Who's on First?: Why *Philip Morris USA v. Williams* Left Juries Confused About Whose Injuries Can Be Considered When Determining Punitive Damages

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I. INTRODUCTION

For the third time in eleven years, the United States Supreme Court imposed constitutional limits on punitive damage awards. In *Philip Morris USA v. Williams*, the Court, in a 5-4 decision, held that punitive damages cannot be used to punish a defendant for injuries that the defendant inflicted upon nonparties to the case. However, the Court also held that injuries to nonparties can be considered when determining the reprehensibility of the defendant's conduct under the "Gore guideposts." Nevertheless, this decision is important for trial lawyers for what the Court did not hold. Once again, the Court passed on the

2. *Id.* at 1063.
3. *Id.* at 1063-64. The Court created the Gore guideposts in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-75 (1996). These guideposts are discussed in detail in Section III of this Casenote. See *infra* text accompanying notes 73-93.
opportunity to decide how much was too much when determining the size of punitive damage awards.4

II. FACTUAL BACKGROUND

Throughout his entire life, Jesse Williams heavily smoked Philip Morris USA brand cigarettes, of which Marlboros were his favorite. After Jesse died in 1997 from a form of lung cancer traditionally caused by cigarette smoking, Jesse's widow filed a lawsuit on behalf of his estate against Philip Morris for negligence and deceit.5 At trial a jury found for the plaintiff on both claims. The jury concluded that Jesse's cancer was caused by smoking Philip Morris cigarettes and that Jesse primarily smoked these cigarettes because he relied on the company's deceitful and negligent claims that smoking was safe.6 Jesse's false belief regarding the safety of smoking was influenced by a public relations campaign that Philip Morris and other tobacco companies implemented to create the public perception that scientists genuinely disagreed about smoking's carcinogenic effects. To create this misconception, the cigarette companies performed joint scientific studies that avoided researching the biological effects of smoking cigarettes.7 Additionally, although Philip Morris knew that correlations existed between smoking and cancer, throughout the 1950s and 1960s Philip Morris proclaimed that it "would 'stop business tomorrow' if it believed that its products were harmful."8 In an internal memo, a Philip Morris corporate officer stated that the goal of these studies and statements "was to give smokers a psychological crutch" to encourage them to continue smoking.9

At trial, the estate's attorney asked the jury, when determining punitive damages, to consider not only how Philip Morris's misleading statements harmed Jesse, but also how many other Oregonians were misled and harmed by Philip Morris's statements and studies.10 In response, Philip Morris proposed a jury instruction that punitive damages could be used to punish Philip Morris only for its misconduct toward Jesse and not for its misconduct toward other Oregon residents.

4. Philip Morris USA, 127 S. Ct. at 1065.
8. Id. at 129.
9. Id.
10. Philip Morris USA, 127 S. Ct. at 1061.
who were not parties to the case. The trial judge rejected this instruction, and the jury found for the estate, awarding $821,000 in compensatory damages and $79.5 million in punitive damages. However, the trial judge ruled that the award was excessive and violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution; therefore, the judge reduced the punitive damages award to $32 million.

On appeal to the Oregon Court of Appeals, Philip Morris argued that the trial judge's rejection of its jury instruction and the size of the punitive damages award violated the Due Process Clause. The court of appeals rejected the first argument and cited Parrott v. Carr Chevrolet, Inc. In Parrott the Oregon Supreme Court held that juries, when determining the amount of punitive damages, can consider the potential injuries that the defendant caused to past, present, and future consumers who are not parties to the case. The court of appeals also rejected the second argument regarding the size of the award, holding that "no simple mathematical formula controls our review of the ratio of punitive damages" and that the 97-1 ratio was not excessive under the Due Process Clause. The court of appeals then reinstated the original $79.5 million punitive damages award against Philip Morris.

After the Oregon Supreme Court declined to review the case, the United States Supreme Court granted certiorari and, without oral arguments, remanded the case back to the Oregon Court of Appeals for reconsideration in light of the decision in State Farm Mutual Automobile Insurance Co. v. Campbell. On remand, the court of appeals re-adopted its original decision and held that Philip Morris could be punished for its conduct towards nonparties because there was evidence that other Oregon residents were harmed and misled by the same public

11. Id. Punitive damages were only awarded on the fraud claim. Because the jury found Jesse to be fifty percent negligent for his own death, the jury declined to award punitive damages on the negligence claim. Williams I, 48 P.3d at 828.
13. Philip Morris USA, 127 S. Ct. at 1061.
15. 17 P.3d 473 (Or. 2001).
17. Id. at 840-41 (quoting Parrott, 17 P.3d at 489).
18. Id. at 843. The Oregon Court of Appeals granted Philip Morris's petition for reconsideration of Williams I to consider questions not relevant to the issue of punitive damages. However, the court of appeals adhered to its original decision. See generally Williams v. Philip Morris Inc. ("Williams II"), 51 P.3d 670 (Or. Ct. App. 2002).
19. 538 U.S. 408 (2003); Philip Morris USA, 127 S. Ct. at 1061. In Campbell the Court reexamined each of the three Gore guideposts in detail. 538 U.S. at 419-28. This case is further discussed in Section III of this Casenote. See infra text accompanying notes 96-107.
relations campaign that misled Jesse.\(^{20}\) When considering the size of the punitive damages award, the court of appeals recognized there is a presumption of constitutional invalidity.\(^{21}\) However, using the *Gore* guideposts as applied in *Campbell*, the court of appeals concluded that Philip Morris's conduct endangered the health of the Oregon public and that this conduct was reprehensible enough to warrant the $79.5 million in punitive damages.\(^{22}\) The Oregon Supreme Court affirmed the judgment of the court of appeals.\(^{23}\) On appeal for a second time, the United States Supreme Court granted certiorari and held that punishing a defendant with punitive damages for harming nonparties to the case violated the defendant's due process rights.\(^{24}\)

### III. LEGAL BACKGROUND

#### A. Early History of Punitive Damages

Since its inception, the United States Supreme Court has struggled to determine whether there should be limitations on the size of punitive damage awards and, if so, how courts should regulate this area of law that is traditionally controlled by the jury. Punitive damages first appeared in the common law more than two centuries ago.\(^{25}\) *Huckle v. Money*\(^{26}\) is commonly cited as the first recorded case to recognize the existence of punitive damages in the English common law.\(^{27}\) In *Huckle* the English court held that juries, when awarding tort damages, could consider the "state, degree, quality, trade or profession of the party injured, as well as of the person who did the injury."\(^{28}\) In *Wilkes v. Wood*,\(^{29}\) the English court added that juries could punish the guilty and deter similar conduct by awarding damages in excess of the plaintiff's actual harm.\(^{30}\) American courts quickly absorbed this doctrine, which made one of its earliest reported appearances in South Carolina in 1784.\(^{31}\) In *Genay v. Norris*,\(^{32}\) a plaintiff was awarded punitive damag-

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21. *Id.* at 144.
22. *Id.* at 145.
30. *Id.* at 498-99.
es after the defendant slipped a poison into the plaintiff’s wine, causing the plaintiff to become ill.\textsuperscript{33}

Under the common law system, juries were given full discretion to award punitive damages and to determine the amount of damages to be assessed upon the defendant.\textsuperscript{34} American courts treat punitive damages as a form of “private fines” that serve as retribution and deterrence for a defendant's wrongdoing.\textsuperscript{35} However, unlike criminal fines, punitive damages are given to the injured rather than to the state.\textsuperscript{36} Scholars have also claimed that punitive damage awards allow society to express its “social outrage” at the defendant’s reprehensible conduct.\textsuperscript{37} The United States Supreme Court reaffirmed many of these common law principles in \textit{Day v. Woodworth}\textsuperscript{38} by giving juries unbridled discretion to decide when and how much punitive damages should be awarded.\textsuperscript{39}

On July 28, 1868, the Fourteenth Amendment was added to the United States Constitution.\textsuperscript{40} Thus, in addition to adhering to the common law traditions, punitive damages now had to satisfy the requirements of the Due Process Clause.\textsuperscript{41} However, the Supreme Court continued to give juries the same deference they possessed before the enactment of the Fourteenth Amendment. For instance, in \textit{Missouri Pacific Railway Co. v. Humes}, the Court held that no definite rules control the jury's discretion.\textsuperscript{42} The Court later held, in \textit{Minneapolis & Saint Louis Railway Co. v. Beckwith},\textsuperscript{43} that the application of punitive damages does not violate the Due Process Clause because punitive damages have been recognized as proper and legal for more than a century.\textsuperscript{45}
B. The Court Hints at Due Process Protections and Begins to Rein in the Jury's Authority

As the United States Supreme Court entered the *Lochner* era, the justices began hinting that the Due Process Clause has substantive limits "beyond which penalties may not go." The cases from this period primarily focused on the application of statutory as opposed to common law punitive damages. In *Waters-Pierce Oil Co. v. Texas*, the Court held that by imposing penalties that were "grossly excessive," a state was depriving defendants of their property without due process of law. In *Missouri Pacific Railway Co. v. Tucker*, the Court set aside a $500 penalty, which was to be paid to the plaintiff, and concluded that the penalty was unreasonable and "repugnant to the due process clause[] of the 14th Amendment." While many of the precedents from the *Lochner* era were discredited, the Court treats the punitive damages cases differently because the dissenting justices in *Lochner* joined in the majorities of the punitive damages cases.

After limiting the size of statutory punitive damages, the Supreme Court began entertaining the idea that the Due Process Clause might also limit the jury's unbridled authority to administer common law punitive damages. For instance, the Court in *Aetna Life Insurance Co. v. Lavoie*, referred to the appellant's Due Process argument as "rais[ing] important issues which, in an appropriate setting, must be

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46. The *Lochner* era, which is named for the case *Lochner v. New York*, 198 U.S. 45 (1905), refers to a period in the Supreme Court's history that lasted from 1897 until 1937. During this era, the Court held that laws regulating an employee's working hours, wages, and conditions violated the Due Process Clause of the Fourteenth Amendment. See generally David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469 (2005). Today, many of the precedents from this era are discredited, and *Lochner* is considered one of the most reviled cases in American history. Id.


48. *See St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919) (authorizing passengers who were overcharged by railways to collect between $50 and $300 in penalties in a civil action); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 100 (1909) (awarding plaintiffs "not less than $200 nor more than $5,000" for each day that the defendant violated the state's antitrust law); *Seaboard Air Line Ry.*, 207 U.S. at 75-76 (awarding $50 per day to the aggravated party if the carrier failed to follow the statute).

49. 212 U.S. 86 (1909).

50. Id. at 111.


52. Id. at 346-47.


resolved.55 The Court, however, did not reach the issue of whether excessive punitive damages violated the Due Process Clause. The Court also refused to create due process limitations in Bankers Life & Casualty Co. v. Crenshaw.56 However, Justice O'Connor, when referring to the jury's discretion to award common law punitive damages, stated in her concurrence that "[t]his grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."57 A year later in Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,58 the Court concluded that "we have never addressed . . . whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit. That inquiry must await another day."59 In light of the Lochner era cases that limited the size of statutory punitive damages, the Court unanimously agreed that the issue of due process limitations on common law punitive damages should be addressed.60

After dodging the issue in several cases, the Supreme Court could not avoid addressing the due process argument in Pacific Mutual Life Insurance Co. v. Haslip.61 In Haslip the Court held that the common law procedure of giving juries unbridled discretion may "invite extreme results that jar one's constitutional sensibilities."62 The Court then placed a check on the jury's discretion by endorsing the Alabama Supreme Court's posttrial procedures for reviewing a jury's punitive damages award.63 During the posttrial procedures, Alabama courts considered several factors when determining if a jury's punitive damages award bore a reasonable relationship to the defendant's present and future harm.64 Aside from discussing the procedures, the United States

55. Id. at 828-29.
57. Id. at 88 (O'Connor, J., concurring).
59. Id. at 276-77 (citations omitted).
60. See id.; id. at 280 (Brennan, J., concurring) ("I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages . . ."); id. at 283 (O'Connor, J., concurring in part and dissenting in part) ("[N]othing in the Court's opinion forecloses a due process challenge to awards of punitive damages. . . .").
62. Id. at 18.
63. Id. at 22.
64. Id. at 21-22. The Alabama Supreme Court held that a jury could consider, among other things: (1) the relationship between the punitive damages and the harm that the defendant caused and will cause; (2) the degree of reprehensibility of the defendant's conduct; (3) the defendant's profits during the wrongful act; (4) the current financial position of the defendant; (5) the cost of the litigation; and (6) the criminal and civil
Supreme Court declined to draw a mathematical bright-line ratio to determine when a punitive damages award was excessive under the Due Process Clause. However, the Court held that a 4-1 ratio of punitive to compensatory damages “may be close to the line.” The refusal to establish a bright-line ratio was affirmed two years later in *TXO Production Corp. v. Alliance Resources Corp.* There, the Court affirmed a punitive damages judgment with a 526-1 ratio.

The procedures used to limit the jury’s unfettered discretion were further developed in *Honda Motor Co. v. Oberg.* In *Oberg* the Supreme Court held that a punitive damages award violated the Due Process Clause because Oregon law did not provide for judicial review of the size of punitive damages awards. The Court determined that judicial review was one of the few procedural safeguards from excessive punitive damages. While the Court did not decide whether the punitive damages award was excessive, *Oberg* marked the first time that the Court set aside a jury’s common law punitive damages award on due process grounds.

C. How Much is too Much?

The United States Supreme Court in *BMW of North America, Inc. v. Gore* finally provided some guidance on how to determine when a punitive damages award was excessive, and for the first time, the Court struck down a common law punitive damages award as being excessive. The plaintiff in *Gore* purchased an imported car from the defendant in Alabama. After nine months, the plaintiff learned that the car had been damaged during its transport across the Atlantic Ocean and was repainted upon arriving in the United States. At the time of the incident, BMW had a nationwide policy of selling cars without notifying the buyers that the car was damaged during manufacturing or punishments already inflicted against the defendant. *Id.* (citing Cent. Ala. Elec. Coop. v. Tapley, 546 So. 2d 371, 377 (Ala. 1989)).

65. *Id.* at 18.
66. *Id.* at 23.
68. *Id.* at 453.
70. *Id.* at 432.
71. *Id.*
72. See *id.*
74. *Id.* at 585-86.
75. *Id.* at 563 & n.1.
While BMW's policy violated Alabama law, it was consistent with the laws of twenty-five other states. As a result of the policy, the plaintiff alleged that the defendant fraudulently sold him a car that had lost ten percent of its value because it had been repainted.

The Court addressed two issues in Gore. First, the Court held that juries could not punish a national corporation for out-of-state conduct that was legal in the state where the conduct occurred. The Court reasoned that the purpose of punitive damages was to support the state's interest in protecting its consumers and its economy. That purpose was not furthered by punishing a defendant for conduct that both occurred outside of the state and did not affect the state or its citizens. The Court also held that the principles of state sovereignty prevented a state from using punitive damages to influence a defendant's conduct in another state.

In addressing the second issue, the Court created three guideposts to aid lower courts in determining when a punitive damages award was excessive. This test ensured that the defendant would receive fair notice that its conduct would be subjected to a severe punishment. The first guidepost analyzed the reprehensibility of the defendant's conduct. This guidepost was the most important indication of excessiveness and reflected the principle that some wrongs are worse than others. In Gore this guidepost suggested awarding smaller punitive damages because BMW's conduct caused purely economic harm and did not place anyone in physical danger. The second guidepost called for the courts to review the ratio of punitive damages to compensatory damages to ensure that the two awards bore a reasonable relationship. While the Court refused to set a bright-line rule, it reaffirmed that the 4-1 ratio from Haslip was close to the line but also

76. Id. at 563-64.  
77. Id. at 565.  
78. Id. at 564.  
79. Id. at 572-73.  
80. Id. at 572.  
81. See id.  
82. Id. at 571-72. After the jury awarded the punitive damages, BMW immediately changed its nationwide policy to notify all potential buyers of all repairs, no matter how minor. Id. at 565-66.  
83. Id. at 574-75.  
84. Id.  
85. Id. at 575.  
86. Id.  
87. Id. at 576.  
88. Id. at 580.
recognized that it had allowed a 526-1 ratio in *TXO Production Corp.*\(^9\) The ratio in *Gore* was a "breathtaking 500 to 1."\(^{10}\) The third guidepost asked the courts to compare the punitive damages award to similar criminal or civil statutory penalties.\(^{11}\) Even though BMW could have received a $2000 fine in a criminal proceeding, it was ordered to pay $2 million in common law punitive damages.\(^{12}\) Using the guideposts, the Court was "fully convinced that the grossly excessive award imposed in this case transcended the constitutional limit."\(^{13}\)

After determining in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*\(^4\) that the *Gore* guideposts were to be reviewed de novo,\(^5\) the Court in *State Farm Mutual Automobile Insurance Co. v. Campbell*\(^6\) sought to clarify the *Gore* guideposts. In *Campbell* the Court again struck down a punitive damages award as being excessive under the Due Process Clause.\(^7\) The plaintiff in *Campbell*, who had caused a car accident, alleged that his insurance company fraudulently told him that it would pay any judgment if the plaintiff went to trial to defend the claims from the accident victims. Relying on this advice, the plaintiff went to trial and lost, and the insurance company refused to pay the judgment.\(^8\) At the trial against the insurance company, the plaintiff provided evidence that his encounter with the insurance company was one of many frauds it had committed across the nation to meet its corporate fiscal goals.\(^9\)

Applying the first *Gore* guidepost (reprehensibility), the Court expanded its ruling in *Gore* and held that a defendant cannot be punished for any conduct that occurred outside the state's jurisdiction.\(^{10}\) The Court then added to this rule, holding that a jury may not use punitive damages to punish a defendant for injuring nonparties unless the injuries to the nonparties and the plaintiff were similar.\(^{11}\) This holding reflected the notion that the United States Constitution

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89. *Id.* at 581.
90. *Id.* at 583.
91. *Id.*
92. *Id.* at 584.
93. *Id.* at 585-86.
95. *Id.* at 431.
97. *Id.* at 412.
98. *Id.* at 412-13.
99. *Id.* at 415.
100. *Id.* at 421 ("Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction.").
101. *Id.* at 422-23.
does not allow courts to "adjudicate . . . hypothetical claims against a
defendant under the guise of the reprehensibility analysis."

The Court concluded that the defendant should not have been punished for
its out-of-state conduct and that the plaintiff's injuries were not similar
to the injuries suffered by other victims of State Farm's nationwide
policy.

Under the second Gore guidepost (ratio), the Court refused to endorse
a bright-line rule but concluded that the 145-1 ratio in Campbell raised
a presumption of constitutional invalidity. The Court held that "few
awards exceeding a single-digit ratio between punitive and compensatory
damages . . . will satisfy due process." Using the third Gore
guidepost (existence of statutory penalties), the Court concluded that the
insurance company's $145 million judgment far exceeded the $10,000
fine it could have received. Weighing all the guideposts, the Court
in Campbell held that the jury's punitive damages award was exces
sive. Four years later, the Court in Philip Morris USA v. Wil-
laims attempted to refine the Court's application in Campbell of the
Gore guideposts.

IV. COURT'S RATIONALE

A. The Majority Opinion

Justice Breyer's majority opinion in Philip Morris USA v. Wil-
laims resumed the discussion from State Farm Mutual Automobile
Insurance Co. v. Campbell and BMW of North America, Inc. v. Gore
by holding that the Due Process Clause monitors two
aspects of punitive damages awards. First, the Court held the Due
Process Clause controls the jury's discretion by imposing limitations on
the procedures for awarding punitive damages. Second, the Court

102. Id. at 423.
103. Id. at 423-24.
104. Id. at 424-26.
105. Id. at 425.
106. Id. at 428.
107. Id. at 429.
113. Philip Morris USA, 127 S. Ct. at 1062.
114. Id.
held the Due Process Clause prohibits excessive punitive damages. The Court started its analysis by discussing the procedures used by the Oregon courts. Summing up the cases from the last twenty years, the Court held that the state had to “cabin the jury’s discretionary authority” or risk depriving a defendant of fair notice while administering arbitrary punishments and imposing one state’s policies on its neighbors. In this case, the Court held that the Due Process Clause required that the Oregon trial court instruct the jury to not punish the defendant for injuries it inflicted on nonparties to the litigation.

The Court provided two reasons for its holding. First, according to the Court, the Due Process Clause allowed the defendant “‘an opportunity to present every available defense.’” If the jury, when determining punitive damages, considered injuries of nonparties, the defendant could not defend itself against the accusations of harm toward these hypothetical victims. For example, when the plaintiff in Philip Morris USA asked the jury to “think about how many other Jesse Williams[es] ... in the State of Oregon there have been,” Philip Morris would have been unable to prove that these other Jesse Williamses were not harmed by Philip Morris’s fraudulent statements. Justice Breyer noted that it was possible that these other Jesse Williamses already knew smoking was dangerous and did not rely on Philip Morris’s fraudulent statements or studies. Because Philip Morris could not defend against these hypothetical claims, it could be subjected to punishment for deceiving people it may not have deceived.

Second, the Court held that allowing juries to punish defendants for causing injuries to nonparties would create a “near standardless dimension to the punitive damages equation.” When thinking about the other Jesse Williamses, the jury would have to consider things such as the similarity of the victims, the seriousness of each nonparty’s injuries, and the manner in which each nonparty was injured. Since these nonparties were not before the court, the jury would have been left

115. Id.
116. Id.
117. Id.
118. Id. at 1063.
119. Id. (quoting Lindsey v. Norment, 405 U.S. 56, 66 (1972)).
120. Id.
121. Id. at 1061 (internal quotation marks omitted).
122. Id. at 1063.
123. Id.
124. See id.
125. Id.
126. Id.
to speculate. This speculation, the Court concluded, would lead to arbitrary punitive damages awards and lack of proper notice for defendants. The Court recognized that it had never explicitly held that juries could not punish defendants for causing harm to nonparties. However, as Justice Breyer proclaimed, "we do so hold now."

Three paragraphs after the Court created this new rule, the Court held that, when considering the reprehensibility of the defendant's conduct under the Gore guideposts, juries can take into consideration injuries to nonparties. Thus, a jury must be instructed that it may consider injuries to nonparties when determining the reprehensibility of the defendant's conduct, but the jury may not go further and consider injuries to nonparties when determining the actual size of the punitive damages award, even though reprehensibility is the most important guidepost when determining the size of a punitive damages award.

When writing about this fine distinction of when juries can and cannot consider nonparty injuries, Justice Stevens, in his dissent, stated that "[t]his nuance eludes me." He concluded that the majority's holding was confusing because any time a jury determines the reprehensibility of the defendant's conduct, "the jury is by definition punishing the defendant—directly—for third-party harm." Furthermore, the Oregon Supreme Court held that this holding would make it "unclear... how a jury could consider harm to others, yet withhold that consideration from the punishment calculus."

When addressing the concerns of Justice Stevens and the Oregon Supreme Court, the majority held that this was a "practical problem" and left it to the states to provide "some form of protection" to prevent juries from being confused.

Applying this holding to the facts, the Court held that the Oregon courts "applied the wrong constitutional standard" by allowing the jury,

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127. Id.
128. Id.
129. Id. at 1065.
130. Id.
131. Id. at 1063-64.
132. Id. at 1064; Gore, 517 U.S. at 575 ("Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.").
133. Id. at 1067 (Stevens, J., dissenting).
134. Id.
135. Id. at 1065 (majority opinion) (internal quotation marks omitted) (quoting Williams v. Philip Morris, Inc., 127 P.3d 1165, 1175 n.3 (Or. 2006)).
136. Id.
when deciding the size of the punitive damages award, to consider the
harm to other Oregonians who were not parties to the case. Thus, the
Court vacated the Oregon Supreme Court's ruling and remanded the
case. While the Court vacated the judgment on procedural grounds, it
never addressed whether the punitive damages award, which had a
ratio of 100-1, was grossly excessive. The Court held it was unnecessary
to reach that question because the award was already set aside on
procedural grounds and a new trial or reduction of the punitive damages
award would be required. As a result, Philip Morris USA joined the
long list of cases where the Court refused to discuss due process
limitations on excessive punitive damages awards.

B. The Dissenting Opinions

Chief Justice Roberts and Justices Kennedy, Souter, and Alito joined
Justice Breyer's majority opinion. Justices Stevens, Thomas, and
Ginsburg filed separate dissenting opinions, and Justice Scalia joined
Justice Ginsburg's dissent. In his dissent, Justice Stevens disagreed
with the Court's holding that juries could not consider the harm to
nonparties when punishing the defendant's conduct. Justice Stevens
wrote that "punitive damages are a sanction for the public harm the
defendant's conduct has caused or threatened." As an example,
Justice Stevens considered that a man who throws a bomb into a crowd
and kills only one person, but injures twelve, should be punished more
severely than the same man who kills that same person, but harms no
one else. Since the first man harmed more people than the second,
a jury will demand more retribution and will require that the first man
pay more punitive damages than the second. Additionally, Justice
Stevens accused the Court of lacking judicial restraint. He stated
that the Court must exercise the "utmost care" when it breaks new
ground in an area of law. Also, he reiterated that "the Court should
be 'reluctant to expand the concept of substantive due process because
guideposts for responsible decisionmaking in this unchartered area are
scarce and open-ended.'

137. Id.
138. Id.
139. Id.
140. Id. at 1066 (Stevens, J., dissenting).
141. Id.
142. Id. at 1067.
143. See id.
144. Id.
145. Id. (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).
146. Id. (quoting Collins, 503 U.S. at 125).
Justice Thomas’s dissent not only criticized the Court’s holding, but also reaffirmed his dissent from *Campbell* where he held that “‘the Constitution does not constrain the size of punitive damage awards.’” Considering that punitive damages were established before the ratification of the Fourteenth Amendment, Justice Thomas wrote that the Due Process Clause does not limit the jury’s discretion to award punitive damages.

The last dissent came from Justice Ginsburg who was joined by Justices Scalia and Thomas. In her dissent, Justice Ginsburg concluded that the Oregon Supreme Court had already done exactly what the Court was now telling them to do. Justice Ginsburg noted that both the Oregon Supreme Court and the majority held that a jury could consider injuries to nonparties only when assessing the reprehensibility of Philip Morris’s actions. Because the majority failed to identify any portion of the Oregon Supreme Court’s opinion that contradicted the majority’s opinion, Justice Ginsburg concluded that the decision should not have been vacated. In response to Justice Ginsburg’s dissent, the majority acknowledged that “one might read some portions of the Oregon Supreme Court’s opinion as focusing only upon reprehensibility.” However, the majority concluded that the opinion as a whole made clear that the Oregon Supreme Court was also allowing juries to consider a nonparty’s injuries when punishing the defendant.

Lastly, Justice Ginsburg criticized the majority for “reach[ing] outside the bounds of the case” to come to its conclusion. She pointed out that the only argument Philip Morris preserved for appeal was the trial judge’s refusal to accept its jury instruction. According to Justice Ginsburg, the majority never addressed the propriety of the instruction. After reviewing it herself, Justice Ginsburg concluded that the

147. *Id.* (Thomas, J., dissenting) (quoting *Campbell*, 538 U.S. at 429 (Thomas, J., dissenting)).
149. *Id.* at 1068 (Ginsburg, J., dissenting).
150. *Id.* Compare *Williams*, 127 P.3d at 1177 (“[A]s we have explained, the jury, in assessing the reprehensibility of Philip Morris’s actions, could consider evidence of similar harm to other Oregonians caused (or threatened) by the same conduct.” (emphasis added)), with *Philip Morris USA*, 127 S. Ct at 1064 (“[A] plaintiff may show harm to others in order to demonstrate reprehensibility.” (emphasis added)).
152. *Id.* at 1064 (majority opinion).
153. *Id.*
154. *Id.* at 1069 (Ginsburg, J., dissenting).
155. *Id.* at 1068.
156. *Id.* at 1069.
jury instruction would confuse rather than enlighten a jury. She ended her dissent by stating that the majority should have given more respect to the "proceedings and dispositions of the state courts that sought diligently to adhere to our changing, less than crystalline precedent."

V. IMPLICATIONS

The opinion in *Philip Morris USA v. Williams* seems to create more confusion than clarity. First, the decision did nothing to clarify when punitive damages awards are excessive. Because the Court did not address the use of a bright-line ratio, Chief Justice Roberts's and Justice Alito's individual opinions on the subject are still unknown. If the other members of the majority in *Philip Morris USA* try to create a bright-line ratio in future cases, these two Justices may join Justices Scalia and Thomas and refuse to create such a ratio. It is also interesting to note that Justice Stevens, who authored the opinion in *BMW of North America, Inc. v. Gore* and was in the majority in *State Farm Mutual Automobile Insurance Co. v. Campbell*, dissented in *Philip Morris USA*. The implications of his dissent are not great. In his dissent, Justice Stevens reaffirmed his support for *Gore* and *Campbell*, but he disagreed with the majority on the role that injuries to nonparties should play in determining the size of punitive damages awards.

While Justices Scalia and Thomas reaffirmed their dissents from *Gore* and *Campbell*, Justice Scalia did not use his typical arguments against the Court's new rule. Justice Thomas was the only Justice to reaffirm his view that the Due Process Clause does not limit the size of punitive damages awards. In the past, Justice Scalia has previously refused to give stare decisis effect to *Gore*, and he has written that the Constitution does not protect defendants from excessive punitive damages. Even

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157. Id.
158. Id.
163. *Philip Morris USA*, 127 S. Ct. at 1066 (Stevens, J., dissenting) ("I remain firmly convinced that the cases announcing those constraints were correctly decided.").
164. *Campbell*, 538 U.S. at 429 (Scalia, J., dissenting) ("[T]he Due Process Clause provides no substantive protections against 'excessive' or 'unreasonable' awards of punitive damages. . . . I do not feel justified in giving [Gore] stare decisis effect." (internal quotation marks omitted)).
though these views mirror the arguments made in Justice Thomas's dissent in Philip Morris USA, Justice Scalia did not sign onto Justice Thomas's dissent. Instead he joined Justice Ginsburg who did not even address whether the Constitution limits the jury's discretion to award punitive damages. Justice Scalia's shift from Justice Thomas's to Justice Ginsburg's dissent might suggest that he is backing down from his previous dissents in Gore and Campbell, and that he may accept some limitations on punitive damages in future cases.165

One legal implication of Philip Morris USA is that juries now have one more constraint placed upon them when considering punitive damages. However, the new limitation on when a jury can consider injuries to nonparties may not be much of a limitation because the ruling will be difficult to enforce and will likely create confusion among courts.166 While lawyers and judges may understand the subtle difference between considering a nonparty's injuries when determining reprehensibility and punishing the defendant, a jury of laymen might not. As the Court held, it is up to the state courts to figure out how to make the distinction clear.167 This mandate will require states to craft rules concerning when to exclude evidence of injuries to nonparties. If the evidence of injuries to nonparties would go toward reprehensibility, the states will have to craft cautionary jury instructions to limit how the jury uses this evidence.168 Also, while the Court charged states to create protections for defendants, the Court may have placed the burden on defendants to request those protections.169 When punitive damages are awarded, defendants must be sure to request due process protections through jury instructions and special verdict forms, and defendants must also preserve error if those requests are denied.170 In the end, this case creates more questions than answers, and the confusion will probably result in the Court having to decide another punitive damages case in the next couple of terms.

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166. Id. at 29.
167. Philip Morris USA, 127 S. Ct. at 1065.
169. Id.; Philip Morris USA, 127 S. Ct. at 1065 ("We believe that where the risk of that misunderstanding is a significant one . . . a court, upon request, must protect against that risk." (emphasis added)).
170. Prince & Vraa, supra note 166, at 28.