

AMERICAN CONSTITUTIONALISM  
VOLUME II: RIGHTS AND LIBERTIES  
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Supplementary Material

Chapter 11: The Contemporary Era – Individual Rights/Property/Due Process

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**Philip Morris USA v. Williams, 549 U.S. 346 (2007)**

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*Jesse Williams was a chain smoker. His preferred cigarette was Marlboro, manufactured by Philip Morris USA. In 1997, Williams died of lung cancer. His widow, Mayola Williams, sued Philip Morris for damages. She claimed that the company for forty years fraudulently informed customers that no reliable evidence linked smoking and cancer. At trial, Philip Morris asked the judge to instruct the trial court that “you are not to punish the defendant for the impact of its alleged misconduct on other persons.” The trial judge rejected that instruction and informed the jury, “punitive damages are awarded against a defendant to punish misconduct and to deter misconduct,” and “are not intended to compensate plaintiff or anyone else for damages caused by the defendant’s conduct.” The jury found that Phillip Morris had been negligent and misrepresented the dangers of smoking. They awarded Williams \$821,000 in actual damages and \$79.5 million in punitive damages. The trial judge reduced the latter award to \$32 million. On appeal from both parties, the Oregon Court of Appeals sustained the finding of fraud and reinstated the \$79.5 million award. Philip Morris appealed to the Supreme Court of the United States.*

*The Philip Morris appeal attracted substantial attention. Many states, professors, public health organizations, the American Trial Lawyers Association, and the American Association for Retired Persons urged the Supreme Court to sustain the punitive damage award. The brief of numerous public health groups declared,*

*For decades, Philip Morris knew that most smokers start smoking before age 18 and acknowledged internally that cigarette smoking causes disease and death. Yet Philip Morris nevertheless marketed its cigarettes, especially its flagship Marlboro brand, to appeal to underage smokers, and designed them to ensure sufficient nicotine delivery to create and sustain nicotine addiction. While that strategy created millions of lifetime Philip Morris customers, made Marlboro the best-selling cigarette brand, and made Philip Morris the dominant cigarette company in the United States, it has caused enormous physical harm, suffering, and death.*

*Prominent conservative interest groups, businesses, tort reform associations, and insurance agencies urged the Supreme Court to strike down the punitive damage award. The brief for the National Association of Manufacturers stated,*

*Both traditional and contemporary notions of due process prohibit imposing punitive damages for harms to non-parties whose claims the defendant has not had a meaningful opportunity to contest. To be sure, the law has long permitted plaintiffs whose claims are representative of others’ claims to recover on behalf of the group. For as long as representative actions have existed, however, courts have required named plaintiffs to establish that the others whom they seek to represent have such a common interest with the named plaintiff that the judgment on behalf of the class representative may fairly be given preclusive effect in future cases.*

*The Supreme Court by a 5–4 vote remanded the case to the Oregon Court of Appeals. Justice Breyer’s majority opinion ruled that the due process clause forbade juries from assessing punitive damages on the basis of harm done to persons not before the Court. Justice Breyer’s majority opinion conceded that juries may determine harm done to others when considering whether a defendant’s conduct was reprehensible. Is his distinction between harm done to others and reprehensibility coherent? What do you believe is the correct damage award in this case? Punitive damages is the rare contemporary subject in which the judicial divisions do not reflect the standard liberal-*

*conservative splits. Chief Justice Roberts and Justice Alito joined the majority. The dissenters were Justices Stevens, Thomas, Ginsburg, and Scalia. How do you explain this lineup?*

JUSTICE BREYER delivered the opinion of the Court.

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This Court has long made clear that “[p]unitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.” . . . At the same time, we have emphasized the need to avoid an arbitrary determination of an award’s amount. Unless a State insists upon proper standards that will cabin the jury’s discretionary authority, its punitive damages system may deprive a defendant of “fair notice . . . of the severity of the penalty that a State may impose,” it may threaten “arbitrary punishments,” *i.e.*, punishments that reflect not an “application of law” but “a decisionmaker’s caprice,” and, where the amounts are sufficiently large, it may impose one State’s (or one jury’s) “policy choice,” say, as to the conditions under which (or even whether) certain products can be sold, upon “neighboring States” with different public policies.

...  
In our view, the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation. For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with “an opportunity to present every available defense.” Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant’s statements to the contrary.

For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty, and lack of notice—will be magnified.

...  
Respondent argues that she is free to show harm to other victims because it is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. That is to say, harm to others shows more reprehensible conduct. Philip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we. 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—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.

...  
JUSTICE STEVENS, dissenting.

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. . . Unlike the Court, I see no reason why an interest in punishing a wrongdoer “for harming persons who are not before the court” should not be taken into consideration when assessing the appropriate sanction for reprehensible conduct.

Whereas compensatory damages are measured by the harm the defendant has caused the plaintiff, punitive damages are a sanction for the public harm the defendant’s conduct has caused or

threatened. There is little difference between the justification for a criminal sanction, such as a fine or a term of imprisonment, and an award of punitive damages. . . . And while in neither context would the sanction typically include a pecuniary award measured by the harm that the conduct had caused to any third parties, in both contexts the harm to third parties would surely be a relevant factor to consider in evaluating the reprehensibility of the defendant's wrongdoing. We have never held otherwise.

...  
[T]he majority relies on a distinction between taking third-party harm into account in order to assess the reprehensibility of the defendant's conduct—which is permitted—and doing so in order to punish the defendant “directly”—which is forbidden. This nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant—directly—for third-party harm. A murderer who kills his victim by throwing a bomb that injures dozens of bystanders should be punished more severely than one who harms no one other than his intended victim. Similarly, there is no reason why the measure of the appropriate punishment for engaging in a campaign of deceit in distributing a poisonous and addictive substance to thousands of cigarette smokers statewide should not include consideration of the harm to those “bystanders” as well as the harm to the individual plaintiff. The Court endorses a contrary conclusion without providing us with any reasoned justification.

...  
JUSTICE THOMAS, dissenting.

I join Justice GINSBURG's dissent in full. I write separately to reiterate my view that “the Constitution does not constrain the size of punitive damages awards.” . . .

JUSTICE GINSBURG, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

The purpose of punitive damages, it can hardly be denied, is not to compensate, but to punish. Punish for what? Not for harm actually caused “strangers to the litigation,” the Court states, but for the *reprehensibility* of defendant's conduct. “[C]onduct that risks harm to many,” the Court observes, “is likely more reprehensible than conduct that risks harm to only a few.” The Court thus conveys that, when punitive damages are at issue, a jury is properly instructed to consider the extent of harm suffered by others as a measure of reprehensibility, but not to mete out punishment for injuries in fact sustained by nonparties. . . .

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