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Working the Unworkable Rule Established in *Philip Morris*: Acknowledging the Difference Between Actual and Potential Injury to Nonparties

I. INTRODUCTION

Over the past fifteen years, legal scholarship dedicated to the topic of punitive damages has increased significantly.¹ This increase is principally due to United States Supreme Court decisions that changed the punitive damages landscape.² Prior to these decisions, the individual states retained almost exclusive control of punitive damages awards.³ This change began with *Pacific Mutual Life*

1. A simple search for articles containing "Punitive Damages" in the title conducted on any major online legal database returns hundreds and hundreds of results that were published in the past ten years. The actual number is likely higher due to the alternate terms used to describe punitive damages (e.g., vindictive and exemplary). In light of the February 20, 2007 Supreme Court decision in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), the number of articles addressing punitive damages awards will increase.

2. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 424 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 444 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 8 (1991).

3. See Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1303-10 (2005) (illustrating that not all states allow punitive damages, and the states that do apply them do so in different ways). Additionally, many states have enacted legislation addressing punitive damages awards. The following states have enacted legislation dealing with the award of punitive damages: Alabama (ALA. CODE §§ 6-11-20 to -30 (2005)); Alaska (ALASKA STAT. § 09.17.020 (2006)); Arkansas (ARK. CODE ANN. §§ 16-55-206, 16-55-208 to -211 (2005)); California (CAL. CIV. CODE §§ 3294-96 (West 1997 & Supp. 2007)); Colorado (COLO. REV. STAT. §§ 13-20-101 (2005)); Florida (FLA. STAT. §§ 768.72, .725, .73, .733, .735-37, .77, .79, 772.104 (2005)); Georgia (GA. CODE ANN. §§ 51-12-5 to -6 (2000)); Idaho (IDAHO CODE ANN. §§ 6-1601, 6-1604 (2004)); Illinois (735 ILL. COMP. STAT. 5/2-604.1, -1107.1, -1115.05, -1207 (2003)); Indiana (IND. CODE §§ 34-51-3-1 to -6 (1998)); Iowa (IOWA CODE ANN. § 668A.1 (West 1998)); Kansas (KAN. STAT. ANN. §§ 60-209, -3702 to -3703 (2005)); Kentucky (KY. REV. STAT. ANN. §§ 411.184, -186, -187 (West 2005)); Louisiana (LA. CIV. CODE ANN. art. 3546 (1994)); Minnesota (MINN. STAT. ANN. §§ 549.191-.20 (West 2000 & Supp. 2007)); Mississippi (MISS. CODE ANN. § 11-1-65 (2002)); Missouri (MO. REV. STAT. §§ 509.200, 510.263, .265, .270, 537.067 (1952)); Montana (MONT. CODE ANN. §§ 27-1-210, -220, -221 (2005)); Nevada (NEV. REV. STAT. § 42.005 (2005)); New Hampshire (N.H. REV. STAT. ANN. § 507:16 (1997)); New Jersey (N.J. STAT. ANN. §§ 2A:15-5.9 to -5.17; 2A:23B-21 (West 2000)); New Mexico (N.M. STAT. § 44-7A-22 (2004)); North Carolina (N.C. GEN. STAT. §§ 1D-1, -5, -10, -15, -20, -25, -26, -30, -35, -40,

Insurance Co. v. Haslip, in which the Supreme Court granted constitutional review of a punitive damages award based on due process arguments.⁴ Prior to *Haslip*, the Court was reluctant to grant constitutional review of such awards.⁵ However, ten years after *Haslip*, the Court clarified the nature of punitive damages as legal rather than factual and thereby forced a de novo standard of review on all challenges to punitive damages awards.⁶ Once the Court implemented this de novo standard of review, punitive damages awards suffered increased constitutional constraints. These constraints have largely taken the form of due process restrictions—both substantive and procedural.⁷ Of late, punitive damages jurisprudence has seen its biggest changes in the area of substantive due process restrictions on the size of punitive damages awards.⁸

The Supreme Court was again asked to review a punitive damages award in late 2006; however, when the *Philip Morris USA v. Williams*⁹ opinion was released on February 20, 2007, the Court did not even breach the usual topic of substantive due process restrictions. The Court ignored the substantive due process issue because the majority adopted a new rule while conducting its review of the less frequently discussed procedural due process restrictions.

-45, -50 (2005)); North Dakota (N.D. CENT. CODE §§ 32-03.2-11, 32-03-35, 32-29.3-21 (1996)); Ohio (OHIO REV. CODE ANN. §§ 2305.01, 2315.21 (LexisNexis 2005 & Supp. 2007)); Oklahoma (OKLA. STAT. tit. 12, §§ 1872, 2009 & tit. 23, §§ 9.1, 95, 96 (1993 & Supp. 2007)); Oregon (OR. REV. STAT. §§ 31.725, .730, .735, .740 (2005)); South Carolina (S.C. CODE ANN. § 15-33-135 (2005)); South Dakota (S.D. CODIFIED LAWS §§ 15-39-45, 21-1-4, 21-1-4.1, 21-3-2 (2004)); Tennessee (TENN. CODE ANN. §§ 20-10-101, 28-3-104 (2000 & Supp. 2006)); Texas (TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.001-.013 (Vernon 1997 & Supp. 2006)); Utah (UTAH CODE ANN. §§ 78-18-1 to -2 (2006)); Virginia (VA. CODE ANN. §§ 8.01-38.1, -374.1 (2007)); Washington (WASH. REV. CODE ANN. § 7.04A.210 (West 2001)); and Wisconsin (WIS. STAT. ANN. § 895.043 (West 2006)). The following states have not enacted legislation dealing with the award of punitive damages: Arizona, Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Michigan, Nebraska, New York, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wyoming.

4. *Haslip*, 499 U.S. at 1.

5. In *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988), the Court used the argument of judicial prudence in determining that it would not grant due process review of a punitive damages award of \$1.6 million that arose from a case awarding \$20,000 in compensatory damages. *Id.* at 76–80.

6. *Cooper*, 532 U.S. at 435–36.

7. See *State Farm*, 538 U.S. at 412; *Cooper*, 532 U.S. at 433; *BMW*, 517 U.S. at 562, 574–75; *Honda*, 512 U.S. at 418.

8. See *State Farm*, 538 U.S. at 416–29; *BMW*, 517 U.S. at 581–83.

9. 127 S. Ct. 1057 (2007).

This new rule is unworkable and will inevitably cripple the states' ability to effectively apply punitive damages awards for their intended purpose: to punish and deter.

This Comment reviews the Supreme Court's decision in *Williams* and concludes that the new rule established by the Court—prohibiting the consideration of injury to nonparties when determining the amount of punitive damages to assess—is self-contradictory and severely undermines the states' ability to pursue its legitimate interest in punishing and deterring egregious misconduct. Due to the new rule's shortcomings, this Comment argues that the Court should adopt an amended version of the new rule that distinguishes between potential injury and actual injury. Thus, the proposed rule would allow the consideration of *potential* injury to nonparties when determining the amount of punitive damages to assess and prohibit the consideration of *actual* injury to nonparties in all stages of the trial.¹⁰

Part II of this Comment presents a historical view of punitive damages awards, emphasizing their underlying purposes. This Part also discusses the importance of potential injury to nonparties—both historically and currently—when determining the appropriate amount of punitive damages to award. Part III then discusses Supreme Court jurisprudence addressing punitive damages awards. More specifically, Part III presents three relatively recent Supreme Court cases that are significant precursors to *Williams*. Part IV presents both the factual and procedural background of *Williams* and the majority opinion therein. Following this presentation of *Williams*, Part V sets forth the proposed changes to the new rule established in *Williams*. The discussion in Part V includes a more in-depth presentation of the new rule, including a discussion of its scope. Part V additionally argues that potential harm is a necessary factor in determining the appropriate amount of punitive damages to assess and presents potential arguments against the amended rule proposed in this Comment. Finally, Part VI gives a brief conclusion.

10. Courts and commentators use various terms to describe the concept of "injury" discussed in this paper. It should be noted that some courts refer to this as "harm;" however, the meaning behind that term is the same.

II. PUNITIVE DAMAGES: A HISTORICAL LOOK

Before delving into the Supreme Court's most recent punitive damages decision, a review of punitive damages—including a brief history of the purposes thereof and the interests being protected thereby—is necessary. This Part discusses the reasoning behind the award of punitive damages—historically—and the important state interest protected by allowing punitive damages awards: punishing conduct that has the potential of injuring many citizens.

A. Punitive Damages Awards: Two Underlying Purposes

The application of punitive damages has a long history.¹¹ Traditionally, the states determined the rules regarding the award of punitive damages.¹² As with other areas of law under their control, states have viewed and implemented punitive damages in a variety of ways.¹³ While all states have the authority to allow punitive damages, some have chosen not to.¹⁴ Despite this disagreement regarding punitive damages, states do have legitimate reasons for allowing them: to punish and deter.

Early judicial opinions confirm that states imposed punitive damages to punish and deter wrongdoing. Over 150 years ago, in *Bishop v. Stockton*, the Circuit Court for the Western District of Pennsylvania explained that punitive damages were allowed in order to “indemnify the public for past injuries and damages, and to protect the community from future risks and wrongs.”¹⁵ When the

11. The purpose of this Comment is not to provide a comprehensive history of punitive damages awards. For more information on the history of punitive damages awards, see, for example, Gorman Houston, *Punitive Damages: A Historical Perspective*, 52 ALA. LAW. 262 (1991); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269 (1993); Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163 (2003); Ryan Fowler, Comment, *Why Punitive Damages Should Be a Jury's Decision in Kansas: A Historical Perspective*, 52 U. KAN. L. REV. 631 (2004); Note, *The Theory of Exemplary Damages*, 7 COLUM. L. REV. 122 (1907) [hereinafter Columbia Note].

12. See, e.g., Fowler, *supra* note 11, at 655.

13. See Rustad & Koenig, *supra* note 11, at 1303–10 (illustrating the different manners in which states apply punitive damages); Sebok, *supra* note 11, at 181–204 (reviewing differing opinions as to punitive damages); Columbia Note, *supra* note 11, at 122–23 (showing different ways in which states viewed and applied punitive damages in the early twentieth century).

14. See Rustad & Koenig, *supra* note 11, at 1303–10.

15. *Bishop v. Stockton*, 3 F. Cas. 453, 454 (C.C.W.D. Pa. 1843) (No. 1440), *aff'd*, 45

court speaks of “indemnify[ing] the public,” it refers to the punishment aspect of punitive damages, and when it speaks of “protect[ing] the community,” it refers to the deterrence function. Shortly after the federal court gave this explanation, the Superior Court of Delaware explained that punitive damages directly relate to the misconduct of the defendant.¹⁶ In *Smyrna v. Whilldin*, the Delaware court was faced with allegations that a steamboat (the Sun) intentionally rammed another steamboat (the Kent) causing it to sink.¹⁷ Though not deciding the factual dispute as to the intent of the captain of the Sun, the judge explained that

[c]onsidering the time; the occasion; the defendant’s knowledge of the number of passengers; a wilful [sic] sinking of the Kent would evince a reckless disregard of human life deserving the severest punishment. But in proportion to the enormity of the act, the jury ought to be cautious in crediting such a design, and should require the clearest proof of it.¹⁸

Thus, in instances where the defendant clearly acted with reckless disregard of human life, the court found it proper to assess the “severest punishment.”

A few years later, in *Stimpson v. Railroads*, another federal circuit judge summarized the nature of punitive damages: “It is a well settled doctrine of the common law . . . that a jury in actions of . . . tort may inflict exemplary or vindictive damages upon a defendant, having in view the enormity of defendant’s conduct rather than compensation to the plaintiff . . .”¹⁹ Thus, it was clear in 1847 that punitive damages did not compensate the plaintiff for actual damages, but instead related solely to the “enormity,” or reprehensibility, of the defendant’s conduct.

Shortly thereafter, the United States Supreme Court further explained the difference between compensatory damages and punitive damages in *Day v. Woodworth*.²⁰

U.S. (4 How.) 155 (1846).

16. *Smyrna, Leipsic & Phila. Steamboat Co. v. Whilldin*, 4 Del. (4 Harr.) 228, 233 (Del. Super. Ct. 1845).

17. *Id.* at 231.

18. *Id.* at 233.

19. *Stimpson v. R.Rs.*, 23 F. Cas. 103, 104 (C.C. 3d Cir. 1847) (No. 13,456).

20. 54 U.S. (13 How.) 363, 371 (1851).

In many civil actions . . . the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.

In actions . . . where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called "smart money." This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.²¹

Although not all of the states allowed the assessment of punitive damages, the Court confirmed that defendants could be punished for the reprehensibility of their misconduct in addition to any compensatory damages awarded.

Three years after the Court's decision in *Day*, the Supreme Court of Wisconsin expressed its opinion of the state of punitive damages law in *McWilliams v. Bragg*.²² The court asserted that

"[i]f the offense is committed willfully, the jury [has] a right to give damages as a punishment to the defendant, for the purpose of making an example, and as a warning to him and others"²³

[T]he great weight of authority in the American courts is in favor of permitting juries in actions of this character, not only to take into consideration the actual injury sustained by the plaintiff, but, where that injury is inflicted under circumstances of aggravation, insult or cruelty, with vindictiveness and malice; but in view of all such circumstances, to impose what is sometimes termed

21. *Id.* at 371.

22. 3 Wis. 424, 431 (Wis. 1854).

23. *Id.* at 425 (quoting jury instructions on the subject of damages given by the judge at the circuit court trial).

exemplary, and sometimes *punitory* damages, in addition to the actual damages.²⁴

Although the language and construction of this passage is somewhat peculiar, the passage clearly explains that courts around the country commonly used punitive damages as both a deterrent and punishment and that those damages were not another form of compensatory damages for the plaintiff. The Wisconsin court also made it clear that punitive damages should be awarded in view of all of the surrounding circumstances.

1. Punishment

Today, there can be no question that punitive damages are used as a way to punish defendants for their conduct.²⁵ While this assertion may seem obvious, many nineteenth-century courts used alternative names for punitive damages, such as vindictive or exemplary damages. Because of this, some courts, including the United States Supreme Court, felt the need to explain the purposes of these non-compensatory damages.²⁶ In 1853, the Supreme Court explained that exemplary damages are awarded “not to recompense the plaintiff, but to punish the defendant.”²⁷

A number of commentators have also enumerated justifications for the punishment purpose behind punitive damages. Some authors assert that the punishment allotted by punitive damages provides the citizenry with peace of mind.²⁸ One article asserts that the punishment purpose reflects “society’s goal of imposing appropriate

24. *Id.* at 431.

25. *See infra* note 54.

26. *See, e.g.,* *Stimpson v. R.Rs.*, 23 F. Cas. 103, 104 (C.C. 3d Cir. 1847) (No. 13,456). (“[A] jury . . . may inflict exemplary or vindictive damages upon a defendant, having in view the enormity of defendant’s conduct rather than compensation to the plaintiff.”); *Taylor v. Church*, 8 N.Y. 452, 460 (N.Y. 1853) (“The principle is well established as well in the English as in the American courts of justice, that in actions for injuries to the person, committed under the influence of actual malice or with the intention to injure the plaintiff, the jury in their discretion may give damages beyond the actual injury sustained, for the sake of the example—damages not only to recompense the sufferer, but to punish the offender.”); *Rayner v. Kinney*, 14 Ohio St. 283, 284 (Ohio 1863) (“[E]xemplary damages . . . are intended to punish the defendant . . .”).

27. *Seymour v. McCormick*, 57 U.S. (16 How.) 480, 489 (1853).

28. *See, e.g.,* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 948 (1998); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 350 (2003).

sanctions on blameworthy parties.”²⁹ Further, the authors of that article claim that the goal of imposing appropriate punishments is not the only reason for punitive damages, but that “the punishment objective derives ultimately from the pleasure or satisfaction people obtain from seeing blameworthy parties punished.”³⁰

2. Deterrence

Similar to the punishment purpose, deterrence is broadly accepted today as a function of punitive damages.³¹ This notion of protecting the public from future similar misconduct was not as widely accepted in the nineteenth century.³² As was the case with the punishment function of punitive damages, courts provided insight as to the propriety of assessing punitive damages as a deterrent.³³ One federal circuit court judge explained that “where the circumstances were of a somewhat aggravated character, what was sometimes called in the law vindictive damages might be given . . . by way of example to deter others from doing the same thing.”³⁴

The reasoning behind deterrence is straightforward. By assessing a more serious penalty on the defendant, the state hopes to prevent future similar misconduct. This prevention is attributed to “the effect that the prospect of having to pay damages will have on the behavior of similarly situated parties in the future (not just on the behavior of

29. Polinsky & Shavell, *supra* note 28, at 948.

30. *Id.*

31. See *infra* note 54.

32. See Sebok, *supra* note 11, at 181–204.

33. See, e.g., Bishop v. Stockton, 3 F. Cas. 453, 455 (C.C.W.D. Pa. 1843) (No. 1440), *aff'd*, 45 U.S. (4 How.) 155 (1846) (“[V]indictive or exemplary damages may be given . . . to protect the community from future risks and wrongs.”); Pike v. Dilling, 48 Me. 539, 1861 WL 1691, at *3 (Me. 1861) (explaining that the jury was “authorized, if they thought proper, in addition to the actual damages the plaintiff has sustained, to give him a further sum, as exemplary or vindictive damages . . . as a salutary example to others, to deter them from offending in like cases”); Rayner v. Kinney, 14 Ohio St. 283, 284 (Ohio 1863) (“[E]xemplary damages . . . are intended . . . to operate as an example to deter others from committing the like offense.”); Rollins v. Pennock, 2 Ohio Dec. Reprint 735, 1862 WL 2543, at *2 (Ohio Ct. Com. Pl. 1862) (“Damages beyond mere compensation are given as *exemplary, vindictive or punitive* damages—by way of example, and to prevent the repetition of similar wrongs in community. . . .”); Phillips v. Lawrence, 6 Watts & Serg. 150, 154 (Pa. 1843) (stating that vindictive or exemplary damages may be given “with a view to promote the peace and quiet of society, and to protect every one in the full enjoyment of his rights”).

34. Parker v. Corbin, 18 F. Cas. 1122, 1122 (C.C.D. Ohio 1848) (No. 10,731).

the defendant at hand).³⁵ Thus, the fear of having to pay punitive damages should reduce the frequency of reprehensible misconduct. One commentator has asserted that “[d]eterrence is probably the most universal rationale [for punitive damages].”³⁶ This is likely true because of the state’s interest in protecting its citizenry from additional misconduct.

B. Potential Injury to Nonparties: State Interest Protected by Punitive Damages Awards

One of the principal justifications for assessing punitive damages awards is to punish defendants for the potential injury to nonparties that could have resulted from the defendant’s misconduct. In fact, case law from the nineteenth century shows that potential injury to nonparties (the public) was a factor considered when assessing punitive damages. More recently, one commentator noted that punitive damages are a form of societal damages.³⁷ Essentially, these damages can be viewed as a punishment for the potential injury to nonparties.³⁸ This section presents nineteenth-century punitive damages opinions to illustrate the emphasis on assessing punitive damages for potential injury to nonparties and also presents modern court opinions that considered potential injury to nonparties when awarding punitive damages.

1. Historical view

In 1832, the United States Supreme Court decided *Conrad v. Pacific Insurance Co.*, and provided insight into how far the state could reach to protect its citizenry:

[When a defendant’s misconduct is effected] in a wanton, rude, and aggravated manner, indicating malice or a desire to injure, a jury ought to be liberal in compensating the party injured In such cases . . . a jury may properly take into view, not only what is due to the party complaining, but to the public, by inflicting what are called in law speculative, exemplary, or vindictive damages.³⁹

35. Polinsky & Shavell, *supra* note 28, at 877.

36. David F. Partlett, *Punitive Damages: Legal Hot Zones*, 56 LA. L. REV. 781, 795 (1996).

37. See generally Sharkey, *supra* note 28.

38. See *id.* at 350; see also Polinsky & Shavell, *supra* note 28, at 873.

39. *Conrad v. Pac. Ins. Co.*, 31 U.S. 262, 272–73 (1832).

Although the Court did not explicitly state that defendants could be punished for injury to nonparties, the Court does stress the jury's ability to consider what is due to the public. One reasonable inference from this statement is that the jury should be able to look beyond the injury to the plaintiff and look to the potential injury to the public in order to assess what is due to the public. Unfortunately, because the Court did not find the necessary malice, it did not address punitive damages and potential injury to the public.⁴⁰

However, the Federal Circuit Court for the Western District of Pennsylvania clarified this point of law in *Bishop v. Stockton*.⁴¹ This case involved injuries sustained when a stagecoach overturned.⁴² The plaintiff, who suffered a broken arm and multiple cuts and bruises, requested both compensatory and punitive damages.⁴³ The request for punitive damages was based on the plaintiff's assertion that the accident occurred because the driver of the coach was drunk.⁴⁴ The judge provided the following instruction to the jury, which ultimately awarded punitive damages of \$6500:⁴⁵

But further vindictive or exemplary damages may be given to indemnify the public for past injuries and damages, and to protect the community from future risks and wrongs. Contracts for carrying passengers are made not only with the party to the transaction, but they are also made with the public as strongly as if they were so expressed and signed and sealed. But to justify exemplary damages, the injury must be more than a mere private loss or injury, it must have been occasioned by such negligence, unskilfulness or recklessness as concerns the safety of the traveling public.⁴⁶

40. This case was one of three related cases dealing with the improper levying of tea; however, there was no malice found on the part of the levier and therefore, there were no punitive damages awarded. *Id.* at 278–79.

41. See generally *Bishop v. Stockton*, 3 F. Cas. 453 (C.C.W.D. Pa. 1843) (No. 1440), *aff'd*, 45 U.S. (4 How.) 155 (1846).

42. *Id.* at 453.

43. *Id.*

44. *Id.*

45. *Id.* at 455. When considering the size of this award, keep in mind that this verdict was entered in 1843. That is the equivalent of over 175,000 current U.S. dollars as a result of a broken arm and a few cuts and bruises. See Robert C. Sahr, Professor, Oregon State University, Consumer Price Index (CPI) Conversion Factors to Convert to 2005 Dollars (Apr. 11, 2006), <http://oregonstate.edu/cla/polisci/faculty-research/sahr/cv2005rsx1.pdf>.

46. *Bishop*, 3 F. Cas. at 455.

No inferences need to be drawn here. This court explicitly allowed and instructed the jury to consider potential injury to the traveling public—nonparties—when determining the amount of damages to award.

2. Modern view

In 2002, the Ohio Supreme Court explained that a jury may inquire beyond the actual injury sustained by the plaintiff. In *Dardinger v. Anthem Blue Cross & Blue Shield*, the court allowed a punitive damages award of \$30 million based on a bad faith denial of a health insurance claim for chemotherapy.⁴⁷ In allowing the punitive damages, the court explained that “[a]t the punitive-damages level, it is the societal element that is most important. The plaintiff remains a party, but the de facto party is our society, and the jury is determining whether and to what extent we as a society should punish the defendant.”⁴⁸ The court also explained that “[t]he award must respect the fact that [the] bad acts were perpetrated on people who were in their most desperate state” and that the health care industry played a “central role in the lives of so many Ohioans.”⁴⁹ This passage clearly demonstrates Ohio’s use of potential injury to nonparties in determining punitive damages, since the complaint alleged injury to only one person, yet the court considered the “lives of so many Ohioans.” In addition to Ohio’s use of potential injury to nonparties, Florida, Kansas, Oklahoma, and Vermont all allowed consideration of potential injury to nonparties as of February 19, 2007.⁵⁰ Further, the District Court for the Eastern District of

47. *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 121 (Ohio 2002).

48. *Id.* at 145.

49. *Id.* at 144.

50. See *Levine v. Knowles*, 197 So. 2d 329, 331 (Fla. Dist. Ct. App. 1967) (“The seriousness of the probable result of the defendant’s conduct . . . is the yardstick for determining the advisability of discouraging such behavior in the future, rather than the seriousness of the damage actually caused.”); *Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 136 P.3d 428, 452 (Kan. 2006) (“The statutory factors to be considered by a court in computing the amount of a punitive damages award relate to the defendant’s misconduct rather than the harm to a particular plaintiff because punitive damages, unlike compensatory damages that are based on harm suffered by a plaintiff, are not intended to remunerate the victim.”); *Gilbert v. Sec. Fin. Corp. of Okla., Inc.*, 152 P.3d 165, 179 (Okla. 2006) (“If potential harm to other victims is a consideration, then *actual* harm to others is also an appropriate consideration.”); *Sweet v. Roy*, 801 A.2d 694, 715 (Vt. 2002) (“The purpose of punitive damages is to deter misconduct, and thus, courts can consider ‘the possible harm to other victims’ that might

Pennsylvania held that “the potential harm that a defendant’s conduct poses” may be considered in assessing an award of punitive damages.⁵¹

In light of the states’ traditional use of punitive damages and the important state interests these damages serve, the Supreme Court should proceed with caution when establishing constitutional guidelines that limit the states’ ability to assess punitive damages. Additionally, the Court should look to both historical and modern views related to potential injury to nonparties when establishing and applying those guidelines.

III. MODERN SUPREME COURT JURISPRUDENCE AND PUNITIVE DAMAGES

The Supreme Court has affirmed state justifications for awarding punitive damages. However, the Court has also confirmed that constitutional demands limit state discretion in awarding punitive damages. First, this Part briefly examines both the justifications for and limitations on punitive damage awards and then presents a review of three important Supreme Court decisions that preceded *Williams*: *TXO Production Corp. v. Alliance Resources Corp.*; *BMW of North America, Inc. v. Gore*; and *State Farm Mutual Automobile Insurance Co. v. Campbell*.

A. Justifications for Granting Punitive Damages Affirmed

Punitive damages are in no way a new issue addressed by the Supreme Court. In 1851, the Court explained punitive damages as

a well-established principle of the common law, that in actions of trespass, and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff.⁵²

Thus, it is clear that the Court has long understood that punitive damages are not damages awarded due to actual injury to the

result if similar behavior is not deterred.” (citation omitted)). *Philip Morris v. Williams* clearly preempted the states ability to consider potential harm upon its release on February 20, 2007. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064–65 (2007).

51. *Bemer Aviation, Inc. v. Hughes Helicopter, Inc.*, 621 F. Supp. 290, 300 (E.D. Pa. 1985), *aff’d*, 802 F.2d 445 (3d Cir. 1986).

52. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851).

plaintiff. States imposed punitive damages because of the “enormity” of the defendant’s conduct.⁵³ More recently, the Court explained that the purposes behind punitive damages are to punish the wrongdoer and to deter similar future conduct.⁵⁴ Essentially, the Court has accepted the reasoning behind the application of punitive damages asserted by nineteenth-century courts.⁵⁵

In 2003, the Court recognized in *State Farm* “that in our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decision maker, serve different purposes.”⁵⁶ Just two years prior to its decision in *State Farm*, the Court confirmed the difference between compensatory and punitive damages:

[C]ompensatory damages and punitive damages . . . serve distinct purposes. [Compensatory damages] are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct. [Punitive damages], which have been described as “quasi-criminal,” operate as “private fines” intended to punish the defendant and to deter future wrongdoing. A jury’s assessment of the extent of a plaintiff’s injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.⁵⁷

The Court explained that the purposes of punishment and deterrence are “supported by the State’s interest in protecting its own consumers and its own economy.”⁵⁸ Further, the Court has explained that it “accord[s] substantial deference” to legislative judgments concerning appropriate sanctions for the conduct at issue⁵⁹ and that in according that deference, “[s]tates necessarily have considerable flexibility in determining the level of punitive

53. *Id.*

54. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (“[P]unitive damages . . . are aimed at deterrence and retribution.”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (“Punitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (“[P]unitive damages are imposed for purposes of retribution and deterrence.”).

55. *See supra* Part II.A.

56. *State Farm*, 538 U.S. at 416 (citing *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001)).

57. *Cooper*, 532 U.S. at 432 (citations omitted).

58. *BMW*, 517 U.S. at 572.

59. *Id.* at 583 (citation omitted).

damages that they will allow in different classes of cases and in any particular case.”⁶⁰ Further, the Court explained that each state “may make its own reasoned judgment” regarding the level of punitive damages that will be allowable.⁶¹

B. Constitutional Restrictions on the Award of Punitive Damages

Although the Court has afforded states some freedom to impose punitive damages, it has not given them free reign. The Court has interpreted the Constitution to impose both procedural and substantive limitations on punitive damages.⁶² The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments,⁶³ and the Court has interpreted this clause as placing restrictions on the assessment of punitive damages.⁶⁴ Justice Breyer’s concurring opinion in *BMW* explains that “[t]his constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, nor of law and legal processes, but of arbitrary coercion.”⁶⁵ In *BMW*, the

60. *Id.* at 568.

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

62. *See id.* at 417 (“To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.”); *Cooper*, 532 U.S. at 433 (“Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion.”); *BMW*, 517 U.S. at 568 (“Only when an award can fairly be categorized as “grossly excessive” in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.”); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (“[D]enial of judicial review of the size of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment.”); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453–54 (1993) (“[T]he Due Process Clause of the Fourteenth Amendment imposes substantive limits ‘beyond which penalties may not go.’” (citation omitted)); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 10 (1991) (“[T]he Due Process Clause places outer limits on the size of a civil damages award.” (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989))). Legal scholars have also addressed the issue of Due Process challenges to punitive damages awards. *See, e.g.*, A. Benjamin Speucer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085 (2006); Jenny Miao Jiang, Comment, *Whimsical Punishment: The Vice of Federal Intervention, Constitutionalization, and Substantive Due Process in Punitive Damages Law*, 94 CAL. L. REV. 793 (2006).

63. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

64. *See State Farm*, 538 U.S. at 417; *Cooper*, 532 U.S. at 433; *BMW*, 517 U.S. at 562.

65. *BMW*, 517 U.S. at 587 (Breyer, J., concurring) (citing *Daniels v. Williams*, 474

Court explained the due process considerations, noting that “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”⁶⁶

C. High Court Cases Leading up to Williams: Clarifying Punitive Damages Jurisprudence

This section highlights three significant precursors to the Court’s decision in *Williams*. The significance of these cases is found in the constitutional principles set forth and clarified therein.

1. TXO: Potential harm resulting from defendant’s conduct

In 1993, the Supreme Court decided *TXO v. Alliance*, a case dealing with a slander of title claim and a resulting punitive damages award.⁶⁷ *TXO* provided the Court with the opportunity to clarify the relationship between the Due Process Clause and punitive damages awards; however, the Court could not reach a majority opinion. In the resulting plurality opinion, a majority of the Justices did agree on one point: the propriety of considering potential injury to nonparties.

a. Facts. In 1985, Alliance Resources Corporation (Alliance) assigned its interest in the oil and gas on a portion of its property to TXO Production Corporation (TXO) in exchange for twenty-two percent of the revenue generated from the oil and gas.⁶⁸ One provision in this agreement allowed TXO to void the agreement if Alliance’s title failed for any reason.⁶⁹ After entering into the agreement, TXO found a 1958 deed that previously conveyed mineral rights for the same portion of Alliance’s property that the TXO agreement covered.⁷⁰ The 1958 deed was then held by Virginia Crews Coal Company (Virginia Crews).⁷¹ However, the 1958 deed

U.S. 327, 331 (1986)).

66. *Id.* at 574 (majority opinion).

67. *TXO*, 509 U.S. 443.

68. *Id.* at 447–48.

69. *Id.* at 448.

70. *Id.*

71. *Id.*

clearly stated that all oil or gas rights were retained in Alliance.⁷² Upon discovering the 1958 deed, TXO “unsuccessfully tr[ie]d to convince Virginia Crews that it had an interest in the oil and gas.”⁷³ When that attempt to convince Virginia Crews failed, TXO paid \$6000 in exchange for a quitclaim deed in any interests that Virginia Crews did possess under the 1958 deed.⁷⁴ Next, TXO unsuccessfully attempted to induce the original holder of the 1958 deed to execute a false affidavit stating that the original conveyance of the mineral rights “might have included oil and gas rights.”⁷⁵

After both of these fraudulent attempts failed, TXO recorded the quitclaim deed and informed Alliance that there was a problem with the title.⁷⁶ TXO then arranged to meet with Alliance to renegotiate the original terms of their agreement in an attempt to decrease the percentage of revenues it was required to pay.⁷⁷ When those negotiations failed, TXO filed for declaratory judgment over the oil and gas rights and Alliance counterclaimed for slander of title.⁷⁸ Ultimately, the Court denied declaratory judgment and Alliance prevailed on the slander of title claim.⁷⁹ The jury awarded Alliance \$19,000 in actual damages and \$10 million in punitive damages.⁸⁰ The West Virginia Supreme Court of Appeals upheld the full jury verdict⁸¹ because “TXO ‘knowingly and intentionally brought a frivolous declaratory judgment action’ when its ‘real intent’ was ‘to reduce the royalty payments under a 1002.74 acre oil and gas lease,’ and thereby ‘increas[e] its interest in the oil and gas rights.’”⁸²

To determine the reasonableness of the award for punitive damages, the West Virginia Supreme Court of Appeals considered three factors: “(1) the potential harm that TXO’s actions could have caused; (2) the maliciousness of TXO’s actions; and (3) the penalty necessary to discourage TXO from undertaking such endeavors in

72. *Id.*

73. *Id.* at 449.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *See id.* at 449–50.

79. *Id.* at 449–51.

80. *Id.* at 451.

81. *Id.* at 453.

82. *Id.* at 449 (quoting TXO Prod. Corp. v. Alliance Res. Corp., 419 S.E.2d 870, 875, 877 (W.Va. 1992)).

the future.”⁸³ The state court held that all three factors supported the award:

The type of *fraudulent* action *intentionally* undertaken by TXO in this case could potentially cause millions of dollars in damages to other victims. As for the reprehensibility of TXO’s conduct, we can say no more than we have already said, and we believe the jury’s verdict says more than we could say in an opinion twice this length. Just as important, an award of this magnitude is necessary to discourage TXO from continuing its pattern and practice of fraud, trickery and deceit.⁸⁴

The Supreme Court granted certiorari⁸⁵ to review “whether that punitive damages award violate[d] the Due Process Clause of the Fourteenth Amendment, either because its amount [was] excessive or because it [was] the product of an unfair procedure.”⁸⁶

b. Holding. Unfortunately, the Court did not reach a majority decision on all of the constitutional issues before it. However, one important issue did receive majority support—and therefore constitutes a majority rule—namely the relevance of potential injury to nonparties to an award of punitive damages.

Justice Stevens’ plurality opinion recognized that “[t]aking account of the potential harm that might result from the defendant’s conduct in calculating punitive damages was consistent with the views we expressed in *Haslip*.”⁸⁷ Stevens clarified the significance of this potential injury aspect of the analysis by confirming the standards accepted in *Haslip*: “whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant’s conduct as well as the harm that actually has occurred.”⁸⁸ Further, the plurality asserted that “[i]t is appropriate to consider the magnitude of the potential harm that the defendant’s conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not

83. *TXO*, 419 S.E.2d at 889.

84. *Id.* at 889–90.

85. *TXO Prod. Corp. v. Alliance Res. Corp.*, 506 U.S. 997 (1992).

86. *TXO*, 509 U.S. at 446.

87. *Id.* at 460 (referring to *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)).

88. *Id.* (quoting *Haslip*, 499 U.S. at 21).

deterred.”⁸⁹ This characterization clearly established that courts may consider potential injury when determining the amount of punitive damages to award. Additionally, the use of the term “intended victim” left the door open for courts to consider the potential injury to nonparties since defendant misconduct is frequently aimed at multiple victims.

Although only three Justices supported these assertions,⁹⁰ Justice Scalia, in his concurring opinion joined by Justice Thomas, agreed that potential injury could be considered when awarding punitive damages.⁹¹ Justice Scalia noted that “today we decide that a 10-to-1 ratio between punitive damages and *the potential harm of petitioner’s conduct* passes muster—calculating that potential harm, very generously, to be more than 50 times the \$19,000 in actual damages that respondents suffered.”⁹² This statement clearly shows that five Justices agreed that potential injury is an appropriate consideration in determining the amount of punitive damages to award. Further, because Justice Scalia characterized the potential injury as the “*potential harm of petitioner’s conduct*,” it is reasonable to conclude that juries may consider potential injury to nonparties.

Of further importance, the plurality considered all of the surrounding circumstances when looking at the reasonableness of the punitive damages award. It recognized that the award was very large; however, it commented that:

in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner’s wealth, we are not persuaded that the award was so “grossly excessive” as to be beyond the power of the State to allow.⁹³

Additionally, Justice Kennedy, concurring with this part of the plurality opinion, explained that “it was rational for the jury to place great weight on the evidence of TXO’s deliberate, wrongful conduct in determining that a substantial award was required in order to serve

89. *Id.*

90. Chief Justice Rehnquist, Justice Blackmun, and Justice Stevens joined in the plurality opinion. *See id.* at 446.

91. *Id.* at 472 (Scalia, J., concurring in part).

92. *Id.*

93. *Id.* at 462 (plurality opinion).

the goals of punishment and deterrence.”⁹⁴ In light of the foregoing analysis, the Court affirmed the decision of the Supreme Court of Appeals of West Virginia, thereby upholding the entire punitive damages award despite the fact that it represented a 526:1 ratio of punitive to compensatory damages.⁹⁵

2. BMW: Guideposts offered to determine constitutionality

In 1996, the Supreme Court decided *BMW v. Gore*, another case dealing with the award of substantial punitive damages.⁹⁶ *BMW* provided the Court with an opportunity to clarify two parts of its constitutional analysis that prove useful in obtaining an understanding of its decision in *Williams*: reprehensibility and ratio.

a. Facts. In *BMW*, the Court was faced with a disgruntled Alabama consumer. In early 1990, Mr. Gore purchased a brand new BMW from an authorized dealer; however, nine months later Mr. Slick—the man providing Gore with car customization services— informed Gore that the BMW had previously been repainted.⁹⁷ Shortly thereafter, Gore filed suit against BMW of North America alleging that “failure to disclose that the car had been repainted constituted suppression of a material fact.”⁹⁸

At trial, BMW acknowledged its nationwide policy to withhold information concerning repair to a car if the damage occurred during the course of manufacture or transportation and the cost of repair was less than three percent of the car’s suggested retail price.⁹⁹ If the cost of repair exceeded three percent of the suggested retail price, “the car was placed in company service for a period of time and then sold as used.”¹⁰⁰ Gore argued that the policy effected widespread consumer fraud and asserted that \$4 million was an adequate measure for punitive damages since BMW of North America sold— nationwide—983 used cars as new.¹⁰¹

94. *Id.* at 469 (Kennedy, J., concurring in part).

95. *Id.* at 446, 466 (plurality opinion).

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

97. *Id.* at 563.

98. *Id.*

99. *Id.* at 563–64.

100. *Id.* at 563.

101. *Id.* at 564.

The jury found that BMW was liable for \$4000 in compensatory damages and \$4 million in punitive awards.¹⁰² The jury based its determination of punitive damages on its conclusion that BMW's nondisclosure policy "constituted gross, oppressive or malicious fraud."¹⁰³ In response to this award, BMW filed a post-trial motion requesting that the punitive damages be set aside.¹⁰⁴ Although that motion was denied,¹⁰⁵ the Alabama Supreme Court held that the punitive damages award was inappropriate because the jury considered "acts that occurred in other jurisdictions" when calculating the amount of punitive damages it would award against BMW.¹⁰⁶ Ultimately, the Alabama Supreme Court reduced the punitive damages award to \$2 million—an amount the court considered constitutionally reasonable.¹⁰⁷ BMW then filed a petition for certiorari and the Supreme Court granted review¹⁰⁸ to help "illuminate 'the character of the standard that will identify unconstitutionally excessive awards' of punitive damages."¹⁰⁹

b. Holding. The Court set forth three guideposts for determining the constitutionality of punitive damages awards: "the degree of reprehensibility of [defendant's conduct]; the disparity between the harm or potential harm suffered by [the plaintiff] and [the] punitive damages award; and the difference between [the punitive damages awarded] and the civil penalties authorized or imposed in comparable cases."¹¹⁰ Although the Court set forth three guideposts, it noted that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."¹¹¹ Additionally, the Court stressed the

102. *Id.* at 565.

103. *Id.*

104. *Id.*

105. *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619 (1994).

106. *Id.* at 628.

107. *Id.* at 629.

108. *BMW of N. Am., Inc. v. Gore*, 513 U.S. 1125 (1995).

109. *BMW*, 517 U.S. at 568 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994)).

110. *Id.* at 575. The Court in *BMW* alternatively referred to these three guideposts as Degree of Reprehensibility, Ratio, and Sanctions for Comparable Misconduct. *Id.* at 575, 580, 583. Because the third guidepost is not necessary for an analysis of the Court's decision in *Williams* due to the Court's failure to address it, this section does not provide a review of the Court's treatment thereof.

111. *Id.* at 575.

guidance it provided almost 150 years prior to this decision, when it reiterated that “[punitive] damages imposed on a defendant should reflect ‘the enormity of his offense.’”¹¹² In order to properly ascertain the enormity of the offense, the Court reviewed various aspects of BMW’s conduct, including the nature of the offense and the reasonableness of its actions, taking all of the surrounding circumstances into account.¹¹³

In its treatment of the second guidepost—ratio—the Court affirmed that the proper inquiry when looking at the ratio is “whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant’s conduct as well as the harm that actually has occurred.”¹¹⁴ The Court also affirmed its precedent by rejecting the use of a mathematical formula when determining whether this relationship is reasonable.¹¹⁵

Ultimately, the Court reversed the reduced punitive damages award. First, it found that BMW’s conduct was not highly reprehensible, mainly due to the purely economic nature of the plaintiff’s injury and to the reasonableness of BMW’s nondisclosure policy in light of the national standards.¹¹⁶ Second, the Court found that the ratio of actual or potential harm to the punitive damages was excessive considering the ratio of punitive damages to compensatory damages was 500:1.¹¹⁷ The Court further noted that “there [was] no suggestion that Dr. Gore or any other BMW purchaser was threatened with any additional potential harm by BMW’s nondisclosure policy.”¹¹⁸ On these bases, the Court reversed and remanded the case back to the Alabama state courts.¹¹⁹

112. *Id.* (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852)). The Court also drew attention to a more recent opinion where Justice O’Connor asserted that the reviewing court “should examine the gravity of the defendant’s conduct” when determining the reasonableness of punitive damages. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O’Connor, J., concurring).

113. *See BMW*, 517 U.S. at 576–80.

114. *Id.* at 581 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993) (emphasis in original) and *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991)).

115. *Id.* at 582.

116. *See id.* at 575–80. The Court noted that BMW’s national nondisclosure policy was drafted to coincide with the strictest state statute addressing the issue of disclosure requirements. *Id.* at 578. It also noted that it was reasonable for BMW to “interpret the [state] disclosure requirements as establishing safe harbors.” *Id.*

117. *Id.* at 582–83.

118. *Id.*

119. *Id.* at 586.

3. State Farm: *Guideposts clarified and ratio emphasized*

In 2003, the Court decided *State Farm v. Campbell*, another case dealing with the award of substantial punitive damages.¹²⁰ *State Farm* provided the Court with the opportunity to clarify the three guideposts elucidated in *BMW*. Specifically, in *State Farm*, the Court placed special emphasis on constitutional constraints related to the allowable ratio between punitive and compensatory damages,¹²¹ and, more importantly, it clarified what factors could be considered for the reprehensibility analysis.¹²²

a. Facts. In *State Farm*, the Court was faced with a bad faith insurance claim. In 1981, Curtis Campbell (Campbell) was driving on a two-lane Utah highway when he attempted to pass six vans traveling ahead of him.¹²³ As Campbell tried to pass the vans, another car was approaching from the opposite direction.¹²⁴ To avoid a head-on collision, the on-coming driver swerved onto the shoulder of the highway, lost control of his vehicle, and collided with a third vehicle.¹²⁵ The driver of the on-coming vehicle was killed, and the driver of the third vehicle was permanently disabled.¹²⁶ Fortunately for Campbell, he and his wife escaped without injury.¹²⁷

A wrongful death action followed this tragedy, and although Campbell insisted that he was not at fault, investigators and witnesses confirmed that “Campbell’s unsafe pass had indeed caused the crash.”¹²⁸ State Farm, Campbell’s automobile insurance provider, chose to contest Campbell’s liability and declined offers to settle the claims of both drivers at the policy limit of \$50,000.¹²⁹ Had State Farm accepted the settlement offer, both claims would have likely been dismissed with prejudice and the Campbells would have been

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

121. *Id.* at 425.

122. *Id.* at 419.

123. *Id.* at 412.

124. *Id.*

125. *Id.* at 412–13.

126. *Id.* at 413.

127. *Id.*

128. *Id.* (quoting *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, ¶ 2, 65 P.3d 1134, *rev’d*, 535 U.S. 1111 (2002)).

129. *Id.*

absolved of all liability.¹³⁰ State Farm assured the Campbells that “their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel.”¹³¹

The claims ultimately went to trial and the jury entered judgment against the Campbells in the amount of \$185,849.¹³² This award left them personally liable for \$135,849.¹³³ In light of the judgment, State Farm’s attorney informed the Campbells that “[they] may want to put for sale signs on [their] property to get things moving.”¹³⁴ Campbell immediately filed an appeal that was ultimately denied.¹³⁵

Before the appeal was denied, the Campbells agreed to allow plaintiffs’ attorneys to pursue a claim for insurance bad faith in the Campbells’ name. Also, as part of this agreement, the plaintiffs would receive ninety percent of any verdict against State Farm, in exchange for the assurance that the plaintiffs would not seek satisfaction of their claims against Campbell.¹³⁶ Hoping to induce the Campbells not to file their bad faith claim, State Farm then paid the entire judgment, leaving the Campbells with no personal liability.¹³⁷ Regardless, the Campbells, still possessing a viable bad faith claim, filed suit against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress.¹³⁸ In support of the bad faith and fraud claims, Campbell argued that his injury was the result of a nationwide policy to minimize payouts.¹³⁹

As a result of these claims, the jury awarded Campbell \$2.6 million in compensatory damages and \$145 million in punitive damages.¹⁴⁰ As with most awards of this magnitude, the trial court reduced the award—in this case to \$1 million in compensatory

130. Due to the confidential nature of settlement offers, it is impossible to know the exact details of the proposals, but it is safe to assume that in exchange for the \$50,000—\$25,000 per plaintiff—all claims would have been dismissed with prejudice.

131. *State Farm*, 538 U.S. at 413 (quoting *Campbell*, 2001 UT 89, ¶ 7, 65 P.3d 1142).

132. *Id.*

133. The insurance policy covered \$50,000 of the award. *Id.*

134. *State Farm*, 538 U.S. at 413 (quoting *Campbell*, 2001 UT 89, ¶ 7, 65 P.3d 1142).

135. *Id.* at 414.

136. *Id.* at 413–14.

137. *Id.* at 414.

138. *Id.*

139. *Id.* at 415. This nationwide policy affected consumers outside the State of Utah. *Id.*

140. *Id.*

damages and \$25 million in punitive damages.¹⁴¹ On appeal, the Utah Supreme Court reinstated the \$145 million award for punitive damages after applying the three guideposts set forth in *BMW*.¹⁴² Following the reinstatement of the full punitive award, the U.S. Supreme Court granted review.¹⁴³

b. Holding. In setting forth its opinion, the Court reaffirmed *BMW* in explaining that

courts reviewing punitive damages [must] consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.¹⁴⁴

In addition to affirming these guideposts, the Court explained that the *de novo* review provided a safeguard against juries capriciously imposing punitive damages.¹⁴⁵

Before beginning its analysis, the Court explicitly listed five factors for courts to consider when determining the reprehensibility of the defendant's conduct:

[W]hether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.¹⁴⁶

By articulating these factors, the Court emphasized that reprehensibility is "the most important indicium" of reasonableness.¹⁴⁷ This emphasis on reprehensibility was the Court's

141. *Id.*

142. *Id.* at 415–16.

143. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 535 U.S. 1111 (2002) (mem.).

144. *State Farm*, 538 U.S. at 418 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

145. *Id.* (citing *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001)).

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

147. *Id.* (quoting *BMW*, 517 U.S. at 575).

attempt to ensure that future punitive damages awards are based on constitutionally accepted principles.

With the five factors of reprehensibility in mind, the Court explained that because compensatory damages are intended to make plaintiffs whole, “punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.”¹⁴⁸ Because the purposes of punishment and deterrence are based on the state’s interest in protecting its citizenry,¹⁴⁹ the Court took issue with the state courts’ consideration of other unrelated conduct that injured nonparties outside the State of Utah.¹⁵⁰ The Court stressed that “[states do not] have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the [states’] jurisdiction.”¹⁵¹ Further, the Court noted that if the state considered the out-of-state conduct that injured nonparties, the state would be required to include those nonparties in the suit and to follow the laws of the various jurisdictions corresponding to those newly included parties.¹⁵² Thus, the Court found error in the state courts’ consideration of the out-of-state conduct causing harm to nonparties, noting that courts may not punish defendants for actions that are not a direct cause of the actual plaintiff’s injury.¹⁵³

Additionally, the Court attempted to illuminate the second guidepost of its analysis—ratio—when it limited the allowable size of punitive damages awards. The Court stated, “[w]e decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”¹⁵⁴ Having set such a “soft” rule, however, it was inevitable that the Court would face future substantive due process challenges to large punitive damages awards.

148. *Id.*

149. *See supra* Part II.

150. *See State Farm*, 538 U.S. at 419–23.

151. *Id.* at 421.

152. *Id.* at 421–22.

153. *Id.* at 422–23.

154. *Id.* at 425.

IV. WILLIAMS PAVES NEW GROUND

Philip Morris v. Williams represents the Court's most recent opinion addressing constitutional limitations on punitive damages awards.¹⁵⁵ This Part provides both the background facts related to Williams' suit against Philip Morris and the procedural history of Williams' claim that ultimately led to the Court's new rule. Additionally, this Part discusses the majority's opinion and highlights the Court's reasoning in establishing the new rule.

A. Background and Procedural History

Mayola Williams brought the original action against Philip Morris when her husband, Jessie Williams (Williams), died of smoking-related lung cancer.¹⁵⁶ Williams began smoking cigarettes in the early 1950s and continued smoking until his death in 1997.¹⁵⁷ Despite the efforts of Williams' children and his wife to help him quit smoking, Williams never quit smoking in large part because he believed that cigarette companies would not sell cigarettes if they would cause cancer and because he had heard in the media that cigarettes did not cause cancer.¹⁵⁸ In one instance, Williams found "published assertions showing that cigarette smoking [was] not dangerous" to justify his continued use of tobacco.¹⁵⁹ When Williams learned that he was dying of smoking-related lung cancer, he felt betrayed and said "those darn cigarette people finally did it. They were lying all the time."¹⁶⁰ After Williams' death, his widow filed suit against Philip Morris asserting claims of negligence and fraud.¹⁶¹

At the trial's end, the jury found that (1) "Williams' death was caused by smoking," (2) "Williams smoked in significant part because he thought it was safe to do so," and (3) "Philip Morris knowingly and falsely led him to believe that this was so."¹⁶² On the negligence claim, the jury found in favor of Williams and awarded \$21,485.80 in economic damages and \$800,000 in non-economic

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

156. *Williams v. Philip Morris, Inc.*, 48 P.3d 824, 828 (Or. Ct. App. 2002).

157. *Id.*

158. *Id.* at 829.

159. *Id.*

160. *Id.*

161. *Id.*

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

damages; however, the jury refused to grant punitive damages based on negligence.¹⁶³ On the fraud claim, the jury also found in favor of Williams and awarded \$79.5 million in punitive damages.¹⁶⁴ Following the jury's findings, the trial judge reduced the non-economic damages to \$500,000—pursuant to Oregon law—and reduced the punitive damages to \$32 million “on the ground that the jury’s award was excessive under the United States Constitution.”¹⁶⁵

The legal battle that followed the reduced jury verdict has been in multiple venues, multiple times. First, the Oregon Court of Appeals reviewed the reduced verdict and directed the lower court to reinstate the full jury award for punitive damages.¹⁶⁶ Thereafter, the court of appeals reconsidered its previous opinion, pursuant to Philip Morris’s request, and affirmed the reinstatement of the full award for punitive damages.¹⁶⁷ Subsequently, the Oregon Supreme Court denied Philip Morris’s request for review.¹⁶⁸ Upon denial from the Oregon Supreme Court, Philip Morris petitioned the United States Supreme Court to review its constitutional arguments.¹⁶⁹ The Supreme Court granted Philip Morris’s petition, vacated the judgment, and remanded the case to the Oregon Court of Appeals for reconsideration in light of the recent decision in *State Farm*.¹⁷⁰

On remand, and after considering the *State Farm* decision, the Oregon Court of Appeals directed the trial court to reinstate the full amount of punitive damages awarded by the jury.¹⁷¹ Again, Philip Morris requested that the Oregon Supreme Court review the court of appeals’ most recent decision, and on this second attempt the Oregon Supreme Court granted review.¹⁷² Ultimately, the Oregon Supreme Court affirmed the court of appeals’ direction to reinstate the full punitive damages award and noted that

163. *Williams*, 48 P.3d at 828.

164. *Id.*

165. *Id.*

166. *Id.* at 843.

167. *Williams v. Philip Morris, Inc.*, 51 P.3d 670, 673 (2002).

168. *Williams v. Philip Morris, Inc.*, 61 P.3d 938 (2002).

169. *Philip Morris USA, Inc. v. Williams*, 540 U.S. 801 (2003).

170. *Id.*

171. *Williams v. Philip Morris, Inc.*, 92 P.3d 126, 146 (2004).

172. *Williams v. Philip Morris, Inc.*, 104 P.3d 601 (2004).

there can be no dispute that Philip Morris's conduct was extraordinarily reprehensible. Philip Morris knew that smoking caused serious and sometimes fatal disease, but it nevertheless spread false or misleading information to suggest to the public that doubts remained about that issue. It deliberately did so to keep smokers smoking, knowing that it was putting the smokers' health and lives at risk, and it continued to do so for nearly half a century.¹⁷³

With respect to Philip Morris's conduct at issue in this case, the United States District Court for the District of Columbia stated, in a separate case against Philip Morris, that

over the course of more than 50 years, [Philip Morris] lied, misrepresented, and deceived the American public, including smokers and the young people they avidly sought as "replacement smokers," about the devastating health effects of smoking and environmental tobacco smoke, they suppressed research, they destroyed documents, they manipulated the use of nicotine so as to increase and perpetuate addiction, they distorted the truth about low tar and light cigarettes so as to discourage smokers from quitting, and they abused the legal system in order to achieve their goal—to make money with little, if any, regard for individual illness and suffering, soaring health costs, or the integrity of the legal system.¹⁷⁴

The state high court supported its affirmation of the award on the basis that "[u]nder such extreme and outrageous circumstances, . . . the jury's \$79.5 million punitive damage award against Philip Morris comported with due process, as we understand that standard to relate to punitive damage awards."¹⁷⁵ Unsatisfied with the Oregon Supreme Court decision, Philip Morris petitioned the Supreme Court to review the jury award once again.¹⁷⁶

Once again, the Supreme Court granted review, but limited its review to two specific issues:¹⁷⁷ (1) whether the Constitution permits punishing a defendant for harming nonparty victims and (2) whether

173. *Williams v. Philip Morris, Inc.*, 127 P.3d 1165, 1177 (2006).

174. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 852 (D.D.C. 2006).

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

176. *Philip Morris USA v. Williams*, 126 S. Ct. 2329 (2006) (mem.).

177. *Id.*

the punitive damages award met “the constitutional requirement that [it] be reasonably related to the plaintiff’s harm.”¹⁷⁸

With regard to the first issue, Philip Morris argued that Williams’ closing argument encouraged the jury to consider injury to nonparties:

[T]hink about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. . . . In Oregon, how many people do we see outside, driving home . . . smoking cigarettes? . . . [C]igarettes . . . are going to kill ten [of every hundred]. [And] the market share of Marlboros [i.e., Philip Morris] is one-third [i.e., one of every three killed].¹⁷⁹

In response to that argument, Philip Morris requested that the court adopt its proposed jury instruction, which included the instruction that the jury was “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.”¹⁸⁰ The trial court ultimately denied that request and Philip Morris argued that “the result was a significant likelihood that a portion of the \$79.5 million award represented punishment for its having harmed others, a punishment that the Due Process Clause would here forbid.”¹⁸¹ To support its argument surrounding the second issue, Philip Morris argued that, in light of the Court’s decisions in *BMW* and *State Farm*, the punitive award of \$79.5 million was grossly excessive.¹⁸²

B. Majority Opinion in Williams

At the outset of Justice Breyer’s majority opinion, he clarified that the Court was only going to consider the first issue presented by Philip Morris: whether the Constitution permits punishing a defendant for injury to nonparty victims.¹⁸³ The majority acknowledged that states could appropriately impose punitive damages in order to further their “legitimate interests in punishing

178. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062 (2007) (quoting Petition for Certiorari at 1, *Philip Morris*, 127 S. Ct. 1057 (No. 05-1256)).

179. *Id.* at 1061 (quoting app. at 197a, 199a).

180. *Id.* (quoting app. at 280a).

181. *Id.*

182. *Id.* at 1061–62.

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

unlawful conduct and deterring its repetition;" however, it also stressed "the need to avoid an arbitrary determination of an award's amount."¹⁸⁴ Justice Breyer further explained some of the dangers in allowing the jury to exercise unbridled discretion in determining the amount of punitive damages awarded:

Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of "fair notice . . . of the severity of the penalty that a State may impose," it may threaten "arbitrary punishments," i.e., punishments that reflect not an "application of law" but "a decisionmaker's caprice," and, where the amounts are sufficiently large, it may impose one State's (or one jury's) "policy choice," say as to the conditions under which (or even whether) certain products can be sold, upon "neighboring States" with different public policies.¹⁸⁵

Based on "these and similar reasons," Justice Breyer explained that "the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as 'grossly excessive.'"¹⁸⁶ By failing to address the second issue presented to the Court, the majority limited its opinion to "the Constitution's procedural limitations."¹⁸⁷

Indeed, the Court centered its analysis squarely on the Due Process Clause: the only constitutional theory that has been repeatedly used by the Court to vacate punitive damages awards.¹⁸⁸ First, Justice Breyer presented the Court's new rule: "[T]he 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" because it "prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'"¹⁸⁹ Justice Breyer explained that defendants have no opportunity to defend against the

184. *Id.*

185. *Id.* (quoting *BMW*, 517 U.S. at 571–72, 574 and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 418 (2003)) (citations omitted).

186. *Id.* (citation omitted).

187. *Id.* at 1063.

188. *See supra* note 62.

189. *Williams*, 127 S. Ct. at 1063 (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). Justice Breyer noted that the Court "did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now." *Id.* at 1065.

injuries to nonparties by presenting evidence that the nonparties were not entitled to damages due to differing circumstances.¹⁹⁰ In support of this new rule, Justice Breyer stated that permitting punitive damages based on injuries to nonparties “would add a near standardless dimension to the punitive damages equation” and the jury would be “left to speculate.”¹⁹¹ This standardless dimension, according to Justice Breyer, would necessarily increase the likelihood that fundamental due process protections—“risks of arbitrariness, uncertainty and lack of notice”—will not be afforded to defendants.¹⁹²

After presenting the Court’s new rule, Justice Breyer stated that he could “find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others.”¹⁹³ In support of this assertion, he clarified previous Court opinions that could be interpreted to allow consideration of potential nonparty injury in determining punitive damages. First, Justice Breyer asserted that the Court’s previous references to “potential harm the defendant’s conduct could have caused” referred only to potential harm to the named plaintiff.¹⁹⁴ In support of this assertion, Justice Breyer cited to language from *State Farm* addressing the issue of potential harm: “[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award.”¹⁹⁵ Justice Breyer also cited to the Court’s opinion in *TXO*, asserting that the Court implemented the “same kind of comparison as [a/the] basis for finding a punitive award not unconstitutionally excessive.”¹⁹⁶ Second, Justice Breyer conceded that in *BMW*, the Court referred to the lack of potential injury to other nonparties,¹⁹⁷ however, he asserted that

190. *Id.* at 1063.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* (emphasis omitted).

195. *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003)) (emphasis added by Justice Breyer).

196. *Id.* (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460–62 (1993)).

197. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996) (noting that there was no implication that defendant or “any other [third party] was threatened with any additional potential harm” by defendant’s nondisclosure policy).

the Court “did not purport to decide the question of harm to others. Rather, the opinion appears to have left the question open.”¹⁹⁸

Having justified the majority’s new rule, Justice Breyer next addressed the propriety of allowing the jury to consider injury to nonparties when determining the reprehensibility of the defendant’s conduct. Neither party disputed the relevance of injury to nonparties when determining the reprehensibility of the defendant’s conduct, nor the notion that potential injury to nonparties demonstrates highly reprehensible conduct.¹⁹⁹ The majority also agreed that injury to nonparties could be considered when determining the reprehensibility of the conduct; however, it reaffirmed its new rule that injury to nonparties could not be considered when determining the amount of punitive damages, and explained that the consideration of injury to nonparties “may not go further than [a determination of the level of reprehensibility].”²⁰⁰

The majority understood the fine line that this new rule established and concluded that courts must institute certain safeguards to protect against “the risks of unfairness” when a jury is allowed to consider injury to nonparties for only one aspect of its verdict but not another.²⁰¹ Justice Breyer explained that “it is constitutionally important [in this situation] for a court to provide assurance that the jury will ask the right question, not the wrong one.”²⁰² In fact, the majority concluded that “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.”²⁰³ In support of this finding, Justice Breyer noted specific language from the Oregon court’s opinion:

[The Oregon Supreme Court] pointed out (1) that this Court in *State Farm* had held only that a jury could not base its award upon

198. *Williams*, 127 S. Ct. at 1063.

199. *Id.* at 1064.

200. *Id.*; *see also id.* at 1065 (“We have explained why we believe the Due Process Clause prohibits a State’s inflicting punishment for harm caused strangers to the litigation. At the same time we recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility.”).

201. *Id.* at 1064.

202. *Id.*

203. *Id.* (emphasis added).

“dissimilar” acts of a defendant. It added (2) that “[i]f a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all.” And it stated (3) that “[i]t is unclear to us how a jury could ‘consider’ harm to others, yet withhold that consideration from the punishment calculus.”²⁰⁴

According to the majority, this language clearly demonstrated the Oregon Supreme Court’s acceptance of the punitive damages award despite the possibility that it was at least partially based on injury to nonparties.²⁰⁵ Thus, the judgment was vacated and the case was remanded for further proceedings consistent with the majority’s opinion.²⁰⁶

V. A CALL FOR AN AMENDMENT TO THE NEW RULE

The new rule established in *Williams* is unworkable, critically flawed, and will lead to future constitutional problems. This Part proposes changes to the new rule established in *Williams*. First, this Part offers an in-depth discussion of the new rule including its scope. Additionally, this Part argues that potential injury is a necessary factor in determining the appropriate amount of punitive damages to assess. This Part then presents potential arguments against the proposed rule and demonstrates the effectiveness of the proposed rule despite these counterarguments.

A. The New Rule Set Forth by the Majority

Before delving into the deficiencies of the new rule established by the majority in *Williams*, it is useful to review what the rule is and the reasoning behind its establishment. In succinct terms, the new rule allows juries to consider injury to nonparties when determining the level of reprehensibility, but prohibits juries from considering that same injury when determining the amount of punitive damages to assess.

1. Background principles of the Constitution

The Court referred to three constitutional principles as a background for this new rule. First, the Constitution prohibits

204. *Id.* at 1064–65 (citations omitted).

205. *Id.* at 1064.

206. *Id.* at 1065.

procedures that deprive a defendant of “fair notice . . . of the severity of the penalty that a State may impose.”²⁰⁷ Second, the Constitution will not allow “‘arbitrary punishments,’ *i.e.*, punishments that reflect not an ‘application of law’ but ‘a decisionmaker’s caprice.’”²⁰⁸ Third, where punitive damages awards “are sufficiently large, [the State’s punitive damages system] may impose one State’s (or one jury’s) ‘policy choice,’ . . . as to the conditions under which (or even whether) certain products can be sold, upon ‘neighboring States’ with different public policies,” thereby infringing upon the federal government’s constitutional authority to control interstate commerce.²⁰⁹

2. *Supporting arguments*

The majority gave three principal arguments supporting the establishment of the new rule. First, the majority noted that the Constitution “prohibits a State from punishing an individual without first providing that individual with ‘an opportunity to present every available defense.’”²¹⁰ With respect to this first argument, the majority explained that allowing the jury to consider injury to nonparties in the determination of punitive damages would clearly infringe on this right because the defendant would not have the ability to present defenses that directly relate to the nonparty claims.²¹¹

Second, the majority argued that allowing consideration of injury to nonparties “would add a near standardless dimension to the punitive damages equation” and the jury would be “left to speculate.”²¹² Essentially, the majority believes that if juries are left free to consider these hypothetical claims, punitive damages awards will be artificially inflated. In turn, the need for substantive due process (fairness) review would increase.

207. *Id.* at 1062 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571–72, 574 (1996) and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 418 (2003)) (citations omitted).

208. *Id.* (quoting *State Farm*, 538 U.S. at 416, 418) (citations omitted).

209. *Id.* (quoting *BMW*, 517 U.S. at 571–72, 574) (citations omitted).

210. *Id.* at 1063 (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). Justice Breyer noted that the Court “did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now.” *Id.* at 1065.

211. *Id.* at 1063.

212. *Id.*

Third, the majority claimed that no previous Supreme Court jurisprudence contradicts the new rule. In support of this argument, the majority referred to *State Farm*, which noted that the Court had “been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award.”²¹³ Further, Justice Breyer asserted that in *BMW*, the Court “did not purport to decide the question of harm to others,” and therefore, it was appropriate for the Court to address the issue as a matter of first impression.²¹⁴

3. Majority instructions related to the new rule

In establishing this rule, the majority was likely attempting to strike a balance between the states’ interest in punishing and deterring highly reprehensible misconduct and the defendants’ interest in constitutional protections. Indeed, the Court explained that “it is constitutionally important [in this situation] for a court to provide assurance that the jury will ask the right question, not the wrong one.”²¹⁵ Further, the majority acknowledged that, under the new rule, courts will have to ensure that juries do not consider inappropriate evidence or arguments, yet the majority provided no guidance for how this might be done:

213. *Id.* (quoting *State Farm*, 538 U.S. at 424) (emphasis added by Justice Breyer). Justice Breyer applied this *State Farm* language out of context. In *State Farm*, the phrase “harm, or potential harm, to the plaintiff” referred to compensatory damages, not punitive damages. Indeed, the *State Farm* language relied upon by Justice Breyer simply states that the Court had been reluctant to impose a concrete ratio between compensatory damages (“harm or potential harm, to the plaintiff”) and punitive damages. The language does not imply that punitive damages include only potential harm to plaintiff and exclude considerations of others. It actually says nothing about whether potential harm to plaintiff or others should be considered for punitive damages. Further, even if previous opinions did not contradict Justice Breyer’s new rule, that rule should still be modified because of failings set forth below. See *infra* Part V.C.

214. *Williams*, 127 S. Ct. at 1063. As to this argument, it is curious when considering the facts and circumstances of *BMW*. In *BMW*, the Court clarified that the Constitution does not permit state courts to consider out-of-state injury to nonparties. The evidence in question in *BMW* fits the issue addressed by the new rule in *Williams*, but the majority failed to acknowledge the similarity. If the new rule is in fact required by due process, why did the Court fail to establish the new rule when it was presented with the case in *BMW*, where injury to nonparties had been considered by the jury when determining the amount of punitive damages to award? To say that the question still remains after *BMW* is to rob *BMW* of its precedential value. As with the previous supporting argument, this error is also trivial to this analysis since the suggested modification to the new rule is not affected thereby.

215. *Id.* at 1064.

[W]here 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. Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases.²¹⁶

Thus, the majority failed to offer the states a procedure that would protect juries from inappropriate information. In instances like these, courts generally use limiting instructions whereby the judge instructs the jury to consider evidence for one specific factual finding and exclude that evidence for all other factual findings.²¹⁷ The courts' task of ensuring that the juries consider evidence for one purpose (reprehensibility) but not another (amount of punitive damages) may prove difficult especially when the two purposes are interrelated.

B. Court's New Rule Applies to Actual and Potential Injury to Nonparties

Although the majority opinion does not explicitly state that the new rule applies to both actual and potential injury to nonparties, the facts of the case and the majority's explanation indicate that the rule does apply to both actual and potential injury. Perhaps the Court should have provided a more lengthy discussion of the rule and its application to the facts of the case or an explicit explanation of its breadth, but as the opinion stands, the rule unquestionably applies to both actual and potential harm to nonparties.

Clearly, the rule prohibits juries from considering actual injury to nonparties when determining the amount of punitive damages to award. If a jury assessed punitive damages based on actual injury to nonparties, the jury would frustrate the defendant's due process right to defend himself against all claims brought. The proper remedy for actual harm to nonparties is the award of compensatory damages if and when the nonparty in question files a claim related thereto.

The rule also prohibits juries from considering potential injury to nonparties. The Oregon courts did not assess punitive damages against Philip Morris based on actual injury to nonparties. Plaintiff

216. *Id.* at 1065.

217. *See, e.g.,* *People v. Falsetta*, 986 P.2d 182, 193–95 (Cal. 1999).

did not present any evidence related to actual injury; rather, plaintiff asked the jury to consider the number of Oregonian smokers likely affected by Philip Morris's conduct and provided the jury with statistics of the number of Oregonian smokers, the number of smokers that die from smoking related diseases, and the percentage of those smokers who smoke Philip Morris cigarettes.²¹⁸ Because the new rule emerged under facts where plaintiff presented only evidence of potential injury to nonparties, the holding necessarily applies to potential injury to nonparties.²¹⁹

Additionally, the majority indicated that its rule applies to potential injury when it re-characterized *State Farm*. In his unpersuasive use of *State Farm*, Justice Breyer explicitly explained that the jury's consideration of potential injury is limited to the potential injury to the plaintiff.²²⁰ This statement, combined with a consideration of the holding in *Williams* in light of the facts of the case, necessarily lead to the conclusion that the new rule was directed at all nonparty injury, both actual and potential.

C. Potential Harm to Nonparties Must Be Considered in Both Phases

If the new rule is as broad as it appears—prohibiting actual and potential harm to nonparties—it will not work. Therefore, the Court must adopt an amended rule that can be reasonably applied and that will shield against the constitutional violations the new rule was intended to prevent. The amended rule should provide that *potential* injury to nonparties may be considered by the jury when determining the level of reprehensibility and when determining the correct amount of punitive damages to assess; however, *actual* injury to nonparties may not be presented to the jury for its consideration at any time.

218. *Williams*, 127 S. Ct. at 1061 (quoting app. at 197a, 199a).

219. While *Williams* did include the percentage of Oregonian smokers that are expected to die as a result of smoking-related diseases, she gave no statistics regarding the number that have died, or the number that were defrauded by Philip Morris's conduct. All of this information was included in closing argument to emphasize the reprehensibility of Philip Morris's conduct, and all of this information was presented as potential injury to nonparties. The majority even recognized "that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few." *Id.* at 1065. In light of the importance of reprehensibility, it was not unreasonable for *Williams* to present this information to the jury.

220. *Id.* at 1063.

1. Court's new rule cannot be reasonably applied

Juries may appropriately consider reprehensibility when determining the amount of punitive damages to assess. Indeed, the Court uses three factors to determine the reasonableness of a punitive damages award under its substantive due process review: reprehensibility, ratio of compensatory to punitive damages, and similarity to sanctions for like conduct in criminal tribunals.²²¹ Of those three factors, reprehensibility is unquestionably the most important factor in determining reasonableness.²²² The importance of reprehensibility likely stems from a state's interest in punishing and deterring reprehensible misconduct. Since reprehensibility is a factor courts look to in determining the reasonableness of a punitive damages award, it must follow that juries be allowed to consider reprehensibility when determining the amount of punitive damages to award. If juries are not permitted to consider such evidence, there is no justification for allowing courts to do so. Additionally, one author noted that if a defendant is found to have acted "in a way that is egregious, malicious, or undertaken with reckless disregard for the rights of others . . . the degree of his reprehensibility is often treated as a key factor in determining the level of punitive damages."²²³ Thus, there should be no dispute that reprehensibility can be appropriately considered when determining the amount of punitive damages to assess.

According to the majority's opinion, jurors may consider actual and potential injury to nonparties when determining the

221. *Id.* at 1061.

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

223. *Polinsky & Shavell*, *supra* note 28, at 905 (citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223 (Ala. 1989) ("The degree of reprehensibility of the defendant's conduct should be considered" when "determining whether the jury award of punitive damages is excessive or inadequate."); *endorsed in* *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991); *Neal v. Farmers Ins. Exch.*, 582 P.2d 980, 990 (Cal. 1978) (stating that, among the factors to consider in assessing punitive damages is "the particular nature of the defendant's acts in light of the whole record" and that "clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal"); *McNeill v. Allen*, 534 P.2d 813, 820 (Colo. Ct. App. 1975) ("[T]he purpose of punishment and deterrence may best be served by relatively higher or relatively lower exemplary damages according to the nature of the wrongful conduct.") (citation omitted); and *Ultimate Chem. Co. v. Surface Transp. Int'l, Inc.*, 658 P.2d 1008, 1012 (Kan. 1983) (listing among the factors to consider in assessing punitive damages "the nature, extent, and enormity of the wrong")).

reprehensibility of defendant's conduct.²²⁴ Herein lies the problem. If jurors consider injury to nonparties when determining reprehensibility, and if, at the same time, they consider reprehensibility to determine the amount of punitive damages to assess, naturally jurors ultimately *will* consider injury to nonparties when determining the total punitive damages. The Court should have had no trouble making this connection; however, it is possible that the majority missed this correlation due to the fact that it limited its review to the procedural due process issue and refused to consider the substantive due process issue related to the reasonableness of the punitive damages award.

The Court cannot separate juror determinations of reprehensibility and the amount of punitive damages because the punitive damages award depends on the reprehensibility of defendant's conduct. The majority's attempt to keep them separate is illusory and does not ensure that the jury is asking the right question. The jury *must* ask the wrong question based on the new rule. Inevitably, juries will have to consider—whether indirectly or directly—the injury to nonparties in order to ascertain the constitutionally appropriate amount of punitive damages to award. Therefore, this rule will likely cause jury awards to become more arbitrary due to juror confusion.

How can a judge really ask the jury to consider fact *A* for purpose 1, but prohibit it from considering fact *A* for purpose 2, when purpose 1 is considered for purpose 2? Confused? This is the confusion that a jury will likely experience when the judge gives the final instructions before deliberation:

*Ladies and gentlemen of the jury, you are permitted to consider injury to nonparties to determine the level of reprehensibility of the defendant's conduct; however, you may not consider injury to nonparties when determining the amount of punitive damages to assess. The most important factor in determining the amount of punitive damages to assess is the level of reprehensibility of the defendant's conduct.*²²⁵

Accordingly, the new rule must be amended in a way that eliminates the contradiction. To do this, the Court must amend the

224. *Williams*, 127 S. Ct. at 1064.

225. Of course, this is merely an illustration of the type of jury instruction that must be given pursuant to the new rule established by the *Williams* majority.

rule to allow juries to consider injury to nonparties during all phases of the punitive damages determination. Further, to adequately protect defendants' due process rights, courts must distinguish between *actual* and *potential* injury to nonparties and must not allow juries to consider actual injury to nonparties at any time.

2. Potential injury to nonparties must be considered to effectively punish and deter reprehensible misconduct

States must be allowed to consider potential injury to nonparties if they are to effectively punish and deter reprehensible conduct. They have a legitimate interest in punishing and deterring misconduct, especially when the misconduct is malicious and in disregard to the health and safety of the citizenry.

A. Mitchell Polinsky and Steven Shavell offer an economic analysis of punishment and deterrence that directly relates to the type of misconduct committed in *Williams*.²²⁶ First, they explain that misconduct that is purely intentional and highly reprehensible must be deterred "completely."²²⁷ In order to deter future misconduct, the punitive damages awarded must be "equal to the greater of gain or harm."²²⁸ Further, if the punitive damages are less than the amount gained, or the potential injury sustained, "injurers' incentives to take precautions will be inadequate and their incentive to participate in risky activities will be excessive."²²⁹ Since Philip Morris will never be "caught" for all of the people that were

226. See generally Polinsky & Shavell, *supra* note 28.

227. *Id.* at 906. Philip Morris's actions clearly fit into this category of misconduct.

228. *Id.* at 918 n.154.

When an injurer has a chance of escaping liability, the proper level of *total damages* to impose on him, if he is found liable, is the harm caused multiplied by the reciprocal of the probability of being found liable. Thus, for example, if the harm is \$100,000 and there is a twenty-five percent chance that the injurer will be found liable for the harm for which he is legally responsible, the harm should be multiplied by 1/.25, or 4, so total damages should be \$400,000. Because the injurer will pay this amount every fourth time he generates harm, his average payment will be \$100,000 (= \$400,000/4). Thus, on average, the injurer will pay for the harm he causes, and appropriate deterrence will result. Once the proper level of total damages is calculated in this way, punitive damages can be determined by subtracting compensatory damages from the total. In the example, because compensatory damages would equal the harm of \$100,000, punitive damages would equal \$300,000 (= \$400,000-\$100,000).

Id. at 874-75 (citations omitted).

229. *Id.* at 888 (emphasis omitted).

potentially harmed, Oregon must punish Philip Morris for the misconduct. The state will never be able to assess a reasonable amount of punitive damages necessary to deter without considering the potential harm. Therefore, punitive damages that do not assess sufficient penalties will fail to effectively deter future misconduct.

It is indisputable that misconduct that threatens a large group of people is more reprehensible than misconduct that only threatens one person. However, misconduct that threatens a large group of people will rarely be litigated by all persons actually affected.²³⁰ Because of this, juries must be allowed to consider potential harm to nonparties when determining the amount of punitive damages to assess.²³¹ Allowing juries to consider potential harm to nonparties in all aspects of punitive damages awards will prevent juror confusion and will increase the likelihood of awarding a more effective punishment.

Although this approach leaves the jury considerable leeway in deciding the amount of punitive damages to assess, the alternative—confusion—will likely lead to more arbitrary awards and therefore necessitate more substantive due process reviews of those awards.²³² Jury confusion will likely lead to smaller punitive damages awards in some instances and larger awards in others. If jurors are confused by the instructions, and decide that they should not be assessing severe punishments for malicious misconduct, awards will be too small and the states will not be able to adequately punish and deter highly reprehensible conduct. Conversely, if jurors are confused, and decide to consider actual injury to nonparties when determining the amount of punitive damages to assess, awards will be larger than due process allows. In addition to minimizing juror confusion, this amended rule

230. There will always be injured parties who do not want to deal with the hassle of a lawsuit and, therefore, forego the opportunity to obtain compensation for their injuries through legal channels.

231. And, nonparties are necessarily part of that consideration, as shown *supra* in Part V.C.1, but this argument, which provides that potential injury to nonparties must be considered to effectively punish and deter reprehensible misconduct, is separate from the previous argument addressing the necessary relationship between the two uses of injury to nonparties.

232. To date, there has not been any research as to the actual effect of juror confusion on the resulting verdicts and awards, but juror confusion could never lead to more consistent verdicts and awards. One possible reason that there has not been research on this topic is because once a court determines that there has been juror confusion, the decision is reversed unless the judge determines that the confusion was harmless. *N. Pac. Ry. v. Herman*, 478 F.2d 1167, 1171 (9th Cir. 1973).

does not increase jury discretion in light of the high level of discretion the jury already enjoys when determining the level of reprehensibility and in light of the necessary connection between reprehensibility and the amount of punitive damages to assess.

This argument that potential injury to nonparties is a necessary part of the punitive damages award is additionally supported by the plurality opinion in *TXO*.²³³ According to the plurality, “[i]t is appropriate to consider the magnitude of the potential harm that the defendant’s *conduct would have caused to its intended victim* if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.”²³⁴ In cases with similar facts to those of *Williams*—where the misconduct was directed at a very large group of people—the intended victim is the entire group of people. Therefore, in these types of cases where the intended victim is a large group, the magnitude of the potential harm that the defendant’s conduct would have caused to the *group* if the wrongful plan had succeeded may be appropriately considered. If evidence of the potential harm to nonparties is prohibited, the state will never be able to effectively punish and deter highly reprehensible misconduct.

3. Consideration of actual injury to nonparties must be prohibited at all stages

In order to adequately protect the defendants’ constitutional rights, courts must prohibit jury consideration of actual injury to nonparties at all stages of litigation. First, the majority’s concern regarding defendant’s right to present all available defenses is only applicable to actual injury. As explained previously, the accused may defend against plaintiff’s potential-injury-to-nonparty claims, despite the fact that the actual plaintiffs are not at trial. However, when the injuries are actual, the injured party must be required to present its claims to the court and request compensatory damages based on the actual injury. States should not use punitive damages to punish defendants for claims that can, and likely will, be litigated in the future, or that have already been litigated. If courts prohibit jury consideration of actual injury to nonparties, defendants will continue to enjoy their right to assert all available defenses.

233. See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993).

234. *Id.* at 460 (emphasis added).

Second, if courts allow juries to consider actual injury to nonparties for reprehensibility, but not punitive damages determinations, jurors will likely become confused. Because the jurors will likely be confused and may consider the actual injury when determining the amount of punitive damages to assess, the consideration of actual injury should be prohibited at all stages. The Supreme Court reversed both *BMW* and *State Farm* partly because the juries had considered actual injury to nonparties.²³⁵ Allowing juries to consider the actual injuries to nonparties for one “allowable” purpose, when there is a chance that the information will also be considered for inappropriate purposes, subjects defendants to unnecessary danger that the final punitive award will be based partly on actual injury to nonparties. Additionally, the resulting confusion likely will lead to arbitrary punitive awards. By disallowing the consideration of actual injury in all stages, the Court can prevent juries from becoming confused and from inappropriately considering actual injury when determining the amount of punitive damages to award.

This distinction between actual and potential injury could be seen as illusory since actual injury to nonparties can be seen as part of the potential injury to nonparties. The potential injury to nonparties looks to the magnitude of the misconduct directed at the intended victims. When there is a large group of intended victims, it is highly likely that more than one member of the group will experience actual injury. Thus, the actual injury is included in the potential injury because the person actually injured is a member of the group. However, when juries consider potential injury to nonparties, they are not considering the merits of actual injuries, just hypothetical ones. Since the actual injuries of out-of-court plaintiffs are not at issue, the accused may freely defend against all hypothetical claims and suffer no constitutional infringement of his right to defend.

In order for the proposed rule to function properly, the Court must allow juries to consider potential injury to nonparties both for reprehensibility and the amount of damages to be assessed. The Court must also prohibit juries from considering actual injury to

235. In *BMW*, the Court noted that it was inappropriate for the state courts to consider the injury caused by BMW's conduct that occurred outside of Alabama. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573–74 (1996). In *State Farm*, the Court noted that it was inappropriate to consider the injury caused by State Farm's conduct that occurred outside the state. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003).

nonparties at all stages of the trial. Establishing a rule that provides otherwise would unnecessarily limit the states' ability to effectively punish and deter misconduct and, at the same time, would unnecessarily expose defendants to potential harm caused by the misuse of actual injury evidence.

4. The consideration of potential injury to nonparties must be partially restricted

The jury's consideration of potential injury should be restricted in order to provide some safeguards for defendants. These restrictions are found in *BMW* and *State Farm*: a jury should not consider (1) out-of-state misconduct or (2) misconduct by the defendant exceeding the actual misconduct suffered by plaintiff.

In *BMW*, the Court explained that the jury should not be presented with any information that demonstrates misconduct by the defendant that was directed out of the state.²³⁶ For example, in *Williams*, the plaintiff would not be allowed to present evidence of campaigns to defraud that were not aimed at Oregonians. Thus, if Philip Morris had an advertising scheme exclusively disseminated in New York that sought to convince smokers that smoking was not adverse to their health, Williams would not be allowed to mention that campaign in her argument to the jury. If a court allowed otherwise, Oregon could police Philip Morris's conduct outside of Oregon through punitive damages awards. This type of extraterritorial policing is clearly inappropriate and should be protected against. Thus, potential injury to nonparties must be limited to those nonparties that constitute part of the group of persons that defendants target through their misconduct, and only those nonparties that are within the geographical boundaries of the state.

In *State Farm*, the Court explained that the jury should not be presented with any evidence that demonstrates misconduct by the defendant that exceeds the actual misconduct that caused the actual injury to the plaintiff.²³⁷ For example, if Philip Morris contacted an Oregon support group that helps smokers quit, and conveyed the message that smoking was not necessarily linked to cancer, as long as Williams was not a member of that group, the conveyance of the

236. *BMW*, 517 U.S. at 572-73.

237. *State Farm*, 538 U.S. at 421-22.

information to the group should not be disclosed to the jury. Although the evidence would bolster the argument that Philip Morris acted maliciously and with complete disregard for health and safety, evidence may not veer from the underlying case that brought about the punitive damages. Since that information would not be admissible for the compensatory phase of the trial, it should not be admissible to bolster reprehensibility arguments. Thus, the potential harm to nonparties must arise from the actual misconduct that the suit for compensatory damages is based on.

If a court allowed juries to consider potential injury to nonparties for reprehensibility and punitive damages determinations and included the above-mentioned two restrictions, that court would not contradict any Supreme Court precedent—other than *Williams*.

5. Possible arguments against allowing consideration of potential injury to nonparties

There are possible arguments against allowing the consideration of potential injury to nonparties for both purposes, and those arguments should not be ignored.²³⁸ Most of the arguments center around one question: will the proposed rule adequately guard the interests protected by substantive due process? Ultimately, the proposed rule is based on procedural due process considerations, and therefore its validity should not depend on substantive due process considerations. Substantive due process, as applied by the Court, requires that the award be “fair.” However, the new rule established by the Court was not dependent on the fairness of the outcome, nor was the fairness of the outcome even considered. Despite this distinction, the substantive due process arguments are germane to the viability of the proposed rule and will be considered below.

One such argument is that allowing the jury to consider potential injury to nonparties will lead to arbitrary awards, and therefore, the Court would be in the same place it was prior to any application of the proposed rule. However, as explained above, punitive damages awards will likely become more reasonable as the jury receives clear and coherent instructions allowing it to consider the potential injury for both reprehensibility and amount purposes. Additionally, if the jury fails to assess a constitutionally reasonable punitive damages

238. Naturally, there are possible arguments against this rule that are not included herein. None of those potential arguments were intentionally excluded from this Comment.

award, the Court could review the award on a substantive due process challenge and correct the error. There is no question that the Court is willing to apply substantive due process principles to ensure that punitive damages awards are "fair."²³⁹ Additionally, many states have enacted legislation that provides guidance to the jury and safeguards to the defendant when punitive damages are awarded.²⁴⁰ It is likely that more states will pass legislation in order to curb the frequency of Supreme Court review on substantive due process grounds.

Another argument against the proposed rule is that allowing the jury to consider potential injury will deprive the defendant of fair notice because the awards have the potential to be very large in some cases. Although fair notice is an important right that should be protected, it should not be misused as a defense for the most reprehensible conduct. States should not have to provide potential wrongdoers with the exact range of dollar amounts that might be awarded for specific misconduct. The Court has already established that in most cases, the ratio of punitive to compensatory damages should not exceed single digits. However, in some instances, the most reprehensible conduct may lead to higher ratios of punitive to compensatory damages.²⁴¹ Plaintiffs that act with malice and complete disregard for the health and safety of the citizenry should not enjoy the protection of the pretextual argument that they were

239. Almost all of the Court's previous punitive damages opinions centered on principles of substantive due process. *See supra* Part III.

240. The following states have enacted legislation that attempts to provide defendants with safeguards when faced with the imposition of punitive damages: Alabama (ALA. CODE §§ 6-11-20 to -30 (2005)); Arkansas (ARK. CODE ANN. §§ 16-55-206, 16-55-208 to -211 (2005)); Colorado (COLO. REV. STAT. §§ 13-20-101 to -102.5 (2005)); Florida (FLA. STAT. §§ 768.72, .725, .73, .733, .735-.737, .77, .79, 772.104 (2005)); Georgia (GA. CODE ANN. §§ 51-12-5 to -6 (2000)); Idaho (IDAHO CODE ANN. §§ 6-1601, 6-1604 (2004)); Illinois (735 ILL. COMP. STAT. 5/2-604.1, -1107.1, -1115.05, -1207 (2003)); Indiana (IND. CODE §§ 34-51-3-1 to -6 (1998)); Kansas (KAN. STAT. ANN. §§ 60-209, -3702 to -3703 (2005)); Missouri (MO. REV. STAT. §§ 509.200, 510.263, .265, .270, 537.067 (1952)); Montana (MONT. CODE ANN. §§ 27-1-210, -220, -221 (2005)); Nevada (NEV. REV. STAT. § 42.005 (2005)); New Jersey (N.J. STAT. ANN. §§ 2A:15-5.9 to -5.17; 2A:23B-21 (West 2000)); North Carolina (N.C. GEN. STAT. §§ 1D-1, -5, -10, -15, -20, -25, -26, -30, -35, -40, -45, -50 (2005)); Oklahoma (OKLA. STAT. tit. 12, §§ 1872, 2009 (1993 & Supp. 2007) and OKLA. STAT. tit. 23, §§ 9.1, 95, 96 (1987 & Supp. 2007)); Oregon (OR. REV. STAT. §§ 31.725, .730, .735, .740 (2005)); South Dakota (S.D. CODIFIED LAWS §§ 15-39-45, 21-1-4, 21-1-4.1, 21-3-2 (2004)); Texas (TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.001-.013 (Vernon 1997 & Supp. 2006)); and Virginia (VA. CODE ANN. §§ 8.01-38.1, -374.1 (2007)).

241. *State Farm*, 538 U.S. at 425.

not on notice that their conduct would lead to such a large punitive award.

Additionally, some may argue that defendants are robbed of the opportunity for defense if juries consider potential injury to nonparties. However, admissible evidence can be used to defend against potential injury to the same extent it can be used to defend against actual injury. The defendant faced with arguments regarding a high level of potential injury can present evidence showing that the potential is much smaller than the plaintiff asserts, if in fact the potential is smaller. Although this defense may be difficult to successfully assert, it provides some opportunity to defend.

One final argument is that allowing the jury to consider potential injury would lead to overdeterrence.²⁴² This is one argument included in Polinsky and Shavell's analysis. Despite their assertion that this is a danger, they also carved out an exception—either intentionally or unintentionally—that if “a reprehensible act is purely intentional, overdeterrence cannot occur.”²⁴³ This is because there is no need for society to preserve misconduct that can be described as the most reprehensible: there is no social value to it. Conduct falling into this highly reprehensible category does not, by definition, include behavior that is merely negligent or reckless. While juries could assess punitive damages for a defendant's negligence or recklessness, juries would necessarily impose a lower level of reprehensibility due to the defendant's lack of willful and wanton behavior. Therefore, overdeterrence of highly reprehensible conduct is not a real threat.

In light of the foregoing, the Supreme Court should take the next available opportunity to adopt this Comment's proposed rule and thereby more adequately balance the interests of the states with the interests of defendants. Indeed, the proposed rule provides a workable solution to the unworkable rule set forth in *Williams*.

VI. CONCLUSION

It is indisputable that the state has a legitimate interest in punishing and deterring reprehensible misconduct. At the same time, defendants faced with punitive damages awards must be afforded constitutional protections. The Supreme Court tried to strike a

242. Polinsky & Shavell, *supra* note 28, at 914–17.

243. *Id.* at 907 n.120.

balance between these two intersecting interests in its recent decision in *Williams*. However, the new rule established in that opinion created more confusion than clarity and provided an unworkable rule that cannot be implemented by the states or followed by juries. In light of the foregoing, the Supreme Court needs to amend the new rule established in *Williams* to effectively balance the interests of the state and of the defendant. That amended rule should establish that *actual* injury to nonparties may not be considered at any stage of the trial but *potential* injury to nonparties may be considered when determining both the level of reprehensibility and an appropriate amount of punitive damages to award. This rule effectively balances the interests of the state with the interests of the defendant facing a punitive damages award. Until the rule proposed in this Comment is adopted by the Court, punitive damages awards will become increasingly difficult to monitor and review.

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