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Punitive Damages After *Philip Morris USA v. Williams*

Benjamin C. Zipursky

For a single tort case in which liability is no longer contested, *Philip Morris USA v. Williams*¹ proved remarkably difficult to bring to closure. Like many plaintiffs since the 1990s, Mayola Williams persuaded a jury that Philip Morris fraudulently concealed the addictive and carcinogenic aspects of its product from the public and thereby killed her husband. The jury awarded \$821,000 in compensatory damages and \$79.5 million in punitive damages. That is a nearly 100:1 ratio, far greater than the single-digit ratio designated by the Court as a presumptive limit only four years earlier in *State Farm Mutual Automobile Insurance Company v. Campbell*.² It is therefore unsurprising that, in 2007—eight years after the case went to trial—the United States Supreme Court bridled at the award in *Williams* and remanded it to the Oregon Supreme Court to examine whether there had been a procedural due-process violation in the trial judge’s handling of the case, especially its jury instructions. It is equally unsurprising that the Oregon Supreme Court, aiming to preserve the autonomy of its tort law and hostile to a perceived pro-business orientation on the Roberts Court, wished to keep the \$79.5 million dollar verdict intact and promptly reaffirmed the verdict. The surprise is that after three visits to the Court, plenty of hand-wringing, and a volatile oral argument in December of 2008, the United States Supreme Court simply backed down and permitted a visibly defiant Oregon Supreme Court to have its way. On March 31, the Supreme Court issued a one-line per curiam order dismissing the certiorari petition in *Williams* as improvidently granted.³

What happened? The short answer appears to be that the United States Supreme Court, with Chief Justice Roberts replacing Chief Justice Rehnquist and Justice Alito replacing Justice O’Connor, has become queasy about doing constitutional excessiveness review of the sort commenced in *BMW v. Gore*.⁴ Not only did the Supreme Court decline to cut the damages award in *Williams*, it did not even address the size of the award. Indeed, in initially granting Philip Morris’s certiorari petition last year, the Court pointedly declined to hear arguments on the size of the award.⁵ Oral argument in

Williams during the 2006 Term had little or nothing to do with excessiveness, and even though the Court had granted certiorari on the *BMW* excessiveness issue in *Williams*, Justice Breyer expressly declined to address that issue in his opinion.⁶ As the recent 80% reduction of the Alaskan fisherman’s verdict in the *Exxon Valdez* case indicates, a majority of the Court is willing to cut a punitive-damages verdict,⁷ but that case was decided on federal statutory grounds; the Court had pointedly declined to grant certiorari on the constitutional excessiveness issue.⁸ The 2007 decision in *Williams* therefore appeared to represent a decision to move in a new direction, but the Court was able to do so only tentatively; moreover, the Court was unwilling to bring Philip Morris relief because it was uncomfortable utilizing its most potent tool for punitive damages: constitutional excessiveness review.

Why would the Roberts Court suddenly become dissatisfied with *BMW*’s approach to punitive damages? What is it about the arrival of Chief Justice Roberts and Justice Alito that might have precipitated this change? While one can only conjecture, certain conjectures are quite plausible. Justice Scalia and Justice Thomas have always rejected excessiveness review as another example of substantive due process, which they reject for both jurisprudential and ideological reasons, associating *BMW v. Gore* with both *Roe v. Wade*⁹ and *Lochner v. New York*.¹⁰ If Chief Justice Roberts and Justice Alito shared the Scalia/Thomas hostility to substantive due process and shared their sense (and that of Justice Ginsburg) of the institutional competence and federalist reasons against excessiveness review, they would have ample reason to be uncomfortable with *BMW* and its progeny. Before pouring more into that framework and even before tolerating it, the new Justices would perhaps be attracted to the idea of a foundation that is not so perilously close to sheer second-guessing of state court judgments of what constitutes “too big.” Chief Justice Roberts and Justice Alito appear to have believed they could have it all by switching to procedural due process, and their willingness to sign onto Philip Morris’s victory in 2007 seems to reflect this precise strategy.

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Footnotes

1. *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).
2. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).
3. *Philip Morris USA v. Williams*, 128 S. Ct. 2904 (June 9, 2008) (granting certiorari on first issue only), *cert. dismissed as improvidently granted*, 129 S. Ct. 1436 (March 31, 2009).
4. *BMW of North America v. Gore*, 517 U.S. 559 (1996).

5. *Philip Morris USA v. Williams*, 128 S. Ct. 2904 (June 9, 2008) (granting certiorari on first issue only), *cert. dismissed as improvidently granted*, 129 S. Ct. 1436 (March 31, 2009).
6. *Williams*, 549 U.S. at 358.
7. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008).
8. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 492 (Oct 29, 2007) (granting certiorari limited to issues 1, 2, 3(1) – where 3(2) was excessiveness under Due Process Clause issue).
9. 410 U.S. 113 (1973).
10. 198 U.S. 45 (1905).

This article is an exploration of the Court's new direction in *Williams*, written with the hope of providing guidance to the courts now required to apply it.¹¹ The constitutional doctrine of punitive damages before *Williams* is briefly set forth in Part I. Part II recounts Justice Breyer's majority opinion for the Court, as well as the dissents filed by Justices Stevens, Thomas, and Ginsburg, and closes with a short overview of the subsequent progress of the case. Part III elaborates on the problems of *Williams*—both those that arise from the opinion itself and those that have arisen or are likely to arise for courts striving to understand the case moving forward—and argues that the problems stem from basic lack of clarity regarding the justification for the treatment of nonparty harm. Part IV sets forth a theoretical model that makes sense of the nonparty-harm rule and resolves the tensions within *Williams*. In doing so, it draws from my own prior work and sounds themes articulated by scholars such as Thomas Colby and Dan Markel in recent articles also addressing *Williams*.¹² The clarifications of Part IV guide a discussion in Part V of model jury instructions that some jurisdictions have produced in light of *Williams* and in Part VI of a variety of difficult issues that have confronted courts in the aftermath of *Williams*.

I. CONSTITUTIONAL SCRUTINY OF PUNITIVE DAMAGES BEFORE WILLIAMS

The United States Supreme Court has issued exactly eight significant decisions regarding the constitutional scrutiny of punitive damages: *Browning-Ferris v. Kelco*,¹³ *Pacific Mut. Life Ins. Co. v. Haslip*,¹⁴ *TXO Production Corp. v. Alliance Resources Corp.*,¹⁵ *Honda Motor Co. v. Oberg*,¹⁶ *BMW of North America, Inc. v. Gore*,¹⁷ *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,¹⁸ *State Farm Mut. Ins. Co. v. Campbell*,¹⁹ and *Williams* itself. While each could sustain (and has sustained) substantial commentary, the doctrine itself remains quite straightforward. In *Browning-Ferris*, a 7-2 majority held that the Eighth Amendment's Excessive Fines Clause did not apply to punitive damages. The Court in *Haslip* and *TXO* held that the common-law procedures associated with punitive damages were not per se violations of the Fourteenth Amendment's Due Process Clause but that at some point a grossly excessive punitive damages award might be so unreasonable as to violate the Due Process Clause. In neither case did the Court find the awards grossly excessive. *Honda v. Oberg*, the least cited of the eight

11. The general lines of the analysis in this article are in some ways anticipated in a more sustained piece, Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 1 (2005), but that piece was written before the Court's decision in *Williams*.
 12. See Thomas R. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L. J. 392 (2008); Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 183 (2009). Neither the interpretive nor the normative account of *Williams* or of punitive damages borrows from these articles, with which I am in substantial disagreement. However, I also refrain from presenting or criticizing the content of the articles here, leaving that for another occasion. Cf. Zipursky, *supra* note 11 (criticizing earlier article by Colby). Readers should be aware, however, that these authors have made significant contributions to the scholarly literature identifying and

decisions, held that a state statute knocking out all but the most minimal appellate review of punitive damages awards departed from the common-law protections afforded defendants and therefore violated the Due Process Clause. Prior to *BMW v. Gore*, the Court had ruled out the Excessive

Fines Clause, had ruled out any broad due-process attack based on inadequate state procedures, and had left open the possibility of some enormous punitive damages award "crossing the line" of what it considered constitutionally permissible.

BMW v. Gore, decided in 1996, remains the Court's most important punitive-damages decision because it is the first to strike down a punitive-damages award as excessive and therefore unconstitutional. Writing for a 5-4 majority, Justice Stevens set out a three-guidepost test for determining whether an award was grossly excessive. Courts should consider the reprehensibility of the defendant's conduct, the ratio of punitive damages to the actual (or potential harm) suffered by the plaintiff, and the size of the award relative to sanctions prescribed by civil or criminal statutes of the jurisdiction for comparable conduct. Alabama's Supreme Court had permitted the plaintiff, Ira Gore, to recover a two-million-dollar punitive damages award based on minimally reprehensible conduct of BMW, namely, the failure to disclose that because of flaws in the original paint job of his \$40,000 BMW, the company had repainted it before sale. The economic damages associated were \$4,000, leaving a ratio of 500 to 1, and comparable sanctions in Alabama were relatively puny.²⁰ Justice Stevens easily concluded that this was excessive and therefore a violation of due process. As a theoretical matter, he opined that fair notice was a core value of the Due Process Clause and that grossly excessive awards were inconsistent with this value.

Cooper v. Leatherman and *State Farm v. Campbell* put teeth in the gross-excessiveness test of *BMW*. An 8-1 majority held in *Cooper* (per Justice Stevens) that appellate review of gross excessiveness was to be de novo.²¹ A 6-3 majority held in *State Farm v. Campbell* (per Justice Kennedy) that the ratio between

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working through a central, but insufficiently analyzed issue in *Williams*: whether punitive damages call for different levels of constitutional scrutiny depending on the extent to which they are functioning in a private-law mold or a public-law mold.
 13. 492 U.S. 257 (1989).
 14. 499 U.S. 1 (1991).
 15. 509 U.S. 443 (1993).
 16. 512 U.S. 415 (1994).
 17. 517 U.S. 559 (1996).
 18. 532 U.S. 424 (2001).
 19. 538 U.S. 408 (2003).
 20. *BMW*, 517 U.S. 559, 574-75 (1996) (maximum Alabama fine for Deceptive Trade Practices would be \$2,000, compared to \$2 million imposed on BMW).
 21. 532 U.S. 424 (2001).

Several important themes have dominated the opinions of those justices resisting constitutional scrutiny of punitive damages.

punitive and compensatory damages may not normally exceed a single-digit ratio.²² *State Farm* also endorsed a number of other propositions, most notably: that the defendant's wealth could not be used to justify an otherwise excessive award,²³ that although "[l]awful out-of-state conduct may be probative when it demonstrates the

deliberateness and culpability of the defendant's action in the State where it is tortious, . . . the conduct must have a nexus to the specific harm suffered by the plaintiff,"²⁴ and that dissimilar conduct could not be used to heighten the award.²⁵

Several important themes have dominated the opinions of those justices resisting constitutional scrutiny of punitive damages. In *Browning-Ferris*, the Court reasoned that punitive damages should not be regarded as a form of fine because the state does not initiate tort suits and because it does not keep the money.²⁶ In that case and in the middle-of-the-road opinion for the Court in *Haslip* (as well as the concurrences), a majority of the Justices gave significant weight to the historical pedigree of punitive damages within the common law.²⁷ Justice Scalia's powerful concurring opinion in *Haslip* declared that the historical acceptance of punitive damages with civil/tort-law safeguards by definition rules out any procedural "due process" critique now.²⁸ Justice Thomas has remained true to that line;²⁹ indeed, Justice Thomas recently authored a 5-4 opinion for the Court recognizing the presence and legitimacy of punitive damages in the common law of admiralty and therefore permitting punitive damages in (at least a large subset of) admiralty personal-injury cases.³⁰ Both Justice Scalia and Justice Thomas have also vigorously criticized Justice Stevens and other members of the *BMW* majority for engaging in the sort of substantive due process that made *Lochner* notorious (and that, on their view, plagues the post-*Griswold* privacy decisions).³¹ Finally, Justice Ginsburg wrote an important dissenting opinion in *BMW* (with which Chief Justice Rehnquist concurred and whose thrust is shared by Scalia and Thomas) emphasizing that federalist and institutional competence concerns should lead the Court to stay out of the punitive-damages area where it does not belong.³²

Conversely, two voices in favor of punitive damages scrutiny before *Williams* did not write any majority opinions on punitive damages but nevertheless contributed substantially to the Court's thought in this area. From the outset, Justice O'Connor strongly agreed with the defendants challenging contemporary punitive-damages awards, and her dissenting opinion in *Browning-Ferris* (with which Justice Stevens concurred) favored use of the Excessive Fines Clause for what she regarded as arbitrary and excessive state fines secured through private plaintiffs.³³ Again, in her dissent in *Haslip*, Justice O'Connor made a forceful argument that punitive-damages law in Alabama was patently unacceptable as a procedural due-process matter, whether one applied void-for-vagueness standards or one applied *Mathews v. Eldridge*.³⁴ Concern with procedural due process and cabining jury discretion was at the core of Justice Breyer's important concurring opinion in *BMW v. Gore*, with which Justice O'Connor and Justice Souter concurred.³⁵ It is notable that the author of the opinion for the Court in *Williams* was Justice Breyer—the leading voice of procedural due-process concerns in punitive-damages cases on the Court since Justice O'Connor stepped down.

II. THE WILLIAMS OPINIONS

A. THE OPINION OF THE COURT

The opinion of the Court, for a majority of five, was written by Justice Stephen Breyer; Chief Justice Roberts, Justice Kennedy, Justice Souter, and Justice Alito concurred.³⁶ The Court began by describing the facts and procedural history of the case and noting that, although it had granted certiorari on whether there was a nonparty harm problem *and* whether the award was grossly excessive, it was only going to address the former.³⁷ Thus, while the object of the Court's scrutiny was "a large state punitive damages award," the question addressed was "whether the Constitution's Due Process Clause permits a jury to base that award in part on its desire to *punish* the defendant for harming persons who are not before the court (*e.g.*, victims whom the parties do not represent)."³⁸ Justice Breyer's answer, speaking for the Court, was negative: "We hold that such an award would amount to a taking of 'property' from the defendant without due process."³⁹ In light of that holding, the Court vacated the Oregon judgment and remanded to the Oregon Supreme Court for "further proceedings not inconsistent with this opinion."⁴⁰

Justice Breyer offered two arguments for the statement that

22. *State Farm*, 538 U.S. 408, 425 (2003).

23. *Id.* at 427-28.

24. *Id.* at 422.

25. *Id.*

26. *Browning-Ferris*, 492 U.S. 257, 275 (1989).

27. *Haslip*, 499 U.S. 1, 17-18 (1991) (Blackmun, J.).

28. *Id.* at 24 (Scalia, J., concurring).

29. See, *e.g.*, *State Farm*, 538 U.S. 408, 429 (2003) (Thomas, J., dissenting).

30. *Atlantic Sounding Co. v. Townsend*, 129 S. Ct. 2561 (2009).

31. *BMW*, 517 U.S. 559, 598 (1996) (Scalia, J., dissenting) (with Justice Thomas joining); *TXO*, 509 U.S. 443, 470 (1993) (Scalia, J. concurring) (with Justice Thomas joining).

32. 517 U.S. 559, 607 (Ginsburg, J., dissenting) (with Chief Justice Rehnquist joining).

33. 492 U.S. 257, 282 (O'Connor, J., concurring in part and dissenting in part).

34. 509 U.S. 443 (1993) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

35. 517 U.S. 559, 586 (1996) (Breyer, J., concurring).

36. *Williams*, 549 U.S. 346 (2007).

37. *Id.* at 352.

38. *Id.* at 349 (emphasis in original).

39. *Id.*

40. *Id.* at 358.

it is a violation of due process to permit the jury to punish the defendant for injuring nonparties: The first is that Philip Morris is entitled, as a matter of due process, to have an opportunity to defend itself against the charges made, “by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant’s statements to the contrary.”⁴¹ Breyer’s tacit assumption appears to be that the alleged other victims’ nonparty status renders it procedurally infeasible to run this, and other, defenses.

The second argument is that the number of nonparties and the extent of their harm are too “standardless” to pass muster under the Due Process Clause.

How many such victims are there? How seriously were they injured? Under what circumstances did the injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty, and lack of notice—will be magnified.⁴²

After offering a dense argument that this treatment of the nonparty-harm rule was not inconsistent with its prior decisions on punitive damages—particularly *BMW*—the Court went on to concede that a plaintiff may present evidence of harm to nonparties because “harm to others shows more reprehensible conduct.”⁴³

Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a risk of harm to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.⁴⁴

An insufficiently recognized feature of the Court’s opinion is that it yielded not one but five interrelated procedural due-process dictates, each nested within the prior one. It began with a pair of dictates that are more theoretical. First, as we have seen,

[1] “the Constitution’s Due Process Clause forbids a state to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation.”⁴⁵

The Court’s discussion of this issue indicates that it is largely focused upon what it regards as the most com-

mon version of this problem: a jury is asked to decide on the punitive-damages award and is invited by the plaintiff’s lawyer to use the punitive-damages award to punish the defendant for harming nonparties. Thus, a second dictate is that

[2] “a jury” may not use punitive damages to punish a defendant for harming nonparties.⁴⁶

The latter three dictates are more practical and are derived from the theoretical analysis: [3] “the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.”⁴⁷

[4] “[S]tate courts cannot authorize procedures that create an unreasonable and unnecessary risk” that “a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to punish the defendant for having caused injury to others [].”⁴⁸

And finally,

[5] in appropriate cases, a court must, “upon request, protect against that risk.”⁴⁹

Because the Court believed that Philip Morris’s appeal was considered by the Oregon Supreme Court within a framework that, understandably but incorrectly, rejected the five points I have just discussed, the Court concluded its opinion by remanding to the Oregon Supreme Court to reconsider Philip Morris’s appeal by applying “the standard we have set forth.”⁵⁰ Critically, the Court appears to have left it open for the courts below it in *Williams* to remedy any nonparty-harm problem it might find in either of two ways: retrial or remittitur. “Because the application of this new standard may lead to the need for a new trial, or a change in the level of the punitive damages award, we shall not consider whether the award is constitutionally ‘grossly excessive.’”⁵¹

B. THE DISSENTING OPINIONS

Justice Stevens⁵² and Justice Thomas⁵³ each wrote a solo dissenting opinion. Justice Ginsburg also wrote a dissenting opinion, in which Justice Scalia and Justice Thomas concurred.⁵⁴

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41. *Id.* at 353-54.

42. *Id.* at 354.

43. *Id.* at 355.

44. *Id.*

45. *Id.* at 353.

46. *Id.* at 356-57 (“We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now.”).

47. *Id.* at 355.

48. *Id.* at 357.

49. *Id.*

50. *Id.* at 358.

51. *Id.*

52. *Williams*, 549 U.S. at 358 (Stevens, J., dissenting).

53. *Williams*, 549 U.S. at 361 (Thomas, J., dissenting).

54. *Williams*, 549 U.S. at 362 (Ginsburg, J., dissenting).

By far the most notable feature of Justice Thomas's dissent is what is missing: Justice Scalia's agreement.

1. Justice Stevens's Dissent

Justice Stevens's crisp and cogent dissent hits three points: (1) punitive damages are punishment, not compensation, so nonparty harm is relevant to reprehensibility and *the infeasibility of Philip Morris* (or any other defendant) defending itself regarding the actual harm caused nonparties is irrelevant;

(2) the Court has drawn an elusive and unjustifiable distinction between the impermissibility of punishing for nonparty harm and adding damages for increased reprehensibility demonstrated by nonparty harm; and (3) the core of the Court's due-process doctrine on punitive damages is about substantive due process and excessiveness, and it is unwise to break new ground as the Court has here.

For our purposes, (2) is the most important. Justice Stevens's paragraph encapsulating this critique is the most often quoted by those scholars who criticize the Court's decision:

While apparently recognizing the novelty of its holding, the majority relies on a distinction between taking third-party harm into account in order to assess the reprehensibility of the defendant's conduct—which is permitted—from doing so in order to punish the defendant “directly”—which is forbidden. The nuance eludes me. 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. 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 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.⁵⁵

2. Justice Thomas's Dissent

Justice Thomas dissented separately in order to reiterate his opposition to constitutional review of the size of punitive-damages awards based on his longstanding view that punitive damages were accepted in 1868, when the 14th Amendment was ratified. While Justice Breyer's opinion for the Court styled itself as “procedural” rather than comfortably embracing the “substantive” label that Justice Stevens prefers, Justice Thomas registered his opinion that the different word choice concealed an underlying commonality between the Court's approach in this case and its approach to prior cases, which he

(along with Justice Scalia) vigorously opposed. “It matters not that the Court styles today's holding as ‘procedural’ because the ‘procedural’ rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages.”⁵⁶

By far the most notable feature of Justice Thomas's dissent is what is missing: Justice Scalia's agreement. The originalist approach to the Due Process Clause is of course the hallmark of Justice Scalia's concurrence in *Haslip* and his dissents in *BMW* and *State Farm*; indeed, it is a hallmark of Justice Scalia's originalism more generally. It is tempting to infer that Justice Scalia may be closer in his view of due process in *Williams* to that of Chief Justice Roberts and Justice Alito; he may regard the difference between procedural due process and substantive due process as significant at least in the context of this litigation in the state of Oregon, which has a split-recovery statute.⁵⁷ Justice Scalia's decision to join Justice Ginsburg's dissent (see below) is consistent with the possibility that he regards the procedural due-process line on punitive damages, in states with newfangled punitive-damages law, as consistent with originalism.

3. Justice Ginsburg's Dissent

Justice Ginsburg's opinion may not be as conciliatory as it appears; it is unclear. It asserts that she agrees with the Court's recognition of the role of nonparty harm to the issue of reprehensibility. However, once the Court decided to permit nonparty harm to come in on the reprehensibility issue, the opinion contends, the Court has undermined any reasons for criticizing the Oregon Supreme Court. Like Justice Stevens, Justice Ginsburg seemed to balk at the idea that there is a difference between punishing indirectly, through the added reprehensibility nonparty harm indicates, and punishing directly for injuring nonparties.

Justice Ginsburg's skepticism about the Court's distinction becomes clearer with her second argument: that the only issue preserved by Philip Morris on appeal regarding nonparty harm is the issue of whether the trial court erred by declining to give Philip Morris's proposed jury instruction. The proposed instruction cautioned the jury that they may consider nonparty harm in determining the reasonable relationship between the punishment of Philip Morris and the harm caused to the party, Jesse Williams, but “you are not to punish the defendant for the impact of its alleged misconduct on other persons. . . .”⁵⁸

Her criticism echoes Justice Stevens's: “Under that charge, just what use could the jury properly make of ‘the extent of harm suffered by others.’? The answer slips from my grasp. A judge seeking to enlighten rather than confuse surely would resist delivering the directed charge.”⁵⁹ In a piece of the analysis that figured significantly in oral argument and anticipated subsequent proceedings in the Oregon Supreme Court, Justice Ginsburg opined that an affirmance, not a remand, was in order because the only argument Philip Morris had preserved

55. *Id.* at 360 (Stevens, J., dissenting).

56. *Id.* at 361 (Thomas, J., dissenting).

57. Or. Rev. Stat. § 31.735(1) (2003). For a comprehensive description (and spirited defense) of split-recovery statutes, see Catherine

M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L. J. 347, 375-80 (2003).

58. *Id.* at 363 (Ginsburg, J., dissenting) (quoting App. 280a).

59. *Id.* at 363 (Ginsburg, J., dissenting).

There are other problems with the Court's opinion in *Philip Morris*, and they exist at many levels.

on appeal pertained to the rejected jury instruction, which the trial judge correctly decided.

C. WILLIAMS ON REMAND IN OREGON AND IN THE U.S. SUPREME COURT'S 2008 TERM

The Oregon Supreme Court was plainly disconcerted to find itself with *Williams* again; equally plainly, the Court did not feel it needed to waste much time or energy on remand. It simply reaffirmed the rejection of Philip Morris's appeal notwithstanding the Supreme Court's critique of its analytical framework and consequent remand.⁶⁰ The Oregon Supreme Court used its special competency in Oregon law to narrow the grounds of the appeal. It first reasoned that, since Philip Morris had not objected to the instructions actually given, it could not appeal the instructions given, only the refusal to give its proposed instruction. The Court then reasoned, critically, that refusal to give the instruction would not have been an error unless the instruction was completely correct. "In Oregon, there is a well-understood standard governing claims of error respecting a trial judge's refusal to give a proffered instruction: An appellate court will not reverse a trial court's refusal to give a proposed jury instruction, unless the proposed instruction was "clear and correct in all respects, both in form and in substance, and . . . altogether free from error."⁶¹

Its resolution of the issue therefore turned on whether Philip Morris's proposed nonparty-harm rule was correct in all respects and free from error. The Oregon Supreme Court easily concluded that, as a matter of Oregon law, the proposed instruction was incorrect in many respects. It therefore rejected Philip Morris's appeal and affirmed the punitive damages verdict.⁶²

Philip Morris petitioned the United States Supreme Court for certiorari again on two issues:

1. Whether, after this Court has adjudicated the merits of a party's federal claim and remanded the case to state court with instructions to "apply" the correct constitutional standard, the state court may interpose - for the first time in the litigation - a state-law procedural bar that is neither firmly established nor regularly followed.
2. Whether a punitive-damages award that is 97 times the compensatory damages may be upheld on the ground that the reprehensibility of a defendant's conduct can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm.⁶³

The Supreme Court granted certiorari but limited it to the first issue.⁶⁴ Oral argument took place on December 3, 2008, but on March 31, 2009, the Court dismissed the petition as improvidently granted in a one-sentence per curiam order.⁶⁵

III. TROUBLES WITH WILLIAMS

Justice Breyer offered two arguments for the statement that it is a violation of due process to permit the jury to punish the defendant for injuring nonparties, but neither is persuasive. The first is that Philip Morris ought to be able to defend itself against the charges that it has caused injury to nonparties, and their nonparty status renders this procedurally infeasible. The problem with this superficially plausible complaint is that, while the right to defend oneself against the charge of having wronged another by litigating against the alleged victim is highly relevant if the issue involves liability for the costs of that victim's injury, the reason for that appears to be the relevance of the connection between the defendant's wrongful conduct and the victim's alleged damages. The existence of the harm goes to damages and requires litigating against the victim; the connection between the wrongdoing and the harm is an issue of causation, and again requires the victim. The entitlement of the victim to shift these costs is under attack when affirmative defenses are being considered and again requires litigating against the victim. But all of these appear irrelevant if the issue is whether the defendant should be punished for the wrongdoing rather than whether the defendant should be held responsible for the harm inflicted upon the plaintiff. Perhaps the most powerful proof of this point is that a crime victim is not a party to a criminal prosecution.

The second argument is that the number of nonparties and the extent of their harm is too vague for due-process standards, and therefore the defendant cannot be punished for the harm to nonparties. But then it is entirely perplexing why the number of nonparties and extent of harm should be permitted to come in under the guise of reprehensibility. If punishment can be extended for added reprehensibility, and number and extent of harm is a permissible basis for inferring added reprehensibility, then the same vagueness problem exists.

There are other problems with the Court's opinion in *Philip Morris*, and they exist at many levels. For one thing, although the Court does acknowledge that some of its earlier decisions—including *BMW v. Gore*—appear to treat the inclusion of nonparty harm as an entirely normal and unobjectionable aspect of state tort law, it does so almost grudgingly, making little effort to be candid about the mixed messages of prior decisions or about the need for an increasingly pro-defendant line on this point. The larger concern on this point is a federalist one: inclusion of nonparty harm frequently is a feature—and an accepted feature—of state tort law of punitive damages; the better entrenched, utilized, and recognized an aspect of state tort law, the higher the demand for a genuinely thought

60. *Williams v. Philip Morris, Inc.*, 176 P.3d 1255 (Or. 2008).

61. *Williams*, 176 P.3d at 1261 (quoting *Beglau v. Albertus*, 536 P.2d 1251 (Or. 1975)).

62. *Id.* at 1263-64.

63. Philip Morris's Petition for Certiorari in *Philip Morris USA v.*

Williams, 2008 WL 795148 (March 24, 2008).

64. *Philip Morris USA v. Williams*, 128 S. Ct. 2904 (June 9, 2008) (granting certiorari on first issue only).

65. *Philip Morris USA v. Williams*, 129 S. Ct. 1436 (March 31, 2009) (per curiam).

through constitutional basis for deeming it impermissible.

Perhaps the largest problem is whether the Court has a genuine basis for its subtle distinction between the impermissibility of increasing punitive damages because one is punishing for injuries to nonparties and the permissibility of increasing punitive damages because the harm to other parties displays added reprehensibility of the conduct that injured the plaintiff. Justice Stevens openly displayed complete disbelief on this point, and leading commentators have shared this assessment.⁶⁶

Justice Breyer anticipated Stevens's criticism, but neither of his responses to it is persuasive. One is that recidivists can be punished more seriously because of prior conduct that is not part of the particular crime at issue; the prior wrongful conduct seems, in some sense, to be a ground for deeming the reprehensibility level to be higher.⁶⁷ This is an unhelpful point because the prior conduct will have been subjected to appropriate procedural safeguards, unlike that which is permitted in the punitives context. More helpful, it seems, is Breyer's recognition that

[e]vidence of actual harm to nonparties can 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—although counsel may argue in a particular case that conduct resulting in no harm to others nevertheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.⁶⁸

The problem is that Breyer's distinction seems to become unimportant, to the point of triviality, in certain contexts, and *Williams*—indeed, most punitive damages cases involving large manufacturers—involves exactly that context. If the defendant's knowledge or tortious marketing of a dangerous product to a large group is in question, then the magnitude of the risk generated by that marketing campaign is relevant to the reprehensibility of the marketing campaign. So long as the number of people injured can be used to demonstrate the magnitude of the risk generated, then the number of people injured can be used to demonstrate the reprehensibility of the conduct. Moreover, punishing the defendant for conduct that was particularly reprehensible because it generated such a high amount of risk—and showing that by indicating how many people were injured—appears only marginally different than punishing them for injuring the others. After all, one might think, what

we are really punishing when we punish for injuring people is the conduct that injured the people, not the fact of their having been injured. If the conduct that injured or killed the plaintiff was the conduct that injured all of these others, and that conduct was more reprehensible because of its demonstrated potentiality to injure others, then its having injured others is going to come into the reprehensibility analysis.

Although lower courts will soon be forced to deal with the problems inherent in *Williams*'s lack of clarity, they have not thus far faced huge challenges. That is due largely to a peculiar and perhaps intentional feature of the Court's decision in *Williams*: while it crafted a potentially broad due-process right of defendants to be judged by properly instructed juries, the Court included language that could be interpreted as suggesting there would be no violation of such a right *unless the defendant had proffered an appropriately protective jury instruction which the lower court wrongly rejected*.⁶⁹ If this is so, then for any appeal based on litigation before *Williams* there is unlikely to be any viable due-process claim unless the defendant at the time of trial anticipated the Court's ruling in *Williams* and proposed jury instructions suited to this anticipated decision. Unsurprisingly, this rarely occurred. Hence, a number of cases appealed since *Williams* have been affirmed on the ground that no proper jury instruction was requested by the defendant.⁷⁰

The protection of plaintiffs stemming from pre-*Williams* requests for jury instructions will only last so long, of course. Indeed, today's defense lawyers are bound to be offering a wide variety of *Williams*-crafted jury instructions and motions more generally, some dictated by incontrovertible readings of the opinion, some by more aggressive and pro-defendant readings. At a minimum, courts are to instruct a jury, at least when requested, that when nonparty harm is used for reprehensibility, the jury must be cautioned not to punish the defendant for causing nonparty harm. Part IV, which follows, sketches an explanation of what this could mean and why it is justifiable.

At a minimum, courts are to instruct a jury, at least when requested, that when nonparty harm is used for reprehensibility, the jury must be cautioned not to punish the defendant for causing nonparty harm.

66. See, e.g., Keith N. Hylton, *Reflections on Remedies and Philip Morris v. Williams*, 27 REV. LITIG. 9, 30 (2007). But see Mark A. Geistfeld, *Punitive Damages, Retribution, and Due Process*, 81 S. CAL. L. REV. 263 (2008) (offering an entirely different way of justifying the Court's effort to split these issues).

67. *Williams*, 549 U.S. 346, 357 (citing *Witte v. United States*, 515 U.S. 389 (1995)).

68. *Id.* at 355.

69. *Id.* at 357 (“where the risk of that misunderstanding is a significant one—because, for instance, of the sort of evidence that was

introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk.”). The words “upon request” may create the impression that there is a requirement of a request of some sort of precaution. However, in just the prior sentence the Court had indicated a broader-sounding duty: “state courts cannot authorize procedures that create an unreasonable and unnecessary risk” that juries will punish defendants for injuring nonparties under “the rubric of reprehensibility.”

70. See Part VI.B, *infra*.

We must begin with the reality that punitive-damages awards in virtually every state today can, and often do, involve a compound of different legal principles

IV. A THEORETICAL FRAMEWORK FOR THE NONPARTY HARM RULE

A. COMPOUND THEORIES OF PUNITIVE DAMAGES

In order to understand the constitutional scrutiny of punitive damages, one needs to begin with an insight that is cogent and plausible from an intuitive point of view and yet patently false from the point

of view of constitutional doctrine:

Simple public-sanction/private-damages dichotomy:

Since punitive damages involve the state's imposition of a punitive sanction upon a defendant for an especially wrongful act, punitive damages are properly subjected to whatever heightened level of constitutional scrutiny is applicable to state punishments and punitive sanctions for wrongful conduct.

There is substantial legal plausibility to the idea that punitive damages are enough like punishments that the constitutional safeguards provided to criminal defendants should be applied to defendants facing claims for punitive damages by private plaintiffs. Indeed, in the years preceding the Court's early decisions on punitive damages, a small but significant cluster of analytically impressive articles made essentially that point.⁷¹ But every judge and lawyer should also see that the Supreme Court has never adopted this view, and has, in fact, adopted a civil framework for understanding punitive damages that does not demand criminal procedural safeguards. Moreover, the Supreme Court (like the overwhelming majority of state courts) seems to have looked the quasi-criminal aspects of punitive

damages straight in the eye and decided that while they might be something of a civil/criminal hybrid, they shall be regarded as civil damages for constitutional purposes.⁷² And so it is natural to reject the public-sanction/private-damages dichotomy as the foundation for analyzing the constitutional status of punitive damages, putting to an end the hope that such a simple observation will really clarify matters.

In recent years, I—and a handful of other scholars of torts, legal history, and constitutional law, including Judge Guido Calabresi and Professors Colby, Goldberg, Markel, and Sebok—have decided to give the public-sanction/private-damages dichotomy a second look.⁷³ I believe the results have been fruitful, and lead, somewhat surprisingly, back to this simple idea as the way to understand the constitutional status of punitive damages. But the idea cannot remain quite so straightforward if it is to withstand serious evaluation, and indeed there is a variety of different academic accounts of punitive damages, each with its own complications. However, the gist of the analysis can be stated quite simply.

We must begin with the reality that punitive-damages awards in virtually every state today can, and often do, involve a *compound* of different legal principles: they frequently embody *both* a state-imposed sanction *and* a private-damages award intended as part of the remedy to which the injured plaintiff is entitled.⁷⁴

Second, the idea that a punitive-damages award offers a means of deterring corporate actors from engaging in public wrongs is largely a development of the twentieth century, and—while it may have been well-motivated—can nevertheless be understood as a graft of something foreign onto the traditional common-law conception of punitive damages, not within the core notion of punitive damages before that time.⁷⁵ By contrast, the notion of permitting a private plaintiff to be vindicated by allowing her to exact damages beyond what is needed to make herself whole when she was wronged in a particularly willful or wanton manner lies at the common-law core of punitive damages.⁷⁶ While both of these ideas are

71. 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 (1988); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986); Calvin A. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233 (1987); Malcolm A. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983).

72. In *Haslip*, Justice Blackmun wrote for himself, Chief Justice Rehnquist, and Justices White, Marshall, and Stevens: "It is true, of course, that under Alabama law, as under the law of most States, punitive damages are imposed for purposes of retribution and deterrence. [] They have been described as quasi-criminal. [] But this itself does not provide the answer." *Haslip*, 499 U.S. 1, at 19 (citations omitted).

73. Zipursky, *supra* note 11. Sebok's work and my conversations with him over the years regarding punitive damages have had an especially significant impact on my views on this subject. See Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007). See also Guido Calabresi, *The Complexity of Torts—The Case of Punitive Damages*, in *EXPLORING*

TORT LAW 333 (M. Stuart Madden ed., 2005); Colby, *supra* note 12; Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual Private Wrongs*, 87 MINN. L. REV. 583 (2003); John C. P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435 (2006); Dan Markel, *supra* note 12; Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 279 (2009); Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages are Unconstitutional*, 33 EMORY L. J. 1 (2004); Benjamin C. Zipursky, *Civil Recourse, not Corrective Justice*, 91 GEO. L. J. 695 (2003); Benjamin C. Zipursky, *The Philosophy of Private Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 623 (Jules Coleman & Scott Shapiro eds., 2002).

74. Zipursky, *supra* note 11, at 129-34 (describing "double aspect" of punitive damages). Accord Dan B. Dobbs, *THE LAW OF TORTS* 1063 (2000) ("Punitive damages raise unique problems. Sometimes they resemble criminal fines, sometimes civil damages.").

75. Goldberg, *supra* note 73.

76. *Id.* Zipursky, *supra* note 11, at 151-55. Sebok, *supra* note 73, at 983-1008.

about *being punitive and deterring powerful actors by communicating that they will be held accountable*, the more traditional one is really intended predominantly to supplement the private redress to which a victim is normally entitled, while the more modern notion is intended to supplement state enforcement efforts by adding sanctions through tort law. I will refer to the former, more traditional model, as “the private-redress model” and the latter, more modern one, as “the public-sanction model.”

The third point is that the private-redress model is on a different constitutional footing than the public-sanction model both as a historical matter and as a political theoretic matter. Professor Colby’s version of this point was sufficiently powerfully made to attract the attention of the Fifth District Court of Appeals in California.⁷⁷ Historically, the “grandfathering” of punitive damages under the Due Process Clause makes some sense if the phrase “punitive damages” today refers to the same principles and forms of law that existed when the clause was ratified; it makes little sense if it is entirely different legal creature hiding behind the same words.⁷⁸ And as a political theoretic matter—as I have argued at length elsewhere—the state’s involvement when it is exacting damages from an individual in order to empower the victim of a wrong is quite different than when it is doing so as a matter of sanctioning actors for violating state-created legal rules of conduct. It is justifiable that our requirements of due process are different, and more modest, when the state is playing its role in facilitating a plaintiff’s efforts to achieve private redress than when it is imposing sanctions albeit through the efforts of private parties.⁷⁹

The most striking difference in constitutional safeguards has to do with notice of which conduct will warrant state sanction and which sanction, or range of sanctions, the defendant will be subjected to. Criminal law has exacting versions of such standards;⁸⁰ the common law of torts is evolutionary, incremental, and depends on individual damages awards, and our constitutional system has always deemed that adequate.⁸¹ Regulations lie in-between; substantial notice of the nature of conduct prohibited and the magnitude of the sanctions is required.⁸² State law that fails this test is void for vagueness. Thus, where the state is doing public-sanction imposition without adequate delineation of prohibited conduct or range of permissible sanctions (thereby granting the jury too much discretion to impose a monetary penalty), there is a procedural due-process problem.⁸³

B. THE NONPARTY-HARM RULE AS A PUBLIC SANCTION DETECTION TEST

In every jurisdiction that has what I am calling “compound” punitive-damages law, different verdicts may embody quite different proportions (so to speak) of the two models, and some do so quite clearly while others remain quite ambiguous. Even where a jurisdiction openly embraces a public-sanction justification for its punitive-damages law, it may well be that jurors in a particular case are conceiving the punitive damages on a private-redress model. Conversely, in jurisdictions in which courts have not gone out of their way to direct jurors to a public-sanction model, plaintiffs’ lawyers and the narrative of the litigation may have done effectively the same thing, and in such cases, the state’s enforcement of a judgment on a jury verdict must be understood as involving the public-sanction model. *BMW v. Gore* was such a case, as I have argued elsewhere.⁸⁴ Other cases are quite ambiguous. In these, it is clear enough that the jury wished the defendant to be deterred as well as wishing the plaintiff to be afforded greater redress. But it is not clear whether the legal system is essentially imagining giving the plaintiff a higher verdict in order that she or he be empowered to exact damages because of the wrong to her or him or whether the jury is understanding the state to be, in effect, kicking in its own public-sanction system, regardless of whether the victim is entitled to that redress.

The constitutional status of the award turns on this. If the state is simply empowering a private plaintiff to exact greater damages in order to recognize a heightened level of redress, there is no ground for altering the constitutional scrutiny to which defendant is entitled from that which state tort law ordinarily provides. However, if the plaintiff’s lawsuit is in part a vehicle for the state to impose its own public sanctions, then greater constitutional safeguards are in order. That is the constitutional defect.

The framework just elaborated raises a critical question in a wide swath of cases: Is the verdict part state-imposed public sanction or not? If it is, and the state supplied only its usual process for tort plaintiffs, then the process was constitutionally inadequate. If not—if the entire verdict could plausibly be

There are four different kinds of frameworks that a court asked to do constitutional review of punitive damages might adopt.

77. See *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793 (Ct. App. 2003) (applying Colby’s theory). The California Supreme Court expressly rejected Colby’s theory in reversing a case similar to *Romo*. See note 98, *infra*, for further discussion.

78. Zipursky, *supra* note 11, at 143; Colby, *supra* note 73, at 650.

79. Zipursky, *supra* note 11, at 164-68.

80. See, e.g., *Kolender v. Lawson*, 462 U.S. 352 (1983); *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982).

81. *Haslip*, 499 U.S. 1, 17-18 (1991) (Blackmun, J.).

82. *Hoffman Estates*, 455 U.S. at 498-500. See, e.g., *Diversified Numismatics, Inc. v. City of Orlando, Florida*, 615 F. Supp. 141

(M.D. Fla. 1985).

83. *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *BMW*, 517 U.S. at 587 (Breyer, J., concurring); *Haslip*, 499 U.S. at 42-48 (O’Connor, J., dissenting). Justice O’Connor referred to this as a “void-for-vagueness” problem; the phrase may seem superficially awkward because, in most states, there is no statute governing punitive damages imposition (and, *a fortiori*, no statute whose wording is too vague). But so much the worse, of course, for the alleged ground of the public sanction—there is not even a statute.

84. Zipursky, *A Theory of Punitive Damages*, at 161-64.

**In short, a
“public-sanction
detection test”
is needed.**

understood as simply private redress—then there is no need, as a constitutional matter, for better defined constraints on conduct definition or sanction levels. The answer to the question therefore determines

whether there is a procedural due-process problem.

There are four different kinds of frameworks that a court asked to do constitutional review of punitive damages might adopt. The simplest would be to assume, in a spirit of deference to state courts and anxiety about drawing the distinction, that all punitive damages should be understood to be more or less exclusively a version of what was contemplated in the common law of the nineteenth century: as a part of individual private redress (albeit sometimes aimed at deterrence or making an example of a defendant). In this case, there would be no basis for constitutional review, at least on the analysis offered. The dissenters in *BMW* appear to have favored this view.

The polar opposite approach would be to assume that *no* punitive-damages awards in today’s legal system are exclusively of the private-redress type. On that view, all are to that degree in need of greater process than they receive. Justice O’Connor’s *Haslip* dissent can be interpreted as taking this view. Had it been adopted by the majority in *Haslip*, it would have entailed an immediate crisis of constitutionality for punitive damages in every jurisdiction.

If neither of these extremes is selected, then what is needed is an intermediate position that would require the Court to articulate a criterion or criteria for determining whether a given award should be understood as, at least in part, a public sanction. In short, a “public-sanction detection test” is needed. Here again one is faced with a choice: should the criteria be *facial* or *contextual* or a combination of the two? By “facial” (in this context) I mean that a court could take stock

of concrete changes that have been made in various jurisdictions in the structure of their punitive-damages law as possible grounds for an across-the-board recategorization of the awards in that state. Thus, for example, a state’s decision to funnel punitive-damages awards to the state revenue would be a strong basis for inferring that all of the awards in that state are conceived of as, at least in part, public sanctions; in this scenario, all should be subject to void-for-vagueness scrutiny.⁸⁵

A *contextual* public-sanction detection test, by contrast, would aim to evaluate the evidence presented to the jury, the narrative presented to the jury, the instruction of the jury by the Court, and the verdict the jury arrived at. This evaluation would help ascertain whether the jury’s damages award is plausibly understood as simply a judgment by the jury of what the plaintiff was entitled to exact from the defendant as a matter of private redress for the wrong done to him or whether it must be understood, at least in part, as the delivery of a public sanction. If the result is the latter, then the award violates due process because the tort process fails, on void-for-vagueness grounds, to comply with what the Constitution requires of public sanctions.

The nonparty-harm rule of *Williams* may be seen as a contextual public-sanction detection test. Where the jury is asked to punish the defendant for harm to nonparties, the punitive damages are plainly aimed as something beyond redress for the injury done to the private plaintiff. They are specifically about the injury done to others, not the injury done to the plaintiff. Thus, we must infer that the award is intended in part as a public sanction. But if this is so, then the tort process is not enough, and there is a procedural due-process violation.⁸⁶

The Court in *Williams* was interestingly misled by the procedural soundness of the nonparty-harm rule to think that the procedural defect was the very same attribute that made the punitive-damages award detectable as a public sanction: the additional, nonjoined persons whom the plaintiff is alleging

85. Cf. Paul Rietema, *Reconceptualizing Split-Recovery Statutes After Philip Morris v. Williams*, 127 S.Ct. 1057 (2007), 31 HARV. J.L. & PUB. POL’Y 1159 (2008) (noting ways of re-interpreting split-recovery statutes so as to avoid inference of unconstitutionality but indicating strong argument for unconstitutionality after *Williams*).

86. Because the foregoing analysis obviously seizes upon a void-for-vagueness procedural due-process critique of punitive damages, it may seem to be inconsistent with current Supreme Court doctrine. After all, the Court’s opinion in *Haslip* expressly rejected a void-for-vagueness challenge. Only Justice O’Connor was willing to embrace the void-for-vagueness critique.

Reading too much significance into the 8-1 ruling in *Haslip* is a mistake of black-and-white thinking. The framework I have laid out contemplates that not all punitive damages awards fall into the same constitutional category. That is, of course, just the point. While there are some punitive damages awards that are fairly viewed as purely a matter of private redress, there are others that are not fairly so viewed and those must be viewed as, at least in part, public sanction. The *Haslip* Court did not reject this view; it did not even address this question. There is no reason to attribute to those Justices an opinion on whether punitive damages can be viewed as coming in different types and whether, if so, some of the types should be subject to a different level of scrutiny than that

which eight Justices deemed appropriate in *Haslip*.

The proposal here is that five Justices in the *Williams* majority can be understood as implicitly setting forth conditions on when they will be willing to indulge the *Haslip* majority presumption that punitive damages are operating as private redress, and when they will no longer be willing to indulge that presumption, and will, instead, treat punitive damages as public sanctions. Notably, two of the Justices who joined the Court’s opinion in *BMW*—Souter and (again) O’Connor—embraced the discretion-curbing conception of due process as applicable to punitive damages awards in Justice Breyer’s concurrence. Moreover, Justice Kennedy’s majority opinion in *State Farm* displays perhaps the Court’s most vigorous expression to date of concern over the unchanneled discretion applied by the Utah jury to the punitive-damages award in that case and therefore seemed to regard punitive-damages awards as properly susceptible to vagueness-based procedural due-process challenges. Although Justice O’Connor is no longer on the Court, the other three—Justice Breyer, Justice Souter, and Justice Kennedy—were the very three members of the Rehnquist Court whom Chief Justice Roberts and Justice Alito were willing to join. Of the eight Justices voting against the petitioner in *Haslip*, only three remain: Justice Kennedy (who has become an impassioned critic of punitive damages), Justice Stevens, and Justice Scalia. The latter two are, of course, part of the dissent in *Williams*.

were harmed by the defendant and in light of whom extra damages ought to be imposed. That was a mistake. The non-joinder of nonparties simply makes it clear that the state is imposing damages on defendant for injuring someone *but not as a matter of permitting the victim/plaintiff to redress the wrong to her*; it follows that the state is permitting the imposition of damages as a state-imposed sanction, not as private redress. But once we know that, we know there are more fundamental procedural due-process violations, viz., those sounding in void-for-vagueness doctrine.

C. THE REPREHENSIBILITY CRITIQUE REVISITED

Let us now turn to the “reprehensibility” critiques, both theoretical and practical. The theoretical critique said that it was incoherent to forbid inflation of punitive damages on a one-step route in which the defendant is punished for injuring nonparties, while simultaneously permitting punitive-damages inflation on a two-step reprehensibility route. On the two-step route, the jury is permitted to inflate punitive damages in light of the added reprehensibility of defendant’s conduct, and it is permitted to find the defendant’s conduct more reprehensible because the defendant injured nonparties. Either way, injuring nonparties leads to greater punitive damages, the argument goes.

The critique is easily met on the public-sanction-detection-test theory. Reprehensibility is relevant to punitive damages both within the private-redress model and within the public-sanction theory, but a threshold question must be answered either way: which of the defendant’s allegedly reprehensible acts is the jury to be evaluating? Trivially, the answer is this: whichever act is the basis of defendant’s liability is the act whose reprehensibility is to be evaluated for punitive damages. The reprehensibility evaluation on the public-sanction model targets whatever acts the defendant is being sanctioned for. The sanction can be imposed for injury to nonparties, or even for conduct that is considered only on the basis of its potential (but unrealized) impact, not its actual impact. For example, inchoate crimes including attempts and conspiracy can be penalized, so can the act of risking injury to a wide range of people. By contrast, on the private-redress model, the focus is much narrower: the act whose reprehensibility is to be evaluated is the wronging of the plaintiff. It is the latter that should guide the reprehensibility analysis given the logic ascribed to the majority in *Williams*.

Contrary to what Justice Stevens asserted, then, harm to nonparties is not directly relevant to the reprehensibility analysis. Although harm to nonparties might be directly relevant on the public-sanction model, it is not directly relevant on the private-redress model, and the latter is what should count. If it is relevant at all on the private-redress model, it is indirectly relevant. Greater injury to nonparties can display greater riskiness, which in turn could entail greater reprehensibility. But we need to be more careful here because the act of risking is not the basis of liability; *the act of tortiously injuring* is the basis of liability. Does the reprehensibility of the tortious injuring of the plaintiff change depending on how risky the conduct was and how many others were injured? Perhaps. If, for example, a defendant sold a product knowing full well that the same product had killed hundreds of people in the past, that action is more reprehensible than selling a product that occasionally

has caused some health problems. Prior injury to nonparties, if the defendant knew of it or remained willfully blind to such injuries, is evidence that the defendant recklessly injured the plaintiff, rather than negligently doing so, for example. Indeed, actual or constructive knowledge of prior injury to nonparties is grounds for ratcheting up the reprehensibility of the manner in which the defendant injured the plaintiff.

Evidence of non-party harm will often be probative of several issues in a tort action, and when that is true, it should normally not be excluded.

On the other hand, concurrent or subsequent injury to nonparties will typically not be relevant to the reprehensibility of the defendant’s conduct under the private-redress model. Ordinarily, it will not tend to show any greater degree of recklessness or indifference in the risks that the defendant was taking toward the plaintiff when the defendant tortiously injured him. For the same reason, past injuries of which the defendant neither was aware nor should have been aware will not ordinarily be relevant to the reprehensibility of the defendant’s wronging of the plaintiff. The reprehensibility of the defendant’s injuring of the plaintiff does not lie in the riskiness of the conduct per se but in the riskiness willfully or recklessly undertaken.

For related reasons, there are some cases in which the reprehensibility concept within the private-redress model will not justify admitting evidence of prior nonparty harm and will not justify attention within a jury instruction. If the defendant has already admitted knowledge of the degree of riskiness of the conduct in question or if the evidence of prior nonparty harm does not in any way add to the extent of evidence on that issue, then the defendant may well have a sound argument for excluding such evidence. It is not simply its duplication that might warrant exclusion, but also the risk that it will be considered for the wrong reasons altogether; that defendant will be punished for injuring nonparties. If that is occurring, then punitive damages are functioning as a public sanction, and less deferential standards of process are applicable; the law is void for vagueness.

Evidence of nonparty harm will often be probative of several issues in a tort action, and when that is true, it should normally not be excluded. In some of these scenarios, it might be appropriate to caution the jury not to punish for harm to nonparties, but it would be unnecessary or even confusing in others. Imagine, for example, that a certain plaintiff is suing a defendant pharmaceutical manufacturer alleging the product caused him to develop heart disease. In most jurisdictions, the standard for design defect requires the jury to perform a risk/utility test regarding the products design (as compared to alternative designs). In this context, it might well be permissible for the plaintiff to introduce evidence that the design feature that causes heart problems has also caused birth defects when a woman taking the product becomes pregnant. The harm to infants who are in no way related to the litigation is therefore relevant to liability. Whether the jury is likely to consider such evidence in imposing punitive damages without a

caution is questionable, given that the harmful effect he suffered is quite different. Similarly, evidence of others suffering heart disease from a drug with the same chemical makeup might well be relevant to general causation (*i.e.*, this compound can cause this disease), even if the drug were made by a different manufacturer. Again, nonparty harm is probative, but there is little chance the defendant would be punished for harm caused by another manufacturer if that harm were only introduced for showing general causation. A cautionary instruction might be unnecessarily confusing or counterproductive as it may suggest a line of inference that would not have crossed the jury's mind in the first place.

By contrast, suppose that there is evidence that this manufacturer's drug caused prior injuries to nonparties, introduced to show general causation, design defect, and awareness of the risks of the drug. Here, the jury might well be drawn to punishing for the injury to nonparties, and more generally to punishing for the risky course of conduct. It should be cautioned that it is relevant to punitive damages only to the extent that it bears on the reprehensibility of the defendant's injuring the plaintiff through this course of conduct.

On rare occasions, there may be cases in which harm to nonparties—even concurrent or subsequent harm to nonparties—would be relevant in a quite different way to the reprehensibility of the defendant's conduct; in the cases I am envisioning, harm to nonparties might be probative of what it is the defendant actually did. Thus, for example, suppose the defendant surreptitiously put some alcohol in a punch that he believed the unsuspecting plaintiff would drink at a social event, and plaintiff was hospitalized after drinking the punch. Imagine that the defendant and the plaintiff dispute how great a risk the defendant was taking for the plaintiff (and therefore how reprehensible his injuring of her was). Under these circumstances, a relatively high number of other involuntarily intoxicated event attendees who drank the punch would be indirectly relevant to the reprehensibility of defendant's conduct toward the plaintiff, because it would shed light on how much alcohol defendant had put in the punch, and, in turn, how great a risk to the plaintiff the defendant had deliberately taken.

V. MODEL JURY INSTRUCTIONS AFTER WILLIAMS

The Model Jury Instructions published in several states and circuits have made an effort to incorporate the lessons of *Williams*. Below is a sampling from Ohio, California, and the United States Court of Appeals for the Eighth Circuit.

Ohio's Model Jury Instructions—as updated in August of 2008—include the following:

6. DAMAGES TO NON-PARTIES (ADDITIONAL).

Evidence was introduced that (*insert name of defendant*)'s conduct has resulted in harm to persons other than (*insert name of plaintiff*). This evidence may only be considered for the purpose of helping you decide whether (*insert name of defendant*) showed a conscious disregard for the rights and safety of other persons that had a great probability of causing substantial harm. However, you

are not to punish (*insert name of defendant*) for the direct harm his/her/its alleged misconduct caused to other persons.⁸⁷

California's are quite different:

In arriving at any award of punitive damages, consider the following factors:

- (1) The reprehensibility of the conduct of the defendant;
- (2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition;
- (3) That the punitive damages must bear a reasonable relation to the injury, harm, or damage [actually] suffered by the plaintiff.

[The phrase "injury, harm, or damage" includes not only that actually caused by the defendant's conduct but also potential injury, harm, or damage caused by the defendant's wrongful conduct.]

[If you find that defendant had a practice of engaging in, and profiting from wrongful conduct [occurring in California] similar to that which injured the plaintiff, that evidence may be considered in deciding the issues of reprehensibility, whether punitive damages should be assessed, and if so, the amount of punitive damages to be awarded. Do not include in your award of damages any sum that represents damages for injuries to any person other than the plaintiff[s].]⁸⁸

The Eighth Circuit's Instructions read in part:

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. how [reprehensible] [bad] [offensive] the defendant's conduct was. In this regard, you may consider whether the harm suffered by the plaintiff was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether others were harmed by the same conduct of the defendant that harmed the plaintiff; and whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff;
2. how much harm actually resulted to the plaintiff, [but not to others,] from the defendant's wrongful conduct [and not from the defendant's general conduct];⁸⁹

The Model Jury Instructions published in several states and circuits have made an effort to incorporate the lessons of *Williams*.

87. 1 Ohio Jury Instructions 23.71 (2006) (2008 update).

88. Cal. Jury Instr.—Civ. 14.71 (Spring 2008).

89. Model Civ. Jury Instr. 8th Cir. 4.50C (2005) (2008 update).

Of the three instructions offered here, Ohio's is clearly the closest to the theoretical model proposed in this article.

One thing that can be said in favor of all of these model instructions is that they are less confusing than that which Philip Morris proffered in *Williams*, which read in part: “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.”

While Justice Stevens was probably right to point out the great (and perhaps elusive) nuance of the distinction between punishing for harming others (which is impermissible, according to the majority) and finding greater reprehensibility because of harm to others (which is permissible), that distinction was not really the principal problem of Philip Morris’s instruction. The problem was that these issues were further entangled by the concept of a “reasonable relationship” between the punishment of Philip Morris and the harm to Jesse Williams. Presumably, Philip Morris was conceding that the damages could be greater where there was greater reprehensibility but was trying to insist that the relationship to actual harm (ratio) must remain reasonable. However, that message is itself quite complicated. Merging that idea with the subtle distinction noted by Justice Stevens was simply too confusing. All three of the model instructions quoted above avoid that pitfall. California’s even manages to do so while retaining the concept of a “reasonable relationship,” prudently set forth in a different portion of the instruction.

None of the instructions set out above is patently in conflict with the Supreme Court’s decision in *Williams*; indeed, all three are plainly designed to conform to *Williams*, and all three do conform to what might be called “the letter of *Williams*.” Whether they conform to the spirit of *Williams* is a question that cannot really be answered without the imposition of a the-

oretical framework upon the quite sparse majority opinion. From the perspective of the framework put forth in this article, all three are vulnerable to criticism.

The Eighth Circuit describes a very broad domain of conduct that may be considered with regard to the reprehensibility of the defendant’s conduct. There is no limitation on where the conduct took place. Past and subsequent conduct is included. It is permissible to include harm to others in considering reprehensibility, but there is no effort by the Eighth Circuit to specify the reasons that this is relevant to reprehensibility.

California’s instruction is both better and worse on this question. It is (arguably) better because only conduct in California is to be considered and because harm to others is not specifically mentioned as relevant (which reduces confusion). It is worse, however, because the jury is told that they are entitled to consider the question of whether there is a pattern of conduct by defendant. This suggests two quite concerning points: first, that the wrongs-to-others point is not being used to ascertain the level of risk generated by the act that injured plaintiff—Justice Breyer’s explanation of why it is relevant to reprehensibility; second, that the wrongs-to-others point is being used to invite the jury to punish the defendant for a RICO-like “pattern of conduct” rather than for the particular act or acts that injured the plaintiff. In short, it actually looks more like an instruction directing the jury to punish in the spirit of a “public sanction.”⁹⁰

Of the three instructions offered here, Ohio’s is clearly the closest to the theoretical model proposed in this article. It also appears to be the shortest, the clearest, and the most likely to be digestible and helpful to juries: Evidence of harm to others cannot be the basis of extra punishment but can only be considered to help the jury decide whether the defendant “showed a conscious disregard for the rights and safety of other persons that had a great probability of causing substantial harm.”⁹¹ But it, too, is not beyond reproach. It does not mention risk itself but only conscious disregard of risk; while the theoretical model introduced here suggests this is a more defensible view, the view is farther, not closer, to what the Court’s opinion actually says. Relatedly, defense lawyers might argue from this instruction that jurors should not be permitted to consider injuries incurred by nonparties of which the defendant was not aware (or could not have been aware) prior to the conduct that injured the plaintiff; whether Ohio intended such a restrictive approach (which this article would likely favor, but the Court has not indicated) is unclear. Moreover, the instruction does

90. It is also of concern that the California instruction tells the jury that:

(3) That the punitive damages must bear a reasonable relation to the injury, harm, or damage [actually] suffered by the plaintiff.

[The phrase “injury, harm, or damage” includes not only that actually caused by the defendant’s conduct but also potential injury, harm, or damage caused by the defendant’s wrongful conduct.]

It is true that punitive damages must bear a reasonable relation to the injury harm, or damage suffered by the plaintiff, and it is true that the jury can consider the potential injury, harm, or damage caused by the defendant. But the conjunction of these two is,

at a minimum, highly misleading, and is almost certainly incorrect. It seems self-evident that part of the reason for instructing the jury on “reasonable relationship” is that under both *BMW* and virtually every jurisdiction’s common law of excessiveness on punitive damages, the ratio of punitive damages to compensatory damages is a consideration in assessing the permissibility of the award; “reasonable relationship” is a rough version of what courts think about when they assess the ratio. If that is so, however, then potential harm should stay out of the picture for it is clearly not what the higher courts—especially the Supreme Court—are including in the ratio assessment.

91. 1 Ohio Jury Instructions 23.71 (2006) (2008 update).

not indicate whether harm to others should be considered where the plaintiff's theory is that the defendant's conduct was intended to cause injury to the plaintiff; in such instances, punitives would be available but evidence of conscious disregard would seem irrelevant.

VI. POST-WILLIAMS CASE LAW: A CRITICAL DISCUSSION

While hundreds of courts have cited to *Williams*, far fewer courts have actually applied it, and fewer still have applied it with any care. This section reviews a (concededly unsystematic) selection of published decisions that apply *Williams*, subdividing the cases into the four topics that appear to be most worthy of attention: (1) whether the failure to provide a cautionary instruction of the sort favored by the *Williams* Court has generated a reversal, remand, or remittitur; (2) whether waiver and forfeiture arguments based on failure to proffer an adequate instruction will defeat a *Williams*-based appeal; (3) how courts treat the relationship between nonparty harm and reprehensibility; and (4) whether the Supreme Court's analysis of due process and punitive damages is perceived by lower courts as a relatively minor or a relatively major development for state punitive-damages law.

A. STRAIGHTFORWARD REVERSAL AND REMAND

*Bullock v. Philip Morris USA, Inc.*⁹² represents the post-Supreme Court victory that Philip Morris thought it should obtain in Oregon. As in the trial court in *Williams*, counsel for Philip Morris drafted a proposed jury instruction that cautioned the jury that it may not punish for harm to nonparties but may punish for reprehensibility. As in *Williams*, the trial judge refused the instruction, and the jury came in with a very large verdict. Philip Morris took the Supreme Court's *Williams* opinion and used it to demand of the appellate court that the jury verdict be vacated in light of an improper refusal to give the proffered jury instruction, which seemed to track the principles laid out by the Court. Unlike the Supreme Court of Oregon, however, the California Court of Appeals accepted Philip Morris's argument and vacated the jury verdict on the ground that Philip Morris's proposed cautionary instruction ought to have been given. The case was remanded for a new trial on punitive damages.

Ford Motor Company similarly obtained a reversal and remand from a panel of the Ninth Circuit in *White v. Ford Motor Company*.⁹³ In 1994, the plaintiffs' three-year-old son was playing in his father's Ford pickup truck, which was parked facing downhill in the family's sloped driveway. He accidentally knocked the gearshift from first gear into neutral, and the parking brake did not hold. When the boy fell or climbed out of the rolling truck, he fell underneath the truck, which rolled over him and killed him. Based on evidence obtained during discovery documenting a known propensity

for the parking break of this model to slip, leading to the truck rolls that caused damage, the Whites persuaded a jury that Ford should have recalled the truck or warned consumers of this danger, rather than consciously refusing to do either.

After a jury trial on liability, compensatory and punitive damages, a reversal and remand (prior to *Williams*), and a second jury trial on punitive damages, the District Court of Nevada generated a compensatory-damages award of \$2.3 million and a punitive-damages award of \$52 million. In the second trial, the plaintiffs' counsel told the jury that Ford was aware of 54 people who had been injured by rollaways before 1999. Ford objected to the trial court's jury instruction and "requested an instruction that would prevent the jury from punishing it 'in this case not just for the harm to these plaintiffs, but for harm to other plaintiffs, whether in state or out of state.'"⁹⁴ The district court refused to give the proposed instruction. Because of that refusal, the Ninth Circuit panel reversed and remanded with a direction that "the district court must explain to the jury that although evidence of harm to nonparties may bear on Ford's reprehensibility, any award of punitive damages cannot be used to 'punish [Ford] directly for harms to . . . nonparties.'"⁹⁵

Fourteen years after the loss of their son, the Whites are still litigating this case against Ford; in that respect, the Ninth Circuit's decision to remand a second time might seem remarkably accommodating to Ford under the circumstances. Nevertheless, the discussion in this article might also lead to the conclusion that district court, and even the Ninth Circuit, remained too accommodating to the plaintiffs in their treatment of punitive damages even in this last round. It is hard to see why rollover injuries occurring after 1994 should be deemed relevant to Ford's reprehensibility for the purposes of punitive damages, but the district court permitted just this and the Ninth Circuit did not comment upon any problem. Post-*Williams*, defendants in Ford's situation should object to such inclusion. They have nothing to do with the reprehensibility of Ford's wrongdoing of the White child because they occurred after his accident.

B. WAIVED RIGHTS, FORFEITURE OF RIGHTS

There are other straightforward decisions to reverse and remand in light of refused jury instructions since *Williams*, but not many (at least among those in published reporters).⁹⁶ The

It is hard to see why rollover injuries occurring after [plaintiff's injury] should be deemed relevant to Ford's reprehensibility for the purposes of punitive damages

92. 71 Cal. Rptr. 3d 775 (Ct. App. 2008), *rev. denied* (Apr. 30, 2008).

93. 500 F.3d 963 (9th Cir. 2007).

94. *Id.* at 972.

95. *Id.* at 973 (quoting *Williams*, 549 U.S. at 355).

96. See also *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007 (9th Cir. 2007), *infra*.

The Ninth Circuit had no trouble concluding that there was a real risk in this case that the jury punished the defendants for the harm they caused to nonparties.

obvious reason for this is that cases that went to a jury before *Williams* would rarely have featured a defendant who proposed such an instruction at trial.⁹⁷ It is no surprise that Philip Morris did so in *Bullock*, and only slightly more surprising that Ford did so; Philip Morris and Ford have been on the cutting edge of the development of constitutional punitive-damages law at the appellate courts.⁹⁸

Where the defendant did not propose nonparty-harm jury instructions of the right sort, plaintiffs will argue that the right to such an instruction was waived. Indeed, even where the defendant did propose such instructions, plaintiffs are likely to argue (as they did on remand in *Williams*), that the instructions proposed were not quite right and that the trial court's rejection of them does not warrant remand. That is exactly the argument plaintiff Buell-Wilson made against Ford at the California Court of Appeal last year, and the Court of Appeal accepted the plaintiff's argument. Thus, in *Buell-Wilson v. Ford Motor Co.*,⁹⁹ the appellate court expressed its approval of the trial judge's rejection of Ford's proposed Special Jury Instruction No. 21:

In determining the appropriate amount of punitive damages, if any, in this case, you may consider only the harm to the plaintiffs. Any individuals other than the plaintiffs who might claim to have been harmed by Ford have the right to bring their own lawsuit seeking damages for any alleged injuries they may have incurred. Therefore, if you decide to award any puni-

tive damages, your award must be limited to redressing the injuries incurred only by the plaintiffs in this lawsuit.¹⁰⁰

The trial judge was right to reject this instruction, according to the appellate court, because the instruction "did not merely tell the jury it could not impose punishment for harm suffered by third parties. Rather, it told the jury it could not consider third party harm for *any purpose*, including in assessing the reprehensibility of Ford's conduct."¹⁰¹ The instruction ran afoul of *Williams*; indeed, its impermissibility was evident from the Supreme Court's prior decision in *State Farm*. Moreover, it contradicted the trial court's other instructions, which indicated that the jury should consider how reprehensible the defendant's conduct was. In what can be read as a rather harsh comment on what it regarded as overreaching by Ford at trial, the appellate court concluded: "Thus, by proposing an instruction that was an incorrect and misleading statement of law, Ford has forfeited the right to assert instructional error before this court."¹⁰² The California Supreme Court recently dismissed the petition for review and remanded back to the intermediate appellate court.¹⁰³

The defendant Paul Revere Life Insurance Company overcame a similar forfeiture/waiver argument before the United States Court of Appeals for the Ninth Circuit when it sought a *Williams*-based remand in *Merrick v. Paul Revere Life Ins. Co.* The case concerned a large insurance company's alleged bad-faith denial of a plaintiff's disability insurance claim.¹⁰⁴ Although the \$10 million punitive-damages award on top of plaintiff's \$1.65 million compensatory-damages award was not strikingly large, it is nonetheless initially surprising that a *Williams* vacate-and-remand order was hard to procure. The plaintiff's counsel in *Merrick* plainly made the whole case revolve around Paul Revere's alleged large-scale scheme to deal unfairly and in bad faith with claimants and insureds. Moreover, Paul Revere proposed a nonparty-harm jury instruc-

97. In an unpublished opinion, the Tenth Circuit shows a striking lack of concern for a defendant who wished the district court to alter jury instructions based on *Williams*, which had been decided after the briefing before the district court. The defendant's delay of a few weeks in writing a letter to the district court regarding the recently decided *Williams* played a role in the Tenth Circuit's ruling; so, too, did its perception that the ruling in *Williams* was sufficiently telegraphed by *State Farm* to put the defendant on notice that it should request nonparty-harm instructions. *Cook v. Medical Savings Ins. Co.*, 287 Fed. App'x. 657, 2008 WL 2805472 (10th Cir. 2008).

98. Indeed, Ford rather dramatically lost an argument quite like *Williams* in the California Supreme Court, in *Johnson v. Ford Motor Co.*, 113 P3d 82 (Cal. 2005). In *Johnson*, Ford was defending an argument made successfully at the Court of Appeal for the 5th District that a plaintiff may not justify a \$10 million punitive-damages award on a compensatory award of \$17,811.60 by depicting the scope and profitability of the defendant's fraudulent conduct. *Johnson v. Ford Motor Co.*, 37 Cal. Rptr. 3d 283 (Ct. App. 2005). That decision, in turn, applied the reasoning of the same appellate court in *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793 (Ct. App. 2003). *Romo* expressly applied the theoretical analysis of Thomas H. Colby's article, *Beyond the Multiple*

Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs, 87 MINN. L. REV. 583 (2003) [Colby, *supra* note 73]. To summarize: the Court of Appeals for the 5th District followed Colby on a nonparty-harm-type argument in *Romo*; the 5th District applied its own rule in *Johnson*; the California Supreme Court reversed the 5th District, indicating it was not persuaded by Colby or by the idea that the U.S. Supreme Court would adopt a nonparty harm-rule.

Similarly, as *State Farm* indicates, large insurance companies have also played a significant role in pushing this issue at appellate courts; *Merrick v. Paul Revere Life Ins. Co.* is also an unsurprising case in which the defendant proposed a nonparty-harm jury instruction.

99. 73 Cal. Rptr. 3d 277 (Ct. App. 2008).

100. *Buell-Wilson*, 73 Cal. Rptr. 3d at 324 (quoting Ford's proposed Special Jury Instruction No. 21).

101. *Id.* at 326.

102. *Id.* at 326-27.

103. *Buell-Wilson v. Ford Motor Co.*, 187 P3d 887 (Cal. 2008) (granting review but deferring briefing pending the decision of the United States Supreme Court in pending *Williams* petition), *review dismissed, case remanded*, 207 P3d 1 (2009).

104. 500 F3d 1007 (9th Cir. 2007).

tion, which the district court rejected.¹⁰⁵ The Ninth Circuit had no trouble concluding that there was a real risk in this case that the jury punished the defendants for the harm they caused to nonparties. And the court correctly noted that the defendant had made a timely request for a jury instruction to guard against such a risk. However, the court also credited the plaintiff's argument that the proposed jury instruction was misleading because it did not indicate that harm to others may enter the reprehensibility analysis.¹⁰⁶ This meant that the plaintiff had a reasonably good argument that the district court judge was right to reject the proposed jury instruction. Nevertheless, the Ninth Circuit ruled for defendant, reasoning that "where a proposed instruction is supported by law and *not* adequately covered by other instructions, the court should give a non-misleading instruction that captures the substance of the proposed instruction."¹⁰⁷ The court concluded that the failure to give a nonparty-harm instruction was therefore error, and remanded for a new trial on punitive damages.¹⁰⁸

More straightforward discussions of waiver are found in *Rinehart v. Shelter General Ins. Co.*,¹⁰⁹ *Kauffman v. Maxim Healthcare Servs. Inc.*,¹¹⁰ and *American Family Mut. Ins. Co. v. Miell*.¹¹¹ After noting that Philip Morris had requested a protective jury instruction in the trial court in *Williams* and that the Supreme Court specifically indicated that a trial court must offer such protection "on request,"¹¹² the *Rinehart* court inferred that the defendant's failure to request such an instruction at trial waived the right to raise the failure to give such an instruction on appeal; virtually the same analysis is articulated by the district court in *Kauffman*, an employment-discrimination case.¹¹³ The district judge in *Miell* noted that although the trial was held after *Williams* was decided, and although Iowa Uniform Jury Instructions had already been amended to reflect *Williams*, the jury was not instructed that it could consider defendant's prior similar conduct *or* that it could not punish defendant for harm caused to others. The district court ruled, however, that the defendant waived the right to have such an instruction because the defendant failed to request it. Although Fed. R. Civ. P. 51(d)(2) sometimes permits a court to consider plain error notwithstanding a party's failure to raise the issue, it does so only when the error affects substantial rights. The court rejected this argument because it determined that any mention of nonparty harm would have had little or no impact on the outcome.¹¹⁴

Merrick and *Miell* are together quite illuminating but also create another puzzle about the path of *Williams*. They are illuminating because they indicate that whether the defendant's

proposal of a protective jury instruction was exactly correct is not necessarily the beginning and end of whether the punitive damages award should be vacated under *Williams* for lack of a protective jury instruction. *Merrick* reasoned that a defendant's proffer of a flawed instruction that captures an essential protection triggers an obligation in the court to craft an acceptable instruction capturing that protection; *Miell* reasoned that a defendant's failure to request a jury instruction will not relieve the court of an obligation to provide such an instruction if the protection is properly viewed as guarding substantial rights in the case before the court, but it concluded that the defendant had not met that standard or anything like it. What now appears odd, however, is the Oregon Supreme Court's narrow focus in *Williams* (on second remand) on the question of whether Philip Morris's instruction was perfectly correct under Oregon law. As the discussion in Part II of this article indicates,¹¹⁵ the majority opinion in *Williams* contains several holdings about the procedural due-process protection a defendant is entitled to with regard to punishment for nonparty harm; the right to a jury instruction when proposed is only the most specific of the holdings.

Justice Stevens and the academic critiques of the majority suggest that the greatest problems in applying *Williams* might involve reprehensibility.

C. REPREHENSIBILITY

Justice Stevens and the academic critiques of the majority suggest that the greatest problems in applying *Williams* might involve reprehensibility.¹¹⁶ Several cases bear out that prediction. An unusual (and quite disturbing) example is *Snyder v. Phelps*,¹¹⁷ from the United States District Court in the District of Maryland. The litigation stems from a funeral at a Catholic church in the town of Westminster, Maryland, held for Matthew A. Snyder, the son of plaintiff Albert Snyder. Raised in Westminster, Matthew Snyder served as a Marine Lance Corporal in Iraq, where he was killed in the line of duty. Snyder was gay, which is what caught the attention of the defendants: Fred W. Phelps, his daughters Shirley Phelps-Roper, Rebekah Phelps-Davis, and Westboro Baptist Church, Inc. of Topeka, Kansas, which Phelps founded. Phelps and his church are anti-gay activists.¹¹⁸ The defendants traveled from Kansas to Maryland and brought members of the congregation

105. *Id.* at 1015. The proposed instruction was: "In deciding whether or in what amount to award punitive damages, you may consider only the specific conduct by Defendant that injured Plaintiff. You may not punish Defendants for conduct or practices that did not affect Plaintiff, even if you believe that such conduct or practices were wrongful or deserving of punishment. The law provides other means to punish wrongdoing unrelated to Plaintiff."

106. *Id.* at 1017.

107. *Id.* (citing *Ragsdell v. S. Pac. Transp. Co.*, 688 F.2d 1281, 1285 (9th Cir. 1982) (emphasis in original)).

108. *Id.* at 1017-18.

109. 261 S.W.3d 583 (Mo. App. 2008).

110. 509 F. Supp. 2d 219 (E.D.N.Y. 2007).

111. 569 F. Supp. 2d 841 (N.D. Iowa 2008).

112. *Rinehart*, 261 S.W.3d at 597-98 (quoting *Williams*, 549 U.S. at 357).

113. *Kauffman*, 509 F. Supp. 2d at 214.

114. 569 F. Supp. 2d at 852-53.

115. See Part II.A., *supra*.

116. See Part II.B.1., *supra*.

117. 533 F. Supp. 2d 567 (D. Md. 2008).

118. *Id.* at 571.

A far broader conception of reprehensibility is embraced by the Eleventh Circuit in *Action Marine . . .*

in order to picket Snyder's funeral. In Westminster, at the actual funeral and funeral procession, they carried signs featuring messages such as: "God Hates the USA," "America is doomed," "Pope in hell," "Fag troops," "You're going to hell," "God hates you,"

"Semper fi fags," and "Thank God for dead soldiers." Even after the funeral, the activities continued; Rebekah Phelps-Roper created an entire documentary (which she placed on the church's website, www.godhatesfags.com) critically depicting Snyder and his parents.

Albert Snyder sued the four defendants on several theories and obtained a verdict of \$10.9 million on intentional infliction emotional distress and intrusion-upon-seclusion claims (linked via civil conspiracy). Of that, \$2.9 million was compensatory damages (compensating him predominantly for the severe emotional harm he incurred and continues to incur), and \$8 million in punitive damages (\$2 million for each defendant). In its motion for new trial or remittitur, the defendants argued that the award should be reduced both under *BMW* and under *Williams*. It appears that the defendants had engaged in such demonstrations at gay soldiers' funerals before Snyder's and that they intended to continue doing so. The defendants' intention to continue doing so was brought to the jury's attention; the plaintiff's lawyer, in arguing for a punitive-damages award, told the jury that its award should say "don't do this in Maryland again. Do not bring your circus of hate to Maryland again. That no son or daughter of Maryland shall have [his or her] funeral defiled by the malicious tactics of the [D]efendants again and that no future father or mother suffers this."¹¹⁹ The district judge rejected defendants' *Williams* challenge, reasoning that "[p]laintiff's counsel did not mention *past* harm to third parties, only *future* harm to third parties." Nonetheless, the \$8 million verdict was reduced to \$2.1 million on state-law grounds principally concerning the inability of the defendants to pay.¹²⁰

The district judge in *Snyder* is plainly correct in stating that *Williams* addresses the unconstitutionality of punishing for prior harm to nonparties rather than deterring future acts toward nonparties, and to that extent, the judge's holding is beyond reproach. However, it does not take much imagination to generate the following concern: if the punitive-damages award is functioning as a deterrent for future conduct, is it not functioning as a public sanction, rather than private redress? And if that is so, then the constitutional safeguards

appropriate to public sanctions should be applied, and the damages award should have been vacated under the interpretation of *Williams* constructed in this article.

The foregoing anticipated objection is understandable, but it misconceives the peculiar role that punitive damages held under the common-law conception. Various called "vindicative damages," "punitive damages," "exemplary damages," and "smart money," the common law *simultaneously embraced two ideas: one concerning what grounds justify a plaintiff's entitlement to a punitive-damages award and another concerning what worthwhile social functions might be served if punitive damages were awarded.* Plainly, the courts conceived the entitlement as grounded in an individual victim's right to redress the wrong done to him or her by the wrongdoer. But that did not preclude the damages serving some sort of social function too; it is just that the social function was not needed to provide an adequate ground for imposing the damages. It is therefore a mistake to infer from the fact that it serves a deterrent role—or even that the jurors paid attention to its possible deterrent role when thinking of what damages to award—that the ground of entitlement to have the award imposed was precisely its future deterrent role. So long as the award could be understood as something that the private plaintiff was entitled to exact by virtue of the scope of his right to redress this wrong, the fact that jurors used deterrent considerations to select a higher sanction from within this legitimate range does not mean that the award ought to be classified as a public sanction.

The real question regarding reprehensibility in *Snyder* was actually never asked. It is whether, in light of how the jury was instructed and in light of the evidence supplied to the jury, it was plausible to understand the jury's decision to impose \$2 million dollars of punitive damages on each of these defendants as a decision that Mr. Snyder was entitled to exact such damages in light of the reprehensibility of the wrong they did to him, or whether one would have to understand the jury as having made this decision in connection with the reprehensibility of their whole political agenda and pattern of conduct. I think it is entirely plausible that the jury arrived at this decision simply focusing on the wrong done to Mr. Snyder; to the extent that is so, the district court's decision is not only consistent with *Williams* but is also consistent with the broader account of the constitutional analysis of punitive damages offered here.

A far broader conception of reprehensibility is embraced by the Eleventh Circuit in *Action Marine Inc. v. Continental Carbon Inc.*,¹²¹ in which a manufacturer of black carbon was held liable to the owners of property that was polluted, discolored, and devalued by emissions from the manufacturer's plant. The legal theories asserted were negligence, wanton conduct,

119. *Id.* at 592.

120. *Id.* The court also rejected the *BMW* challenge to the size of the award as well as all other grounds for the defendants' motions for judgment as a matter of law, *j.n.o.v.*, new trial, and relief from judgment. However, the court granted in part the defendants' motions for remittitur to \$2.1 million under Maryland common-law principles regarding punitive damages. More particularly, under *Bowden v. Caldor Inc.*, 710 A.2d 267 (Md. 1998), the court

decided that the duplicativeness of the two causes of action and the limited ability of defendants to pay the punitive damages awards justified a reduction of Westboro to \$1 million, Fred Phelps to \$300,000, Rebekah Phelps-Davis to \$200,000, and Shirley Phelps-Roper (who authored the documentary) to \$600,000.

121. 481 F.3d 1302 (11th Cir. 2007), *cert. denied*, *Continental Carbon, Inc. v. Action Marine, Inc.*, 128 S. Ct. 2994 (2008).

breach of duty to warn, fraud, misrepresentation, deceit, nuisance, trespass, and strict liability. After a ten-day trial, an Alabama jury returned a verdict of approximately \$1.2 million in compensatory damages, \$1.3 million in attorney fees, and \$17.5 million in punitive damages.

In its evaluation of the defendant's appeal, the Eleventh Circuit considered *Williams's* holding that punitive damages may not be used to punish nonparties, but the risk of harm to others may be part of the reprehensibility analysis. It reasoned that because "Continental's actions likely harmed a great number of people and businesses who are not parties to this litigation,"¹²² Continental's actions and inaction were "exceedingly reprehensible."¹²³ A similar approach is taken by a Louisiana appellate court in *Grefer v. Alpha Technical*;¹²⁴ the damage to nonparties done by the defendant Exxon's polluting behavior is said to warrant a very high finding of reprehensibility, which in turn justifies a higher punitive-damages award.

On the theoretical model offered here, those courts' interpretation of *Williams*—while consistent enough with the terse language of Justice Breyer's opinion—is not consistent with a theoretically sound understanding of the rationale for the non-party-harm rule. In both *Action Marine* and *Grefer*, there were sustained accounts of the defendants' awareness of the harm they were doing to the plaintiffs and therefore of the recklessness or indifference of the defendants harming the plaintiffs. That other victims were similarly situated and also endured harm from these wrongful activities does not in any way alter the characterization of the nature of the wrong to the plaintiffs in those cases. In other words, harm to nonparties was not probative of the reprehensibility of the defendants' injuring of the plaintiffs. Reprehensibility was purely a back door for punitive damages operating as a public sanction for the wrongful conduct. The evidence of harm to nonparties, in these cases, was such that the jury should have been cautioned not to consider it in evaluating the reprehensibility of the defendant for purposes of imposing punitive damages. To the extent that motions for remittitur invited the courts in these cases to reduce the punitive-damages award commensurate with their sense of how the impermissible considerations might have inflated the award, the courts should have done so.

D. LARGER QUESTIONS ABOUT THE CONSTITUTIONAL STATUS OF PUNITIVE DAMAGES

In its litigation before the United States Supreme Court and the Oregon Supreme Court, Philip Morris has focused upon the trial judge's refusal to instruct the jury in what Philip Morris alleges was the constitutionally required manner. The record in *Williams* produces several other issues that revolve around the same idea: (1) was there evidence admitted that should not have been because irrelevant or prejudicial; (2) were there statements made during witness questioning or

during opening or closing statements that should not have been made; (3) were there motions in limine that ought to have been granted; and (4) was the award excessive in light of the evidence that could properly have been considered? As several of the cases considered above indicate, defendants in the lower courts have already begun asserting many of these arguments, and lower courts—quite appropriately—have taken them seriously as offshoots of *Williams*.

There are, however, much larger questions about punitive-damages law that *Williams* may force lower courts to confront. These questions revolve around the disquieting possibility that the United States Supreme Court in *Williams* was expressing its disapproval of a whole way of thinking about punitive damages that is in fact very popular in state tort law. I have suggested that *Williams* can be understood as containing a litmus test for when punitive damages are functioning as a public sanction for antisocial or harmful conduct that the state wishes to punish. When the litmus test is positive, then punitive damages are not plausibly viewed as functioning wholly within the private-redress model. They therefore require the greater due-process protection that tort cases traditionally have had. Or so the argument went.

The problem with this view is that many states—perhaps most—openly regard punitive damages as a public sanction for socially harmful and wrongful conduct. Many articulate this approach quite explicitly; many have adopted clear-and-convincing evidence standards, split-recovery statutes, and noninsurability of punitive-damages awards for this very reason. If *Williams* is so understood, does that not suggest that such states' punitive-damages law is categorically unconstitutional?

Some courts have begun to worry about this possibility. Thus, a federal judge in the District of Colorado read the defendant's argument as "inviting" the court to hold a Colorado statute governing punitive damages "unconstitutional," an invitation the court declined.¹²⁵ Similarly, the Chief Judge in the Western District of Oklahoma in a pair of thoughtful post-*Williams* opinions voiced her concerns that Oklahoma's punitive-damages statute is "ripe" for judicial review because "[o]n its face, [the statute] contemplates harm to third parties as the foundation for any award of punitive damages."¹²⁶

While these two courts may well have been exaggerating, the general concern is entirely sensible. States that funnel punitive-damages awards to the state revenue do not generally

The problem . . . is that many states—perhaps most—openly regard punitive damages as a public sanction for socially harmful and wrongful conduct.

122. *Id.* at 1320.

123. *Id.*

124. 965 So. 2d 511 (La. Ct. App. 2007), *cert. denied*, Exxon Mobil Corp. v. Grefer, 128 S. Ct. 2054 (2008).

125. Cook v. Rockwell International Corp., 564 F. Supp. 2d 1189,

1212 (D. Colo. 2008).

126. Huggins v. Four Seasons Nursing Centers, Inc., 2007 WL 3113429 (N.D. Okla. 2007) (citing Moody v. Ford Motor Co., 506 F. Supp. 2d 823, 848 (N.D. Okla. 2007)).

regard themselves as doing a taking of the plaintiff's property.¹²⁷ They regard the state as being at least equally entitled, or more entitled, to the proceeds of the punitive-damages awards. This very idea appears to undercut the hypothesis that punitive damages are awarded as an expanded version of what the plaintiff is entitled to receive as a matter of private redress. It appears to concede that the punitive damages award is functioning as a public sanction. If so, then the procedural due-process analysis urged here arguably carries over to every instance in which a court applies a split-recovery statute without affording to the plaintiff a process far less vague in its standard than that which the private law of torts typically provides. And split-recovery statutes are simply one example. Although we are not currently seeing these broad critical arguments from defendants, we should expect to see more of this in coming years unless the federal courts decide to take *Williams* in a particularly narrow direction; in the terms of this article, if they adhere to purely contextual, rather than facial, public-sanction detection tests. Whether the Supreme Court or circuit courts would actually embrace such broad elaborations of constitutional punitive-damages doctrine is, of course, simply a matter of conjecture at this stage.

CONCLUSION

Philip Morris USA v. Williams should be seen for what it is: the Roberts Court's first foray into the constitutional status of punitive damages. It marks a shift from the sort of excessiveness review that sometimes goes under the label of "substantive due process" to a nuanced but potentially quite aggressive form of "procedural due-process" review that looks less at the size of the award and more at the process used to reach it. As with many procedural decisions, *Williams* is easy to discount as technical and relatively unimportant. This would be a mistake. Both in its content and in what it foreshadows about possible directions for the constitutional scrutiny of punitive damages, *Williams* is hugely important. Although declining to exercise its power to vacate or remit the award against Philip Morris, the Court did something potentially more significant: it began to question whether states can use punitive damages as an instrument of public law to sanction wrongdoers given the relatively meager procedural protection defendants have to defend themselves when such "public wrong" arguments are thrown at them in front of a jury in an individual tort case. Thus far, *Williams* has generated only modest changes in jury instructions and a surprisingly narrow array of appeals and motions to remit by defendants who have met with mixed success. One should not be surprised, however, if defendants start to see *Williams* as a blueprint for bold critiques of state punitive-damages law.

The dissenting Justices in *Williams*—Justices Stevens, Scalia, Thomas, and Ginsburg—were understandably resistant to the arguments of Philip Morris and the majority because the nonparty-harm rule adopted by the Court is difficult to reconcile with the prominence of reprehensibility in punitive-damages law. Moreover, there is a substantial potentiality for intrusiveness of a sort inimical to federalist values. Nevertheless, this article has taken a more optimistic and constructive

approach to the Court's opinion in *Williams*, one which aims to guide future courts both in recognizing the constitutional justification at the basis of the decision and in applying the standards set forth in a cogent manner.

The essential holding of *Williams* is that while a punitive-damages award aimed at punishing the defendant for injuring a party may be constitutionally permissible, a punitive-damages award aimed at punishing the defendant for injuring nonparties is a violation of the Due Process Clause. The basic principle here, according to this article, is quite clear: punitive damages are operating as part of the traditional common law of torts when the plaintiff is seeking to redress the defendant's injuring of her but that cannot be what is happening when the state is punishing the defendant for injuring nonparties. To the extent that the punitive damages award is punishing the defendant for injuring nonparties, it is serving as a form of public sanction, not simply as a form of private redress that can deliver some of the same deterrent effect as a public sanction. If this is so, then the process applicable to public sanctions—criminal at most and regulatory at least—must come into play. State tort law typically lacks such process, and therefore the punitive-damages awards are unconstitutional on this developed version of the principles underlying *Williams*. The nonparty-harm rule of *Williams* can thus be understood as a litmus test for when the punitive-damages award is operating as a public sanction; for awards that show up positive on the litmus test, there is a procedural due-process problem inherent in the vague standards of state tort law.

It remains to be seen how far the United States Supreme Court would really be willing to push this line of thinking. Meanwhile, however, a variety of medium-sized analytical problems will face courts operating under *Williams*. How to conceive of reprehensibility, how to instruct a jury, when to permit evidence of nonparty harm (and for what purposes) — these are some of the many questions with which lower courts have already begun to grapple. The nonparty-harm rule analyzed as a public-sanction detection test permits us to begin to answer those questions.



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127. See, e.g., *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635 (Ga. 1993) (rejecting plaintiff's taking claim based on split-recovery

statute); but see *Kirk v. Denver Pub Co.*, 818 P.2d 262 (Colo. 1991) (accepting plaintiff's takings claim).