

SYMPOSIUM INTRODUCTION: PUNITIVE
DAMAGES, DUE PROCESS, AND
DETERRENCE:
THE DEBATE AFTER *PHILIP MORRIS V.*
WILLIAMS

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The essays and articles in this symposium issue of the *Charleston Law Review* are based on presentations given at a symposium held on September 7, 2007, at the Charleston School of Law. The catalyst for the symposium was the Supreme Court's latest constitutional decision on punitive damages, *Philip Morris v. Williams*.¹ Sponsored by the Charleston School of Law and the South Carolina Bar, the symposium brought together distinguished scholars, judges, and practitioners to engage in a dialogue concerning the implications of *Philip Morris*, and more generally, the role of punitive damages in modern litigation. The symposium participants each brought a unique perspective to an area of the law that, as the Supreme Court has recognized, has been the subject of "long enduring debate."² The essays and articles that comprise this edition—some grounded in theory, others in pragmatism, others in frustration—make clear that the debate is far from over, and that *Philip Morris* will not be the Court's last word on this controversial area of law.

The Philip Morris Decision

Philip Morris involved the death from lung cancer of Jesse

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1. 127 S. Ct. 1057 (2007).

2. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 8 (1991).

Williams, who had smoked Marlboro cigarettes for over forty years.³ Following Williams's death, his widow brought a fraud action in Oregon state court against Marlboro's manufacturer, Philip Morris, for misleading Jesse Williams about the dangers of smoking.⁴ At trial, Philip Morris proposed a jury instruction that sought to limit any punitive damages award to the harm caused only to Jesse Williams, not "harm suffered by others."⁵ The trial court, however, rejected the proposed instruction.⁶ Mrs. Williams won at trial, and was awarded \$510,000 in compensatory damages and \$79.5 million in punitive damages.⁷

In a 5-4 decision, Justice Breyer, joined by Chief Justice Roberts, and Justices Alito, Souter and Kennedy, reversed the judgment and remanded the case to the Oregon Supreme Court. Although Philip Morris challenged the size of the award,⁸ the Court limited its decision to whether Oregon's procedures allowing the jury to punish for harm to non-parties violated procedural due process.⁹

The Court made two core holdings. First, the Court held that the Due Process Clause prohibits a State from imposing punitive damages based on injuries that the defendant "inflicts upon non-parties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."¹⁰ The Court reasoned that the Due Process Clause guarantees a defendant the "opportunity to present every

3. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1168 (Or. 2006), *rev'd*, 127 S. Ct. 1057 (2007).

4. 127 P.3d at 1167-68.

5. *Id.* at 1175.

6. 127 S. Ct. at 1061.

7. *Id.* The jury awarded \$821, 000 in compensatory damages and \$79.5 million in punitive damages. The trial court, however, reduced the compensatory award pursuant to a state statutory cap. 127 P.3d at 1171. The trial court originally reduced the jury's punitive damages award to \$32 million under the punitive damages guideposts announced in *BMW of N. America v. Gore*, 517 U.S. 559, 574-75 (1996). But, on appeal, the Oregon Court of Appeals reinstated the jury's original award. 127 P.3d at 1171.

8. 127 S. Ct. at 1062.

9. *Id.* at 1062-63.

10. *Id.* at 1063; *see also id.* at 1065 ("[T]he Due Process Clause prohibits a State's inflicting punishment for harm caused strangers to the litigation.").

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available defense.”¹¹ Allowing a punitive damages award to be based on harm to non-parties would prevent the defendant from raising all possible defenses.¹² For example, the Court noted that in *Philip Morris*, other allegedly injured smokers might have known smoking was dangerous or might not have relied upon the defendant’s statements.¹³ In addition, the Court expressed concern that allowing a jury to punish a defendant based on harm to non-parties would “would add a near standard less dimension to the punitive damages equation.”¹⁴ The Court reasoned that the questions¹⁵ raised by the addition of non-party victims would add a risk of “arbitrariness [and] uncertainty”¹⁶ forbidden by the Due Process Clause. Despite these concerns, the Court recognized that evidence of a defendant’s harm to others could be used by the jury to gauge the reprehensibility of the defendant’s conduct: “Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible.”¹⁷

The tension between not allowing punishment based on harm to others but allowing consideration of harm to others for reprehensibility forced the Court to confront the constitutionality of state procedures in punitive damages cases.¹⁸ Under the Court’s harm-to-others and reprehensibility holdings, a jury can consider harm to others when evaluating the reprehensibility of the defendant’s conduct, but may not “use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.”¹⁹ The Court reaffirmed that the Due Process Clause imposes procedural limits on

11. *Id.* at 1063 (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

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

13. *Id.*

14. *Id.*

15. The Court noted the following potential questions: “How many such victims are there? How seriously were they injured? Under what circumstances did the injury occur?” *Id.*

16. *Id.*

17. *Id.* at 1064.

18. *Id.*

19. *Id.*

punitive damages awards:²⁰ “[T]he 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.”²¹ Beyond some general statements,²² however, the opinion leaves open exactly what process is required: “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.”²³

The Road Ahead

As the Symposium articles and essays illustrate, a large number of significant questions remain unanswered following *Philip Morris*. This edition begins with an essay by Professor Anthony J. Sebok. Professor Sebok examines the road *not* taken in *Philip Morris*: The Court’s decision to sidestep Philip Morris’s argument that the amount of the punitive damages award itself was excessive under *BMW of North America v. Gore*.²⁴ Professor Sebok notes that although the case presented an opportunity for the Court to reaffirm the “single digit ratio” language from *State Farm Mutual Automobile Insurance Co. v. Campbell*,²⁵ the Court nevertheless chose not to develop this recent standard. Professor Sebok concludes that the Court’s refusal to defend the “ratio rule” could signal the end of this “hard cap.”

Mr. Anthony J. Franze, counsel at Arnold & Porter LLP, uses *Philip Morris* as a platform to discuss deficiencies in the model punitive damages jury instructions used in courts across the country. Referencing his prior article urging instructional reform,²⁶ Mr. Franze suggests that reform has been hindered in

20. *Id.* at 1062 (“[T]his Court has found that the Constitution imposes certain limits, in respect...to procedures for awarding punitive damages.”).

21. *Id.* at 1064.

22. *Id.* at 1064-65.

23. *Id.* at 1065.

24. 517 U.S. 559 (1996).

25. 538 U.S. 408, 425 (2003).

26. Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After State Farm*, 6 U. PA. J. CONST. L. 423 (2004).

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part by antiquated views on punitive damages as a creature of only state law. He argues that it is time to end any federalism-based resistance to the needed overhaul of model punitive damages instructions, and provides reasons why he believes that “the time for instructional reform is now.”

Professor Neil Vidmar and Mr. Matthew W. Wolfe answer Mr. Franze’s call for instruction guidance. Given the complexity of the Supreme Court’s punitive damages jurisprudence, Vidmar and Wolfe argue that courts should provide jurors with a written set of jury instructions that can be taken into the jury room during deliberations. To this end, Vidmar and Wolfe propose a set of model punitive damages instructions that can be modified to fit individual states’ requirements. In addition to detailing the purpose of punitive damages and the burden of proof, the Vidmar and Wolfe instructions include a detailed list of “factors to consider,” and “factors that [the jury] must not consider” as well as an overall “fairness” instruction.

Two pieces step back and explore the theoretical underpinnings of the Court’s punitive damages jurisprudence. Building on Professor Sebok’s theory of punitive damages as private revenge,²⁷ Professor Christopher J. Robinette examines punitive damages as a means of preserving the peace. Reviewing historical precedents in both England and the United States, Professor Robinette concludes that a historical purpose of punitive damages was “the preservation of ‘public tranquility’ by ‘avoiding resort to violence.’” Professor Robinette further relates the peace rationale of punitive damages to Professor Sebok’s view of punitive damages as private revenge. Finally, Professor Robinette addresses whether punitive damages still serve a function of preserving the peace in the twenty-first century. Professor Robinette concludes that changes in the modern world have undermined the pacificatory function of punitive damages.

Professor Keith N. Hylton, on the other hand, focuses on the purpose of the Due Process Clause and its application to punitive damages. Professor Hylton posits that “the function of the clause is to authorize courts to distinguish socially desirable regulation

27. Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007).

from predatory wealth transfers.” Professor Hylton points out three key elements under the Due Process Clause: (1) a set of protected entitlements (life, liberty and property), (2) the process by which those entitlements may be taken by the state (*i.e.*, due process of law), and with respect to damages, (3) the nature of the deprivation or the “deprivation quantum,” which refers to the amount of damages assessed against the defendant. Professor Hylton explains that if the deprivation quantum (*i.e.*, amount of punitive damages) is set too high, potential defendants cannot engage in legitimate activities; conversely, if set too low, potential victims lose their entitlement to protection from negligent or intentional injuries. Professor Hylton finds that *Philip Morris* represents “a substantive limit on the deprivation quantum,” namely that the amount of punitive damages imposed against a recidivist injurer cannot be based on harm to non-parties. Professor Hylton concludes that *Philip Morris* stands as a “flawed application of due process doctrine” because it “fails to protect the entitlements of potential victims.”

Several authors consider the impact of *Philip Morris* on mass tort or class action litigation and reach markedly different conclusions. Mr. Victor E. Schwartz, Chairman of the Public Policy Group in the Washington, D.C., office of Shook, Hardy & Bacon L.L.P., and Mr. Christopher E. Appel, a lawyer with Shook, Hardy & Bacon, address the “reverse bifurcation” phenomena: the practice of requiring a jury to assess punitive damages before a full determination of the defendant’s liability. Schwartz and Appel argue that determining punitive damages before liability violates due process. First, the authors point out that reverse bifurcation departs from traditional punitive damages procedures, and “maximize the potential for jury bias and an excessive award” by allowing presentation of “half the case.” Second, the authors contend that reverse bifurcation of punitive damages runs contrary to the Court’s holding in *Philip Morris* by failing to allow the defendant the “opportunity to present every available defense” before punitive damages are awarded. Finally, the authors argue that reverse bifurcation violates the *BMW* guideposts “because it leaves the jury to determine a punitive damages ratio without a nexus to the defendants’ conduct toward any particular plaintiff or group of

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plaintiffs.” Schwartz and Appel conclude that reverse bifurcation not only circumvents the Supreme Court’s constitutional limits on punitive damages, but also “serves no constructive function when punitive damages are alleged.”

Ms. Elizabeth J. Cabraser and Mr. Robert J. Nelson, partners in the law firm of Lieff Cabraser Heimann & Bernstein, LLP, offer a different perspective on punitive damages in mass torts cases. The authors note that a “presumably unintended consequence” of *Philip Morris* “is to undercut the deterrent force of punitive damages awards in the modern context of mass production, mass marketing, and mass harms.” Cabraser and Nelson argue that *Philip Morris*’s limitation on the jury’s use of harm to others evidence means that the ratio between punitive and compensatory damages will not account for such harm and “a defendant will not be fully punished for (or deterred from) such antisocial conduct unless and until all its victims find their way to court.” Thus, the authors propose aggregation of all victims of the defendant’s conduct as “[t]he obvious solution to the ‘punishment for harm to plaintiffs only’ dictate” of *Philip Morris*. Cabraser and Nelson acknowledge that judicial acceptance of a punitive damages class action has been “mixed,” but contend that aggregation “best ensures both an appropriate level of deterrence and protection against an excessive punitive damages award, thereby balancing the equities to ensure a ‘just right’ level of punishment consonant with the reprehensibility and injury of conduct that results in mass, and massive, harm.”

In contrast to Cabraser & Nelson, Professor Byron Stier concludes that class-wide treatment of punitive damages violates due process under *Philip Morris*. Instead of a punitive damages class action, Professor Stier urges litigants to consider a “growing, potent alternative to the mass tort class action” – mass tort litigation as “network.” Professor Stier notes that *Philip Morris*’s limit on harm to non-parties ensures that an individual punitive damages award is based only on that plaintiff’s harm. This, in turn, he contends will assist litigants in pricing individual claims and thus ease settlement. Finally, Professor Stier addresses the multiple punishment problem, which has led to punitive damages class actions based on a limited fund or limited punishment theory. Professor Stier contends that *Philip*

Morris “makes impossible the problem of multiple punishment for the same act.” Accordingly, Professor Stier concludes that *Philip Morris* “enhances further the attractiveness of an individual-litigation based method, used to forward settlement, that effectively and efficiently adjudicates the mass tort.”

Finally, Professor Michael L. Rustad offers predictions for the future of punitive damages. Professor Rustad begins by reviewing the Supreme Court’s punitive damages decisions over the past decade. He boldly challenges the Supreme Court’s foray into the area of punitive damages as “uncertworthy.” Professor Rustad notes that punitive damages is historically an area of state law, and posits that “the members of the Court generally lack expertise in remaking tort remedies.” Thus, Professor Rustad urges the Court to “re-evaluate the cert-worthiness of punitive damages.”

In the second part of his article, Professor Rustad sets forth his predictions for the “future of constitutionalizing tort remedies” post-*Philip Morris*. Professor Rustad begins with the premise that the Court is too eager “to address Corporate America’s demand for judicial tort reform.” Accordingly, Professor Rustad predicts that three issues dear to “tort-reformers” will be next on the Court’s punitive damages agenda: (1) the use of a corporate defendant’s wealth or financial condition in setting the amount of punitive damages, (2) the issue of multiple punitive damages for the same conduct, and (3) the constitutional limits on non-economic damages. Professor Rustad laments the Court’s federalization of state tort law, and concludes that “[t]he Court should take the next exit off the due process highway because there is no ‘tort crisis’ justifying its intervention in the common law of torts.”

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Despite Professor Rustad’s call for the “uncertworthiness” of punitive damages cases, I suspect that it won’t be long before the Supreme Court again takes up the issue.²⁸ The thoughts

28. Although the Court recently granted review of the \$5 billion punitive damages award against Exxon for the Exxon Valdez oil spill, the Court declined

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expressed in this volume will aid jurists, policymakers, and trial lawyers in the continued debate over the role punitive damages should play in our tort system.

to consider Exxon's due process challenge and limited its review to several maritime law issues. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 492 (2007).