

COMMENTS

LOSING THE PROCEDURAL BATTLE BUT WINNING THE SUBSTANTIVE WAR: HOW *PHILIP MORRIS V. WILLIAMS* RESHAPED REPREHENSIBILITY ANALYSIS IN FAVOR OF MASS- TORT PLAINTIFFS

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INTRODUCTION

When a litigant argues her case before an appellate court, she can benefit from the decision of the court in either (or both) of two ways. First, the litigant can benefit by emerging victorious in the specific case before the court. The court can decide in favor of the litigant and grant her the specific relief she seeks. Second, the court can rule in a way that provides useful precedent to the litigant for her future litigation. This is possible even if the court decides not to grant the litigant the specific relief she requests.¹

Some court decisions are a clear win for one side. Not only is that side the prevailing party in a given appeal, but the court's opinion also provides helpful precedent for future cases. Other decisions, from the day they are decided, may allow one party to emerge victorious on the particular issue being appealed while simultaneously making it harder for that party to succeed in future cases.² And some

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1 The above is applicable to a decision by any appellate court, but the effect is the most significant when the decision comes from the U.S. Supreme Court because its decisions cannot be appealed any further and are binding statements of federal law on all other courts.

2 *E.g.*, *Oncle v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998) (finding that same-sex discrimination is actionable under Title VII, but finding that the discrimination must be "because of sex," and that there is less likely to be an inference that discrimination is motivated by a plaintiff's sex when the parties are of the same sex); Mary Coombs, *Title VII*

cases appear to be clear wins for one side, only to be used against that side in subsequent cases.³ In this Comment, I will argue that the Supreme Court's decision in *Philip Morris USA v. Williams*,⁴ in which the Court sided with a corporate defendant facing significant punitive damages liability,⁵ may fall into this third category.

The Supreme Court's decision in *Philip Morris* deals with the constitutionality of a \$79.5 million punitive damages verdict against Philip Morris, the maker of Marlboro brand cigarettes, for the death of Jesse D. Williams.⁶ At trial, the jury found that Philip Morris had negligently caused the death of Mr. Williams—a heavy smoker since the 1950s, who died from lung cancer in 1997.⁷ Having found liability, the jury awarded the plaintiff \$821,000 in compensatory damages.⁸ But it did not stop there. In addition to finding that Philip Morris had acted negligently, the jury found that Philip Morris had “engaged in deceit” by “knowingly and falsely [leading Mr. Williams] to believe” that it was safe to smoke so heavily,⁹ and based on this finding, the jury awarded the plaintiffs an additional punitive damages award of \$79.5 million¹⁰—nearly one hundred times larger than the compensatory damages award.

and Homosexual Harassment After Oncale: Was It a Victory?, 6 DUKE J. GENDER L. & POL'Y 113, 144 (1999) (“[T]he extension of Title VII to same-sex sexual harassment may make the situation of gay and lesbian employees, as a whole, even worse. It is unclear how much it will protect them from harassment by their heterosexual colleagues. Yet, it may make it relatively easy for those same colleagues to successfully charge them with harassment.” (footnote omitted)).

³ *E.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2744 (2007) (citing the principles of the Court's *Brown v. Board of Education* decisions, 347 U.S. 483 (1954) and 349 U.S. 294 (1955), to strike down voluntary integration programs in public schools); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (applying the injury-in-fact test, which liberalized the standing requirements in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), to find that plaintiffs did not have standing to sue). For a good analysis of the development of the injury-in-fact requirement from *Data Processing* to *Lujan*, see Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

⁴ *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

⁵ *Philip Morris* is the most recent step in the Court's apparent attempt to reign in punitive damages awards through the use of due process review. The Court previously struck down punitive damages awards for violating the Due Process Clause in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

⁶ *See Philip Morris*, 127 S. Ct. at 1060–61.

⁷ *See id.* at 1061; Brief for the Petitioner at 2, *id.* (No. 07-1216).

⁸ *See Philip Morris*, 127 S. Ct. at 1061.

⁹ *Id.*

¹⁰ *Id.*

After the case made its way up through the Oregon courts,¹¹ where the punitive damages judgment was ultimately sustained by the Oregon Supreme Court,¹² the U.S. Supreme Court granted certiorari to review the award to determine whether it was consistent with both substantive and procedural due process.¹³ On review, the Court held that, because the trial court had improperly rejected a jury instruction regarding the allowable use of evidence of harm to non-parties,¹⁴ the \$79.5 million punitive damages verdict against Philip Morris was reached in violation of Philip Morris's procedural due process rights.¹⁵ In explaining the reasoning behind its holding,¹⁶ the Court stated 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."¹⁷ The Court then remanded the case to the Oregon Supreme Court to apply the standard set forth in its ruling,¹⁸ allowing Philip Morris to claim victory in the specific decision.

11 *See id.* at 1060–62 (describing the case's procedural history in the Oregon court system).

12 *Williams v. Philip Morris Inc. (Philip Morris V)*, 127 P.3d 1165, 1182 (Or. 2006), *rev'd and remanded sub nom., Philip Morris*, 127 S. Ct. 1057.

13 *See Philip Morris USA v. Williams*, 547 U.S. 1162 (2006) (granting certiorari to review the punitive damages judgment for violations of both substantive and procedural due process); Petition for a Writ of Certiorari at I, *Philip Morris*, 127 S. Ct. 1057 (No. 05-1256), 2006 WL 849860 [hereinafter Petition].

14 *See Philip Morris*, 127 S. Ct. at 1064–65.

15 *See id.* at 1065.

16 Although the Court's procedural holding may be viewed as an implicit extension of some of the language in *State Farm*, *see* 538 U.S. 408, 422 (2003) ("Lawful out-of-state conduct . . . must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (citation omitted)), the Court believed it was a sufficiently novel holding to warrant further explanation. *See Philip Morris*, 127 S. Ct. at 1065 ("We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now.").

17 *Id.* at 1064.

18 *Id.* at 1065. The Court stated that "the application of this standard may lead to the need for a new trial, or a change in the level of the punitive damages award," but did not specify exactly what the Oregon Supreme Court would have to do to comply with its ruling. *Id.* On remand, the Oregon Supreme Court found that a new trial was unnecessary and upheld the jury verdict on other grounds. *See Williams v. Philip Morris Inc. (Philip Morris VII)*, 176 P.3d 1255, 1257 (Or. 2008). The Supreme Court has granted certiorari to review this decision in *Philip Morris USA Inc. v. Williams*, 128 S. Ct. 2904 (2008), and determine "[w]hether, after this Court has adjudicated the merits of a party's federal claim and remanded the case to state court with instructions to 'apply' the correct constitutional standard, the state court may interpose—for the first time in the litigation—a state-law procedural bar that is neither firmly established nor regularly followed." Petition for a Writ of Certiorari at i, *Philip Morris*, No. 07-1216 (U.S. Mar. 24, 2008), 2008 WL 795148.

Despite the fact that Philip Morris was the victorious party on this particular appeal, the question of which party will benefit more from the decision in the long-run is harder to answer. Most commentators have viewed *Philip Morris* as “a victory for corporate defendants,”¹⁹ a characterization that appears reasonable at first blush. The Court’s decision explicitly imposes new procedural limitations on plaintiffs seeking punitive damages—that a jury may not use punitive damages to directly punish the defendant for harm caused to non-parties to the litigation, but it may consider such harm in determining a defendant’s reprehensibility.²⁰

But I will argue that another aspect of the *Philip Morris* opinion—an aspect that has received almost no scholarly attention—has the potential to have a much more significant impact on future litigation, and may ultimately be detrimental to the interests of Philip Morris and other mass-tort defendants. This aspect is the Court’s reconceptualization of “reprehensibility,” which is a key factor for the jury to examine when awarding punitive damages,²¹ as well as one of the three guideposts that reviewing courts use to determine whether an award violates substantive due process.²² The Court’s statements about reprehensibility suggest a very different conception of reprehensibility than what the Court had described in *BMW of North America, Inc. v. Gore*²³ and *State Farm Mutual Auto Insurance Co. v. Campbell*.²⁴ If courts reviewing punitive damages awards in the future understand the Court’s language regarding reprehensibility as being applicable

19 Sachin Bansal, Comment, *Philip Morris USA v. Williams: A Confusing Distinction*, 2 DUKE J. CONST. L. & PUB. POL’Y ONLINE EDITION 61, 75 (2007); see also *The Supreme Court—Leading Cases*, 121 HARV. L. REV. 185, 277–78 (2007) (“*Philip Morris* is only the latest example of how our society insists on providing ‘due process’ protections for wealth aggregations while ignoring the widespread losses of life and constraints on liberty that plague so many people and communities.”); Linda Greenhouse, *Justices Overturn \$79.5 Million in Punitive Damages Against Philip Morris*, N.Y. TIMES, Feb. 21, 2007, at A14 (explaining that the decision was “a victory for the cigarette industry and for other corporate defendants whose products or behavior have caused widespread injury”).

20 See *Philip Morris*, 127 S. Ct. at 1065. The Court explained that a plaintiff may still present evidence of harm to non-parties to the jury, but once it has done so, the trial court must “provide assurance that the jury will ask the right question, not the wrong one.” *Id.* at 1064.

21 See *Philip Morris*, 127 S. Ct. at 1064 (majority opinion) (“*Philip Morris* . . . does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we.”).

22 See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996) (noting that one of the most important factors in determining the reasonableness of a jury award is the degree of reprehensibility of the defendant’s conduct).

23 517 U.S. 559.

24 538 U.S. 408 (2003).

to substantive due process review, then the Court's opinion could have a significant impact on the way courts review punitive damages awards.²⁵

In Part I of this Comment, I will discuss how the Supreme Court conceptualized reprehensibility prior to its decision in *Philip Morris*. I will argue that reprehensibility was based on factors that demonstrated the culpability of the defendant and the callousness of the defendant's conduct. The amount of harm was only a relevant consideration if it was instrumental in demonstrating culpability or callousness. In Part II, I will discuss how the Court's language regarding reprehensibility in *Philip Morris* differs dramatically from the understanding of reprehensibility previously expressed by the Court in *Gore* and *State Farm*. It is broader than the *Gore/State Farm* understanding of reprehensibility in that it allows for the consideration of the amount of harm for its own sake, not just to show culpability. I will also show how the manner in which the Court applies the procedural holding of the case, as well as the Court's analogy to an atypical recidivism case in connection with its view of reprehensibility, similarly suggests a broader understanding of reprehensibility than the Court had previously expressed. Finally, in Part III, I will discuss the differences between substantive due process and procedural due process review of punitive damages awards, and describe the ways in which the case law has treated the two areas as being coextensive. I will argue that the Court's discussion of reprehensibility in *Philip Morris*, although made in the procedural due process context, has the potential to be extremely relevant to how courts view the reprehensibility factor in substantive due process cases as well. Based on this discussion, and an explanation of how the lower courts have applied the three guideposts, I will explain how the change in the Court's view of reprehensibility could significantly benefit plaintiffs suing corporate defendants in mass-tort lawsuits.

I. REPREHENSIBILITY PRIOR TO *PHILIP MORRIS*

Prior to *Philip Morris*, the Supreme Court's conception of reprehensibility as a factor relevant to punitive damages was best spelled out in the Court's decisions in *BMW of North America, Inc. v. Gore*²⁶ and

25 See discussion *infra* Part III. Early signs of such an application of *Philip Morris* are starting to show up in decisions from both the Supreme Court and lower courts. See *infra* notes 100, 130, 132.

26 517 U.S. 559 (ruling in favor of BMW and striking down a \$2 million punitive damages award).

State Farm Mutual Auto Insurance Co. v. Campbell.²⁷ In both *Gore* and *State Farm*,²⁸ the Court insisted that the reprehensibility of the defendant's conduct is "the most important indicium of the reasonableness of a punitive damages award,"²⁹ and that it is the first guidepost for a court to consider when reviewing a punitive damages award.³⁰ But while the Court was clear in proclaiming the importance of reprehensibility in determining the reasonableness of a punitive damages award, it was far less clear in its attempt to explain what particular aspects of conduct make that conduct reprehensible, and how a defendant's level of reprehensibility should be considered by a jury in imposing punitive damages and by a judge in reviewing such damages. By examining the Court's decisions in *Gore* and *State Farm*, we can attempt to divine a coherent theory of how the Court conceptualized reprehensibility prior to *Philip Morris*.

In *Gore*, the Court adopted a set of guideposts by which punitive damages awards could be reviewed to determine whether a verdict is so excessive as to violate constitutional substantive due process.³¹ The three guideposts mentioned in *Gore* are "(1) the degree of reprehensibility . . . ; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between [this remedy] and the civil penalties authorized or imposed in comparable cases."³²

Seven years later in *State Farm*, the Court further elaborated on how courts are to apply the guideposts in assessing punitive damages.³³ In some ways, *State Farm* added to what was required under the

27 538 U.S. 408 (ruling in favor of State Farm and striking down a \$145 million punitive damages judgment).

28 The Court has not previously dealt with reprehensibility in the context of *procedural* due process review of punitive damages judgments; when the Court discussed reprehensibility in *Gore* and *State Farm*, it did so in the context of applying substantive due process review to punitive damages judgments. Although substantive and procedural due process review of punitive damages verdicts differ in significant ways, I will argue in Part III that applying the Court's conception of reprehensibility as a factor of substantive due process review to procedural due process cases is perfectly consistent with the Supreme Court's punitive damages precedent and, similarly, that the Court's conception of reprehensibility in its *Philip Morris* decision is relevant to future substantive due process cases.

29 *State Farm*, 538 U.S. at 419; *Gore*, 517 U.S. at 575.

30 *State Farm*, 538 U.S. at 418; *Gore*, 517 U.S. at 575.

31 517 U.S. at 574–85.

32 *State Farm*, 538 U.S. at 418 (citing *Gore*, 517 U.S. at 575).

33 *Id.* at 419–28; see also Laura J. Hines, *Due Process Limitations on Punitive Damages: Why State Farm Won't Be the Last Word*, 37 AKRON L. REV. 779, 789–92 (2004) (explaining that the Court in *State Farm* aimed to provide additional guidance with regards to due process limitations on punitive damages awards).

Gore framework. For example, *State Farm* added language suggesting that few awards should exceed a single-digit ratio, and the limitation on what evidence may be admissible for purposes of determining punitive damages.³⁴ But in other ways, *State Farm* merely reiterated the standard established in *Gore*.³⁵ This is particularly true with regard to the three guideposts. The Court in *State Farm* did not make any significant changes to the meaning of the guideposts, and instead just reaffirmed the *Gore* Court's understanding of the factors.³⁶

The Supreme Court's explication of reprehensibility, at least as reprehensibility was understood prior to *Philip Morris*, was most clearly stated in *State Farm*.³⁷ In that case, the Court stated that the following considerations are relevant to determining if a defendant's conduct is reprehensible:

whether[] the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.³⁸

All of the factors that the Court found relevant to determining reprehensibility relate to the culpability of the defendant or the callousness of the defendant's conduct.³⁹ They do not, however, deal

³⁴ See *State Farm*, 538 U.S. at 425 (“[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”); *id.* at 422 (“Lawful out-of-state conduct . . . must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.”); see also Laura Clark Fey et al., *The Supreme Court Raised Its Voice: Are the Lower Courts Getting the Message? Punitive Damages Trends After State Farm v. Campbell*, 56 BAYLOR L. REV. 807, 809–10 (2004).

³⁵ See *State Farm*, 438 U.S. at 418–29 (addressing each *Gore* guidepost “in some detail” and applying them to the facts of *State Farm*); see also Fey et al., *supra* note 34, at 858.

³⁶ See Fey et al., *supra* note 34, at 858 (arguing that *State Farm* “is a landmark opinion because it set forth new rulings while clarifying and galvanizing the factors in *Gore*”).

³⁷ 538 U.S. at 419.

³⁸ *Id.*

³⁹ Although two of the five factors—factors one and three—may appear to be relevant to reprehensibility based, at least in part, on considerations other than the culpability of the defendant or callousness of the defendant's conduct, I submit that those two considerations were the more likely considerations on which factors one and three were found to influence reprehensibility in *State Farm*.

The first factor—whether the harm was physical or economic—could have been found to be relevant to reprehensibility based on the effect of the harm caused, not the defendant's culpability in causing the harm. But it is more likely that the significance of this factor is based on the belief that a defendant who causes physical harm often acts more callously than a defendant who causes economic harm. This focus on culpability

with the *amount* of harm caused by the defendant, to either the plaintiffs or individuals not party to the litigation.⁴⁰ This strongly suggests that evidence of the amount of harm to non-parties is only relevant to reprehensibility if it demonstrates that the defendant acted with a heightened level of culpability. Other language in the Court's opinions supports this view of reprehensibility. In *State Farm*, the Court stated that "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."⁴¹ Later in the opinion, when the Court discussed how out-of-state conduct may be relevant to the reprehensibility analysis, it stated that such

would be consistent with the criminal law's view that inchoate crimes generally merit the same punishment as completed crimes, therefore showing that the harm caused is far less significant to the punishment meted out than the culpability of the defendant. See MODEL PENAL CODE § 5.05(1) (2007) ("Except as otherwise provided in this Section, attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense that is attempted or solicited or is an object of the conspiracy.").

The third factor—whether the target had financial vulnerability—could have been found to be relevant to reprehensibility based on policy considerations regarding the likelihood that financially vulnerable victims will require government assistance. But again, it is more likely that the significance of the factor is based on the culpability associated with targeting vulnerable victims. The United States Sentencing Guidelines, which allow for a two-level increase if "the defendant knew or should have known that a victim of the offense was a vulnerable victim," focuses on whether the defendant *targeted* a vulnerable victim. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1). The Guidelines do not allow for the increase merely because the victim happened to be vulnerable, even if the resulting harm would be the same. See *id.* at cmt. 2 ("The adjustment would apply, for example, in a fraud case in which the defendant marketed an ineffective cancer cure or in a robbery in which the defendant selected a handicapped victim. But it would not apply in a case in which the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile.").

40 Consideration of the amount of harm caused by the defendant is not the same thing as consideration of whether the defendant's conduct involved repeated actions. The justices and judges that have begun to apply the *Philip Morris* conception of reprehensibility have done so in cases where an isolated incident caused significant harm. See *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2640–41 (2008) (Breyer, J., dissenting) (finding that Exxon's conduct was reprehensible both because Exxon repeatedly allowed a relapsed alcoholic to pilot the vessel, and because the harm caused by the isolated incident of the crash easily could have been much worse); *S. Union Co. v. Irvin*, No. 06-17347, 2008 WL 4822163, at *5 (9th Cir. Nov. 7, 2008) (Noonan, J., dissenting) (declining to dispute the majority's assertion that damages stemmed from an isolated incident, but nonetheless finding that "the conduct . . . posed a substantial risk of harm to the general public, and so was particularly reprehensible").

Neither is consideration of harm redundant with the ratio guidepost because harm to non-parties, which may be considered for purposes of reprehensibility, may not be considered in determining the ratio.

41 *State Farm*, 538 U.S. at 419 (emphasis added).

“conduct may be probative when it demonstrates the *deliberateness and culpability* of the defendant’s action in the State where it is tortious.”⁴²

Examination of the five reprehensibility factors, in conjunction with the Court’s language when it discusses reprehensibility, makes it clear that the reprehensibility analysis under *Gore* and *State Farm* was meant to focus on the defendant’s culpability (as determined by the defendant’s state of mind) and the callousness of the conduct, not the ultimate amount of harm caused by the defendant.⁴³ The Court’s opinion in *Philip Morris* appears to change that.

II. THE COURT’S CONCEPTION OF REPREHENSIBILITY IN *PHILIP MORRIS*

The Supreme Court’s opinion in *Philip Morris* represents a significant shift in the Court’s understanding of the reprehensibility factor. In *Philip Morris*, the Court used language that suggests a broader view of reprehensibility than the view described above. Instead of focusing merely on the defendant’s *culpability*, the Court appears to say that the *amount of harm caused* by the defendant is relevant evidence of reprehensibility, above and beyond its usefulness in demonstrating culpability. Most notably in this regard, the Court states that “conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few.”⁴⁴ Although this statement could be interpreted in several different ways,⁴⁵ the interpretation that is the most consistent with the rest of the opinion can be rephrased as something like the following: The fact that the conduct causes harm to more people necessarily *makes* the conduct more reprehensible.

This understanding of the above phrase is consistent with the Court’s statement later in the *Philip Morris* opinion that “[e]vidence 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.*”⁴⁶ This statement demonstrates that, to the majority in *Philip Morris*, the fact that conduct

⁴² *Id.* at 422 (emphasis added).

⁴³ See also *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 n.23 (1996) (“The flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages.” (quoting David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 387 (1994))).

⁴⁴ *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007).

⁴⁵ This statement does not make clear whether the Court believes that conduct is made more reprehensible by the fact that it risks harm to many people, or whether the Court just believes that more reprehensible conduct is likely to have a high correlation with conduct that risks harm to many people.

⁴⁶ *Philip Morris*, 127 S. Ct. at 1064 (emphasis added).

risks harm to many people *makes* that conduct more reprehensible. The Court finds a direct causal relationship between risk of harm to the public and the reprehensibility of the conduct, not just a high correlation between the two.

It is also bolstered by the Court's explanation earlier in the opinion of what it means for evidence of harm to others to be relevant to reprehensibility. In explaining the relevance of such evidence, the Court did not even mention the possibility of utilizing the evidence for purposes of showing culpability or a pattern of conduct (two factors that would have been acceptable under *Gore* and *State Farm*),⁴⁷ and instead said that "harm to others *shows* more reprehensible conduct."⁴⁸ This suggests a much more direct connection between evidence of harm to others and reprehensibility than would exist under the view that reprehensibility deals with the defendant's level of culpability.

The language used by the Court in the above passages is not the only evidence that the Court re-conceptualized reprehensibility in *Philip Morris*. The change is also apparent in the Court's application of its procedural holding in *Philip Morris*—that harm to non-parties may be considered for reprehensibility purposes only—to the facts of the case. Under the pre-*Philip Morris* view that reprehensibility is determined by a defendant's level of culpability, evidence of harm to others would still have been relevant to the issue of reprehensibility under some circumstances, but only because it might demonstrate that the defendant's conduct was executed with a high level of culpability, or that the conduct involved repeat action by the defendant.⁴⁹ The fact that the conduct caused or risked harm to non-parties would not have, in and of itself, made the conduct more reprehensible. If this view of reprehensibility had been applied to the facts of *Philip Morris*, it is quite possible that application of the Court's procedural holding would have required exclusion of the evidence of harm to non-parties.⁵⁰

⁴⁷ See *State Farm*, 538 U.S. at 419; *Gore*, 517 U.S. at 576–77.

⁴⁸ *Philip Morris*, 127 S. Ct. at 1064 (emphasis added).

⁴⁹ *State Farm* was a case in which such evidence may have been relevant to demonstrating that the defendant's conduct was not an isolated incident, but was actually one example of a course of conduct. As such, evidence that other parties were harmed in ways similar to the plaintiffs in *Gore* and *State Farm* could have been relevant to showing that the defendants acted with a higher level of culpability.

⁵⁰ In contrast to *State Farm*, the evidence of harm presented in *Philip Morris* (as well as in *Gore*) was probably unnecessary to demonstrate that Philip Morris's conduct towards the plaintiff was one example of a pattern of conduct. In addition, the scope of harm caused by the conduct was a result more of Philip Morris's success in the market than repeated

But the Court in *Philip Morris* did not appear to adopt these limits on the utility of evidence of harm to others,⁵¹ and therefore did not even consider the possibility that the amount of harm to non-parties caused by *Philip Morris* might not be relevant to reprehensibility. None of the above statements from the Court's opinion in *Philip Morris* cabins the significance of harm to others to demonstrating the defendant's culpability. To the contrary, all of these statements strongly suggest that a defendant's conduct is more reprehensible *because* it causes harm to more people.

Finally, the shift in the Court's view of what constitutes reprehensible conduct is evident from the lone citation that follows the Court's statement that "conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few."⁵² In support of this statement, the Court cites to its decision in *Witte v. United States*,⁵³ a case dealing with the constitutionality under the Double Jeopardy Clause⁵⁴ of additional punishment for recidivists. But, even though the Court in *Gore* and *State Farm* had also looked to the Supreme Court's recidivism jurisprudence to support its understanding of reprehensibility, *Witte* is an atypical recidivism case that takes a much more expansive view of recidivism than what was contemplated by the Court in *Gore* and *State Farm*. The Court's reliance on *Witte* provides further support that the *Philip Morris* Court viewed

acts of fraud. I would submit that Philip Morris's conduct would be just as reprehensible even if Philip Morris had a significantly smaller market share, and therefore harmed significantly fewer people.

Similarly, the conduct in *Gore* involved a policy not to notify purchasers of BMW cars if there was damage to the car below a specified amount. Once the policy was in place, the amount of people it harmed was determined by the success of BMW's marketing and sales campaigns. If BMW's marketing had been less successful, that would not have meant that BMW's conduct had been any less reprehensible.

In both of these cases, a strong argument can be made that evidence of the total amount of harm caused by the defendant should have been excluded under Oregon's and Alabama's Rules of Evidence 403, respectively, because the probative value was substantially outweighed by the danger of unfair prejudice. See *Klein v. Nat'l R.R. Passenger Corp.*, No. 04-955, 2008 WL 879968, at *21-22 (E.D. Pa. Mar. 31, 2008) (upholding instructions very similar to the above theory of reprehensibility).

51 *But see* Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. (forthcoming 2009) (manuscript at Part IV.e) (arguing that the Court's reprehensibility holding is best understood as adopting this type of distinction between when evidence of harm to others may legitimately be used to demonstrate reprehensibility and when it may not).

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

53 515 U.S. 389 (1995).

54 See U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .").

reprehensibility more expansively than did the *Gore* and *State Farm* Courts.

The traditional understanding of recidivism is that, when a defendant continues to violate the law after having been previously punished, the defendant demonstrates an inability to reform after being punished for his conduct.⁵⁵ This is the version of recidivism that was contemplated by the Court in *Gore* and *State Farm*. In *Gore*, the Court mentioned that recidivism is an aspect of reprehensibility, stating that “a recidivist may be punished more severely than a first offender [because] repeated misconduct is more reprehensible than an individual instance of malfeasance.”⁵⁶ The Court then cited to *Gryger v. Burke*,⁵⁷ which upheld a life sentence for a defendant who had been arrested eight times, with each arrest leading to either a guilty plea or verdict.⁵⁸

In *Gryger*, the Court held that the Pennsylvania Habitual Criminal Act did not retroactively punish the defendant for a conviction that took place before the passage of the act because the life sentence “is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes.”⁵⁹ The Court justified this result by stating that the increased sentence “is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.”⁶⁰ Because the Court upheld the increased sentence on the grounds that the defendant had previously been convicted on multiple occasions and had not reformed his behavior, it was a fairly standard recidivism case.

The Court’s reference to recidivism in *State Farm* was, as in *Gore*, to the traditional understanding of recidivism. When the Court in *State Farm* discussed recidivism, it merely cited to its decision in *Gore* for the proposition that “repeated misconduct is more reprehensible than an individual instance of malfeasance.”⁶¹ The Court then further limited its understanding of the relevance of recidivism “in the

55 See, e.g., *Rummel v. Estelle*, 445 U.S. 263 (1980). In that case, the Court found that the recidivism statute was constitutional because “a recidivist must twice demonstrate that conviction and actual imprisonment do not deter him from returning to crime once he is released.” *Id.* at 278. As such, the defendant “has been both graphically informed of the consequences of lawlessness and given an opportunity to reform, all to no avail.” *Id.*

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

57 334 U.S. 728 (1948).

58 *Id.* at 730.

59 *Id.* at 732.

60 *Id.*

61 *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) (quoting *Gore*, 517 U.S. at 577).

context of civil actions,” stating that “courts must ensure the conduct in question replicates the prior transgressions.”⁶²

But in *Philip Morris*, the Court did not cite to either *Gore* or *State Farm* to explain how recidivism can be analogized to punitive damages.⁶³ Nor did it directly cite to a standard recidivism case like *Gryger*.⁶⁴ Instead, the Court cited to *Witte*, an atypical and more expansive recidivism case.⁶⁵ *Witte* dealt with the issue of whether the U.S. Sentencing Guidelines Manual violates the constitutional protection against double jeopardy when it allows sentencing judges to consider “all relevant conduct in which the defendant was engaged and not just with regard to the conduct underlying the offense of conviction,”⁶⁶ in addition to allowing for separate prosecution of the same relevant conduct. In *Witte*, the defendant, Steven Kurt Witte, had been a party to a conspiracy to smuggle into the United States marijuana from Mexico and cocaine from Guatemala.⁶⁷ The conspiracy involved two separate attempts to import drugs into the States—one in 1990 and another in 1991.⁶⁸ Unfortunately for the defendant, one of his co-conspirators was actually an undercover agent for the Drug Enforcement Administration.⁶⁹

In 1990, the conspirators attempted to deliver 591 kilograms of cocaine from Mexico to the United States.⁷⁰ But before the drugs could be delivered, they were seized in a raid of the Mexican airstrip that was being used by Witte’s co-conspirators.⁷¹ Although the 1990 attempt to import cocaine was unsuccessful, Witte was not arrested at that time.⁷²

After a short hiatus, Witte was again approached by the undercover agent about participating in the delivery of 1,000 pounds of marijuana, and Witte agreed.⁷³ This time, Witte’s luck ran out. He was not able to escape arrest for the second conspiracy and was taken into custody when he took possession of the drugs.⁷⁴

62 *Id.*

63 *See Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007).

64 *Id.*

65 *Id.* (citing *Witte v. United States*, 515 U.S. 389, 400 (1995)).

66 *Witte*, 515 U.S. at 393 (internal quotation marks omitted).

67 *Id.* at 391.

68 *Id.* at 392.

69 *Id.* at 391.

70 *Id.* at 392.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

When Witte was first indicted for conspiracy and attempting to distribute marijuana with intent to distribute, the indictment only covered his participation in the attempted delivery of marijuana that had been scheduled to take place in 1991.⁷⁵ The aborted delivery of cocaine that took place in 1990 was not part of the indictment. But when it came time to sentence Witte for the 1991 conspiracy, the sentencing judge factored the cocaine from the 1990 conspiracy into his consideration under the Sentencing Guidelines, finding that “the 1990 importation offenses were part of the same continuing conspiracy, [and therefore] were ‘relevant conduct’ under . . . the Guidelines.”⁷⁶

Although Witte did not appeal this sentence, he was later charged in a separate indictment for his activities in the 1990 conspiracy, and he appealed that conviction up to the Supreme Court on the grounds that the conviction violated the Double Jeopardy Clause.⁷⁷ In reviewing the case, the Supreme Court found that, although Witte’s sentence for the 1991 conspiracy had been determined by factoring in the quantity of drugs he had attempted to smuggle into the United States in both 1990 and 1991, his sentence did not constitute “punishment” for the 1990 conspiracy⁷⁸ because he was “neither prosecuted for nor convicted of the cocaine offenses during the first criminal proceeding.”⁷⁹ As such, subsequent punishment for the same conduct would not constitute double jeopardy.⁸⁰

Witte is an atypical recidivism case because the conviction for which the defendant received an increased penalty was his first conviction. Therefore, he had not demonstrated an inability to reform after being punished for his conduct—the standard reason for punishing recidivists more heavily.⁸¹ In comparison to *Gryger*, where the Court looked at the defendant’s capacity for reform after multiple convictions—in a sense culpability—the Court in *Witte* placed more emphasis on the total harm caused by the defendant’s conduct, as demonstrated by the total amount of drugs the defendant attempted

⁷⁵ *Id.* at 392–93 (“The indictment was limited on its face to conduct occurring on or about January 25 through February 8, 1991, thus covering only the later marijuana transaction.”).

⁷⁶ *Id.* at 394.

⁷⁷ *Id.* at 394–95.

⁷⁸ *Id.* at 397 (“[A] defendant . . . is punished, for double jeopardy purposes, only for the offense of which the defendant is convicted.”).

⁷⁹ *Id.* at 396.

⁸⁰ *Id.*

⁸¹ *See, e.g., supra* note 51.

to smuggle into the country. The Court's reliance on *Witte* in its *Philip Morris* opinion, instead of a more traditional recidivism case, demonstrates an expansion of the way in which the Court finds recidivism to be relevant to the reprehensibility analysis. It shows that the Court no longer believes that reprehensibility is based solely on the culpability of the defendant and the callousness of the defendant's conduct towards the plaintiff—a view of reprehensibility that would be supported by cases that find conduct towards others relevant only because they demonstrate that the defendant is incapable of reform. Instead, other factors, such as the potential scope of harm that could flow from the defendant's conduct, are now directly relevant to determining the defendant's reprehensibility.

The Court's citation to *Witte*, as well as the above-quoted passages from the *Philip Morris* opinion and the way in which the procedural holding from *Philip Morris* was applied to the facts of the case, all demonstrate that the Court has broadened its understanding of reprehensibility from the one expressed by the Court in *Gore* and *State Farm*.

III. BEYOND *PHILIP MORRIS*: APPLICATION TO SUBSTANTIVE DUE PROCESS REVIEW

Even if the Court's conception of reprehensibility in *Philip Morris* differs from the conception of reprehensibility put forth in *Gore* and *Campbell*, the significance of that development would be fairly inconsequential if the *Philip Morris* conception of reprehensibility was limited to being an evidentiary rule, applicable only to the issue of what evidence a jury may legitimately consider when determining whether to award punitive damages and, if so, how large the award should be. Reprehensibility takes on much more significance as the first of three guideposts of a substantive due process challenge than it does as an evidentiary rule. I will argue that, based on Supreme Court precedent, it appears that even though *Philip Morris* was a procedural due process decision, the Court's conception of reprehensibility should be equally applicable to substantive due process challenges to punitive damages judgments.

The Constitution imposes both substantive and procedural due process restraints on punitive damages awards,⁸² and the restrictions imposed by these two forms of due process differ in some significant ways. In the context of punitive damages, substantive due process re-

82 *State Farm*, 538 U.S. at 416.

view is utilized to determine whether a punitive damage award is so excessive that it is unconstitutional.⁸³ A violation of substantive due process can be found regardless of whether the procedures used to determine the amount of the damages award were infirm.⁸⁴

In contrast, procedural due process protects the methods by which a court reaches its determination of the amount of a damages award,⁸⁵ and can be violated regardless of the amount of damages awarded. Prior to *Philip Morris*, the Court had been fairly deferential to the states when it came to reviewing trial procedures, generally upholding even “skeletal jury instructions”⁸⁶ under a reasonableness test,⁸⁷ although members of the Court have occasionally voiced their apprehensions with applying such a lax standard of review.⁸⁸

On its face, *Philip Morris* is a procedural due process case.⁸⁹ As such, it would appear to have limited applicability to future cases decided on substantive due process grounds. But even though the Court refused to address the question of whether the award was so excessive as to violate substantive due process,⁹⁰ and instead only reviewed the award for procedural due process infirmities,⁹¹ the Court’s

83 See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 524 (2d ed. 2002) (“Substantive due process [in the context of challenges to punitive damages awards] prevents excessive punitive damage awards, regardless of the procedures followed.”).

84 See *id.*

85 See *id.* (“Procedural due process [in the context of challenges to punitive damages awards] requires that there be safeguards such as instructions to the jury to guide their discretion, and judicial review to ensure the reasonableness of the awards.”).

86 Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After State Farm*, 6 U. PA. J. CONST. L. 423, 425 (2004).

87 See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (“[G]eneral concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.”).

88 See, e.g., *State Farm*, 538 U.S. at 417 (“Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant’s net worth creates the potential that juries will use their verdicts to express biases against big businesses”); *Haslip*, 499 U.S. at 42–64 (O’Connor, J., dissenting) (“Regrettably, common-law procedures for awarding punitive damages [have a devastating potential for harm]. States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so.”).

89 See *Philip Morris*, 127 S. Ct. at 1063 (“Because we shall not decide whether the award here at issue is ‘grossly excessive,’ we need now only consider the Constitution’s procedural limitations.”). But see *id.* at 1067 (Thomas, J., dissenting) (“[T]he ‘procedural’ rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages.”).

90 *Philip Morris*, 127 S. Ct. at 1065 (majority opinion) (“[W]e shall not consider whether the award is constitutionally ‘grossly excessive.’”).

91 *Id.* at 1063 (“Because we shall not decide whether the award here at issue is ‘grossly excessive,’ we need now only consider the Constitution’s procedural limitations.”).

opinion may nonetheless demonstrate a significant shift in the Court's understanding of the substantive due process analysis and, therefore, affect the way such analysis is undertaken in the future.

This is because the Supreme Court's punitive damages precedents have created a strong interrelation between the applicable law in procedural and substantive due process cases.⁹² In the Court's more recent punitive damages cases, the distinction between post-verdict substantive due process review of punitive damages awards and pre-verdict procedural due process requirements has often been far from clear. Starting with *State Farm*, the Court began to contemplate the relationship between substantive and procedural due process and has found them to be interrelated in many ways.⁹³ Based on that interrelation, the Court in *State Farm* found that procedural limitations were a relevant consideration for substantive due process review.⁹⁴ The Court's opinion in *Philip Morris* recognizes the same relationship, although it represents the opposite of *State Farm*, basing its procedural due process holding on the substantive due process holdings in *State Farm* and *Gore*.⁹⁵ When the Court in *Philip Morris* contemplated whether a jury could directly punish for potential harm to non-parties, the Court looked to *State Farm* (a substantive due process decision) and found that judges could only consider potential harm to the plaintiff, and not to other parties.⁹⁶ The Court did not try to distinguish between consideration at trial by a jury and post-verdict review by a judge, nor did it put any reservations on the analogy between these two aspects of a case.⁹⁷

Because of the way punitive damages law has developed through recent Supreme Court opinions, with concepts from substantive and procedural due process cases intermixing whenever a concept is relevant to both areas, there seems to be little reason to believe that rep-

92 See Franze & Scheuerman, *supra* note 86, at 511 (explaining that the "Court's punitive damages decisions repeatedly have blended the concepts of substantive and procedural due process").

93 See Sheila B. Scheuerman & Anthony J. Franze, *Instructing Juries on Punitive Damages: Due Process Revisited After Philip Morris v. Williams*, 10 U. PA. J. CONST. L. 1147, 1149 (2008) ("[I]n *State Farm*, the Court for the first time stated that a jury must be instructed on one of the substantive, post-verdict limits recognized by the Court.").

94 See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) ("Our [substantive due process] concerns are heightened when the decisionmaker is presented . . . with evidence that has little bearing as to the amount of punitive damages that should be awarded.").

95 See *Philip Morris*, 127 S. Ct. at 1063.

96 *Id.*

97 See *id.*

reprehensibility should be an exception. Just as the Court looked to the post-verdict guideposts when it was asked to decide what a jury could validly consider,⁹⁸ it would be perfectly consistent with its precedents for the Court to look to what aspects of reprehensibility a jury may consider when utilizing reprehensibility as a guidepost for substantive due process review.⁹⁹ Some courts have already cited language from *Philip Morris* regarding reprehensibility when discussing the reprehensibility guidepost of a substantive due process challenge,¹⁰⁰ and there is no reason to believe that this trend will not continue.

So how will the post-*Philip Morris* conception of reprehensibility affect future mass-tort plaintiffs? Before I answer that question, it is necessary to understand how lower courts have applied the reprehensibility guidepost when reviewing punitive damages judgments. Despite the Supreme Court's language stating that reprehensibility is the most important factor to consider when determining whether punitive damages violate substantive due process, the lower courts have generally utilized the reprehensibility guidepost as merely a secondary consideration, far inferior to the second guidepost—the ratio between a punitive damages award and the actual or potential harm to the plaintiff.

The way the guideposts have been utilized by lower courts is exemplified by two state supreme court cases: *Goddard v. Farmers Insur-*

98 *See id.* (looking at questions such as the number of victims, as well as the seriousness and circumstances of the injury).

99 In fact, it is more likely that concepts from procedural due process will be relevant to substantive due process than vice versa, because there may be considerations that a judge is allowed to take into account even though a jury is forbidden to do so.

100 *See* *Action Marine, Inc. v. Cont'l Carbon Inc.*, 481 F.3d 1302, 1318–20, 1323 (11th Cir. 2007) (finding punitive damages judgment did not violate substantive due process in part because plaintiff's "actions likely harmed a great number of people and businesses who are not parties to this litigation," making its conduct "exceedingly reprehensible"); *Leavey v. Unum Provident Corp.*, Nos. 06-16285, 06-16350, 2008 WL 4472937 (9th Cir. Oct. 6, 2008) (upholding the lower court's reduction of a punitive damage award on substantive due process grounds in part because there was "scant evidence of repeated misconduct of the sort that injured [the plaintiff]" (quoting *State Farm*, 538 U.S. at 423)); *Cook v. Rockwell Int'l Corp.*, 564 F. Supp. 2d 1189, 1211 (D. Colo. 2008) (adding "whether the conduct risked harm to many as opposed to a few" to the list of factors relevant to reprehensibility); *cf. Loudermilk Servs., Inc. v. Marathon Petroleum Co.*, No. 3:04-0966, 2008 WL 4181379 (S.D. W. Va. Sept. 5, 2008) (intermingling a discussion of reprehensibility for purposes of substantive due process review with a discussion of the constitutionality under procedural due process of a multiplier to determine punitive damages for each member of a class). *But see* *Morris v. Flaig*, 511 F. Supp. 2d 282, 310 n.20 (E.D.N.Y. 2007) (finding *Philip Morris* inapplicable to a substantive due process challenge to a punitive damages award).

ance Co. of Oregon,¹⁰¹ recently decided by the Oregon Supreme Court, and *Simon v. San Paolo U.S. Holding Co.*,¹⁰² decided by the California Supreme Court. In both cases, the courts used the first guidepost as a supplement to the second guidepost, and not as an independent determinate of whether an award was reasonable.

In *Goddard*, the Oregon Supreme Court first considered whether the reprehensibility guidepost, on its own, would be helpful in determining the reasonableness of an award,¹⁰³ and found that it would not be.¹⁰⁴ The court stated that “the first guidepost, reprehensibility, does not generate numerical answers at all, because the guidepost itself, and the ‘subfactors’ that go into it, are all qualitative, not quantitative.”¹⁰⁵ Because reprehensibility deals with qualitative factors, it could only be used as a tool for comparing punitive damage verdicts with each other.¹⁰⁶ Similarly, the court found that “[t]he third guidepost, which examines comparable sanctions, also fails to provide a quantitative measuring stick.”¹⁰⁷ Although the dollar amount of any comparable sanction is a quantitative measurement, the court found that the Supreme Court had not used it as a quantitative measure. Instead, the court found that, based on the Supreme Court’s application of the third guidepost in *State Farm*, the dollar amount is to “be used as a basis for comparing one punitive damages award to another, and not as a direct predictor of the constitutional limits of an individual punitive damages award.”¹⁰⁸

Therefore, even though the Supreme Court has stated that reprehensibility is the first and “most important” guidepost,¹⁰⁹ the Oregon Supreme Court began its analysis with the second guidepost—the ratio between punitive damages and actual or potential harm to the plaintiff.¹¹⁰ It found that this guidepost “comes closest to providing numerical limits” on the amount of punitive damages that should be

101 179 P.3d 645 (Or. 2008).

102 113 P.3d 63 (Cal. 2005).

103 *Goddard*, 179 P.3d at 660 (“It is clear that analysis must begin, at least, with the . . . guideposts from *Gore* and *Campbell*.”).

104 *Id.*

105 *Id.*

106 *Id.* (“[W]e may compare the level of reprehensibility exhibited in various cases, and that comparison may lead us to a conclusion that the constitutionally permissible limit in a particular case is ‘high’ or ‘low,’ relative to the limit in another case.”).

107 *Id.*

108 *Id.*

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

110 *Goddard*, 179 P.3d at 660.

found to be constitutionally permissible.¹¹¹ Although the second guidepost is “far from perfect” as a measure of constitutionality,¹¹² the court found that it “does provide at least a *rough* numerical baseline

111 *Id.*

112 *Id.* at 661. Aside from the questions of how the ratio is grounded in the Constitution, see Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1029 (2007) (arguing that the words in *State Farm* dealing with the constitutionality of a single-digit multiplier “are some of the most regrettable ever written about punitive damages. The ratio rule the Supreme Court embraced lacks any principled foundation, and it does not even have the virtue of being an arbitrary rule chosen by the legislature”), and what ratio represents the constitutional limit in any particular case, a lot of confusion surrounding the second guidepost stems from the question of what “potential harm” may be considered in determining the second number in the punitive damages ratio. See, e.g., *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 234 (3d Cir. 2005) (finding “no shortage of candidates” for the second number in the ratio); *In re Exxon Valdez*, 270 F.3d 1215, 1243 (9th Cir. 2001) (finding the second number in the ratio to be “arguable” and “somewhat indeterminate”); see also John A. Albers, Comment, *State of Confusion: Substantive and Procedural Due Process with Regard to Punitive Damages After TXO Production Corp. v. Alliance Resources Corp.*, 26 U. TOL. L. REV. 159, 193–94, n.262 (1994); 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, 798 (2006).

Courts have generally limited the scope of the inquiry to potential harm that would be likely to happen, see *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993) (opinion of Stevens, J.) (“Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant’s conduct as well as to the harm that actually has occurred.”), but even that leaves multiple questions unanswered. Prior to *Philip Morris*, it was unclear whether the potential harm relevant to the second guidepost was only potential harm to the plaintiff, or if it included potential harm to non-parties. Compare *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 424 (2003) (“[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.” (emphasis added)), and *TXO*, 509 U.S. at 462 (“While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme.” (emphasis added)), with *TXO*, 509 U.S. at 460 (“It 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.” (second and third emphases added)), and *Dean v. Olibas*, 129 F.3d 1001, 1007 (8th Cir. 1997) (considering potential harm to future victims when determining the ratio). But *Philip Morris* appears to have answered this question. 127 S. Ct. at 1063 (“[W]e have made clear that the potential harm at issue was harm potentially caused the plaintiff.”). It remains unclear whether potential harm includes potential harm that would have been caused by future similar conduct, or only harm that potentially could have resulted from conduct that transpired. Compare *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 (8th Cir. 1995) (“[A] court may not justify the award of punitive damages in a particular case by overlooking the actual events and focusing on potential victims of similar hypothetical torts.”), with *Dean*, 129 F.3d at 1007 (“[Harm that might have resulted] includes ‘the possible harm to other victims that might have resulted if similar future behavior were not deterred.’” (quoting *TXO*, 509 U.S. at 460)).

for calculating a maximum constitutionally permissible punitive damages award in a given case.”¹¹³

The reprehensibility guidepost (as well as the third guidepost dealing with comparable sanctions) then comes into play once a ratio of punitive damages to actual or potential harm to the plaintiff has been determined.¹¹⁴ Even then, the court only utilizes it in a subsidiary role to the second guidepost. The court stated that the first guidepost can be used to justify a ratio that is on the high end of what the Supreme Court has previously found would be acceptable, namely a 9-to-1 ratio.¹¹⁵ Only in extraordinary cases, such as when conduct is particularly reprehensible, will a court be justified in upholding a punitive damages award that exceeds a single-digit ratio.¹¹⁶

The Supreme Court of California has applied the guideposts in a very similar manner to the way the Oregon Supreme Court used them in *Goddard*. In *Simon v. San Paolo U.S. Holding Co.*,¹¹⁷ the court interpreted the *Gore/State Farm* guideposts as creating “a type of presumption” against punitive damage awards greater than a 9- or 10-to-1 ratio,¹¹⁸ but a presumption that could be overcome by a “special justification.”¹¹⁹ And the first justification listed by the court was “extreme reprehensibility.”¹²⁰ This language demonstrates that, like the Oregon Supreme Court, the California Supreme Court used the reprehensibility guidepost as a subsidiary factor to the ratio in the second guidepost. An extremely high level of reprehensibility can be used to justify a higher ratio, but it is insufficient on its own to justify a particular punitive damages award because it does not have a quantitative element.

Based on the way the lower courts have applied the three guideposts to cases, the reprehensibility guidepost actually has a fairly limited effect on the amount of punitive damages that will be allowed in a particular case, at least when compared to the significance of the

113 *Goddard*, 179 P.3d at 661.

114 *Id.* (“Once that rough numerical reference point is established, the other guideposts come into play.”).

115 *Id.* (“[P]unitive damages at what normally is the highest constitutionally permissible level (*i.e.*, a nine-to-one ratio between punitive and compensatory damages) are justified only when the conduct at issue is highly reprehensible . . .”).

116 *Id.* at 667 (“It may be true that . . . a punitive damages award that exceeds the single-digit ratio may be acceptable in a few narrow circumstances . . . [, such as] when ‘extraordinarily reprehensible’ conduct . . . is involved.”).

117 113 P.3d 63 (Cal. 2005).

118 *Id.* at 77.

119 *Id.*

120 *Id.*

second guidepost. When a defendant is particularly reprehensible, the court will consider allowing a ratio that exceeds a single-digit multiplier. But courts are hesitant to significantly exceed such a multiplier, regardless of how reprehensible the defendant's conduct was.¹²¹

This does not mean that courts have never upheld punitive damages verdicts where the ratio of actual or potential damages to punitive damages far exceeded the 10-to-1 ratio. One prominent example of a lower court upholding a large ratio between actual (or potential) damages and punitive damages to a substantive due process challenge is, of course, the Oregon Supreme Court's opinion in *Philip Morris*.¹²² But the Oregon Supreme Court in *Philip Morris* was only able to justify such a large ratio by applying the guideposts in a way that was fundamentally different from how the same court had applied them in *Goddard* and how the California Supreme Court had applied them in *Simon*—a way that allowed the evidence of harm to non-parties to take on substantially more significance.

When the Oregon Supreme Court first considered the *Philip Morris* case, the court found that the \$79.5 million punitive damages judgment did not violate substantive due process even though the actual damages did not exceed \$800,000¹²³—a ratio of almost 100:1! In order to reach such a conclusion, the Oregon Supreme Court did not

121 See, e.g., *Bocci v. Key Pharm., Inc.*, 76 P.3d 669, 675 (Or. Ct. App. 2003) (finding that, although the defendant's conduct was highly reprehensible, it did not "rise to the level of 'particularly egregious,' intentionally malicious acts" justifying a ratio exceeding single digits), *modified and adhered to on reconsideration*, 79 P.3d 908 (2003); *Bardis v. Oates*, 14 Cal. Rptr. 3d 89, 105 (Cal. Ct. App. 2004) (finding that a 42-to-1 ratio "cannot stand unless extraordinary factors are present"). But see *Swinton v. Potomac Corp.*, 270 F.3d 794, 818–19 (9th Cir. 2001) (upholding a 28-to-1 ratio for "particularly egregious" acts of ongoing racial harassment that resulted in low actual damages).

122 See *Williams v. Philip Morris Inc. (Philip Morris V)*, 127 P.3d 1165, 1182 (Or. 2006), *rev'd sub nom. on other grounds*, *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). The Supreme Court reversed the Oregon Supreme Court's decision, but on remand, the Oregon Supreme Court again upheld the punitive damages verdict on state procedural grounds, without addressing the substantive due process issue. See *Williams v. Philip Morris Inc. (Philip Morris VII)*, 176 P.3d 1255 (Or. 2008). Certiorari was granted "limited to Question 1 presented by the petition." *Philip Morris USA Inc. v. Williams*, 128 S. Ct. 2904 (2008). The Court will answer "[w]hether, after this Court has adjudicated the merits of a party's federal claim and remanded the case to state court with instructions to 'apply' the correct constitutional standard, the state court may interpose—for the first time in the litigation—a state-law procedural bar that is neither firmly established nor regularly followed," but declined to review Question 2, which sought clarification of the appropriate application of the relationship between punitive and compensatory damages. Petition, *supra* note 13, at *i.

123 *Philip Morris V*, 127 P.3d at 1181–82.

find that the 100:1 ratio was reasonable given the reprehensibility. In fact, the court expressly stated that, regardless of which figure they used to represent the actual damages,¹²⁴ “the second *Gore* guidepost is not met.”¹²⁵ But even though the ratio seemed to suggest that the punitive damages award was unconstitutional, the court upheld it on substantive due process grounds by ignoring the ratio altogether.¹²⁶ The court found that “[o]f the three *Gore* guideposts, then, two support a very significant punitive damage award. One guidepost—the ratio—cuts the other way.”¹²⁷ And because the first and third guidepost pointed towards “a very significant punitive damage award,” the fact that the second guidepost suggested the award was unconstitutional was outweighed.

This method of applying the guideposts for purposes of substantive due process review is seriously flawed. As other lower courts that have attempted to apply the guideposts have pointed out, the second guidepost—the ratio—is the only guidepost that provides a “quantitative measuring stick.”¹²⁸ As such, the court’s finding that a \$79.5 million punitive damages award is constitutional does not appear to be tethered to any quantitative measure. Because the approach utilized by the Oregon Supreme Court in *Philip Morris* to review the award for a violation of substantive due process does not provide a quantitative method for assessing constitutionality, it is a far inferior utilization of the *Gore* guideposts than the method utilized by the *Goddard* and *Simon* courts, and implicitly utilized in numerous other cases.

If the post-*Philip Morris* conception of reprehensibility is applied to the substantive due process framework described above, courts will be able to uphold large punitive damages awards against corporate mass-tort defendants that they would have been unable to uphold under the *Gore/State Farm* rubric. Whereas the culpability understanding of reprehensibility ignored the total amount of harm caused by the defendants actions and focused solely on the defendant’s culpability and the callousness of the defendant’s conduct, the *Philip Morris* interpretation of reprehensibility would make corporate defendants, whose conduct is more likely to cause widespread harm than that of

124 *Id.* at 1181 (declining to decide whether the appropriate figure to use for the actual damages portion of the ratio was the \$800,000 awarded by the jury or the \$500,000 awarded by the trial court after applying a statutory cap to the award).

125 *Id.*

126 *Id.*

127 *Id.*

128 *Goddard v. Farmers Ins. Co. of Or.*, 179 P.3d 645, 660 (Or. 2008) (noting that the second guidepost comes closest to providing numerical limits).

individual defendants,¹²⁹ more susceptible to judicial findings of high reprehensibility.¹³⁰ If courts are able to find that a defendant's conduct is highly reprehensible based, either entirely or in part, on the total scope of the harm caused by defendant's conduct (not on the level of culpability associated with the conduct), then it is likely that corporate conduct will be deemed highly reprehensible with greater frequency, leaving corporate defendants more susceptible to punitive damages verdicts approaching or exceeding the 10-to-1 ratio that has generally marked the outer boundary of constitutionality.¹³¹ Defendants will no longer have to prove that a corporate defendant acted with a high level of culpability to sustain a high punitive damages verdict so long as the conduct that caused the defendant's harm also caused widespread harm.¹³²

CONCLUSION

If courts reviewing punitive damages verdicts for violation of substantive due process adopt the broader view of reprehensibility suggested by *Philip Morris*, that result would be a victory for plaintiffs seeking to obtain punitive damages verdicts from corporate defendants in mass-tort cases. Although the procedural holding of *Philip*

¹²⁹ See Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787, 1800 (2004) ("Corporations, by and large the defendants in [class actions], . . . affect the real world—with their power . . . to do devastating and widespread harm.").

¹³⁰ Compare *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2621–22 (2008) (applying a 1:1 ratio to reduce a \$2.5 billion punitive damages award because the defendant's conduct ranked on the low end of the blameworthiness scale), *with id.* at 2640–41 (Breyer, J., dissenting) (voting to uphold the punitive damages award based on his agreement with the district court and the Ninth Circuit that the defendant's conduct was "highly reprehensible" and "egregious"). Justice Breyer's view that Exxon's conduct was "highly reprehensible" is particularly enlightening because he authored the majority opinion in *Philip Morris*.

¹³¹ See *supra* notes 114–20 and accompanying text.

¹³² A recent decision by the Ninth Circuit shows how application of the *Philip Morris* reprehensibility holding to substantive due process challenges could potentially benefit plaintiffs. In *Southern Union Co. v. Irvin*, a majority of the panel applied the *State Farm* reprehensibility factors and found that a punitive damages verdict ten times larger than compensatory damages violated substantive due process, and remanded with an offer of remittitur three times compensatory damages. See No. 06-17347, 2008 WL 4822163, at *1–2 (9th Cir. Nov. 7, 2008). In contrast, Judge Noonan in dissent found that the punitive damages judgment did not violate substantive due process. Although Judge Noonan did not dispute the majorities analysis of the *State Farm* factors, citing *Philip Morris*, he found that the plaintiff's "exploitation of high public office" was "particularly reprehensible" because it "posed a substantial risk of harm to the general public." *Id.* at *5 (Noonan, J., dissenting) (quoting *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064 (2007)).

Morris prevents plaintiffs from arguing for “total harm” damages—punitive damages that punish the defendant for all of the harm they cause, including harm to non-parties—which may make it more difficult to persuade juries to award large punitive damages judgments, plaintiffs who receive large punitive damages awards may now find it easier to argue that the awards should survive substantive due process review. Based on the Court’s re-conceptualization of reprehensibility, a punitive damages verdict at or near the 10-to-1 ratio—generally considered to be the maximum allowable ratio under *State Farm* absent special circumstances—could now be sustained even if the defendant’s culpability was not particularly egregious, so long as the conduct that harmed the defendant also caused significant and widespread harm to others. Plaintiffs who suffer mass-tort harm at the hands of corporate defendants may have lost the procedural battle in *Philip Morris*, but if future courts apply the broader conception of reprehensibility adopted in *Philip Morris* to substantive due process review, plaintiffs may find that the more significant effect of the case derives from their victory in the substantive war.

