip*,<sup>31</sup> the Court gave great deference to the state court. Writing for the majority, Justice Blackmun stated that the Court would not “draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit in every case,” but recognized that “general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.”<sup>32</sup> The Court was satisfied that the state court properly instructed the jury and the award was carefully reviewed on appeal.<sup>33</sup> “As long as the [jury’s] discretion is exercised within reasonable constraints,” the Court concluded, “due process is satisfied.”<sup>34</sup>

Two years later, in *TXO Production Corp. v. Alliance Resources Corp.*,<sup>35</sup> a substantial fissure began to appear on the bench.<sup>36</sup> In a plurality opinion, Justice Stevens warned that out-of-state corporations must be protected against a local jury’s protectionist impulses.<sup>37</sup> Despite this warning, the Court found that a defendant received sufficient notice “if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct.”<sup>38</sup>

Although writing separate concurring opinions, Justice Kennedy,

---

30. *Id.* at 276-77.

31. 499 U.S. 1 (1991). Haslip was insured by Pacific Mutual. *Id.* at 4. The hospital informed Haslip that she had no health insurance during her hospitalization. *Id.* at 5-6. Haslip sued her insurance company for fraud, claiming that one of its agents was misappropriating her annual payments. *Id.* The jury awarded her approximately \$840,000 in punitive damages, more than four times the amount of the compensatory award which was approximately \$200,000. *Id.* at 7 n.2, 23. As noted above, the Supreme Court upheld the award. *Id.* at 24.

32. *Id.* at 18.

33. *Id.* at 23.

34. *Id.* at 20.

35. 509 U.S. 443 (1993) (plurality opinion). TXO learned that Alliance owned property containing lucrative amounts of oil and gas, so TXO tried to obtain development rights to the land. *Id.* at 447. TXO offered to pay part of the royalties to Alliance and Alliance agreed to convey the development rights to TXO. *Id.* at 447-48. Later, regretting its decision to convey royalties, TXO sued Alliance falsely alleging that there was a cloud on their title to the minerals. *Id.* at 448-49. A jury found that TXO brought the claim in bad faith to pressure Alliance into renegotiating its royalty agreement and that TXO had engaged in similar dealings on a national level. *Id.* at 450-51. The jury awarded Alliance \$19,000 in compensatory damages and \$10 million in punitive damages. *Id.* at 451. On appeal, the Supreme Court found the punitive damages award procedurally and substantively constitutional even though it was 526 times larger than the compensatory award. *Id.* at 446, 453. The Court noted that “in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner’s wealth,” it was a reasonable means of deterrence. *Id.* at 462.

36. The following cases most pronounced the split: *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (5-4 decision); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (5-4 decision); and *TXO*, 509 U.S. 443 (plurality opinion).

37. *TXO*, 509 U.S. at 464.

38. *Id.* at 465-66.

and Justice Scalia who was joined by Justice Thomas, warned that the Court was reaching beyond its proscribed authority.<sup>39</sup> They insisted that the Constitution does not provide substantive guidance as to what constitutes a reasonable punitive damages award.<sup>40</sup> Furthermore, Justice Kennedy encouraged the Court to avoid issues on which the Constitution was silent: "As I have suggested before, . . . a more manageable constitutional inquiry focuses not on the amount of money a jury awards in a particular case but on its reasons for doing so."<sup>41</sup> In dissent, Justice O'Connor, joined by Justice White, insisted that the jury was still exercising far too much discretion and needed more objective standards to guide and constrain its deliberations.<sup>42</sup>

The Court's deferential approach took a more activist turn in 1994 as the Court began to develop more objective standards.<sup>43</sup> In *Honda Motor Co. v. Oberg*,<sup>44</sup> the Court held that all states are required to provide appellate review of punitive damages awards; and in 2001, the Court decided that appellate review should be de novo.<sup>45</sup> The Court's most important decision, however, came in 1996. For the first time, in *BMW of North America, Inc. v. Gore*,<sup>46</sup> the Court found a punitive damages award to be excessive under the substantive limits of the Due Process Clause.<sup>47</sup> Furthermore, the Court developed three "guideposts"

---

39. *Id.* at 467 (Kennedy, J., concurring); *id.* at 470-71 (Scalia, J., concurring).

40. *Id.* at 467 (Kennedy, J., concurring); *id.* at 470-71 (Scalia, J., concurring).

41. *Id.* at 467 (Kennedy, J., concurring).

42. *Id.* at 474-76 (O'Connor, J., dissenting).

43. Justice O'Connor encouraged the Court to develop objective standards that juries could use as a basis for awarding punitive damages and that courts could use to evaluate the reasonableness of a jury's award. See *id.* at 480-81 (O'Connor, J., dissenting) (arguing that the Court should consider adopting TXO's proposed criteria: (1) there should be proportionality between the harm done and the punishment imposed; (2) courts should compare punitive damages awards to awards given in other cases; and (3) courts should look to other penalties imposed by the legislature). These suggestions resurfaced in 1996 as the *Gore* guideposts. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996).

44. 512 U.S. 415 (1994). Plaintiff brought a product liability action against an automobile manufacturer for the faulty design of a three-wheeler that overturned and injured the plaintiff. *Id.* at 418. The jury awarded the plaintiff \$919,390.39 in compensatory damages and \$5 million in punitive damages, an amount more than five times the size of the compensatory award. *Id.* At the time, the Oregon State Constitution prohibited appellate review of jury awards except in limited circumstances. *Id.* at 418-19, 426-27. The Supreme Court held that the state's constitutional provision violated the Due Process Clause. *Id.* at 434-35.

45. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001). The manufacturer of a multi-function pocket tool sued a competitor for false advertising. *Id.* at 427. The jury awarded the plaintiff \$50,000 in compensatory damages and \$4.5 million in punitive damages. *Id.* at 426. The Oregon Court of Appeals reviewed the award under an abuse of discretion standard. *Id.* at 431. The Supreme Court vacated the judgment and remanded the case for review under the de novo standard. *Id.* at 443.

46. 517 U.S. 559 (1996). Gore sued the car dealership for failing to disclose that the vehicle he purchased as "new" had been damaged and repainted. *Id.* at 563. The repair was "less than 3 percent of the car's suggested retail price," however, this kind of fraud was part of the car dealership's nationwide policy. *Id.* at 562-63. The jury awarded Gore \$4,000 in compensatory damages and \$4 million in punitive damages. *Id.* at 565. The Oregon Supreme Court reduced the punitive award to \$2 million. *Id.* at 567. The United States Supreme Court noted that the punitive award was still 500 times greater than the compensatory award and found it unconstitutional under the three guideposts. *Id.* at 582, 585-86.

47. *Id.* at 585-86.

for evaluating future punitive damages awards: (1) evaluate “the degree of reprehensibility of the defendant’s conduct,”<sup>48</sup> (2) evaluate the ratio—or “reasonable relationship”—between the punitive damages award and “the actual harm inflicted on the plaintiff,”<sup>49</sup> and (3) “[c]ompar[e] the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct.”<sup>50</sup>

The Court added flesh to these guidelines in *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>51</sup> First, the Court suggested that “a single-digit ratio” between compensatory damages and punitive damages was, with a few exceptions, probably the best measure of constitutionality.<sup>52</sup> Next, the Court provided a list of factors that juries should consider when evaluating reprehensibility:

whether the 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.<sup>53</sup>

Finally, the Court declared that state courts should not permit juries to consider a defendant’s extraterritorial conduct if it is unrelated to the “acts upon which liability was premised.”<sup>54</sup> In other words, the Court would only allow juries to consider evidence of a defendant’s conduct in other states if it had a “nexus” to the conduct that injured the plaintiff.<sup>55</sup>

---

48. *Id.* at 575. The Court called reprehensibility “[p]erhaps the most important indicium of the reasonableness of a punitive damages award” because it “reflects the accepted view that some wrongs are more blameworthy than others.” *Id.*

49. *Id.* at 580. The Court called the ratio analysis “perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award.” *Id.* Later in the opinion, the Court noted that the ratio is sometimes understood more broadly as “between the punitive damages award and the harm likely to result from the defendant’s conduct as well as the harm that actually has occurred.” *Id.* at 581 (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993)). In *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), the Court explained that “potential harm” was not all-encompassing, but was limited to considering potential harm “to the plaintiff.” *Id.* at 1063.

50. *Gore*, 517 U.S. at 583.

51. 538 U.S. 408 (2003). The Campbells were in a car accident that killed one person and permanently injured another. *Id.* at 412-13. Although evidence of Curtis Campbell’s fault was overwhelming, the Campbells’ insurance company refused to settle with the opposing party, and the case went to trial. *Id.* at 413. The Campbells lost at trial and were required to pay far beyond their policy limit. *Id.* Thereafter, the Campbells sued the insurance company for bad faith failure to settle and introduced evidence showing the insurance company engaged in bad faith on a national level. *Id.* at 413-15. The jury awarded the Campbells “\$2.6 million in compensatory damages and \$145 million in punitive damages, which the trial court reduced to \$1 million and \$25 million respectively.” *Id.* at 415. The Supreme Court ultimately found the 145:1 ratio excessive under the Due Process Clause. *Id.* at 426, 429.

52. *Id.* at 425. The Court provided the following exceptions to its “single-digit ratio” proposal: Punitive damages may be greater (1) where “a particularly egregious act has resulted in only a small amount of economic damages,” (2) where “the injury [was difficult] to detect,” or (3) where “the monetary value of noneconomic harm [was] difficult to determine.” *Id.* On the other hand, punitive damages may be smaller where the compensatory damages are already significant and, therefore, already have a deterrent effect. *Id.*

53. *Id.* at 419 (citing *Gore*, 517 U.S. at 576-77).

54. *Id.* at 422-23.

55. *Id.* at 422.

Although the Supreme Court has repeatedly held that punitive damages may be used to punish and deter, it has begun to redefine the extent to which punitive damages may be used to punish.<sup>56</sup> In 2007, the Supreme Court reviewed another punitive damages award. As with most cases, the punitive damages award in *Philip Morris* came from the story of an individual: Jesse Williams.

### III. CASE DESCRIPTION

As a young man, Jesse Williams began smoking while serving in the United States Army in the early 1950s.<sup>57</sup> The Army supplied its soldiers with Philip Morris cigarettes, and many of Williams's fellow soldiers encouraged him to smoke in order to "keep mosquitoes away."<sup>58</sup> After returning home from the service, Williams increased his consumption to three packs a day so that he was spending "half of his waking hours smoking."<sup>59</sup> His wife and children urged him to quit smoking.<sup>60</sup> Although Williams tried to quit smoking over twenty times, he never succeeded.<sup>61</sup> Instead, he reasoned that the cigarette companies would not sell a product if it endangered the lives of its consumers, and he referred his family to publications and television segments that stated "cigarette smoking is not dangerous" and "do[es] not cause cancer."<sup>62</sup> Eventually, Williams developed a severe cough that woke him in the middle of the night and caused him to spit blood mixed with a "black and greenish" substance.<sup>63</sup> In 1996, a doctor diagnosed Williams with inoperable lung cancer.<sup>64</sup> Feeling betrayed, Williams told his wife he wanted to see the tobacco companies' lies brought to an end.<sup>65</sup> Williams died in March of 1997 at the age of sixty-seven.<sup>66</sup>

Ms. Mayola Williams, as representative of her husband's estate,

---

56. See Rustad, *supra* note 14, at 519-20 (noting that the Supreme Court has "subordinated deterrence to retribution").

57. *Williams v. Philip Morris Inc.*, 48 P.3d 824, 829 (Or. Ct. App. 2002). The Supreme Court did not provide a detailed discussion of the facts in this case. Therefore, this presentation of the facts came from the 2002 Oregon Court of Appeals decision. Because Williams prevailed at the trial court level, the Oregon Court of Appeals reviewed the facts in a light most favorable to Williams. *Id.* at 828. Because juries allot punitive damages in response to the factual findings, these facts are representative of the case and of the punitive damages award at issue.

58. *Id.* at 829. The court noted that the evidence showed that Williams smoked cigarettes produced by Philip Morris, and he was not known to smoke any other brand. *Id.* at 828 n.2.

59. *Id.* at 829.

60. *Id.* An expert testified that Williams's addiction was both psychological and physiological. *Id.*

61. Joint Appendix at 35a, *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (No. 05-1256), 2006 WL 2147483.

62. *Williams*, 48 P.3d at 829.

63. Joint Appendix, *supra* note 61, at 141a.

64. *Williams*, 48 P.3d at 829.

65. *Id.*; Meier, *supra* note 4, at A14.

66. *Williams*, 48 P.3d at 829; see *Williams v. Philip Morris Inc.*, 92 P.3d 126, 128 (Or. Ct. App. 2004) (noting that Williams died within six months of his diagnosis); Meier, *supra* note 4, at A14.

brought negligence and fraud claims against Philip Morris.<sup>67</sup> She presented evidence to the jury demonstrating that Philip Morris and other tobacco companies engaged in a misinformation campaign that began in the 1950s and continued into the mid-1990s.<sup>68</sup> Ms. Williams's evidence showed that in the early 1950s, scientific studies revealed that tobacco consumption caused cancer in mice.<sup>69</sup> When this information became public, "cigarette sales fell in 1953 for the first time in the twentieth century."<sup>70</sup> According to Ms. Williams, Philip Morris and other tobacco companies responded to the scientific research by disseminating information designed to create doubt about the negative effects of smoking so that people would be encouraged to continue smoking.<sup>71</sup>

In January 1954, as part of its campaign, Philip Morris worked with several tobacco companies, growers, and marketers to publish "A Frank Statement to Cigarette Smokers" in 448 newspapers nationwide.<sup>72</sup> The tobacco industry used the publication to announce the creation of the Tobacco Industry Research Committee (TIRC), dedicated to researching the effects of tobacco on health.<sup>73</sup> The Oregon Court of Appeals noted that, instead of pursuing its stated purpose, the TIRC destroyed unfavorable results and avoided scientific tests on live animals or actual production cigarettes.<sup>74</sup> The director of research understood that his job was to "fuel the controversy" and "discredit or somehow cast [doubt] on the outside research."<sup>75</sup> In 1964, when the Surgeon General's Report reinforced the link between smoking and cancer, one of Philip Morris's

---

67. *Williams*, 48 P.3d at 828. Ms. Williams had a number of hurdles to overcome before presenting her claims. Oregon Revised Statute § 30.905(1) (2001) is an eight-year statute of repose that "extinguishes claims for injuries that occurred more than eight years after a product is first purchased." *Id.* at 830. To get around this, she had to prove that the cigarettes her husband bought after 1988 were "a substantial factor in causing his cancer and death." *Id.* Furthermore, 15 U.S.C. § 1334 (2000) required a federal warning to appear on cigarette packages. *Id.* Therefore, under *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524, 527-28 (1992), she could not argue that Philip Morris actually concealed information about the health consequences of smoking. *Williams*, 48 P.3d at 830. Rather, she was limited to demonstrating that Philip Morris engaged in "affirmative misrepresentations." *Id.* To prove fraud under Oregon law, Ms. Williams had to show "that [her husband] was within a class of people whom defendant intended to be recipients of and to rely on the message that it conveyed." *Id.* at 832.

68. *William*, 48 P.3d at 831.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 833.

73. *Id.* The tobacco companies, marketers, and growers that participated in the "Frank Statement" actually signed the announcement. *Id.*

74. *Id.* at 839. In 1964, the Surgeon General's report reinforced the link between smoking and poor health. *Williams v. Philip Morris Inc.*, 92 P.3d 126, 128 (Or. Ct. App. 2004). After the Surgeon General issued this report, the tobacco industry divided the Tobacco Industry Research Committee into two distinct bodies: (1) the Council on Tobacco Research that "support[ed] scientific research," and (2) the Tobacco Institute that "focused on public relations and lobbying." *Id.*

75. *Williams*, 48 P.3d at 834 (alteration in original); see Joint Appendix at 62a-63a, *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (No. 05-1256), 2006 WL 2147483 (including excerpts from the trial transcript where these statements were made). The Oregon Court of Appeals quoted these statements and attributed them to the director of research at the Tobacco Institute. *Williams*, 48 P.3d at 834 n.13.

vice presidents issued an internal memorandum stressing the need for the company to “provide some answers which will give smokers a psychological crutch and a self-rationale to continue smoking.”<sup>76</sup> Spokespersons for Philip Morris and other tobacco companies used commercial, print media, and public television to assure people that modern research remained inconclusive.<sup>77</sup> At the same time, tobacco manufacturers manipulated their cigarettes to increase their addictive effects.<sup>78</sup>

### A. Trial and Appeal

At trial, the jury found that: (1) “Williams’[s] death was caused by smoking;” (2) “Williams smoked in significant part because he thought it was safe to do so;” and (3) “Philip Morris knowingly and falsely led him to believe that this was so.”<sup>79</sup> On Ms. Williams’s negligence and fraud claims, the jury awarded her \$21,485.80 in economic damages and \$800,000 in noneconomic damages.<sup>80</sup> On her fraud claim, the jury awarded her \$79.5 million in punitive damages.<sup>81</sup> Concerned that the punitive damages award violated the Due Process Clause of the Constitution, the trial court reduced it to \$32 million.<sup>82</sup> Both parties appealed.<sup>83</sup> Philip Morris argued, in part, that the award was unconstitutionally excessive,<sup>84</sup> and the trial court wrongly rejected its proposed jury instruction, which would have directed the jury not to use its punitive damages award to punish the defendant for unproven harm to non-parties.<sup>85</sup>

The Oregon Court of Appeals reviewed the punitive damages

---

76. *Id.* at 833. The Oregon Court of Appeals decision does not provide a citation for this quotation, however, it appears to be taken from testimony or evidence presented at trial. The court also noted that the tobacco industry’s campaign appeared to go through two distinct phases. *Id.* In the 1950s and 1960s, the industry “den[ie]d that there was a problem.” *Id.* After the Surgeon General’s report in 1964, the industry “focus[ed] on keeping the ‘controversy’ alive [by] calling for ‘more research.’” *Id.*

77. *Id.* at 834.

78. *Id.* at 838.

79. Philip Morris USA v. Williams, 127 S. Ct. 1057, 1060-61 (2007).

80. *Williams*, 48 P.3d at 828. The trial court reduced the noneconomic award to \$500,000 to comply with the state’s statutory cap on noneconomic damages. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 838.

85. *Id.* at 837. Philip Morris’s proposed jury instruction stated in part:

(1) 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.

...

(2) The size of the punishment may appropriately reflect the degree of reprehensibility of the defendant’s conduct – that is, how far the defendant has departed from accepted societal norms of conduct.

Philip Morris USA v. Williams, 127 S. Ct. 1057, 1068-69 (2007) (Ginsburg, J., dissenting).

award under state law<sup>86</sup> and the Supreme Court's *Gore* guideposts.<sup>87</sup> After discussing the reprehensibility of Philip Morris's conduct, the court noted that the \$79.5 million award was the equivalent of "a little more than two and a half weeks' profit" for the company.<sup>88</sup> The court also pointed out that, if the defendant's conduct "affected people other than the plaintiff," the jury should consider the effect on nonparties.<sup>89</sup> Such broad considerations would not lead to duplicative punitive damages awards in subsequent cases because the Oregon statute governing punitive damages required the court to consider "the total deterrent effect of *other* punishment imposed upon the defendant as a result of the misconduct."<sup>90</sup> Although a jury cannot predict what punitive damages might be awarded for future claims by other parties, it may consider past awards and adjust its award accordingly.<sup>91</sup> The appellate court, therefore, reversed the trial court and reinstated the jury's punitive damages award.<sup>92</sup>

Philip Morris appealed. The Oregon Supreme Court refused to hear the case, and the United States Supreme Court remanded the case in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>93</sup>

### B. On Remand

The Oregon Court of Appeals again reviewed the facts that inspired the substantial award.<sup>94</sup> After discussing Philip Morris's conduct, the court summarized *Campbell's* holding as follows: juries may consider a defendant's out-of-state conduct "when it demonstrates the deliberateness and culpability of the defendant's action in the state where

---

86. *Williams*, 48 P.3d at 839-40. In awarding punitive damages, the Oregon jury was required to consider the following statutory factors:

Punitive damages, if any, shall be determined and awarded based upon the following criteria:

- (a) The likelihood at the time that serious harm would arise from the defendant's misconduct;
- (b) The degree of the defendant's awareness of that likelihood;
- (c) The profitability of the defendant's misconduct;
- (d) The duration of the misconduct and any concealment of it;
- (e) The attitude and conduct of the defendant upon discovery of the misconduct;
- (f) The financial condition of the defendant; and
- (g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

OR. REV. STAT. § 30.925(2) (2001).

87. *Williams*, 48 P.3d at 840-42.

88. *Id.* at 841.

89. *Id.* The Oregon Court of Appeals reviewed state case law to explain the evidentiary scope of punitive damages. *Id.*

90. OR. REV. STAT. § 30.925(2)(g) (emphasis added); see *Williams*, 48 P.3d at 841.

91. *Williams*, 48 P.3d at 841.

92. *Id.* at 842-43.

93. *Philip Morris USA, Inc. v. Williams*, 540 U.S. 801, 801 (2003); see *supra* Part II (discussing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)).

94. *Williams v. Philip Morris Inc.*, 92 P.3d 126, 128-30 (Or. Ct. App. 2004).

it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff.”<sup>95</sup> Applying this “nexus” rationale, the court found that the jury’s consideration of Philip Morris’s *state-wide* harm was not unreasonable because it had a nexus to Williams’s injury.<sup>96</sup> In light of the defendant’s reprehensible conduct and the state’s heightened interest in protecting the well-being of its citizens, the court upheld the \$79.5 million award.<sup>97</sup>

Philip Morris again appealed to the Oregon Supreme Court.<sup>98</sup> The court re-applied the *Gore* guideposts and noted that the United States Supreme Court held in *Campbell* that the reprehensibility guidepost was “[t]he most important indicium of the reasonableness of a punitive damages award.”<sup>99</sup> Although the court recognized that the \$79.5 million award exceeded the single-digit ratio suggested in *Campbell*, it emphasized the reprehensibility of the defendant’s conduct and noted that the comparable criminal sanction for manslaughter justified the award.<sup>100</sup> Once again, Philip Morris appealed the decision to the United States Supreme Court.

#### IV. THE COURT’S DECISION

In *Philip Morris*, the Supreme Court used the Due Process Clause to place yet another procedural safeguard on punitive damages awards.<sup>101</sup> By narrowing its holding to a single procedural issue, the Court avoided applying the substantive limits of the Due Process Clause and remanded the case to the state court to determine whether the award was excessive.<sup>102</sup>

Before the Supreme Court, Philip Morris concentrated its argument on two key issues: (1) whether punishing a defendant for harm to nonparties was constitutional, and (2) whether courts should give equal weight to each of the three *Gore* guideposts before finding a punitive

---

95. *Id.* at 138 (quoting *Campbell*, 538 U.S. at 422).

96. *Id.* at 142.

97. *Id.* at 142, 145-46.

98. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1061-62 (2007). Philip Morris argued that the jury should not have considered harm to nonparties, in part, because Williams did not present any evidence showing that the tobacco industry actually deceived persons other than Williams. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1170 n.1 (Or. 2006). The court, however, dismissed the defendant’s concerns in a footnote:

[E]ven the simplest assessment of human nature, viewed in light of the designedly addictive properties of cigarettes, tells any reasonable person that those lies would have been very persuasive. . . . Moreover, Philip Morris’s own conduct belies its protestations. As a for-profit corporation, it would not spend over 40 years of time, effort, and money to deceive people, unless it thought it was succeeding.

*Id.*

99. *Williams*, 127 P.3d at 1173 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)).

100. *Id.* at 1179-82.

101. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007).

102. *See id.* at 1065.

damages award constitutional.<sup>103</sup> In its brief, Philip Morris emphasized the manner in which Williams's attorney appealed to the jury, "repeatedly urg[ing] the jury to punish Philip Morris not only for the harm caused to Williams, but also for the smoking-related harms allegedly suffered by other Oregonians who were not identified and whose circumstances were never presented to the jury."<sup>104</sup> Philip Morris argued that the reprehensibility guidepost and the comparable sanctions guidepost should not be determinative alone, but should be treated as variable factors *within* the confines of a single-digit ratio.<sup>105</sup>

In response, Ms. Williams argued that, if a jury is to fashion an appropriate means of deterrence, it must be allowed to consider the "actual and potential public effects of [defendant's] misconduct."<sup>106</sup> Furthermore, she reminded the Court that it characterized reprehensibility as the "most important" measure of an award's constitutionality.<sup>107</sup> Granting punitive damages on the basis of a ratio, she argued, would encourage defendants to calculate their tortious conduct into the cost of doing business—especially when that conduct is as lucrative as it proved for Philip Morris.<sup>108</sup> Attempting to find a middle ground, Philip Morris encouraged the Court to develop a rule that would permit a jury to consider harm to nonparties as part of the reprehensibility analysis but would prohibit a jury from punishing a defendant for harm to nonparties.<sup>109</sup>

The Supreme Court granted certiorari to decide "whether the Constitution's Due Process Clause permit[ted] a jury to base [a punitive damages] award in part upon its desire to *punish* the defendant for harming persons who [were] not before the court."<sup>110</sup> In a five-to-four decision, the Court held that, although a jury may consider harm to nonparties when gauging the reprehensibility of a defendant's conduct, a jury may not award punitive damages to punish "directly" for harm the defendant caused to persons not before the court.<sup>111</sup> While recog-

---

103. Brief for the Petitioner at 8-9, *Philip Morris*, 127 S. Ct. 1057 (No. 05-1256), 2006 WL 2190746.

104. *Id.* at 3. Williams's attorney told the jury:

When you determine the amount of money to award in punitive damages against Philip Morris, . . . [i]t's fair to think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. It's more than fair to think about how many more are out there in the future. . . . For every hundred, cigarettes . . . are going to kill ten through lung cancer. And . . . the market share of Marlboros is one-third.

*Id.* at 3-4.

105. *Id.* at 34-35.

106. Brief for Respondent at 4, *Philip Morris*, 127 S. Ct. 1057 (No. 05-1256), 2006 WL 2668158.

107. *Id.* at 6.

108. *Id.* at 32-33. Ms. Williams noted that Philip Morris made \$2 billion in the year Williams was diagnosed with cancer, and \$1.6 billion in the year Williams died. *Id.* at 32.

109. Reply Brief for the Petitioner at 3-4, *Philip Morris*, 127 S. Ct. 1057 (No. 05-1256), 2006 WL 2966602.

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

111. *Id.* at 1064.

nizing that punitive damages “further a [s]tate’s legitimate interests in punishing unlawful conduct and deterring its repetition,”<sup>112</sup> the Court expressed a need to “cabin the jury’s discretionary authority.”<sup>113</sup>

Writing for the majority, Justice Breyer included four justifications for the Court’s holding. First, the Constitution requires that a defendant have “an opportunity to present every available defense.”<sup>114</sup> A court denies the defendant this opportunity when it administers punishment on behalf of persons not specifically identified.<sup>115</sup> Second, when harm is hypothetical or speculative, the jury is left to decide an appropriate punishment without any standards to guide it, leaving the potential for limitless punitive damages awards.<sup>116</sup> Furthermore, when juries have the ability to grant limitless awards, defendants lack notice as to what civil penalties a jury might impose.<sup>117</sup> Third, punitive damages demonstrate public policy; however, if one state imposes a substantial punitive damages award on a multi-state corporation, that state imposes its policy on other states.<sup>118</sup> Finally, and most importantly, when a jury awards punitive damages to punish a defendant for speculative harm it allegedly caused to nonparties, the award constitutes “a taking of ‘property’ from the defendant without due process.”<sup>119</sup>

The Court recognized, however, that this procedural rule will present practical problems.<sup>120</sup> Lower courts may have difficulty distinguishing between an impermissible punitive damages award, which is an award intended to punish the defendant for harm to nonparties, and a permissible punitive damages award, which is an award intended to punish the defendant for reprehensible conduct.<sup>121</sup> In the present case, the Court found the Oregon Supreme Court’s justification for the \$79.5 million award went beyond reprehensibility.<sup>122</sup> The ambiguity surrounding the award’s purpose was enough for the Supreme Court to vacate the Oregon Supreme Court’s decision and remand the case.<sup>123</sup> Finally, the Court held that states must set up appropriate procedural, evidentiary,

---

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

113. *Id.*

114. *Id.* at 1063 (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted)).

115. *Id.*

116. *Id.*

117. *Id.* at 1062-63.

118. *Id.* at 1062.

119. *Id.* at 1060. The Fourteenth Amendment reads:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

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

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

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

123. *Id.* at 1065.

and instructional safeguards to protect juries from evidence or comments that might lead them to punish a defendant for harming nonparties.<sup>124</sup>

Justices Stevens, Ginsburg, Thomas, and Scalia dissented. Justice Stevens reasoned that the Court's effort to distinguish between punishing for harm and punishing for reprehensibility was already well established in the differences between compensatory and punitive damages: "Whereas compensatory damages are measured by the harm the defendant has caused the plaintiff, punitive damages are a sanction for the public harm the defendant's conduct has caused or threatened."<sup>125</sup> A civil penalty, he concluded, is similar to a criminal sanction; both serve the purpose of "retribution and deterrence."<sup>126</sup> The legitimacy of a punitive damages award is most fully realized when it goes, in whole or in part, to the state.<sup>127</sup>

Writing individually, Justice Thomas posited that the Court was not developing a procedural rule, but was creating a new substantive rule upon which the Constitution was silent.<sup>128</sup> Justice Ginsburg, joined by Justices Scalia and Thomas, noted that the Court's distinction between punishment for harm to nonparties and punishment for the reprehensibility of harming nonparties was likely to confuse a jury.<sup>129</sup> The dissenting Justices admonished the majority for its lack of restraint: if punitive damages are matters of public policy, they wrote, the Supreme Court should defer to the state's judgment and refrain from creating tests that have no grounding in the Constitution.<sup>130</sup>

## V. COMMENTARY

Over the last seventeen years, the Supreme Court's opinions regarding punitive damages have not been easily applicable to different fact patterns. Punitive damages are inherently fact-intensive and case-specific.<sup>131</sup> The Court's effort, therefore, to create "reasonableness"

---

124. *Id.*

125. *Id.* at 1066-67 (Stevens, J., dissenting). Justice Stevens chastised the Court for making a distinction without a difference: "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." *Id.* at 1067.

126. *Id.* at 1066.

127. *Id.* 1066 n.1.

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

129. *Id.* at 1068-69 (Ginsburg, J., dissenting).

130. *Id.* at 1067 (Stevens, J., dissenting) ("Judicial restraint counsels us to 'exercise the utmost care whenever we are asked to break new ground in this field.'"); *id.* (Thomas, J., dissenting) ("I write separately to reiterate my view that the Constitution does not constrain the size of punitive damages awards." (internal quotations omitted)); *id.* at 1069 (Ginsburg, J., dissenting) ("I would accord more respectful treatment to the proceedings and dispositions of state courts that sought diligently to adhere to our changing, less than crystalline precedent.").

131. See *infra* text accompanying notes 191 and 206; *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 39 (1991) (Scalia, J., concurring) (noting that the Supreme Court's opinion was highly "fact-specific," and, thus, the Court's involvement in punitive damages will probably require case-by-case analysis).

tests with no relationship to the facts threatens to undermine the historic value of punitive damages as a remedy by which to punish a particular defendant for particular conduct.

The Supreme Court's precedent has given neither clarity nor consistency to this area of law.<sup>132</sup> Punitive damages involve value judgments traditionally made by legislative bodies.<sup>133</sup> Because punitive awards are shaped by public policy and the facts of each case, state legislatures are in the best position to determine the appropriate limits for such awards, and the trial court is in the best position to determine the appropriate amounts.<sup>134</sup> Uniformity cannot be an end in itself.<sup>135</sup> If state courts administered roughly equivalent awards in all cases, punitive damages could not fulfill their purpose.<sup>136</sup>

The Court's desire to interject itself into the punitive damages discussion has proven counter-productive in theory and in practice. Legal scholars have noted various inconsistencies in the Supreme Court's policy-reasoning and the conflicts that arise when these rules are applied in conjunction with state law.<sup>137</sup> This Comment summarizes how scholars have characterized the major problems in the Supreme Court's punitive damages precedent: the Court has undermined the traditional fact-finding role of the jury; the *Gore* guideposts have little relationship to the facts of the case; and *Campbell* has undermined the power of state courts to punish and deter. Finally, this Comment discusses how those problems have culminated in *Philip Morris*, in which the Court based its holding on a semantic distinction between punishment-for-harm and punishment-for-reprehensibility that has no substantive or evidentiary value.

### A. A Lack of Constitutional Guidance

The Constitution does not expressly address the substantive aspects

---

132. Cf. Roberts, *supra* note 11, at 1022-23 (noting that in the first year after *Campbell*, in which the Supreme Court suggested a single-digit ratio between compensatory and punitive damages awards, federal appellate courts responded to the Court's dicta with widely varying results).

133. See Nathan Seth Chapman, Note, *Punishment by the People: Rethinking the Jury's Political Role in Assigning Punitive Damages*, 56 DUKE L.J. 1119, 1120 (2007); Rustad, *supra* note 14, at 523 (noting that different geographical regions have different economic interests, and therefore state laws protect those interests differently whether it involves legislation about agriculture in the Midwest or technology on the West Coast).

134. See *Haslip*, 499 U.S. at 39 (Scalia, J., concurring).

135. Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 296 (1997); see *Haslip*, 499 U.S. at 41 (Kennedy, J., concurring) (noting that "the jury system of assessing punitive damages discourage[s] uniform results, but nonuniformity cannot be equated with constitutional infirmity").

136. See Roberts, *supra* note 11, at 1035 (noting that the ratio guidepost prevents punitive damages from achieving punishment or deterrence).

137. See, e.g., Allen, *supra* note 22611, at 47-49; A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085, 1086-91 (2006); Thomas C. Galligan, Jr., *U.S. Supreme Court Tort Reform: Limiting State Power to Articulate and Develop Tort Law - Defamation, Preemption, and Punitive Damages*, 74 U. CIN. L. REV. 1189, 1256-58 (2006).

of punitive damages.<sup>138</sup> In fact, in 1989, when first asked to create excessiveness tests that could be used to evaluate punitive damages awarded by state courts under the Fourteenth Amendment Due Process Clause, the Court refrained.<sup>139</sup> The Justices noted that these were “matters of state, and not federal, common law.”<sup>140</sup>

Ultimately, the Court’s decision to become more intimately involved in the punitive damages debate was inspired by policy concerns rather than constitutional considerations.<sup>141</sup> Consequently, the modern punitive damages debate is largely comprised of policy arguments. The central question, however, remains the same: Who is in the best position to make these policy decisions? Although the Court has experimented with punitive damages policy for seventeen years, it has failed to provide meaningful guidance.<sup>142</sup> Because the reasonableness of a punitive damages award depends upon the facts of the case from which it came, state legislatures and trial courts are best positioned to make these policy decisions.

### B. *Punitive Damages as Community-Based Policy-Making*

The Centers for Disease Control and Prevention have noted that “cigarette smoking causes an estimated 438,000 deaths . . . each year,” 38,000 of which were nonsmokers who were exposed to secondhand smoke.<sup>143</sup> Numbers, without more, have the uncanny ability to numb the mind. On the other hand, when a widow stepped into an Oregon

---

138. See *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1067 (2007) (Stevens, J., dissenting) (stating that “the Court should be ‘reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended’” (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992))); *id.* at 1067 (Thomas, J., dissenting) (declaring that “the Constitution does not constrain the size of punitive damages awards” (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (Thomas, J., dissenting))); Chapman, *supra* note 133, at 1142.

139. *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989).

140. *Id.*

141. *Cf. Haslip*, 499 U.S. at 18. In 1991, when the Court decided *Haslip*, the Justices “note[d] once again our concern about punitive damages that ‘run wild.’” *Id.* In 1993, Justice O’Connor stated that “the frequency and size of such awards have been skyrocketing.” *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993) (O’Connor, J., dissenting). The Court’s characterization of punitive damages awards as “wild” manifests their willingness to make value judgments apart from the Constitution. Even though judges are required to evaluate each punitive damages award in light of the facts of the case from which it came, the Court’s eagerness to paint all punitive damages with a broad brush confirms that their analysis of punitive damages was, and continues to be, divorced from any particular set of facts.

142. See *BMW of N. Amer., Inc. v. Gore*, 517 U.S. 559, 602 (1996) (Scalia, J., dissenting). Justice Scalia stated:

One might understand the Court’s eagerness to enter this field, rather than leave it with the state legislatures, if it had something useful to say. In fact, however, its opinion provides virtually no guidance to legislatures, and to state and federal courts, as to what a “constitutionally proper” level of punitive damages might be.

*Id.*

143. Ctrs. for Disease Control & Prevention (CDC), Fact Sheet, *Tobacco-Related Mortality*, [http://www.cdc.gov/Tobacco/data\\_statistics/Factsheets/tobacco\\_related\\_mortality.htm](http://www.cdc.gov/Tobacco/data_statistics/Factsheets/tobacco_related_mortality.htm) (last visited Jan. 21, 2008).

courtroom to share the story of her deceased husband's tobacco addiction, his subsequent smoking-related death, and the impact that struggle had on the family, the Oregon court called a jury to listen to her story and provide an appropriate remedy. In *Philip Morris*, Ms. Mayola Williams sued the nation's leading cigarette manufacturer, a company that helped organize a decades-long campaign of misinformation affecting the lives of millions of Americans.<sup>144</sup> In a case such as this, where there is a striking imbalance of power between the plaintiff and the defendant, and the defendant's indifference endangered millions of people, the jury may use punitive damages as an appropriate remedy for the injustice committed by the corporation against the public.

Punitive damages have historically communicated the "community's sense of outrage, and force[d] the defendant to disgorge much or all of the advantage gained from such conduct."<sup>145</sup> Unlike a compensatory award, which makes the plaintiff whole, punitive damages "vindicate the public interest."<sup>146</sup> In other words, juries have the "political responsibility . . . to interject community morality into the application of the law."<sup>147</sup> Even though the Court has tried to flesh out more "objective" standards for evaluating punitive damages awards, the *Campbell* Court admitted that punitive damages involve a highly fact-sensitive inquiry: "The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff."<sup>148</sup>

The Court's recent use of mathematical analogies to discuss the punitive damages "calculus" reveals a growing desire to make punitive damages more mechanical, more predictable, less jury-specific, and thus, less case-specific.<sup>149</sup> Math cannot replace the humanity of a jury.<sup>150</sup> Jurors bring expectations, values, and experiences that shape their individual perception and analysis.<sup>151</sup> The American court system calls upon representatives of the community to listen to testimony and evidence and determine an appropriate punitive damages award in re-

---

144. See *Williams v. Philip Morris Inc.*, 48 P.3d 824, 831 (Or. Ct. App. 2002).

145. Gash, *supra* note 17, at 1669.

146. Hines, *supra* note 8, at 892.

147. Chapman, *supra* note 133, at 1132. Chapman argues that courts should give greater deference to jury decisions because the Founding Fathers intended the jury to serve as a moral "barometer." *Id.* at 1151-52. As such, it needs the liberty to make "a unique community-based judgment of reprehensibility like the determination of prurience, one that might change over time and draw on local community norms." *Id.* at 1141. He maintains that de novo review "renders juries constitutionally powerless and their input meaningless as to the punishment of civil wrongdoing." *Id.* at 1150.

148. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

149. The Court used this mathematical terminology in the following cases: *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991); *TXO Products Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993).

150. See Zwier, *supra* note 14, at 428.

151. Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513, 516 (1992).

sponse.<sup>152</sup> Consequently, in *Philip Morris*, the Oregon Court of Appeals and the Oregon Supreme Court emphasized the facts behind the substantial punitive damages award. The courts stressed the way in which Philip Morris methodically developed its tobacco research institute and media campaign with the intent to undercut the credibility of legitimate scientific research and to deceive smokers, all with an eye toward maintaining the corporation's consumer base regardless of the consequences.<sup>153</sup> Even though the Court's decisions in *Browning-Ferris*, *Haslip*, *TXO*, *Cooper Industries*, *Gore*, and *Campbell* included extensive factual analysis, the Court ignored the substantive facts of *Phillip Morris*.

The Supreme Court's recent punitive damages case law has shifted the litigants to the back seat and the monetary awards to the front. By dubbing punitive damages a question of law, *Cooper Industries* eliminated all deference to the jury by allowing appellate courts to review a punitive damages award de novo.<sup>154</sup> As soon as a party appeals the verdict, *Cooper Industries* negates the work of the jury.<sup>155</sup> Having seen the evidence and heard the witnesses first-hand, juries and trial courts are in a better position to evaluate the facts than an appellate court that has nothing more than a cold, paper record.<sup>156</sup> Consequently, an appellate court is—more often than not—positioned to reduce the award, resulting in under-deterrence and under-punishment.<sup>157</sup>

The Court's decision in *Philip Morris* exemplified the Court's shift away from the facts of the case. Divorcing the punitive damages award from the egregious story undergirding it, the Court freed itself to discuss punitive damages in the abstract. In the process of dissecting the punitive damages discussion, however, the Court's guidance has become contradictory rather than cohesive. The Court's first step in the wrong direction came with the *Gore* guideposts.

### C. *The Gore Guideposts Gone Wrong*

In *Gore*, the Court emphasized that states have a duty to notify the public of the type of conduct a state will punish and “the severity of the

---

152. See Lind, *supra* note 19, at 334.

153. See discussion *supra* Part III.

154. Chapman, *supra* note 133, at 1147-48.

155. *Id.* at 1150. Chapman argues that, even if two of the *Gore* guideposts (ratio and comparable sanctions) are questions of law, the third (reprehensibility) is a question of fact. *Id.* at 1148. Thus, punitive damages are not completely questions of law, but require substantial input from the trier-of-fact. *Id.*

156. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 445 (2001) (Ginsburg, J., dissenting) (“Trial judges have the unique opportunity to consider the evidence in the living courtroom context . . . while appellate judges see only the cold paper record.” (internal quotations omitted)); Lind, *supra* note 19, at 334.

157. See Lind, *supra* note 19, at 254 (discussing the likelihood that damages will be reduced on appeal).

penalty that a state may impose.”<sup>158</sup> The Court developed three factors for analyzing whether a particular punitive damages award was excessive under the Constitution: (1) the reprehensibility of the defendant’s conduct, (2) the reasonable relationship between the compensatory damages award and the punitive damages award, and (3) the presence or absence of criminal and civil sanctions for such conduct.<sup>159</sup> Although the reprehensibility guidepost captures the importance of the facts in evaluating the reasonableness of a punitive damages award, when it is applied in combination with the Supreme Court’s other tests, the facts of the case are subsumed by less meaningful analysis.

### 1. A Subjective Analysis: Reprehensibility

Throughout its opinions, the Supreme Court has repeatedly emphasized the need to develop more *objective* standards to govern and evaluate jury deliberations.<sup>160</sup> In adopting the reprehensibility analysis, however, the Court simultaneously adopted a *subjective* test.<sup>161</sup> As one scholar noted, “[T]he constitutionally-mandated reprehensibility guidepost is inherently an unpredictable determination.”<sup>162</sup> Jurors bring their values to the discussion of an appropriate moral response to the defendant’s conduct.<sup>163</sup> Furthermore, jurors’ values are shaped, in part, by their environment; therefore, region and demographics may affect the jury’s analysis of the *Campbell* reprehensibility factors.<sup>164</sup>

Nevertheless, the subjectivity involved when a jury translates morality into a monetary award is not itself a reason to invalidate its decision. Rather, scholars have argued that punitive damages are most effective when they retain “a measure of unpredictability.”<sup>165</sup> Part of this uncertainty comes from the fact that juries award punitive damages in response to facts that cannot be anticipated in advance. Furthermore, when the defendant is *uncertain* as to the severity of the penalty, he is

---

158. *BMW of N. Amer., Inc. v. Gore*, 517 U.S. 559, 574 (1996).

159. *Id.* at 575.

160. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 475 (1993) (O’Connor, J., dissenting); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991).

161. *See Davis*, *supra* note 14, at 413 (arguing that all three *Gore* guideposts are subjective).

162. Chapman, *supra* note 133, at 1156.

163. Diamond & Casper, *supra* note 151, at 516.

164. *See Chapman*, *supra* note 133, at 1141 (comparing the jury’s role in evaluating reprehensibility with the jury’s role in evaluating obscenity and arguing that both are shaped by community mores).

165. Jane Mallor & Barry S. Roberts, *Punitive Damages: On the Path to a Principled Approach?*, 50 HASTINGS L.J. 1001, 1003 (1999). Mallor and Roberts add the following:

If a punitive damages award can be known with certainty in advance of the conduct, the very sort of callousness that is to be corrected by a punitive award would be facilitated; the defendant would be able to calculate his maximum exposure to liability and determine whether to disregard the interests of the plaintiff. The punitive award provides an incentive to individuals to act as “private attorney[s] general” and bring cases warranting such awards to the courts.

*Id.*

deterred from engaging in questionable conduct that is only marginally useful.<sup>166</sup> Because punitive damages are the civil counterpart to criminal punishment, courts should consider the defendant's blameworthiness when fashioning a punitive damages award.<sup>167</sup> Although this value-based decision-making is an integral part of punitive damages awards, the comparative analysis required by the Court in the second and third guideposts has undercut the factual analysis conducted under the reprehensibility rubric.

## 2. An Inconsistent Correlation: Plaintiff's Harm and Defendant's Blameworthiness

The Court's second guidepost requires the punitive award and the compensatory award to fall within some unspecified ratio.<sup>168</sup> Although the Court repeatedly promised to avoid artificial mathematical formulas to evaluate punitive damages,<sup>169</sup> its ratio guidepost encourages a comparison that is itself artificial and misleading.<sup>170</sup> As Professor Steven Salbu has noted, compensatory and punitive damages serve different functions, and therefore, the factual analysis underlying each is different.<sup>171</sup> The former is measured by the plaintiff's loss, and the latter is measured by the defendant's culpability.<sup>172</sup> There is no guaranteed correlation between one party's injury and the other's blameworthiness.<sup>173</sup> In one case, the plaintiff's injury may be minor although the defendant's intent was reprehensible, leading to divergent compensatory and punitive awards.<sup>174</sup> Under similar facts, an eggshell plaintiff may require ex-

---

166. See Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1545-47 (2005). Stevenson notes that the Constitution requires states to notify persons of the punishments that may be administered for particular conduct. *Id.* at 1583-86. Without such notice, a person's willingness to engage in productive activity will be chilled by uncertainty. *Id.* He argues, however, that the chilling effect should be limited to the margins where conduct has minimal usefulness or desirability. *Id.* Furthermore, he argues, while people may not have explicit notice of the precise punishment that may be administered, they must be assured that there are procedures in place to prevent arbitrary and unreasonable punishment. *Id.*

167. Salbu, *supra* note 135, at 282.

168. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996).

169. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424-25 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434-35 (2001); *Gore*, 517 U.S. at 582-83; *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

170. See Salbu, *supra* note 135, at 292-93.

171. *Id.*

172. *Id.* at 293; see Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI-KENT L. REV. 163, 163 (2003). Sebok argues that juries award compensatory damages after evaluating the harm the plaintiff suffered and award punitive damages after analyzing the "defendant's attitude when he injured the plaintiff." *Id.*

173. Leah R. Mervine, Comment, *Bridging the "Philosophical Void" in Punitive Damages: Empowering Plaintiffs and Society Through Curative Damages*, 54 BUFF. L. REV. 1587, 1625 (2007) (noting that compensatory and punitive damages "bear little, if any, relation").

174. Salbu, *supra* note 135, at 294; see Rachel M. Janutis, *Reforming Reprehensibility: The Continued Viability of Multiple Punitive Damages After State Farm v. Campbell*, 41 SAN DIEGO L. REV. 1465, 1489-90 (2004) (noting that the Supreme Court considered the defendant's mental state an important factor in shaping an appropriate punitive damages award).

tensive compensation even though the defendant's negligence was minimal and his indifference benign.<sup>175</sup> Disproportional awards, Professor Salbu argues, "should be seen as normal rather than troublesome."<sup>176</sup> It demonstrates a healthy application of policy to facts.

The judicial system is unable to meet society's call for justice with prefabricated verdicts. Although the Court once expressed hesitation about providing a specific ratio,<sup>177</sup> the Court's willingness to recommend a single-digit ratio in *Campbell* has largely overshadowed its previous reservations.<sup>178</sup> More importantly, the ratio analysis will subsume facts to math. A monetary award is meaningless without understanding the case from which it came. By encouraging courts to analyze monetary figures apart from the facts that justify them, the Supreme Court will make the judicial process less just. When the tortfeasor is not required to pay for the harm he causes to society, those communities are left to absorb the cost. Although scholars have noted that the Court's punitive damages precedent has undermined the traditional role of the jury,<sup>179</sup> it is, more importantly, the citizens of an unjust system who must suffer the outcome. The third guidepost raises similar concerns.

### 3. An Unhelpful Comparison: Criminal and Civil Sanctions

The *Gore* guideposts include a third line of reasoning that is likely to result in smaller punitive damages awards. Appellate courts are required to compare the award to criminal and civil sanctions in similar cases.<sup>180</sup> The Supreme Court explained that this factor encourages state courts to defer to legislative decisions regarding appropriate punishments.<sup>181</sup> Nevertheless, "comparability review," as one scholar has dubbed it, presents its own problems.<sup>182</sup> Punitive damages cannot always be compared to other civil or criminal penalties, in part, because punitive damages fill a void where "other civil and criminal penalties are inadequate to deter the defendant's conduct."<sup>183</sup> Punitive damages punish and prevent misconduct not easily categorized as a private tort or a public crime from falling between the cracks of our judicial system.<sup>184</sup>

---

175. Salbu, *supra* note 135, at 294; see Janutis, *supra* note 174, at 1489-90.

176. Salbu, *supra* note 135, at 294.

177. See Robert L. McFarland, *BMW v. Gore: Ten Years Later*, 68 ALA. LAW. 126, 127 (2007).

178. See Roberts, *supra* note 11, at 1020-21; Laura J. Hines, *Due Process Limitations on Punitive Damages: Why State Farm Won't be the Last Word*, 37 AKRON L. REV. 779, 801-02 (2004).

179. Karlan, *supra* note 16, 918 (emphasizing how the Supreme Court's punitive damages precedent has undermined the role of the jury); Chapman, *supra* note 133, at 1148.

180. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583-84 (1996).

181. *Id.* at 583.

182. Lind, *supra* note 19, at 252 (discussing this form of appellate review in the context of federal courts).

183. Mallor & Roberts, *supra* note 165, at 1013; see Mervine, *supra* note 173, at 1604 ("[W]ithout punitive damages, our civil system would require serious alteration in order to effectuate justice for plaintiffs who were egregiously wronged in monetarily immeasurable ways.").

184. Rustad, *supra* note 14, at 479.

Even in circumstances where comparable civil or criminal sanctions exist, the comparison is strained. First, courts cannot meaningfully compare a prison sentence to a monetary penalty.<sup>185</sup> Second, comparability review forces courts to treat dissimilar parties similarly, thereby distorting justice in favor of administrative efficiency.<sup>186</sup> In other words, the Supreme Court has encouraged lower courts to replace custom-made punitive damages awards with a rough average of awards given in other cases. Professor JoEllen Lind argues that “[c]omparability review is utilitarian.”<sup>187</sup> Instead of seeking a punishment that will deter the defendant and others from future misconduct, comparability review seeks merely to “maximize the wealth of society and treats wealth as the ultimate good.”<sup>188</sup> It replaces the “democratic processes” of jury deliberations with “bureaucratic rationality.”<sup>189</sup> The Supreme Court is assuming that judges are more capable of uniform decision-making than are jurors,<sup>190</sup> even when a comparison of punitive damages case law would show otherwise.<sup>191</sup>

In practice, courts applying this guidepost will compare awards based on a paper record.<sup>192</sup> As a result, courts will err on the side of reduction,<sup>193</sup> and once again, the cost of the defendant’s conduct will be left for society to absorb<sup>194</sup> in the form of additional government regulation, additional health care expenses, or additional lives lost. Awards might become more predictable, but they would no longer be crafted to fit the defendant’s blameworthiness.<sup>195</sup> As Professor Lind notes, comparability review denies litigants due process because it binds them to “proceedings in which they did not participate.”<sup>196</sup> In *Philip Morris*, the Court held that juries should not saddle a defendant with damages in-

---

185. Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1605-06 (1997).

186. Lind, *supra* note 19, at 323.

187. *Id.* at 308.

188. *Id.* at 310; see Mervine, *supra* note 173, at 1625-26 (noting that a corporate defendant may require a significant monetary penalty if the punitive damages award is to accomplish its purpose of deterrence).

189. Lind, *supra* note 19, at 297.

190. Zwier, *supra* note 14, at 437-38. *Contra* Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179, 220 (1998).

191. See Joseph J. Chambers, Article, In Re Exxon Valdez: *Application of Due Process Constraints on Punitive Damages Awards*, 20 ALASKA L. REV. 195, 258 (2003) (discussing the divergent outcomes between the district court and the appellate court on whether the \$5 billion punitive damages award was excessive and showing that even when both courts applied the same tests to the same facts, they reached different conclusions).

192. See Lind, *supra* note 19, at 334. Lind argues that only the jury has first-hand exposure to witnesses, testimony, and exhibits; thus, jurors are best equipped to determine an appropriate punitive damages award that satisfies the intangible harm to the plaintiff and that punishes the defendant for his conduct. *Id.*

193. *Id.* at 324.

194. *Id.* at 323.

195. *Id.* at 258.

196. *Id.* at 270, 323.

tended to punish for harm to persons outside of the present lawsuit.<sup>197</sup> Similarly, appellate courts should not adjust punitive damages awards to fit cases having no nexus to the present matter. Comparability review, therefore, undermines the due process rationale of *Philip Morris*.

A jury's decision whether to award punitive damages and how much to award depends on the facts of the case and the inferences the jury draws from the facts.<sup>198</sup> The Supreme Court's effort to supplement this decision-making process with artificial tests, which have no concrete relation to the facts, undermines the legitimacy of punitive damages awards in general. As various scholars have noted, the application of the *Gore* guideposts presents a host of theoretical and practical inconsistencies.<sup>199</sup> The reprehensibility analysis remains subjective,<sup>200</sup> punitive damages have no real relationship to compensatory damages,<sup>201</sup> and comparability review denies litigants due process.<sup>202</sup> For all the problems apparent with such meaningless standards, *Philip Morris* presents a problem of semantics without substance.

#### D. Word Games in Philip Morris

When *Philip Morris* reached the Supreme Court in 2003, the \$79.5 million punitive damages award had gone through a rigorous analysis by the trial court and the Oregon Court of Appeals. On remand, the Oregon Court of Appeals and the Oregon Supreme Court both re-evaluated the award. When the Supreme Court granted certiorari for the second time in 2007, it indicated that the state courts' application of the Court's precedent was fairly accurate;<sup>203</sup> however, it remanded the case for a third round of appeals with instructions that the state courts apply yet another layer of newly developed Due Process analysis.<sup>204</sup> After the parties spent hundreds of thousands of dollars and the case underwent two rounds of the appellate process,<sup>205</sup> the promise of objectivity that

---

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

198. Davis, *supra* note 14, at 410-11.

199. See *id.* at 396; Chambers, *supra* note 191, at 269. See generally McFarland, *supra* note 177.

200. See Davis, *supra* note 14, at 413.

201. Salbu, *supra* note 135, at 294.

202. Lind, *supra* note 19, at 270, 323.

203. See *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007) ("The Oregon court's first statement is correct. We did not previously hold explicitly that a jury may not punish for the harm caused [to] others. But we do so hold now."); *id.* at 1066 (Stevens, J., dissenting) ("In my view the Oregon Supreme Court faithfully applied the reasoning in those opinions to the egregious facts disclosed by this record."); *id.* at 1069 (Ginsburg, J., dissenting) ("I would accord more respectful treatment to the proceedings and dispositions of state courts that sought diligently to adhere to our changing, less than crystalline precedent.")

204. *Id.* at 1065.

205. But see Daniel F. Thomas, Comment, *Necessary Protection: An Examination of the State Farm v. Campbell Standards Test and Why Economically Efficient Rules Do Not Work at the Intersection Between Due Process and Punitive Damages*, 70 ALB. L. REV. 367, 395 (2006) (arguing that the costs of the appellate process are more manageable for society than an unreasonable punitive damages award on a defendant). The messy appellate process involved in *Philip Morris* is mentioned, not to show the cost of justice, but to show the uncertainty of Supreme Court precedent on

came with the *Gore* guideposts seemed illusory.<sup>206</sup> *Philip Morris* reaffirms the concerns of this Comment: the Supreme Court's precedent has not solidified the punitive damages discussion. Instead, the Court has crafted another conflicting rule.

Although punitive damages are traditionally understood to fulfill two purposes—punish defendants for conduct that endangers society and deter defendants and others from engaging in similar conduct in the future<sup>207</sup>—*Philip Morris* bifurcated the two purposes and defanged the punishment rationale. The Court found that a jury is no longer permitted to “base [a punitive damage] award in part upon its desire to *punish* the defendant for harming persons who are not before the court.”<sup>208</sup> Apparently, the Court adopted Justice Kennedy's reasoning in his concurring opinion in *TXO* in which he encouraged the Court to focus its analysis not on what constitutes a reasonable amount but on what constitutes a reasonable motive.<sup>209</sup> By defining the issue as a procedural matter, *Philip Morris* placed limits on the purpose of such an award.<sup>210</sup> One might conclude that the Due Process Clause limits how much punishment a jury may administer through punitive damages but not how much deterrence may be administered.<sup>211</sup> Implying, however, that the Due Process Clause would treat the punishment rationale differently than the deterrence rationale would undermine the remedy's traditional duality—something the Supreme Court has never expressly done.<sup>212</sup>

---

punitive damages.

206. See Chambers, *supra* note 191, at 269 (discussing how the *Gore* guideposts have failed to provide uniformity among courts analyzing the constitutionality of punitive damages awards).

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

208. *Id.* at 1060.

209. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 467 (1993) (Kennedy, J., concurring); Jeff Bleich et al., *Smoke Signals*, OR. ST. BAR BULL., June 2007, at 24.

210. Bleich, *supra* note 209, at 24.

211. Erwin Chemerinsky, *More Questions About Punitive Damages*, TRIAL, May 2007, at 72, 74. Chemerinsky made the following observation not long after the Supreme Court issued its decision in *Philip Morris*:

[D]eterrence is all about preventing future harm to people not involved in the litigation.

After *Philip Morris*, it appears that a jury can base punitive damages on the need to deter wrongdoing, but the Court gives no guidance on how to do so. It would seem that jury instructions that specifically focus the jury's attention on assessing punitive damages so as to deter would be permissible.

*Id.* Interestingly, other scholars have noted that, because punitive damages have numerous viable purposes, the Supreme Court has focused on whichever “purpose” best fits its holding. See, e.g., Sebok, *supra* note 172, at 175. Although this Comment argues that *Philip Morris* condemns a significant part of the punishment rationale, Anthony Sebok noted in 2003, that *Cooper Industries* favored the punishment rationale because it allowed the Court to conclude that punitive damages were not findings of fact, but moral judgments which should be subject to de novo review. See *id.* Similarly, Michael Allen noted that the *Campbell* Court appeared to limit punitive damages by focusing exclusively on the punishment rationale and its ability to extend beyond a state's borders. Allen, *supra* note 11, at 27. He goes on to argue, however, that this reading of *Campbell* conflicts with the Court's traditional understanding of punitive damages as a means of punishment *and* deterrence. *Id.* at 28. This apparent conflict (pitting the punishment rationale against the deterrence rationale) only reinforces the argument of this Comment: the Court's approach to punitive damages has been inconsistent and piecemeal.

212. See Allen, *supra* note 11, at 28.

For all its word games, the Court recognized that punitive damages inherently incorporate a consideration of other persons.<sup>213</sup> A jury may still consider “[e]vidence of actual harm to nonparties” so long as this evidence is not directly used to fashion a punitive damages award, but is used to gauge the reprehensibility of the defendant’s conduct.<sup>214</sup> To evaluate reprehensibility, the jury may consider the scope of danger the defendant’s conduct imposed upon society.<sup>215</sup> In other words, a jury may not punish a defendant directly for endangering others, but through the reprehensibility guidepost, may punish a defendant for doing so.<sup>216</sup>

By forbidding juries from punishing a defendant directly, *Philip Morris* prevents juries from deterring effectively. Deterrence, by its very nature, takes into account future violations against persons who are not parties in the present lawsuit.<sup>217</sup> It is preventative.<sup>218</sup> Punitive damages cannot deter unless they punish with an eye toward protecting those who have not appeared in the present case.<sup>219</sup> Furthermore, the distinction between direct punishment and punishment for reprehensibility will likely cloud jury deliberations because the same evidence would be presented for both.<sup>220</sup> Whether such a distinction would even affect the monetary outcome is impossible to predict.<sup>221</sup>

Not only has the Court’s theoretical hair-splitting created philosophical inconsistencies, but also it poses problems in its practical application. By segregating the deterrence rationale from the punishment rationale, the Court has removed the anchor that makes deterrence reasonable in light of the case’s facts.<sup>222</sup> Professor Salbu recognized this problem eleven years ago:

[D]eterrence is entirely unrelated to individual responsibility. If deterrence alone were used to justify punitive damages, utilitarian calculation of net social welfare could be employed to impose punitive damages in a manner bearing little relationship to any conception of justice or desert. . . . Unless deterrence functions are tempered with conceptions more directly related to individual culpability and responsibility, such as the function of retribution, the risk of injustice remains.<sup>223</sup>

In fashioning an appropriate measure of deterrence, the jury must be allowed to consider how many other persons the defendant’s conduct endangered so that the jury’s interest in deterrence has an objective

213. See *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063-64 (2007).

214. *Id.* at 1064.

215. *Id.*

216. *Id.*

217. Chemerinsky, *supra* note 211, at 74; see also Rustad, *supra* note 14, at 521-22 (noting two kinds of deterrence: (1) specific deterrence intended “to deter the defendant,” and (2) general deterrence designed “to deter others”).

218. Galanter & Luban, *supra* note 3, at 1435.

219. See Chemerinsky, *supra* note 211, at 74.

220. See *Philip Morris*, 127 S. Ct. at 1068-69 (Ginsburg, J., dissenting).

221. Bleich et al., *supra* note 209, at 29.

222. Salbu, *supra* note 135, at 268-69.

223. *Id.*

goal: the cost of the misconduct should be greater than or equal to the benefit.<sup>224</sup> Allowing a jury to contrive a punitive damages award that would deter all imaginable future harm by the same defendant could result in an excessive award. On the other hand, when a jury looks at the facts of the case to determine the exact scope of harm presented, the facts are able to anchor the award to a reasonable limit. Even though the Court has expressed a desire to constrain punitive damages, its decision to treat the punishment rationale separate from the deterrence rationale has not accomplished this goal.

The Court's struggle between a desire to shape political decisions and a recognition that such authority is outside its grasp, has led to a series of conflicting opinions frequently cited by both sides of the political spectrum.<sup>225</sup> Thus, *Philip Morris* gives the appearance of reform without the reality of progress. The Court's tendency to sever the various functions of punitive damages and analyze them piecemeal has undermined and mischaracterized the entire system of punitive damages.<sup>226</sup> The Supreme Court should leave regulation of punitive damages to the states, which are in the best position to regulate them meaningfully, even if imperfectly.<sup>227</sup>

### *E. Punitive Damages: A State Prerogative*

Punitive damages are a "creature of state law"<sup>228</sup> best left to the discretion of state legislatures. In 1993, Justice Kennedy noted that the Constitution addressed punitive damages at a very broad level:

The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards; it does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions. Rather, its fundamental guarantee is that the individual citizen may rest secure against arbitrary or irrational deprivations of property. When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the

---

224. *Id.* at 269-70.

225. Compare Brief for the Petitioner, *supra* note 103, with Brief for Respondent, *supra* note 106.

226. See Allen, *supra* note 11, at 28, 49 (noting that should the Court ever decide to treat the punishment rationale differently than the deterrence rationale, it could undermine punitive damages).

227. Granted, the Supreme Court is able to provide national uniformity in a way that states cannot. See Tracy A. Thomas, *Restriction of Tort Remedies and the Constraints of Due Process: The Right to an Adequate Remedy*, 39 AKRON L. REV. 975, 986 (2006). Juries and courts award punitive damages, however, as a means of addressing the policy concerns of a particular locality. Rustad, *supra* note 14, at 465. Furthermore, lower courts have interpreted the Supreme Court's due process guidelines in a way that will allow them to address local concerns. See Roberts, *supra* note 11, at 1021, 1024. Thus, the lower courts have understood that local interests should have a far greater influence on punitive damages than a panel of judges far removed from the community of affected citizens. See Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 630-32 (1997). As this Comment argues, courts should always be encouraged to assess the facts of the case to determine whether a punitive damages award is reasonable.

228. Allen, *supra* note 11, at 47.

Constitution has been violated, no matter what the absolute or relative size of the award.<sup>229</sup>

The Supreme Court's effort to develop more specific Constitutional rules, ratios, and tests has undermined state court's ability to utilize punitive damages in a manner that effectively fulfills the purposes for which they were created.<sup>230</sup>

In *Campbell*, the Court held that one state cannot award punitive damages to punish or deter a defendant for conduct that took place in another state.<sup>231</sup> This prohibition diminishes a state's ability to enforce its own laws effectively against national corporations.<sup>232</sup> As one scholar has argued, a civil court should be permitted to consider out-of-state conduct when fashioning an appropriate monetary penalty just as a criminal court may consider out-of-state conduct when sentencing a defendant.<sup>233</sup> "[T]urn[ing] a blind eye" to the defendant's extraterritorial conduct undermines the dual purpose of punitive damages.<sup>234</sup> Even though *Gore* encouraged civil courts to analogize punitive damages to criminal law, *Campbell* subsequently prohibited civil courts from evaluating defendants in the same manner as criminal courts: on the basis of the defendant's overall conduct.<sup>235</sup> Because *Campbell* limits a civil court's ability to look beyond its own political borders, defendants will likely argue that the extraterritorial restriction is a justification to reduce the punitive damages award.<sup>236</sup> The Court's confusing and often contradictory line of cases has undermined states' ability to enact meaningful policy to protect its citizens.<sup>237</sup> The judiciary is not accountable to the voting public as are state legislators—if change is desired or necessary, it should be instituted through the people.<sup>238</sup>

Punitive damages played a viable role in civil law long before the Magna Carta was written or the Due Process Clause was proposed.<sup>239</sup> Furthermore, punitive damages are not without reasonable common law restrictions. Judges have always retained the power to vacate any punitive damages award that was patently unreasonable either because it

---

229. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 467 (1993) (Kennedy, J., concurring).

230. See Allen, *supra* note 11, at 49.

231. *Id.* at 21-22. Allen notes that this was the "general rule," but the Court left room for exceptions. *Id.* at 52.

232. *Id.* at 35.

233. *Id.* at 38-40.

234. McFarland, *supra* note 177, at 129 (expressing concern that the Court might use *Philip Morris* to limit a jury's considerations of statewide harm).

235. See Allen, *supra* note 11, at 40.

236. *Id.* at 61. Allen also notes that the Court's prohibition against extraterritorial punishment undermines the effective use of class actions which are intended to address problems on a national level. *Id.* at 64.

237. McFarland, *supra* note 177, at 128-29.

238. See Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 39 (Scalia, J., concurring). *But see* Thomas, *supra* note 227, at 986 (arguing that legislative tort reform tends to be arbitrary and inconsistent while judicial tort reform ensures that all punitive damages awards are evaluated under the same due process standard).

239. See discussion *supra* Part II.

was “‘monstrously excessive,’ ‘shock[ed] the conscience’ of the court, ha[d] ‘no rational connection’ to the evidence, or clearly ‘appear[ed] to be the result of passion and prejudice.’”<sup>240</sup> These common law restrictions provide legitimate safeguards against the very abuses the Due Process Clause seeks to prevent.<sup>241</sup> Furthermore, many states have legislation in place to manage punitive damages awards, most often by allotting all or part of the award to the state or bifurcating trials so that the amount of punitive damages is set by a judge rather than a jury.<sup>242</sup> The Court’s punitive damages case law reaffirms the idea that punitive damages, “a creature of state law,”<sup>243</sup> should be left to the discretion of the states. Unless the Court voluntarily announces its withdrawal from the punitive damages forefront, states will be unable to address the needs of the battle-worn remedy.<sup>244</sup>

## VI. CONCLUSION

The U.S. Supreme Court’s entrance into the realm of punitive damages began with modest deference to the states. The Court stated, “As long as the [jury’s] discretion is exercised within reasonable constraints, due process is satisfied.”<sup>245</sup> With time, however, the Court has grown bolder, announcing that appellate courts should review punitive damages *de novo*, without deference to the jury’s factual findings.<sup>246</sup> The Court’s *Gore* guideposts, furthermore, conflicted with the historic purposes of punitive damages and presented problems in their practical application. At the same time the Court was realizing the limits of its authority, it was creating law that prevented states from correcting the damage that had been done: in *Campbell*, the Court limited state courts’ extraterritorial considerations,<sup>247</sup> and in *Philip Morris*, it limited state courts’ ability to consider harm done to persons outside of the immediate lawsuit.<sup>248</sup> As a consequence of these decisions, the Court has undermined the ability of punitive damages to serve as a deterrent to defendants and others.

The Court’s current framework is contradictory and unworkable. The Court’s effort in *Philip Morris* to segregate the punishment rationale from the deterrence rationale has unearthed a host of new contradictions. In the midst of slicing and dicing punitive damages into smaller and more manageable pieces, the Court has undermined punitive dam-

---

240. Lind, *supra* note 19, at 260.

241. See *Haslip*, 499 U.S. at 39-40 (Scalia, J., concurring).

242. See Mallor & Roberts, *supra* note 165, at 1006.

243. Allen, *supra* note 11, at 47.

244. *Id.* at 7.

245. *Haslip*, 499 U.S. at 20.

246. Chapman, *supra* note 133, at 1150.

247. Allen, *supra* note 11, at 21-22.

248. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064 (2007).

ages' overall legitimacy.<sup>249</sup> As the indeterminacy and incoherency of *Philip Morris* so keenly demonstrates, the Supreme Court's involvement in punitive damages should be called to an end. If punitive damages are expected to accomplish just results, their regulation is best left to state legislatures and state courts.<sup>250</sup>

---

249. Sebok, *supra* note 172, at 206.

250. *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 39 (1991).