

January 2007

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### Recommended Citation

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

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## The New Due Process Limitation in Philip Morris: A Critique and an Alternative Rule Based on Prior Adjudication

# THE NEW DUE PROCESS LIMITATION IN *PHILIP MORRIS*: A CRITIQUE AND AN ALTERNATIVE RULE BASED ON PRIOR ADJUDICATION

## INTRODUCTION

In 2007, the Supreme Court continued its current trend of ratcheting up the constraints on punitive damages awards.<sup>1</sup> In *Philip Morris USA v. Williams*,<sup>2</sup> the Court considered whether the Due Process Clause permits a jury to base its punitive damages award on the defendant's harm to third parties not named in the suit. The Court held that punitive damages cannot punish a defendant for injuries inflicted upon strangers to the litigation.<sup>3</sup> The majority opinion softened the effect of this rule in dicta, however. It stated that a plaintiff can present evidence of the defendant's harm to nonparties when it demonstrates reprehensibility.<sup>4</sup> In effect, the Court allows a jury to consider indirectly the defendant's harm to third parties (i.e., when it speaks to reprehensibility) but forbids a more direct link (i.e., punishing a defendant for similar wrongful acts against others).

As this comment presents, the distinction the Court drew is illusory and problematic. The Court identified a fundamental problem in allowing a plaintiff to present evidence about the defendant's behavior toward non-litigants: third-parties can and should bring claims on their own and the defendant should have every opportunity to refute those claims.<sup>5</sup> The court's solution, however, created a flawed standard that will spawn future problems.

Part I of this comment summarizes the history of punitive damages leading up to the conflict in *Philip Morris*. Part II discusses the specifics of the case, including the facts, procedural history, and majority and dissenting opinions. Part III analyzes the majority opinion and points out the potential problems of the decision. It concludes with a suggested rule which is less confusing and yet balances the competing interests.

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1. Nathan Seth Chapman, *Punishment by the People: Rethinking the Jury's Political Role in Assigning Punitive Damages*, 56 DUKE L.J. 1119, 1144 (2007) (noting that the Court began "adding some muscle and flesh" to the Due Process Clause for restricting punitive damages in 1996).

2. 127 S. Ct. 1057, 1060 (2007).

3. *Id.* at 1063.

4. *Id.* at 1064.

5. *Id.* at 1063; see Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 654-55 (2003); see also Rachel M. Janutis, *Fair Apportionment of Multiple Punitive Damages*, 75 MISS. L.J. 367, 373-74 (2006).

## I. BACKGROUND OF PUNITIVE DAMAGES

*A. The Foundation of and Justifications for Punitive Damages*

Ancient civilizations incorporated primitive forms of punitive damages in their legal frameworks.<sup>6</sup> Historically, no distinction existed between criminal and civil law; therefore, the origin of punitive damages is partly rooted in criminal sanctions.<sup>7</sup> Punitive damages became a civil remedy in English common law during the 18th century.<sup>8</sup> New Jersey was the first state to recognize the doctrine in 1791, and the Supreme Court declared it "a well established principle of common law" in 1851.<sup>9</sup>

The concept of punitive damages has two main justifications, but only one is operative today. First, punitive damages developed as a form of retribution for non-tangible losses, such as embarrassment, humiliation, or mental anguish.<sup>10</sup> This "compensatory" rationale no longer holds weight because American courts now recognize damages for psychological injuries.<sup>11</sup> The second justification for punitive damages is punishment and deterrence.<sup>12</sup> The Supreme Court "has long made clear that 'punitive damages may properly be imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition.'"<sup>13</sup> Several commentators assert that punitive damages do not achieve the goals of punishment and deterrence,<sup>14</sup> and others argue for stricter constitutional constraints on punitive damages.<sup>15</sup> Questions about whether punitive damages are theoretically sound or constitutional are

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6. Alan Calnan, *Ending the Punitive Damage Debate*, 45 DEPAUL L. REV. 101, 104-05 (1995).

7. George Clemon Freeman, Jr. & Makram B. Jaber, *Further Progress in Defining Constitutional Constraints on Punitive Damages and Other Monetary Punishments*, 61 BUS. LAW. 517, 521 n.21 (2006).

8. Calnan, *supra* note 6, at 106.

9. *Id.* at 108-09.

10. *Id.* at 108.

11. *Id.* at 116-17.

12. *Id.* at 116.

13. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062 (2007) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996)).

14. See, e.g., W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 336 (1998) ("Punitive damages generate no statistically significant deterrent effects, but the unpredictable chance of catastrophic losses can generate substantial harm."); Calnan, *supra* note 6, at 110-16.

15. See, e.g., Gerald W. Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 T.M. COOLEY L. REV. 667, 677 (1988) (arguing that punitive damage awards which are disproportionate to the injury violate the Excessive Fines Clause); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 140 (1986) (contending that repeated punitive awards for one harm contravene the Excessive Fines Clause); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 272-73 (1983) (contending that punitive damages should be constrained by the Fourth, Fifth, and Sixth Amendments).

beyond the scope of the present article, though the topic generates much scholarly discussion.<sup>16</sup>

### B. *Precedents from the Supreme Court Regarding Punitive Damages*

The Constitution does not guarantee a right to punitive damages or prohibit their imposition.<sup>17</sup> The Eighth Amendment restricts the government from imposing “excessive fines,” but this clause does not apply to punitive damages.<sup>18</sup> In *Ingraham v. Wright*,<sup>19</sup> “the Court determined that the Eighth Amendment does not limit non-criminal punishments,”<sup>20</sup> and in *Browning-Ferris Industries v. Kelco Disposal, Inc.*,<sup>21</sup> the Court held that the Excessive Fines Clause does not constrain awards in cases between private parties.<sup>22</sup> Because punitive damages are inherently a punishment and not subject to the same constraints as criminal sanctions, the imposition of punitive damages “increases [the Court’s] concerns over the imprecise manner in which punitive damage systems are administered.”<sup>23</sup>

As a result, the Court recently turned to the Fourteenth Amendment to rein in punitive damage awards using both procedural and substantive limits.<sup>24</sup> The restriction of punitive damage awards is a relatively new phenomenon. Before 1994, the Court held only one punitive damage award to be excessive.<sup>25</sup> It gave deference to jury awards unless they were “the product of bias or passion” or “lack[ed] the basic elements of fundamental fairness.”<sup>26</sup> After 1994, the Rehnquist Court began interpreting the Due Process Clause to restrict punitive damage awards.<sup>27</sup> These interpretations make judicial review of punitive damages awards obligatory,<sup>28</sup> and that review must be *de novo*.<sup>29</sup> Justice Scalia and commentators criticize this level of review because it does not accord enough deference to the traditional functions of the jury.<sup>30</sup> Regardless, the juris-

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16. See, e.g., Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 983 (2007); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 *passim* (2005).

17. Chapman, *supra* note 1, at 1143.

18. U.S. CONST. amend. VIII; Chapman, *supra* note 1, at 1142-43.

19. 430 U.S. 651 (1977).

20. Chapman, *supra* note 1, at 1143 (citing *Ingraham*, 430 U.S. at 667-68).

21. 492 U.S. 257 (1989).

22. Chapman, *supra* note 1, at 1143 (citing *Browning-Ferris Indus.*, 492 U.S. at 275).

23. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

24. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062-63 (2007) (“[T]his Court has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as ‘grossly excessive.’”).

25. Chapman, *supra* note 1, at 1144.

26. *Id.* (quoting *Browning-Ferris Indus.*, 492 U.S. at 276).

27. *Id.*

28. See, e.g., *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994).

29. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001).

30. *Id.* at 443-44 (Scalia, J., concurring) (“And I was of the view that we should review for abuse of discretion (rather than *de novo*) . . . .”); see, e.g., Chapman, *supra* note 1, at 1149-56 (arguing that judicial review for punitive damage awards should be stricter than *de novo*).

prudence over the last two decades has increased the scrutiny on punitive damage awards through procedural due process protections.

The Court also imposed substantive due process limitations when an award was "grossly excessive" in relation to the state's interest.<sup>31</sup> In *BMW of North America, Inc. v. Gore*,<sup>32</sup> the majority opinion fashioned three guideposts to determine when an award is "grossly excessive": (1) the degree of reprehensibility [of the conduct]; (2) the disparity between the harm or potential harm and the punitive damages award; and (3) the difference between the punitive damages award and the civil penalties in comparable cases.<sup>33</sup> The Court further elaborated on these guideposts in *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>34</sup> It emphasized that the degree of reprehensibility of the defendant's conduct is the most important guidepost.<sup>35</sup> In determining reprehensibility, a jury cannot consider "lawful out-of-state conduct" when determining punishment;<sup>36</sup> however, the Court hinted such conduct would be admissible if it "demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious" and has a "nexus to the specific harm suffered by the plaintiff."<sup>37</sup> The Court added that punitive damages should not be based on "dissimilar acts," but rather on "conduct that harmed the plaintiff."<sup>38</sup> Further, in reference to the second guidepost, the Court stated single-digit multipliers are more likely to comport with the Due Process Clause.<sup>39</sup>

### C. Foreshadowing the Dispute in Philip Morris

In *State Farm*, the Court prohibited a punitive damage award when based on the defendant's "lawful out-of-state conduct" or "dissimilar acts."<sup>40</sup> The case left open the possibility, however, that the defendant could be assessed punitive damages for *similar acts* done against others *within the same jurisdiction*. The Court recognized in *BMW* that "repeated misconduct is more reprehensible than an individual instance of malfeasance."<sup>41</sup> The damage calculation in *BMW* lends additional support for including third-party harm in a punitive damage award. The majority opinion hinted in a footnote that a proper calculation would be the multiplication of damages per vehicle with the number of occurrences within that jurisdiction (i.e., Alabama).<sup>42</sup> By inference, a jury

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31. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 458 (1993).

32. 517 U.S. 559 (1996).

33. *Id.* at 576.

34. 538 U.S. 408, 419-29 (2003).

35. *Id.* at 419.

36. *Id.* at 422.

37. *Id.*

38. *Id.* at 422-23.

39. *Id.* at 425.

40. *Id.* at 422.

41. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 577 (1996).

42. *Id.* at 567 n.11.

could base its award on similar actions against third parties within the same jurisdiction.<sup>43</sup>

This inference is at odds with the dicta in *State Farm*. There, the Court stated: "Due Process does not permit courts, in calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of a reprehensibility analysis . . . ."<sup>44</sup> The question becomes how to treat third-party harm in a punitive damage calculation. One notion is that a jury can consider similar reprehensible conduct within the same jurisdiction. The competing notion is that allowing the jury to consider third-party harm would violate the defendant's due process rights.

## II. *PHILIP MORRIS USA V. WILLIAMS*

### A. *Facts*

Mayola Williams, on behalf of her deceased husband, sued Philip Morris on negligence and deceit claims.<sup>45</sup> Mr. Williams was a heavy cigarette smoker, and he favored Marlboro cigarettes, a brand manufactured by Philip Morris.<sup>46</sup> A jury found that: smoking caused William's death; Williams smoked partly because he thought it was safe to do so; and Philip Morris knowingly and falsely led him to believe that it was safe to smoke.<sup>47</sup> With regard to the deceit claim, the jury awarded \$821,000 in compensatory damages and \$79.5 million in punitive damages.<sup>48</sup>

### B. *Procedural Posture*

After reviewing the jury verdict, the trial judge decreased the punitive damage award because it was "excessive."<sup>49</sup> The Oregon Court of Appeals reversed the trial judge's decision and reinstated the jury verdict.<sup>50</sup> Philip Morris appealed to the Oregon Supreme Court, which declined to hear the case, and then Philip Morris sought review in the U.S. Supreme Court.<sup>51</sup> Certiorari was granted, and a short opinion remanded the case for reconsideration in light of *State Farm* (which imposed new constraints on punitive damage awards, especially ones which involve greater than single-digit multipliers of the compensatory damages).<sup>52</sup> On remand, the Oregon Court of Appeals kept the jury verdict intact even

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43. *Id.*

44. *State Farm*, 538 U.S. at 423.

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

46. *Id.*

47. *Id.* at 1061.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Philip Morris USA, Inc. v. Williams*, 540 U.S. 801, 801 (2003); see *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

though the punitive damage award was nearly 100 times the compensatory damage award.<sup>53</sup> Philip Morris then successfully petitioned the Oregon Supreme Court for certiorari.<sup>54</sup>

The Oregon Supreme Court reviewed two issues: (1) the trial court's rejection of a jury instruction about third-party harm,<sup>55</sup> and (2) the overall constitutionality of the size of the punitive damage award.<sup>56</sup> Regarding the first issue, Philip Morris argued that it was reversible error to reject the jury instruction, which explained that punitive damages cannot punish the defendant for alleged misconduct to others.<sup>57</sup> This jury instruction would have countered the plaintiff's argument, which asked jurors:

[T]o "think about how many other Jesse Williams in the last 40 years there have been . . . . In Oregon, how many people do we see outside, driving home . . . smoking cigarettes? . . . . Cigarettes . . . are going to kill ten [of every hundred]. [And] the market share of Marlboros is one-third."<sup>58</sup>

The second issue was whether the punitive damage award was "grossly excessive" in light of the recent due process limitations announced in *State Farm*.<sup>59</sup> The punitive damages award was about 100 times greater than the compensatory damages.<sup>60</sup> An award with this ratio triggered heightened scrutiny because of due process concerns.<sup>61</sup> The Oregon Supreme Court ultimately affirmed the punitive damage award because, in its opinion, it comported with the existing due process limitations.<sup>62</sup>

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

54. *Id.*

55. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1171-72 (Or. 2006). The Oregon Supreme Court phrased the first issue: "Is a defendant entitled to have the jury instructed that any award of punitive damages must bear a reasonable relationship to the harm caused to the plaintiff and that punitive damages cannot be imposed for alleged harm to non-parties?" *Id.*

56. *Id.* The Oregon Supreme Court phrased the second issue: "Are the punitive damages assessed in this case unconstitutionally excessive in violation of the *Due Process Clause of the Fourteenth Amendment to the United States Constitution*?" *Id.*

57. *Id.* at 1175. The tendered jury instruction stated:

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

*Id.*

58. *Philip Morris*, 127 S. Ct. at 1061 (alteration in original).

59. *Williams*, 127 P.3d at 1171-72.

60. *Id.* at 1171.

61. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (holding there is a presumption against a 145-to-1 ratio of punitive damages to compensatory damages).

62. *Williams*, 127 P.3d at 1182.



*C. Majority Opinion*

The U.S. Supreme Court granted certiorari on essentially the same issues the Oregon Supreme Court addressed.<sup>63</sup> The majority opinion, written by Justice Breyer, started its analysis by reaffirming the validity of punitive damages.<sup>64</sup> Also, it reviewed the substantive and procedural limits in recent history, including the three *BMW* guideposts.<sup>65</sup> In finding for Philip Morris, the Court created a new due process limit to punitive damages.<sup>66</sup> The majority opinion held “the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . .”<sup>67</sup>

The rule had three rationales. First, the Due Process Clause “prohibits a State from punishing an individual without first providing that individual with ‘an opportunity to present every available defense.’”<sup>68</sup> A defendant, despite its unsavory actions in one suit, retains the right to challenge other claims as they arise.<sup>69</sup> In other suits, it is possible that Philip Morris would be less culpable (e.g., plaintiff knew smoking was dangerous but continued anyway) or would have caused a lower degree of harm (e.g., a chronic disease as opposed to death).

The second rationale was that “to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damage equation.”<sup>70</sup> In essence, the plaintiff’s position would lead to speculation about the number of victims, the magnitude of harm, and the circumstances surrounding other cases. A jury would be forced to speculate about third-party cases, magnifying the risks of arbitrariness, uncertainty, and lack of notice.<sup>71</sup>

Finally, the Court could not find any precedent supporting the use of punitive damages for the purpose of punishing a defendant for harming others.<sup>72</sup> No Supreme Court case had explicitly recognized this principle.<sup>73</sup> Some lower courts, however, had incorporated the “total harm principle” into decisions and allowed a punitive damage award to be based on the “impact of [the defendant’s conduct] on the whole of society.”<sup>74</sup> The Court did not recognize these lower court decisions and

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

64. *Id.* at 1062.

65. *Id.* at 1062-63.

66. Erwin Chemerinsky, *More Questions About Punitive Damages*, 43 TRIAL 72, 72 (2007).

67. *Philip Morris*, 127 S. Ct. at 1063 (emphasis omitted).

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

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* But see *id.* at 1066 (Stevens, J., dissenting).

73. *Id.* at 1066 (Stevens, J., dissenting).

74. Colby, *supra* note 5, at 650 (alteration in original) (quoting *Hoffman v. Sterling Drug, Inc.*, 374 F. Supp. 850, 856 (M.D. Pa. 1974)).

treated punitive damages as an individual rather than a collective punishment.<sup>75</sup>

If the majority opinion stopped there, the rule would have been relatively straightforward. The opinion went on to hold, nonetheless, that "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff . . . was particularly reprehensible . . . ."<sup>76</sup> Thus, evidence regarding a defendant's harm to nonparties can indirectly enter the damage calculation if it speaks to the reprehensibility of the defendant's actions.

The inquiry then becomes whether the jury is properly guided. The Due Process Clause requires the courts to provide "assurance" that juries are not asking the wrong question.<sup>77</sup> If a judge does not properly steer the jury away from punishing a defendant for harm caused to strangers, the judgment could be overturned.<sup>78</sup> The Court did not provide guidance regarding what "assurance" would be sufficient. Instead, it left that issue to the state courts and legislatures.<sup>79</sup> Thus, the Court handed off the task of fleshing out this new principle of law to the "laboratory of the states."<sup>80</sup>

#### *D. Dissenting Opinions*

Three dissenting opinions expressed a wide range of disagreement with the 5-4 majority decision.<sup>81</sup> First, Justice Thomas adhered to his longstanding view that "the Constitution does not constrain the size of punitive damage awards."<sup>82</sup> He maintained that no due process limitations ever existed to circumscribe the jury's discretion to impose punitive damages.<sup>83</sup> For support, Justice Thomas cited Justice Scalia's dissent in *BMW*, which suggested the phrase "due process of law" in the Fourteenth Amendment incorporates customary English common law procedures including, presumably, jury-assessed punitive damages.<sup>84</sup> In previous cases, both Justices Thomas and Scalia expressed "originalist" interpreta-

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

76. *Id.* at 1064.

77. *Id.*

78. *Id.* at 1065.

79. *Id.*

80. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); see David C. Mangan, *Gonzales v. Raich: The "States as Laboratories" Principle of Federalism Supports Prolonging California's Experiment*, 51 ST. LOUIS U. L.J. 521, 543 (2007) (applying the "states as laboratories" principle in a Commerce Clause context).

81. *Philip Morris*, 127 S. Ct. at 1065-69.

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

83. See *id.* at 1067-68.

84. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 599-600 (1996) (Scalia, J., dissenting); see Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication without Judgment*, 33 B.C. L. REV. 981, 992 (1992).

tions of the Due Process Clause.<sup>85</sup> Conspicuously, Justice Scalia chose not to add his voice to Justice Thomas' dissenting opinion, which suggests he is giving *stare decisis* effect to the court's decisions in *Gore* and *State Farm*.<sup>86</sup>

Justice Ginsburg's opinion, in which Justices Scalia and Thomas joined, challenged the *application* of the Supreme Court's new rule. She argued that the Court could find no support that the jury inappropriately considered third-party harm.<sup>87</sup> She would have deferred to the Oregon Supreme Court's judgment that "the jury, in assessing the reprehensibility of Philip Morris's actions, could consider evidence of similar harm to other Oregonians caused (or threatened) by the same conduct."<sup>88</sup> The majority opinion identified no evidence or instruction that suggested the jury considered third-party harm beyond the scope of reprehensibility.<sup>89</sup> Further, she chided the majority for not discussing the propriety of Philip Morris's alternative jury instruction.<sup>90</sup> In her opinion, a well-meaning judge would resist giving the jury instruction because it is confusing.<sup>91</sup>

On the other end of the spectrum, Justice Stevens would permit punitive damages to punish the defendant for the *total public harm* caused rather than for the reprehensible conduct in an individualized case.<sup>92</sup> He emphasized that punitive damages, much like criminal sanctions, are a punishment for the public harm caused by the defendant.<sup>93</sup> Additionally, he disapproved of the majority's distinction between appropriate and inappropriate usage of third-party evidence. To him, taking into account third-party harm to assess reprehensibility of the defendant's conduct amounts to the same as punishing the defendant "directly."<sup>94</sup>

### III. ANALYSIS

*Philip Morris* represents another effort by the Court to constrain substantial punitive damage awards. Justice Scalia called the Court's recent jurisprudence on punitive damages "insusceptible of principled application."<sup>95</sup> This latest expansion of Due Process to punitive damages is along the same lines. The majority opinion identified two key ideas that must be reconciled. First, harm to others shows a higher degree of

85. See, e.g., *BMW of N. Am.*, 517 U.S. at 599 (Scalia, J., dissenting).

86. Jeff Bleich ET AL., *Smoke Signals: Philip Morris Provides Yet Another Chapter in the Ongoing Saga of Punitive Damages in the U.S. Supreme Court*, 67 OR. ST. BAR. BULLETIN. 24, 28 (2007). But see Greenberger, *supra* note 84, at 992.

87. *Philip Morris*, 127 S. Ct. at 1068 (Ginsburg, J., dissenting).

88. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1177 (Or. 2006) (emphasis added).

89. *Philip Morris*, 127 S. Ct. at 1068 (Ginsburg, J., dissenting) ("The Court identifies no evidence introduced and no charge delivered inconsistent with that inquiry.").

90. *Id.* at 1068-69.

91. *Id.* at 1069.

92. *Id.* at 1066 (Stevens, J., dissenting).

93. *Id.*

94. *Id.* at 1067.

95. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting).

reprehensible conduct and warrants a stiffer penalty.<sup>96</sup> At the same time, that punitive damage awards cannot repeatedly punish the defendant for the same instance of misconduct.<sup>97</sup> In balancing these two concepts, Justice Breyer created a distinction<sup>98</sup> that breaks down in practice.<sup>99</sup> Furthermore, the majority's ruling will likely confuse the lower courts and does not fully solve the problems the Court attempted to address. A much better rule would allow evidence of the defendant's harm to third-parties *only if the behavior has been fully litigated*. Such a rule would allow a defendant to challenge each individual claim on the merits and would eliminate the need for drawing confusing distinctions about how such evidence is used.

#### *A. The Court Attempts to Balance Two Competing Principles*

As in the criminal law context, the Court here identified two competing concepts for determining punishment. First, repeated offenses merit tougher punishment.<sup>100</sup> This concept has its roots in criminal law.<sup>101</sup> Repeated misconduct is inherently worse than the initial offense because the defendant continued the illegal conduct despite being previously punished; therefore, a stiffer sentence is necessary to deter the criminal behavior. Thus, the sentencing court may consider the defendant's prior wrongful acts<sup>102</sup> for the purpose of determining the reprehensibility of the charged crime.<sup>103</sup> Following this principle, a heightened punishment for repeated offenses is not unconstitutional on double jeopardy grounds. Recidivism statutes can take into account other instances of misconduct by the criminal defendant.<sup>104</sup> Consideration of repeated misconduct does not impose an additional penalty, but is rather a stiffened penalty for the latest crime.<sup>105</sup> In a punitive damages context, the Court has recognized the principle that "repeated misconduct is more reprehensible than an individual instance of malfeasance."<sup>106</sup>

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

97. *Id.* at 1065.

98. *Id.* at 1064 (stating it is permissible to use third-party harm to determine reprehensibility, but not permissible to base an award on it).

99. Bleich ET. AL., *supra* note 86, at 27 ("The Court drew [a] slender line as follows: a plaintiff can use evidence of actual harm to non-parties to help 'show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible,' but could not use that evidence to 'punish a defendant directly on account of harms it is alleged to have visited on nonparties.'").

100. *Philip Morris*, 127 S. Ct. at 1065 (citing *Witte v. United States*, 515 U.S. 389, 400 (1995)).

101. Freeman & Jaber, *supra* note 7, at 521 n.21.

102. *Nichols v. United States*, 511 U.S. 738, 747 (1994) (citing *Williams v. New York*, 337 U.S. 241, 244-52 (1949)).

103. *Witte*, 515 U.S. at 400.

104. *Id.*

105. *Id.*

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

A second principle holds that a defendant once punished for an illegal act should not suffer additional retribution for that conduct.<sup>107</sup> Since there is no double jeopardy equivalent in punitive damages,<sup>108</sup> the Court was aware of the possibility that a punitive damage award could “double count.”<sup>109</sup> The Court provided some protection for this contingency: “A defendant should be punished for the conduct *that harmed the plaintiff*, not for being an unsavory individual or business.”<sup>110</sup> The Court appropriately raised a concern that defendants should not repeatedly pay for a particular instance of tortious behavior.<sup>111</sup> If a company pays the total damages it owes to society repeatedly, the company overcompensates society for the actual damages.<sup>112</sup>

*B. In Balancing These Principles, the Court Adopts a Senseless Rule*

The dilemma in *Philip Morris* captures the tension between stiffened penalties for repeated misconduct and double punishment concerns. As a solution, the majority opinion attempted to draw a distinction between appropriate and inappropriate treatment of a defendant’s harm to third-parties.<sup>113</sup> The Court considered Philip Morris’s behavior towards other smokers as relevant to a punitive damage calculation when it demonstrated reprehensibility.<sup>114</sup> In other words, a jury could find repeated misbehavior more deserving of punishment than a fluke incident. In contrast, a court cannot justify a punishment solely or partly on Philip Morris’s actions to third parties because each claim should be litigated independently to avoid double punishment.

This distinction breaks down in practice. Justice Stevens criticized this distinction using an example in criminal law:

A murderer who kills his victim by throwing a bomb that injures dozens of bystanders should be punished more severely than one who harms no one other than his intended victim. Similarly, there is no reason why the measure of the appropriate punishment for engaging in a campaign of deceit in distributing a poisonous and addictive substance to thousands of cigarette smokers statewide should not include consideration of the harm to those “bystanders” as well as the harm to the individual plaintiff.<sup>115</sup>

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

108. *Colby*, *supra* note 5, at 597 (discussing res judicata as the seemingly equivalent to double jeopardy but not applying in punitive damage situations because it can only bind litigants that were actually parties to the prior dispute).

109. *BMW*, 517 U.S. at 593 (Breyer, J., concurring).

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

111. *Id.*

112. *See Colby*, *supra* note 5, at 660.

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

114. *Id.*

115. *Id.* at 1067 (Stevens, J., dissenting).

This argument emphasizes that harm to third parties is inextricably linked to reprehensibility. Thus, it is illogical to draw a distinction between directly punishing the defendant for harm to third parties and indirectly considering such harm in a reprehensibility analysis.

This logical breakdown can be seen in another way, through the eyes of jurors. After a jury decides that the defendant deserves a punitive sanction, many factors will enter the equation about what amount is appropriate. Jurors will likely consider the factors identified in *BMW*,<sup>116</sup> such as the reprehensibility of the defendant's conduct. When a jury considers these factors, it makes little difference whether evidence of third-party harm enters the equation under the guise of reprehensibility. Once that evidence is in the jury's hands, jurors will do whatever they want with it; the bell cannot be rung. In effect, the Court removes one avenue to consider such evidence (i.e., it would lead a jury to punish the defendant for harm to nonparties) while leaving another passageway wide open (i.e., it shows reprehensible conduct). It only matters how the lawyer frames the argument to make the evidence admissible.

### C. The Philip Morris Rule Will Be Difficult to Apply

The majority opinion provided no guidance regarding how a court can prevent a jury from improperly punishing a defendant for harm to nonparties. The Court indicated that the Due Process Clause requires states "to provide assurance that juries are not asking the wrong question."<sup>117</sup> This standard is vague. The Court gave no suggestion about what assurances would be permissible.<sup>118</sup> Certainly, a jury instruction like the one Philip Morris submitted might be appropriate. But, as the dissent pointed out, "[t]he Court ventures no opinion on the propriety of the charge proposed by Philip Morris . . . ."<sup>119</sup> Even if the judge issued instructions that correctly explained the proper treatment of third-party harm, the jury is unlikely to heed the instructions. Empirical evidence suggests juries have a low level of comprehension, recall, and application of the judge's instructions in punitive damage scenarios.<sup>120</sup>

Additionally, jury instructions that are in accordance with *Philip Morris* may confuse the jury and lead to erroneous verdicts. The purpose of jury instructions, in part, is to elucidate the applicable law. The Ore-

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116. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-85 (1996).

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

118. *Id.* at 1065 ("Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases.").

119. *Id.* at 1069 (Ginsburg, J., dissenting).

120. CASS R. SUNSTEIN ET AL., *PUNITIVE DAMAGES: HOW JURIES DECIDE* 223 (2002) ("Our empirical studies demonstrate that jury instruction do not play a governing role in jurors' decisions concerning liability for punitive damages."). Cf. John L. Kane, *Giving Trials a Second Look*, 80 DENV. U. L. REV. 738, 739 (jury instructions have become increasingly useless because appellate courts emphasize legally precise pronouncements over frank, natural language) (drawing, in part, from LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 399 (2d ed. 1985) (1973)).

gon Supreme Court correctly criticized Philip Morris's jury instructions: "it is unclear to us how a jury could 'consider' harm to others, yet withhold that consideration from the punishment calculus."<sup>121</sup> The seemingly contradictory jury instructions could induce jurors to come to opposite conclusions.

Justice Breyer's answer to this criticism creates a perplexing standard of review for jury instructions. He reasons that although a court cannot ultimately determine if the instructions confused the jury, it must prevent "procedures that create an unreasonable and unnecessary risk of any such confusion occurring."<sup>122</sup> This statement does not clarify how this principle would operate in practice. Because the Court declined to analyze what jury instructions would be constitutionally permissible, "the ruling will engender enormous confusion in the lower courts . . . ."<sup>123</sup> Additionally, if the jury is perplexed, it might refrain from considering the defendant's harm to others altogether, which would be an incorrect application of the law since the jury can consider reprehensibility as a component of the damage award.<sup>124</sup>

*D. An Alternative Rule: A Jury May Consider Third-Party Harm Only from Previously-Litigated Cases*

In *Philip Morris*, the Court struck down a punitive damage amount "based not on *what* the jury had awarded, but *how* the jury had reached its decision."<sup>125</sup> Traditionally, a jury possessed broad discretion to award punitive damages and courts did not peer into the jury's "black box" to determine how the decisions were made.<sup>126</sup> This virtually unlimited discretion, however, must yield to constitutional concerns about decision makers' caprice.<sup>127</sup> Justice Breyer cautioned against allowing an unelected jury with little experience to essentially create its own public policy in awarding punitive damages.<sup>128</sup> If jurors are not to act as policy makers, the next questions are *whether* and *how* a court can ensure a jury applies the law. Unfortunately, empirical research suggests that jury instructions have a low impact on how juries compute punitive damage awards.<sup>129</sup> This research suggests it is much less effective to direct a jury on how to use certain evidence than it is to prevent the jury from hearing

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

122. *Id.*

123. Chemerinsky, *supra* note 66, at 74.

124. *See id.*

125. Bleich ET AL., *supra* note 86, at 26.

126. *See generally* Chapman, *supra* note 1, at 1122-32.

127. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring).

128. *Id.* at 596 (Breyer, J., concurring) ("[O]ne cannot expect to direct jurors like legislators through the ballot box; nor can one expect those jurors to interpret law like judges, who work within a discipline and hierarchical organization that normally promotes roughly uniform interpretation and application of the law. Yet here Alabama expects jurors to act, at least a little, like legislators or judges, for it permits them, to a certain extent, to create public policy and to apply that policy . . .").

129. SUNSTEIN ET AL., *supra* note 120, at 223 ("The empirical findings demonstrate the low level of comprehension, recall, and application of the judge's instruction by both jurors and juries.").

that evidence altogether. With that concern in mind, this section formulates a rule about how a court should treat evidence relating to third-party harm in punitive damage cases. This rule focuses on the defendant's conduct towards the plaintiff, yet also allows a jury to consider limited evidence about harm to third parties when addressing reprehensibility.

1. A Suggestion for Considering Third-Party Harm: The Prior Adjudication Rule

The Prior Adjudication Rule holds that trial courts should allow evidence of a defendant's similar harm to third parties in the same jurisdiction if that conduct has been adjudicated to its conclusion with a finding against the defendant.

A plaintiff's evidence must satisfy three requirements to warrant jury consideration: (1) the conduct towards a third party was a "similar harm;" (2) it occurred in the "same jurisdiction;" and (3) the claim has been "adjudicated to its completion against the defendant." Each of these components is based on the Supreme Court's recent punitive damage jurisprudence or analogous aspects of the law.<sup>130</sup>

"Similar harm" is a critical component because it allows a jury to factor recidivism into a punitive damage award. Among other factors,<sup>131</sup> recidivism justifies a higher punitive damage award because it speaks to reprehensibility.<sup>132</sup> To justify punishment based on recidivism, "courts must ensure the conduct in question replicates the prior transgressions."<sup>133</sup> As an example of how this principle would operate in *Philip Morris*, the punitive damage award from another case would be admissible where the plaintiff developed emphysema because of the company's misrepresentation of the dangers from smoking. Inherently, this standard will require the discretion of the trial judge based on the circumstances of each case.

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130. See *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007) (prohibiting a state from imposing punitive damages without first providing an opportunity to provide every available defense); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (holding that states do not have legitimate interest in punishing unlawful conduct outside its jurisdiction); *BMW of N. Am.*, 517 U.S. at 576-77 (finding that repeated actions are more reprehensible than isolated incident); *Witte v. United States*, 515 U.S. 389, 438 (1995) (permitting evidence of related criminal conduct to enhance a defendant's sentence for a separate crime).

131. *State Farm*, 538 U.S. at 409 ("We have instructed courts to determine the reprehensibility of a defendant by considering 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.").

132. *BMW of N. Am.*, 517 U.S. at 577 ("Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.").

133. *State Farm*, 538 U.S. at 423.



The “same jurisdiction” criterion avoids the state sovereignty concerns expressed in *State Farm*. In that case, the Court, as a general rule, declared that “the State [does not] have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.”<sup>134</sup> The best reading of this language is that the principle of state sovereignty provides an independent constitutional constraint on punitive damage awards.<sup>135</sup> Although this rule allows for exceptions,<sup>136</sup> the safer course to be within constitutional bounds is to exclude *any* consideration of illegal conduct in other jurisdictions. Note that, under the proposed rule, the same jurisdiction restriction applies only to a defendant’s *harm to third parties*, not to its general course of conduct. The *Philip Morris* Court indicated that “[I]awful out-of-state conduct may be probative when it demonstrates the deliberativeness and culpability of the defendant’s action in the State where it is tortious . . . .”<sup>137</sup> Therefore, the proposed rule permits a plaintiff to present evidence about a company’s general practices to establish whether a tortious act occurred, but the plaintiff cannot allege that those practices harmed any other individual besides herself unless the other requirements are met.

The final criterion is that the third-party harm “be adjudicated to its completion against the defendant.”<sup>138</sup> Punitive damages require that the plaintiff satisfy the underlying cause of action for compensatory damages.<sup>139</sup> Each individual’s claim may fail for a number of reasons (e.g., the absence of causation, contributory negligence, or the statute of limitations); therefore, it would violate due process if the defendant did not have the opportunity to refute each individual claim.<sup>140</sup> Even in class action lawsuits, the jury must still determine for each class member whether he or she was injured, and, if so, whether the defendant caused that injury.<sup>141</sup> The concept of punitive damages cannot be unmoored from its tradition as a punishment for private rather than public wrongs. Justice Breyer raised this concern in *Philip Morris*: a defendant should have an opportunity to present every available defense in each individual action.<sup>142</sup> The proposed rule addresses this concern. In previously adju-

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134. *Id.* at 421.

135. Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1, 24-25 (2004).

136. The language “as a general rule” suggests that exceptions may exist. See *State Farm*, 538 U.S. at 421; see also Allen, *supra* note 135, at 27 (“[T]he Court did not adopt a bright-line rule that a state can never have a constitutionally legitimate interest in punishing a defendant for or deterring it from engaging in unlawful acts done outside that state. Instead, the Court described its decision in this regard as a ‘general rule.’ The Court does not tell us what situation might justify an exception to the general rule.”).

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

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

139. Colby, *supra* note 5, at 652-63.

140. *Id.* at 651-52.

141. *Id.* at 655.

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

licated cases, the defendant had an opportunity to assert the applicable defenses, thus satisfying due process considerations.<sup>143</sup>

## 2. Comparison of the Prior Adjudication Rule to the Supreme Court Rule

### a. Consideration of Recidivism in Reprehensibility Analysis

The Prior Adjudication Rule requires a stronger connection between third-party harm and recidivism before the jury may consider such evidence. Under the Prior Adjudication Rule, a plaintiff may present evidence of third-party harm only if it meets the requirements of similar harm, same jurisdiction, and prior adjudication.<sup>144</sup> These requirements are a heavy burden because they address a compilation of the due process concerns in *State Farm*, *BMW*, and *Philip Morris*.<sup>145</sup> Combined, these requirements strengthen the likelihood that a jury is considering evidence that speaks to recidivism and, by extension, a higher degree of reprehensibility.<sup>146</sup> The Supreme Court's rule is more inclusive of third-party evidence but lends itself to a greater chance of a jury misusing that evidence.<sup>147</sup> For example, the Court would allow a plaintiff to present the defendant's harm to nonparties in order to show that the conduct posed a substantial risk to the general public.<sup>148</sup> In contrast, the Prior Adjudication Rule would ban such evidence.<sup>149</sup> Because the Supreme Court's threshold for admitting third-party evidence is lower, the jury will have more opportunities to consider allegations rather than court-certified findings of previous misconduct.

### b. Protecting Defendants from a Jury's Reliance on Unproven Misconduct

With regard to the policy goal of protecting defendants from a jury's reliance on unproven misconduct, the Prior Adjudication Rule provides additional safeguards. Under the Prior Adjudication Rule, the

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143. See *Nickey v. Mississippi*, 292 U.S. 393, 396 (1934) ("It is enough that all available defenses may be presented to a competent tribunal before exaction of the tax and before the command of the state to pay it becomes final and irrevocable.").

144. See *supra* Part III.D.1.

145. *Id.*

146. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 577 (1996) ("Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.") (citing *Gryger v. Burke*, 334 U.S. 728, 732 (1948)).

147. See *Philip Morris*, 127 S. Ct. at 1063-64 ("Respondent argues that she is free to show harm to other victims because it is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. That is to say, harm to others shows more reprehensible conduct. *Philip Morris*, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we. Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible . . .").

148. *Id.*

149. See *supra* Part III.D.1.

defendant would necessarily have an opportunity to assert the applicable defenses either in previous cases or the case at bar.<sup>150</sup> By definition, a past adjudication provides some measure of protection that the defendants had an opportunity to present every available defense.<sup>151</sup> In contrast, the Supreme Court's rule is weaker. The jury may still consider third-party evidence so long as the judge properly directs the jury.<sup>152</sup> Under the Supreme Court's ruling, a jury could still rely on evidence where the defendant has not received an opportunity to address the merits of the third-party claim.<sup>153</sup>

### c. Practical Considerations

The Prior Adjudication Rule and the Supreme Court's ruling differ in the ease of administration and the impact on future litigation. The Supreme Court's ruling is unclear about which procedural protections would ensure that the jury is not punishing a defendant for harm to non-litigants.<sup>154</sup> As a result, the majority's opinion will foster litigation to flesh out this new principle of law.<sup>155</sup> In comparison, the Prior Adjudication Rule shifts the question from what procedures adequately protect a defendant to whether third-party harm is admissible. The Prior Adjudication Rule relies heavily on factual inquiries, which are easier to determine than an amorphous inquiry into whether a procedure "create[s] an unreasonable and unnecessary risk of any such confusion occurring."<sup>156</sup> Further, the Prior Adjudication Rule will discourage litigation because a defendant may be more likely to settle knowing that a punitive damage award would be admissible in later lawsuits.

## 3. Potential Drawbacks of the Prior Adjudication Rule

### a. The Rule Raises the Evidentiary Threshold Higher than a Criminal Proceeding

A curious consequence of the Prior Adjudication Rule is that it would restrict evidence in punitive damage cases further than a criminal sentencing proceeding. Under the Prior Adjudication Rule, a plaintiff could present third-party harm evidence only if a court previously found

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150. *See id.*

151. *See* *Nickey v. Mississippi*, 292 U.S. 393, 396 (1934).

152. *Philip Morris*, 127 S. Ct. at 1064 ("Given the risks of unfairness that we have mentioned, it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one.").

153. *See id.* at 1065. The Supreme Court would allow evidence where the defendant has not asserted defenses to individual claims: "we recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility." *Id.*

154. *See id.* at 1069 (Ginsburg, J., dissenting) ("The Court ventures no opinion on the propriety of the charge proposed by Philip Morris . . .").

155. *Cf.* Chemerinsky, *supra* note 66, at 74 ("The decision [in *Philip Morris*] is sufficiently unclear that it is difficult to figure out what it means.").

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

the defendant liable for similar conduct.<sup>157</sup> In stark contrast, criminal courts may consider previously uncharged conduct<sup>158</sup> and even conduct for which the defendant was acquitted in a sentencing proceeding.<sup>159</sup> A foreseeable criticism of the Prior Adjudication Rule is that it places a higher emphasis on a court's findings than does the criminal law, where a person's life or liberty is at stake.

A response to this criticism maintains that punitive damages operate similarly to criminal sanctions, and the law should make no distinction between procedural protections for monetary and non-monetary sanctions. Justice O'Connor referred to punitive damages as "quasi-criminal" and suggested that heightened procedural safeguards are therefore applicable:

[P]unitive damages are quasi-criminal punishment. Unlike compensatory damages, which serve to allocate an existing loss between two parties, punitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible. Hence, there is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that there is more than just money at stake. This factor militates in favor of strong procedural safeguards.<sup>160</sup>

Because punitive damages involve a public expression of condemnation and the goals of punishment/deterrence, they should be subject to the same procedural safeguards as criminal sanctions.<sup>161</sup> Strikingly, the due process concerns the Court raises in *Philip Morris* have not taken root in the criminal context.<sup>162</sup> Many commentators criticize the current level of procedural protections for defendants at sentencing because it allows for the possibility that an innocent person may serve enhanced sentences for

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157. See *supra* Part III.D.1.

158. See *Witte v. United States*, 515 U.S. 389, 399-400 (1995).

159. See *United States v. Watts*, 519 U.S. 148, 149 (1997).

160. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting).

161. See, e.g., COLO. REV. STAT. § 13-25-127(2) (2006) ("Exemplary damages . . . shall only be awarded in a civil action when the party asserting the claim proves beyond a reasonable doubt the commission of a wrong . . ."); Cf. Rachel A. Van Cleave, "Death Is Different," *Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217, 272 (2003) ("Unless there are compelling reasons for distinguishing among the sanctions of death, terms of imprisonment, forfeitures, and punitive damages awards, the method for evaluating their excessiveness or disproportionality should be consistent.").

162. See Elizabeth T. Lear, *Double Jeopardy, the Federal Sentencing Guidelines, and the Subsequent Prosecution Dilemma*, 60 BROOK. L. REV. 725, 733-34 (1994) ("Even though facts found at sentencing are of great importance to the defendant, sentencing hearings remain informal events conducted with little regard for procedural fairness or accuracy. Sentencing facts need only be proven by a preponderance of the evidence. Neither the Federal Rules of Evidence nor the Confrontation Clause apply. And although defendants technically have a due process right to be sentenced only upon reliable information, offenders are routinely condemned to spend years behind bars on the basis of double or triple hearsay and questionable drug quantity estimates.").

crimes, which are uncharged or dismissed.<sup>163</sup> Therefore, the Prior Adjudication Rule may not only provide fairness in a punitive damage scenario, but it could also be extended to criminal cases to prevent defendants from serving enhanced sentences for uncharged conduct.

b. Juries Might Still Inappropriately Consider Third-Party Evidence

The Prior Adjudication Rule decreases, but does not eliminate the possibility that a jury will punish the defendant for harm to third parties. Conduct towards third parties speaks not only to *how much* the defendant should be punished but also to *whether* the defendant committed a tort in the first place.<sup>164</sup> For example, in *Philip Morris*, if Williams proved the company engaged in a massive campaign that deceived the public and that the campaign affected the deceased, the company would have committed a tort against him.<sup>165</sup> Third-party evidence might still be relevant for the “guilt-level” phase of the trial, even though a jury could potentially use that evidence inappropriately at the “sentencing” phase.<sup>166</sup> As a result, the trial judge must still issue an instruction about how to appropriately use the third-party evidence.<sup>167</sup> Thus, the Prior Adjudication Rule might be less effective in practice because third-party evidence will still enter the jury’s consideration.

In response to this criticism, the courts could turn to other rules of evidence to prevent a jury from inappropriately considering third-party harm. For example, Rule 404(b) would limit evidence of prior wrongs to show propensity to commit a similar wrong.<sup>168</sup> Courts have not relied on

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163. *Id.* at 764 n.31 (“The literature attacking the procedures at sentencing is extensive.”) (citing Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299 (1994); Joseph P. Sargent, Comment, *The Standard of Proof Under the Federal Sentencing Guidelines: Raising the Standard to Beyond a Reasonable Doubt*, 28 WAKE FOREST L. REV. 463 (1993); Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 323-43 (1992); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 208-25 (1991)).

164. See Janutis, *supra* note 5, at 415 (“[A]n apportionment system would limit consideration of third-party activities to only those third-party activities that bear on the defendant’s state of mind in connection with the activities directed at the injured party before the court.”).

165. Syllogism: Philip Morris deceived the public; Williams is a member of the public; therefore, Philip Morris deceived Williams.

166. The terms “guilt-phase” and “sentencing-phase” relate to two separate aspects of a criminal case, but the model has been incorporated into civil cases. See Donald M. Houser, *Reconciling Ring v. Arizona with the Current Structure of the Federal Capital Murder Trial: The Case for Trifurcation*, 64 WASH. & LEE L. REV. 349, 352-53 (2007) (explaining that the current structure of a capital case is bifurcated into a guilt phase and a sentencing phase). See generally *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (“At State Farm’s request the trial court bifurcated the trial into two phases conducted before different juries. In the first phase the jury determined that State Farm’s decision not to settle was unreasonable because there was a substantial likelihood of an excess verdict . . . . The second phase addressed State Farm’s liability for fraud and intentional infliction of emotional distress, as well as compensatory and punitive damages.”).

167. See Janutis, *supra* note 5, at 414.

168. FED. R. EVID. 404(b).

Rule 404(b) to a great extent in civil cases.<sup>169</sup> By its language, Rule 404(b) would seem to apply equally to both criminal and civil cases, since “the rule is entitled ‘Other Crimes, Wrongs, or Acts,’ not simply ‘Other Crimes.’”<sup>170</sup> Regardless, the Prior Adjudication Rule stands not just on its own, but operates within the context of other evidentiary rules to protect a jury from misusing the evidence.

### CONCLUSION

The only clear conclusion from *Philip Morris* is that the Supreme Court’s struggle with punitive damages will continue in the future.<sup>171</sup> The Court interpreted the Due Process Clause to forbid the use of punitive damages to punish a defendant for an injury it inflicts upon third parties.<sup>172</sup> This relatively simple principle becomes complicated in practice, since a plaintiff may still show the defendant’s harm to third parties demonstrates reprehensibility.<sup>173</sup> The Court has blocked off the highway, but left open the scenic route. Though a jury may not “directly” punish the defendant for harm to third parties, such evidence can indirectly enter the equation through a backdoor reprehensibility analysis. The distinction the Court draws is likely to, at best, make little difference or, at worst, confuse the jury. So long as the jury may consider third-party harm, there is no guarantee it will refrain from punishing the defendant based on the defendant’s harm to nonparties, even if the judge issues a cautionary instruction.

The future debate will likely center around what measures will satisfy the due process concerns raised in *Philip Morris*, since the majority opinion gave little indication. As a consequence, the Court left it to the “laboratory of the states” to carve out this new due process protection.<sup>174</sup> The Prior Adjudication Rule proposed herein presents a potential solution for state legislatures and courts in their efforts to adhere to the Supreme Court’s concerns in *Philip Morris*. Under the rule, a plaintiff may present third-party harm evidence only if it is of a similar nature, in the same jurisdiction, and following a prior adjudication. The rule balances the competing ideas that recidivism is more reprehensible<sup>175</sup> and that a plaintiff deserves the opportunity to refute each separate allegation of misconduct.<sup>176</sup>

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169. John Gardner, Comment, *Help Me Doc! Theories of Admissibility of Other Act Evidence in Medical Malpractice Cases*, 87 MARQ. L. REV. 981, 984 (2004).

170. *Id.*

171. Bleich ET AL., *supra* note 86, at 28.

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

173. *Id.* at 1064.

174. *Palmer v. Asarco Inc.*, No. 03-CV-0498-CVE-PJC, 2007 WL 666592, at \*1 (N.D. Okla. Feb. 27, 2007) (“As Constitutional rights evolve, so does a state’s perception of the interests of its citizens”).

175. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576-77 (1996).

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

Regardless, state courts and legislatures will have to change the existing procedures to accommodate the Court's ruling. It remains an open question how strongly the courts will enforce this new due process protection. The next series of litigation will likely focus on how to incorporate the principles of *Philip Morris* in a courtroom context.

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\* J.D. Candidate, 2009, University of Denver Sturm College of Law. I would like to thank Prof. Arthur Best, U.S. District Judge John Kane, and Justice Michael Bender for their scholarly criticism and immeasurable guidance, as well as Dave Ratner, Eddie Williams and Linda Metzner for their thoughtful revisions. Finally, I would like to thank Phil, Candy, Lizzie, and Mallory for their endless support.

